IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

In re: TEHUM CARE SERVICES,[1] Debtor.	Chapter 11 Case No. 23-90086 (CML)

MOTION OF THE OFFICIAL COMMITTEE OF TORT CLAIMANTS AND CERTAIN TORT CLAIMANTS FOR STRUCTURED DISMISSAL OF CHAPTER 11 CASE

IF YOU OBJECT TO THE RELIEF REQUESTED, YOU MUST RESPOND IN WRITING. UNLESS OTHERWISE DIRECTED BY THE COURT, YOU MUST FILE YOUR RESPONSE ELECTRONICALLY AT HTTPS://ECF.TXSB.USCOURTS.GOV/ WITHIN TWENTY-ONE DAYS FROM THE DATE THIS MOTION WAS FILED. IF YOU DO NOT HAVE ELECTRONIC FILING PRIVILEGES, YOU MUST FILE A WRITTEN OBJECTION THAT IS ACTUALLY RECEIVED BY THE CLERK WITHIN TWENTY-ONE DAYS FROM THE DATE THIS MOTION WAS FILED. OTHERWISE, THE COURT MAY TREAT THE PLEADING AS UNOPPOSED AND GRANT THE RELIEF REQUESTED.

A HEARING WILL BE CONDUCTED ON THIS MATTER ON FEBRUARY 12, 2024, AT 1:00 P.M. (PREVAILING CENTRAL TIME) IN COURTROOM 401, 4TH FLOOR, 515 RUSK STREET, HOUSTON, TEXAS 77002. YOU MAY PARTICIPATE IN THE HEARING EITHER IN PERSON OR BY AUDIO/VIDEO CONNECTION.

AUDIO COMMUNICATION WILL BE BY USE OF THE COURT'S DIAL-IN FACILITY. YOU MAY ACCESS THE FACILITY AT (832) 917-1510. ONCE CONNECTED, YOU WILL BE ASKED TO ENTER THE CONFERENCE ROOM NUMBER. JUDGE LÓPEZ'S CONFERENCE ROOM NUMBER IS 590153. VIDEO COMMUNICATION WILL BE BY USE OF THE GOTOMEETING PLATFORM. CONNECT VIA THE FREE GOTOMEETING APPLICATION OR CLICK THE LINK ON JUDGE LÓPEZ'S HOME PAGE. THE MEETING CODE IS "JUDGE LOPEZ". CLICK THE SETTINGS ICON IN THE UPPER RIGHT CORNER AND ENTER YOUR NAME UNDER THE PERSONAL INFORMATION SETTING.

HEARING APPEARANCES MUST BE MADE ELECTRONICALLY IN ADVANCE OF BOTH ELECTRONIC AND IN-PERSON HEARINGS. TO MAKE YOUR APPEARANCE, CLICK THE "ELECTRONIC APPEARANCE" LINK ON JUDGE LÓPEZ'S HOME PAGE. SELECT THE CASE NAME, COMPLETE THE REQUIRED FIELDS, AND CLICK "SUBMIT" TO COMPLETE YOUR APPEARANCE.

[1] The last four digits of the Debtor's federal tax identification number is 8853. The Debtor's service address is: 205 Powell Place, Suite 104, Brentwood, Tennessee 37027.

The Official Committee of Tort Claimants, the estate fiduciary for tort claimants (the "TCC"), and the tort claimants represented by the law firms on the signature pages to this motion, hereby submit this motion (the "Motion")[2] seeking entry of an order, substantially in the form attached hereto as **Exhibit A**, pursuant to sections 105(a), 554, 1103(c)(5), 1109(b), and 1112(b) of the Bankruptcy Code, dismissing the above-captioned chapter 11 case (the "Chapter 11 Case") and granting related relief. In support of the Motion, the TCC and the co-movants[3] respectfully state as follows.

PRELIMINARY STATEMENT

1. The Debtor' bankruptcy was borne from a fraudulent transaction—a divisive merger that was intended to impair tort victims' ability to recover from a profitable tortfeasor. The Debtor's board, management, and professionals are all entwined with YesCare and CHS TX, Inc. The Debtor is a legal fiction created to perpetrate an obvious fraud. The purpose of this bankruptcy—as devised by the Debtor's owners—is not to maximize value for the benefit of creditors, but to transfer value from creditors to equity holders through a bad faith settlement.

2. This is not speculation. This is exactly what the Debtor's plan does. The Debtor has already proven through its actions that it exists solely to secure a nonconsensual non-debtor release for the benefit of YesCare and its affiliates to the detriment of the victims and their families. The UCC is fully supportive of this outcome so long as its favored creditor group obtains a recovery it considers substantial.

3. This case gives bankruptcy a bad name. Corizon Health and its non-debtor insiders and beneficial owners created the factual basis for, and are trying to settle through this bankruptcy,

2 This is a filing pursuant to the *Stipulation and Agreed Confidentiality and Protective Order Regarding Production of Documents*. [Dkt. No. 1186].

3 Other claimants, including tort victims, who wish to join in the relief sought herein can do so by filing joinders to this Motion.

fraudulent transfer claims and personal injury and wrongful death claims asserted against them. Through clever bankruptcy machinations, Corizon Health and its beneficial owners seek to control—or become both the plaintiff and the defendant in—litigation against them based on their tortious conduct, and take from the victims their property, legal, and Constitutional rights. This case is an elaborate scheme to confirm a plan that includes nonconsensual third-party releases without the affirmative vote of the tort victims and over their vehement objection.

4. A structured dismissal is the only path out of this case that is consistent with the Bankruptcy Code and its objectives. Through the dismissal of this case, the victims' ability to pursue YesCare and its non-debtor affiliates and insiders can be restored, and all claimants can and should be paid more than they will ever be paid in this Chapter 11 Case. This is the best outcome for the tort claimants and other unsecured creditors.

5. Bankruptcy should not be used by tortfeasors to avoid responsibility for the harm that they caused, deny victims their rights against non-debtor entities, and prevent victims from being able to access our justice system. The Debtor's plan seeks to deny victims their legal rights and impose a *de minimis* settlement under which victims would be forced to accept pennies on the dollar on account of claims that are worth millions of dollars.

6. The victims here were incarcerated. They did not deserve to die. They did not deserve to be provided substandard health care. Their families did not deserve to attend funerals of loved ones who would be alive today absent the misconduct of YesCare, its predecessors and beneficial owners. Bankruptcy is not a tool to prey on widows. This case is an affront to basic principles of justice and the dignity that every person deserves under our Constitution. It should be dismissed forthwith, and the claimants should be permitted to pursue their claims against all responsible parties before the state and federal courts of the United States.

7. This case was designed to never allow for a just result. By creating an administratively insolvent estate, incentivizing professionals to advocate for a cheap settlement, and pressuring claimants with few financial resources to settle, the parties who orchestrated this fraud have unleashed a case that could upend our justice system. It is time for someone to take a stand against this. The TCC is that party and the TCC seeks the dismissal of this case.

BACKGROUND

8. This is not a typical bankruptcy case. The real party in interest here is not the Debtor. This case is about YesCare and its tort liability. To understand why—and what this case is truly about—it is helpful to begin with various failed attempts undertaken by wealthy companies to use the bankruptcy system to obtain a discharge of their tort liability to the detriment of victims harmed by their conduct. It is, therefore, appropriate to begin with part of that history, or at least its most recent chapters, including the so-called "Texas Two Step," to appreciate what YesCare is trying to achieve and why a structured dismissal is the only mechanism for resolving this case.

I. The Texas Two Step (the Original)

9. The "Texas Two Step" was first deployed by Georgia Pacific to avoid litigating thousands of asbestos lawsuits. *See In re Bestwall LLC*, No. 17-31795 (Bankr. W.D.N.C. Nov. 2, 2017) (affiliate of Georgia Pacific). It has since been deployed by other tortfeasors that have sought to use bankruptcy to gain a litigation advantage.[4]

[4] *See In re DBMP, LLC*, No. 20-30080 (Bank. W.D.N.C. Jan. 23, 2020) (affiliate of Saint-Gobain Corp.); *In re Aldrich Pump LLC*, No. 20-30608 (Bankr. W.D.N.C June 18, 2020) (affiliate of Ingersoll Rand); *In re Murray Boiler LLC*, No. 20-30609 (Bankr. W.D.N.C. June 18, 2020) (affiliate of Ingersoll Rand); *In re LTL Mgmt. LLC*, No. 21-30589 (Bankr. D.N.J. Oct. 14, 2021) (affiliate of Johnson & Johnson) ("LTL 1.0"); *In re LTL Mgmt. LLC*, No. 23-12825 (Bankr. D.N.J. Apr. 4, 2023) (affiliate of Johnson & Johnson) ("LTL 2.0").

10. The fact pattern in each case varies but the goal is always the same: use the bankruptcy of a manufactured affiliate to create leverage and pressure tort victims into unacceptable settlement amounts that include a full release in favor of the non-bankrupt entity.

11. The first step involves a state law divisive merger conducted by a subsidiary of a wealthy corporation. The divisive merger typically occurs under a 1989 amendment to the Texas Business Corporations Act—hence the name *Texas* Two Step. Under the merger, the subsidiary will split its assets and liabilities among two new entities. One entity—"TortCo"—will house all the subsidiary's tort liabilities. The other entity—"GoodCo"—will be vested with the subsidiary's productive assets and its non-tort liabilities.

12. TortCo will agree to indemnify the entire non-debtor corporate family for the tort liability. To avoid arguments that the divisive merger was fraudulent, TortCo is almost always provided with a funding agreement backstop from GoodCo and/or an affiliate to fund a bankruptcy case and provide funding to TortCo to pay tort claims within certain parameters.

13. Next, TortCo will file for bankruptcy—often called the second step of the Texas *Two Step*. TortCo will immediately seek to enjoin all tort liability litigation against all non-debtor affiliates and other indemnified parties. This step is critical—without the Court's assistance in enjoining litigation against the solvent non-debtors, the Texas Two Step strategy is unlikely to succeed. Once an injunction is obtained, TortCo, usually led by a purported "independent" board, will engage in mediation or other activities designed to prolong the bankruptcy case while tort victims suffer and receive no compensation for their injuries.

14. The Texas Two Step is designed to provide the debtor and, more importantly, its non-debtor affiliates, with all the benefits of a bankruptcy—*i.e.*, a prolonged, if not multi-year stay of litigation—without any of the burdens of bankruptcy being imposed upon GoodCo or other non-

debtors who benefit from the stay and the enjoining of litigation pending before the bankruptcy case. Since the debtor is a shell and not an operating company, the debtor does not need to reach a settlement or confirm a plan; simply put, it has no incentive or reason to exit bankruptcy except on terms highly favorable to GoodCo.

15. In a traditional scenario, a debtor seeking to reorganize has the incentive to negotiate in good faith and reach settlements with victims that will result in a plan acceptable to them. But in a Texas Two Step, the incentives are far different and indeed perverse. GoodCo can operate its business, conduct further corporate transactions and upstream profits to shareholders without court oversight, while claimants are stuck in bankruptcy, anchored by a debtor that has no need to exit bankruptcy, and cannot liquidate or obtain compensation for their claims.

16. Typically, TortCo's primary objective is to stay in bankruptcy for as long as possible and prevent claimants—many of whom suffer from terminal diseases and will die before the bankruptcy case ends—from liquidating their claims to judgment. Not a single Texas Two Step case has resulted in a negotiated settlement with tort claimants holding compensable claims. Nor has any of the Texas Two Step cases resulted in a confirmable chapter 11 plan. Indeed, the first Texas Two Step, *Bestwall*, has lingered in bankruptcy for over six years with no resolution in sight.

17. To believe or hope that the Texas Two Step would ever result in a confirmed plan may be to miss the point entirely. Even when a plan is proposed, it is often one that is unconfirmable. GoodCo and its parent will demand that the plan release them of their tort liability as a condition to providing funding for any settlement trust. *See*, *e.g.*, LTL 2.0, Dkt. No. 525. And such funding typically will be withheld until there is a final, non-appealable order confirming the plan. If such a plan were confirmed by a Bankruptcy Court, it would face certain appeal.

18. For example, in *LTL 2.0*, the debtor's proposed plan channeled the independent liability of non-debtor Johnson & Johnson ("J&J") to a section 524(g) trust even though the Third Circuit has held that a section 524(g) injunction cannot be used to shield a non-debtor party from its own direct and independent liability. *See In re Combustion Eng'g, Inc*., 391 F.3d 190, 233 (3d Cir. 2004). If a plan were somehow confirmed and upheld on appeal, the result would be the elimination of the right to a jury trial to hold a non-debtor responsible for its conduct through the bankruptcy of a manufactured entity. For parties who had obtained a judgment in the tort system prior to the bankruptcy of the manufactured debtor, the result would be the nullification of the jury's verdict, without an appeal, with the judgment creditor being paid an amount deemed appropriate by the defendant (in its sole and absolute discretion).

II. The 3M Variation of the Texas Two Step

19. While all the major Texas Two Step cases have been prosecuted by the same law firm that developed the strategy, other law firms more recently have attempted to implement similar strategies or innovations thereof. The chapter 11 case of *In re Aearo Technologies LLC*, Case No. 22-02890 (Bankr. S.D. Ind. July 26, 2022), an affiliate of 3M, was a recent variation of this strategy.

20. In that case, 3M faced liability for manufacturing and selling defective earplugs after acquiring the underlying operating business in the mid-2000s (and owning the operations for several years prior to terminating production of the defective product and several years prior to implementing the bankruptcy strategy). Claimants sought to hold 3M liable in the tort system.

21. 3M located an affiliate in its organization that was also named as a defendant in the consolidated litigation—Aearo Technologies ("Aearo")—and placed that company into bankruptcy. Aearo was, in substance, intended to be a Texas Two Step without the divisive merger

leading the way. Prior to the bankruptcy, Aearo entered into a funding agreement pursuant to which Aearo agreed to indemnify the entire 3M corporate family for earplug and other tort liabilities. *In re Aearo Tech. LLC*, 642 B.R. 891, 898 (Bankr. S.D. Ind. 2022).

22. To avoid arguments that this indemnification obligation could be avoided as an actual or constructive fraudulent conveyance, Aearo also received a funding agreement backstop to fund a bankruptcy case and provide funding to pay tort claims within certain parameters, including claims for indemnification. This made the funding agreement circular—Aearo's obligation to indemnify 3M could be satisfied by obtaining funds from 3M under the funding agreement. *Id*. at 909-910 (finding that the funding agreement amounted to a circular agreement).

23. Once in bankruptcy, Aearo attempted to implement the classic Texas Two Step litigation strategy. Aearo immediately moved to enjoin litigation against its non-debtor affiliates. The goal was to freeze all litigation against 3M while, at the same time, keeping 3M outside of the bankruptcy proceeding where it would be free to operate its business, conduct further corporate transactions and upstream profits to shareholders without court oversight. Claimants, in turn, would be stuck in bankruptcy and could not liquidate their claims to judgment. Aearo's goal was to create delay and confirm a plan that released 3M of its own tort liability.[5]

24. Aearo's bankruptcy did not go according to plan. The Bankruptcy Court refused to grant Aearo's request for injunctive relief at the beginning of the case. *Aearo*, 642 B.R. at 912. This was critical. Without an injunction, the parent in these cases cannot enjoy the intended litigation holiday or avoid paying defense costs while the bankruptcy is pending.

[5] *See Informational Brief of Aearo Technologies LLC* [Dkt. No. 12] filed in *In re Aearo Tech. LLC*, Case No. 22-02890 (Bankr. S.D. Ind. July 26, 2022) ("The second cornerstone [of a plan of reorganization] would be a permanent channeling injunction and a third-party release of 3M. This injunction would require that all Combat Arms-related claims be brought only against the settlement trust, and not the reorganized Aearo entities or their non-debtor affiliates. The injunction would apply to all potential Combat Arms plaintiffs.").

25. Aearo's bankruptcy—like LTL's bankruptcies—was also met with a motion to dismiss filed by an official committee representing the interests of tort claimants, among others. The Bankruptcy Court ultimately dismissed Aearo's bankruptcy as having been filed in bad faith. *See In re Aearo Tech. LLC*, No. 22-02896, 2023 WL 3938436 (Bankr. S.D. Ind. June 9, 2023). LTL's serial bankruptcy filings were also dismissed.[6]

26. Following dismissal, 3M returned to the tort system where it faced the reality of litigation. On August 29, 2023, roughly three months after Aearo's bankruptcy case was dismissed, 3M announced a settlement under which it agreed to pay $6 billion to settle the earplug lawsuits—roughly ***six times*** the amounts offered by 3M during Aearo's bankruptcy. But for the dismissal of Aearo's bankruptcy—which was designed to suppress tort claim values and facilitate a multi-billion-dollar transfer from victims to equity—this settlement would not have occurred, and the victims would likely be stuck in bankruptcy to this day.

III. <u>The YesCare Two-Step</u>

27. The YesCare Two-Step is also designed to suppress tort claim values and facilitate a transfer of millions of dollars from victims to equity. Like *LTL 1.0* and *LTL 2.0*, this case involves a divisive merger followed by a bankruptcy filing by the manufactured debtor. This case seeks to implement the core strategy that uses bankruptcy to shield affiliated companies from litigation in the tort system. To fully appreciate why the YesCare variant of the Texas Two Step is arguably even more abusive than the schemes attempted by J&J and 3M, it is helpful to start with YesCare's corporate history and the liabilities that its predecessors faced in the tort system.

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6 *See In re LTL Mgmt., LLC*, 64 F.4th 84 (3d Cir. 2023) (reversing bankruptcy court decision and directing dismissal of bankruptcy petition); and *In re LTL Mgmt., LLC*, 652 B.R. 433 (Bankr. D.N.J. 2023) (dismissing LTL's second bankruptcy where the debtor did not file its petition in good faith).

A. **<u>Corizon's Corporate History and the Tort Claims</u>**

28. YesCare—like J&J and 3M—turned to bankruptcy to address its tort liability. The Debtor's predecessors were in the business of providing healthcare services to inmates incarcerated in state and local prisons across the county.

29. During the 2010s, a group of private equity funds owned the Corizon Health conglomerate. During this period, Corizon was very profitable. Many States had converted to providing healthcare to inmates by contracting with private companies and there were only a handful of competitors that were able to compete for these contracts.

30. But Corizon Health ran into headwinds. The disturbing truth of the private prison health care industry is that it incentivizes and provides a level of care that leads to medical malpractice and related liability. With revenue fixed by a government contract, profits are maximized by minimizing costs. The costs here are the costs of providing health care to inmates. Less healthcare equates with a higher rate of return. This reality led to significant tort claims, including claims for wrongful death and permanent disability and disfigurement.

31. The members of the TCC exemplify the tort claims arising from serious medical malpractice and neglect that the Debtor's insiders are trying to evade in this bankruptcy case. Five TCC members have wrongful death claims, and the sixth TCC member suffered permanent disability and disfigurement caused by Corizon's business plan to avoid medical expenses by limiting care provided to inmates.

32. **<u>Daniel Allard</u>**. Daniel Allard had about one year left of a 2½ year sentence in an Arizona prison for attempted trafficking of stolen property. Mr. Allard was found by a prison employee lying in brown vomit. He was taken to Corizon's prison medical facility with bleeding

from his head and nose. Despite clear signs of a traumatic head injury from a likely assault and deteriorating symptoms, Corizon did not call for emergency medical help for over two hours.

33. Ignoring medical advice to fly Mr. Allard immediately to an emergency room, he was driven by ambulance to a Bisbee airport for helicopter transport to a Tucson hospital, where he died three days later. Mr. Allard's grandmother—TCC member Aanda Slocum—filed a wrongful death case against Corizon in *Arizona District Court, Estate of Daniel Allard v. Corizon Health LLC*, Case 4:18-cv-00044-JCH (Claim 158-1).[7]

34. **Michelle Morgan**. In 2022, during Michelle Morgan's intake in a New Mexico jail, a Corizon employee noted that Ms. Morgan had been subjected to "ongoing issues of physical and emotional abuse."[8] On May 3, 2022, Ms. Morgan requested counseling services, which Corizon refused to provide. Ten days later, on May 13, 2022, Ms. Morgan committed suicide by hanging herself from her bunk bed. Corizon employees' use of an automated external defibrillator to resuscitate her failed not once, but twice, because the battery power of two different devices had run down, rendering them unusable. Ms. Morgan's daughter—TCC member Paris Morgan—is now pursuing a wrongful death claim against Corizon. *See* Claim 500.

35. **Jennifer Casey Norred**. Jennifer Casey Norred was 36 years old and suffered from chronic schizophrenia, bipolar disorder and depression when incarcerated in a county jail for "stalking." Ms. Norred had received mental health treatment before her incarceration. Jail records documented at least one prior suicide attempt.

36. On July 24, 2017, after months with virtually no treatment, no inquiry into her prior mental health condition and a failed suicide attempt, Ms. Norred was placed in a "restraint chair"

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7 https://storage.courtlistener.com/recap/gov.uscourts.azd.1077356/gov.uscourts.azd.1077356.1.0.pdf

8 https://www.abqjournal.com/news/local/suit-alleges-mdc-guards-negligence-led-to-jail-death/article_0808296b-fcf8-5b33-97b2-3fe7be37ce19.html

for 24 hours against her will with limited supervision and few comforts or food breaks. Three days later, Ms. Norred tied her jail-issued uniform pants to her bunk and hung herself. Her mother—TCC member Elizabeth Frederick—filed a wrongful death case in Florida District Court against Corizon and the county. *Frederick v. McNeil*, Case No. 4:19-cv-162-MW-CAS (Claim 574).[9]

37. The TCC members' claims are merely examples of atrocities suffered by many other tort claimants who deserve the right to seek compensation in the tort system.[10]

38. **Tracey Grissom**. For example, Tracey Grissom brought claims against Corizon after she was forced to suffer in agony and live in her own fecal matter for four months. Ms. Grissom was convicted of murdering her husband after, according to Ms. Grissom, he had raped her and caused injuries that required her to have a stoma (a surgically made hole) in her lower stomach, which connects to an ostomy bag that collects waste.

39. For two days in 2017, Ms. Grissom suffered terrible pain while her intestines protruded several inches outside the stoma. After a portion of Ms. Grissom's lower intestine was surgically removed, Corizon provided ill-fitting ostomy bags that leaked for four months on her body, clothing, and bedding. Ms. Grissom filed a lawsuit against Corizon in Alabama District Court. As the District Court judge framed her allegations, "For four months, her feces adhered to and excoriated her skin, it soiled her clothes, it covered her bedding, and it repulsed those around her, so much so that she was segregated from other inmates." *Grissom v. Corizon, LLC*, 2:19-cv-420 (Claim 527 & 598).[11]

40. **David J. Hall**. In Maryland, a jury awarded David J. Hall $3 million against Corizon for failing to treat a wrist fracture that had collapsed and required extensive surgery.

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9 https://storage.courtlistener.com/recap/gov.uscourts.flnd.103873/gov.uscourts.flnd.103873.24.0.pdf

10 *See also* https://www.themarshallproject.org/2023/09/19/corizon-yescare-private-prison-healthcare-bankruptcy

11 https://casetext.com/case/grissom-v-corizon-llc-1.

Mr. Hall was provided only an Ace bandage and told his injury would "self-heal." The jury's award was reduced to $770,000 pursuant to Maryland statute. *See* Claim 243 & 585.

41. All actions filed by the hundreds of claimants have been stayed by this bankruptcy. And many cases against Corizon and its affiliates have been dismissed without prejudice because of this bankruptcy case.

B. The 2020 Sale to the Flacks Group

42. As of 2017, BlueMountain Capital Management ("BlueMountain") was Corizon's largest ultimate beneficial owner. Given the mounting litigation, in the summer of 2020, BlueMountain decided to divest and sold the equity of Corizon to the Flacks Group, a Miami-based investment firm. Coincident to this sale, the Flacks Group formed the "M2" related entities to acquire Corizon's purportedly secured debt at a steep discount. Through this acquisition of debt and equity, the M2 companies became both Corizon's parent and secured lender.

43. The Flacks Group did not turn around Corizon's business. Instead, it spun off PharmaCorr—the prison health services adjacent pharmacy benefits manager—stripping Corizon of a profitable company. With this cash in hand, the Flacks Group evaluated a potential bankruptcy transaction as an exit strategy. But, by happenstance, the Flacks Group met Mr. Issac Leftkowitz and Perigrove—and thereby, an entreat with the owners of health care giant Genesis HealthCare—who convinced the Flacks Group to not file for bankruptcy and to sell the business to them instead.

C. The Divisive Merger (aka [redacted])

44. Perigrove had a different vision for Corizon—[redacted]. Code named [redacted]," Perigrove and its advisors set off to shield their companies from litigation in the tort system and impose a forced bankruptcy settlement on the victims and their families, thereby

freeing all future profits for equity holders. *See* **Exhibit B** (filed under seal). [redacted] was designed to use bankruptcy to transfer millions from tort victims to equity.

45. **Step 1—Acquire and Loot Corizon**. As a starting point, in December 2021, Perigrove acquired (for an undisclosed consideration), Corizon Health, its parent, the M2 companies and their debt, all the profitable government contracts, and Corizon's cash.

46. Perigrove then looted Corizon Health to the tune of approximately $30 million. The TCC contends that these transfers were both intentional and constructive fraudulent transfers that would be recoverable by any creditors in future litigation (inside or outside of bankruptcy).

47. **Step 2—Create MergeCo**. In May 2022, Perigrove directed Corizon and certain of its affiliates—*i.e.*, Corizon Health, Inc., Valitas Health Services, Inc., Corizon LLC, and Corizon Healthcare of New Jersey—to merge into a single entity called "MergerCo." MergerCo included all the business entities with assets and ongoing operations.

48. **Step 3—The Divisive Merger**. MergerCo then undertook a divisive merger under Texas law. Merger Co split its assets and liabilities among two entities. One entity—"RemainCo" or "Corizon Health, Inc." or "TortCo"—housed the disfavored liabilities, including the tort claims asserted by the inmates and their families as well as liabilities owed to certain vendors and terminated employees.

49. The other entity—"NewCo" or "CHS TX, Inc." or "GoodCo"—was vested with the MergerCo's productive assets and its favored liabilities. The allocation of liabilities owed to vendors and former employees makes this case somewhat different. In most Texas Two Steps, TortCo is allocated nothing but the disfavored tort liabilities. But the YesCare version is different.

50. The TCC's analogies "Step 3" in the YesCare scheme to a section 363 sale to an insider, where the insider takes all the productive assets and an assignment of the profitable

contracts (along with an assumption the related liabilities), rejects the non-profitable contracts, and leaves other undesirable liabilities (*e.g.*, terminated employee obligations) behind.

51. True to form, the parties provided TortCo with a Funding Agreement with M2 Loan Co. But the Funding Agreement here was subject to an aggregate cap of $15 million. Under the Funding Agreement, M2 Loan Co., as the "Payee," could advance funds to TortCo and make earmarked payments to TortCo's creditors, which it did prior to the bankruptcy.

52. **Step 4—Create a Structure to Eliminate Creditor Remedies**. Ordinarily, the next step is the immediate bankruptcy filing of TortCo—often hours after the divisive merger. But the YesCare variant did not involve an immediate bankruptcy filing.

53. Once the divisive merger was complete, Sarah Tirschwell, who was the sole shareholder of NewCo, contributed 95% of that equity to another newly formed company called YesCare, which would be wholly owned by certain ***undisclosed insiders***. Upon information and belief, these insiders are the **same** people who controlled Corizon prior to the divisive merger. The Funding Agreement was exhausted with millions of dollars being paid to preferred creditors.

54. Perigrove understood that Texas's divisive merger statute does not eliminate the rights of creditors under existing law, including the right to (a) argue that YesCare and/or NewCo is Corizon's legal successor, (b) assert alter ego and veil piercing theories, and (c) assert fraudulent transfer claims (both actual and constructive fraud). A divisive merger that creates an entity saddled with liabilities and no business assets constitutes the very transaction has been banned for close to 500 years since the United Kingdom passed the Statute of Elizabeth.

55. When a divisive merger looks to be a fraud, creditors can challenge the merger as a fraud. Texas law does not afford anyone a license to commit fraud. For YesCare and NewCo, the claimants' state law remedies are the problem.

56. Through the divisive merger and a subsequent bankruptcy filing, YesCare's objective was to ***create*** a new plaintiff that ***controls*** the tort claims and is controlled by YesCare. Understanding the arguments that can be advanced over what is property of a debtor's estate and the Debtor's DIP financing are key to understanding this scheme.

57. TortCo—the Debtor entity—was destined for bankruptcy. But unlike other Texas Two Steps, causing mortal delay was not the end game. YesCare needs a nonconsensual third-party release. The primary remedies available to victims of a fraudulent divisive merger are successor liability, alter ego and veil piercing, and fraudulent transfer claims. Armed with these legal theories, tort victims can seek compensation in the tort system from parties like YesCare and NewCo on account of the particularized injuries that they suffered. Victims can simply continue their lawsuits against YesCare, NewCo, and others as named defendants.

58. But when a company files for bankruptcy, the right to assert state law fraudulent transfer claims vests in the trustee. *See* 11 U.S.C. § 544(b). Generally, creditors cannot pursue such claims while the case is pending. In addition, causes of action that the ***company*** could assert against third parties under state law also become property of the estate under section 541(a).

59. As explained below, the Circuits are split on whether a bankruptcy trustee has standing to assert claims that ***belong to creditors*** under state law against third parties under the doctrines of successor liability and alter ego. *See* cases cited *infra* at fn. 30. Courts, in certain circumstances, have held that a debtor in bankruptcy can assert creditor claims—*i.e.*, claims based on a particularized injury to claimants—based on successor liability and alter ego theories.

60. When this occurs, Courts are often looking to a trustee to hold parties that engaged in misconduct that harmed creditors responsible. But, in the context of a Texas Two Step, this logic results in a perverse reality. If the tort claims asserted against YesCare, NewCo and others

under the doctrines of successor liability and veil piercing are estate causes of action—*i.e.*, they belong to TortCo during a bankruptcy proceeding—then YesCare can effectively control the tort claims asserted against it.[12] Because of the DIP financing scheme discussed below, the Debtor here is controlled by the litigation targets—*i.e.*, the parties alleged to have committed fraud and alleged to be liable as successors or alter egos.

61. By arguing that the tort claims against YesCare and NewCo (under a successorship or alter ego theory) are TortCo's property in a bankruptcy proceeding under section 541(a), YesCare and NewCo can use the Texas Two Step place themselves in the position of both the ***plaintiffs*** and the ***defendants***. The same is true for fraudulent transfer claims. The bankruptcy is used to take the property rights of the victims—*i.e.*, their tort claims against YesCare, NewCo, and others—and place them into the hands of a debtor controlled by the tortfeasor.

62. The key to YesCare's variant of the Texas Two Step is to create a bankruptcy under which it controls the claims against ***itself*** and then can ***settle*** those claims under either a Rule 9019 settlement or a chapter 11 plan. The primary obstacles to this happening are the Bankruptcy Court and estate fiduciaries who are charged with maximizing the value of a debtor's estate.

63. But Perigrove devised a plan for this as well. Before authorizing a bankruptcy filing, Perigrove made certain that the Debtor was deeply insolvent—*i.e.*, stripped of all its value **and** access to funding under the Funding Agreement. This laid the foundation for an insider DIP loan. Without the DIP loan, there is no funding for this case and no funding to pay professional fees, including the professionals retained by the Debtor and any official committees.

[12] To be clear, the TCC does not believe that the personal injury and wrongful death claims asserted against YesCare, NewCo, and their non-debtor affiliates and insiders under the doctrines of successor liability or veil piercing are property of the Debtor's estate. A contrary result would mean that section 541(a) violates the Fifth and Seventh Amendments of the Constitution. The TCC raises and reserves the right to argue that section 541(a) violates the Fifth and Seventh Amendments to the extent that it means that such claims are the Debtor's property.

64. The DIP loan denies funding for any committee or estate party that challenges any of the prepetition transfers or the very insider DIP that controls this case. *See* DIP Motion at pp. 8-9 (DIP Credit Agreement, ¶ 6.13, 6.36(r)), D.I. 185 (the "DIP Motion"). And the DIP loan is collateralized by liens on all conceivable estate causes of action (which the Debtor will argue include the tort claims against YesCare and NewCo). *See* DIP Motion at pp. 16-17 (defining DIP Collateral to include commercial tort claims and causes of action, among other items).

65. **Step 5—File for Bankruptcy**. With the DIP loan fully negotiated and ready to go, the next step was to find professionals willing to represent the newly created debtor, file the petition, seek an injunction to shield YesCare and its non-debtor affiliates and insiders from litigation during the bankruptcy, move to approve the DIP loan (and the related liens and case controls), and then dangle a settlement before the parties as the only way out of the case.

66. On February 12, 2023, just prior to the filing, the Debtor retained Gray Reed as bankruptcy counsel. And, on February 13, 2023, the Debtor filed its chapter 11 petition.

67. **Step 6—Seek an Injunction**. Once in bankruptcy, the Debtor followed the Texas Two Step script. Like J&J and 3M, the Debtor sought an injunction to prevent claimants from pursuing their claims against YesCare and its non-debtor affiliates and insiders.[13] In the PI Action, the Debtor asserted its desires to control estate causes of action (including successor liability Claims) and the indemnity provided by the Debtor to its non-debtor affiliates, insiders, officers and directors, as part of the divisional merger as bases to support the injunction.

68. On March 3, 2023, the Court entered its *Order Regarding Debtor's Emergency Motion to Extend and Enforce the Automatic Stay* [D.I. 118] and on May 18, 2023, the Court

[13] *See* Complaint Seeking (I)(A) a Declaratory Judgment that the Automatic Stay Applies to Certain Claims and Causes of Action Asserted Against Certain Non-Debtors and (B) Extension of the Automatic Stay to Certain Non-Debtors, or in the Alternative, (II) a Preliminary Injunction Related to Such Actions Tehum Care Services, Inc. v. Those Parties Listed in Appendix A, (the "PI Action") [Adv. P. 1].

entered its *Order (I)(A) Declaring that the Automatic Stay Applies to Certain Claims and Causes of Action Asserted Against Certain Non-Debtors and (B) Extending the Automatic Stay to Certain Non-Debtors, or in the Alternative, (II) Preliminarily Enjoining Such Actions* (the "PI Order") [Adv. P. 43]. This Court's injunction appeared to dissolve on August 10, 2023, but has been extended by stipulation of certain parties in the months since.

69. **Step 7—Negotiate with the UCC**. After the filing, the United States Trustee appointed an Official Committee of Unsecured Creditors Committee (the "UCC"). *See* Amended Notice of Appointment of Official Committee of Unsecured Creditors [D.I. 145]. The UCC is comprised of ***five trade creditors*** of Corizon Health and two personal injury claimants.

70. The UCC engaged professionals, who in turn negotiated a settlement and plan with the Debtor. *See* Disclosure Statement Regarding Debtor and Official Committee of Unsecured Creditors' Joint Chapter 11 Plan [D.I. 984] (subsequently revised). The TCC understands that the UCC negotiated the "settlement" and plan allocation among itself and the Debtor and without any lawyers present representing the interests solely of the tort claimants. The results of that internal negotiation speak for itself and are embodied in the proposed plan.

F. The Proposed Plan of Reorganization

71. The proposed plan reflects the final embodiment of YesCare's scheme. As one may expect, the proposed plan treats the inmates and their families poorly (and that is probably an overly generous statement).

72. **Unfair Discrimination**. Unlike the plans proposed in other Texas Two Step cases, the Debtor's plan divides the claimants among three separate classes—Class 4 (Non-Personal Injury Claims), Class 5 (Personal Injury Claims), and Class 6 (Indemnification Claims). Class 4, which includes the five trade creditors represented by the UCC, gets the lion's share of the money.

73. The plan deploys a two-trust structure, with Non-Personal Injury Claims being channeled to the "Liquidation Trust" and Personal Injury Claims being channeled to the "Personal Injury Trust." Under the settlement with the UCC, the Liquidation Trust gets between \$14.5 and \$15.5 million of the \$37 million settlement, the right to pursue certain estates causes of action, including preference claims worth millions of dollars and claims against the Flacks Group (also worth millions of dollars), and ERC credits (purported to be worth between \$5 and \$10 million).[14] The Liquidation Trust can employee the professionals that currently represent the UCC.

74. Holders of Non-Personal Injury Claims will enjoy a substantially higher recovery than holders of Personal Injury Claims. The Personal Injury Trust gets between \$8.5 and \$8.8 million of the \$37 million settlement and insurance rights that are presently estimated to have little to no value. The filed proofs of claims alleged personal injury and wrongful death claims total approximately 200 (plus), with a face value of \$775 million.

75. Under the proposed settlement and plan, claimants on the UCC will receive between a 44% and 69% recovery, YesCare and NewCo will avoid millions of dollars in tort liability that it would otherwise face in the tort system, and assuming any funds are left after the payment of trust administrative claims, the inmates and their families stand to recover pennies on the dollar. Wrongful death claims worth more than \$5 to \$10 million in the tort system may recover less than 1.2% of their claim—*e.g.*, \$60,000 or \$120,000—if the plan is confirmed and upheld on appeal. Victims like David Hall may recover only \$5,000 on his \$770,000 judgment and be stripped of his right to pursue non-debtor tortfeasors for the difference.

[14] On December 18, 2023, the Debtor and the UCC announced a revised settlement based on a \$54 million cash contribution. But this settlement presumes the existing allocation negotiated by the UCC for the benefit of Non-Personal Injury claims.

76. Further, there has been no estimation proceeding in this case to ascertain the Debtor's aggregate tort liability. Only self-serving and untested analysis presented in a liquidation analysis appended to the plan that admits the tort claims could be as high as $75 million. $9 million is not enough money to administer a trust of the kind proposed by the UCC and the Debtor, let alone provide anything other than the $5,000 quick pay payments to victims.

77. **Non-Consensual Third-Party Releases**. To lock in their winnings, the plan also effectuates nonconsensual third-party releases. This occurs through two mechanisms.

78. The first mechanism is the release set forth in Article IX of the plan. Under this Article IX, all parties who have not "opted out"—even those with no actual notice of the bankruptcy proceedings—will be deemed to grant a release to YesCare and other non-debtors, including exculpation of the estate fiduciaries.

79. The second mechanism is the proposed settlement of the estate causes of action against YesCare and its non-debtor affiliates and insiders. Under the plan's Article IX(c), the Debtor and its estate shall release all estate causes of action against YesCare and the other Released Parties. This release is broad and is intended to be the mechanism by which the Global Settlement is effectuated. It specifically includes "rights, actions (including Avoidance Actions), suits . . . . powers, privileges . . . whether known or unknown, foreseen or unforeseen, now existing or hereafter arising, contingent or non-contingent, . . . assertable, directly or derivatively, matured or unmatured, suspected or unsuspected, in contract, tort law, equity, or otherwise that the Debtor, the Post-Effective Date Debtor, or the Estate has, have or may have against the Released Parties."

80. If approved, YesCare and NewCo could appear as a defendant in any pending litigation and argue that any tort claims against them grounded in a successor liability or alter ego theory are barred by the Debtor's confirmation order such that no claimants can hold them

responsible for their misconduct. The same is true for fraudulent transfer claims aimed at undoing the divisive merger—the Debtor's insiders effectively act as both plaintiff and defendant of the tort claimants' claims under this scheme.

81. The plan includes an "Opt Out" for claimants who reject the proposed plan settlement, but the "Opt Out" is illusory. Due to the release in Article IX(c), any tort claimants who opt-out could be barred from pursuing their state law rights against YesCare and its non-debtor affiliates and insiders. YesCare and NewCo could be armed with the ability to defend against any prepetition personal injury claim by arguing that it is grounded in a successor liability or alter ego theory—claims that the Debtor (as controlled by YesCare) allegedly settled under the plan. The tort claimants' full value claims against YesCare and non-debtor affiliates and insiders could be extinguished under the plan without their consent. Anyone who "opts out" will lose their claims. The proposed plan is a new version of an old story where a debtor proposes a plan the cornerstone of which is a nonconsensual third-party release in favor of entities that elect to avoid the burdens of bankruptcy but want to enjoy all the benefits of bankruptcy.

82. Most tort claimants will vote to reject the plan. TCC will obviously object. United States Trustee (who can appeal without posting a bond) will likely object. Parties will argue that the plan engages in unfair discrimination, was not proposed in good faith, that the settlements are unreasonable, that the plan violates the best interests test, and that the releases are unlawful.

83. Even Circuits that permit nonconsensual third-party releases would never permit something like this. The plan—if approved over and crammed down upon tort victims—will be appealed through to at least the Fifth Circuit. Victims and creditors have no real hope for near term payment under the proposed plan, however *de minimis* it is.

84. The litigation over plan confirmation and the resulting appeals could easily go on for years, during which time YesCare and its non-debtor affiliates and insiders will continue to enjoy the benefits of an injunction and a litigation holiday. Equity holders will continue to drink fine wine and pay themselves bonuses while the inmates, and their families, recover ***nothing***. This entire bankruptcy scheme was designed and intended to achieve an unjust result.

IV. Possible Options for Resolving this Case

85. The TCC and the co-movants have analyzed various options for resolving this case and have reached the conclusion that a structured dismissal is the only viable option.

A. A Creditor Plan

86. In other Texas Two Step cases, committees have moved to terminate exclusivity to file a creditor plan.[15] But in these cases, the divisive merger involved funding agreements that facially provided sufficient funding to pay administrative claims in full and, arguably the tort liability of the debtor as well. This made it possible for the claimants to propose a plan that transferred the debtor's rights under the funding agreement to a trust consistent with section 1123(a)(5), which rights could then be used by the trust to fund the payment of tort claims as liquidated post-confirmation in accordance with Court-approved trust distribution procedures.[16] Those creditor plans would not provide for the types of nonconsensual releases for non-debtors contemplated here.

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[15] *See In re LTL Mgmt., LLC*, No. 23-12825 (MBK) (Bankr. D.N.J. June 5, 2023) (Motion of the Official Committee of Talc Claimants to Terminate the Debtor's Exclusive Period Pursuant to 11 U.S.C. § 1121(d)(1), Dkt. No. 702); *In re LTL Mgmt., LLC*, No. 21-30589 (MBK) (Bankr. D.N.J. Sept. 15, 2023) (Motion of the Official Committee of Talc Claimants to Terminate the Debtor's Exclusive Period Pursuant to 11 U.S.C. § 1121(d)(1), Dkt. No. 2721).

[16] *See In re LTL Mgmt., LLC*, No. 23-12825 (MBK) (Bankr. D.N.J. June 12, 2023) (Reply in Support of Motion of the Official Committee of Talc Claimants to Terminate the Debtor's Exclusive Period Pursuant to 11 U.S.C. § 1121(d)(1), Dkt. No. 759).

87. The YesCare Two-Step involves a bankruptcy commenced after the commission of a fraud. The Funding Agreement does not provide sufficient funding to pay administrative claims, tort claims, or commercial claims in full and does not make the full value of the predecessor available to pay claimants. The Funding Agreement was drained prior to the filing.

88. YesCare orchestrated a scheme whereby parties must support an unreasonable settlement that permits a tortfeasor to avoid responsibility for the harm it caused ***for there to be funding to pay administrative claims, including the fees and expenses of estate professionals***. The TCC does not support such a settlement. A creditor plan cannot be confirmed unless administrative claims will be paid in full.[17] Given this, there does not appear to be a path here to the confirmation of creditor plan that rejects a settlement with YesCare.

B. <u>The Debtor's Plan</u>

89. Likewise, there is no path here to the confirmation of the Debtor's plan to harm tort claimants and transfer millions in value from creditors to equity holders. The plan violates the best interest test, proposes unfair discrimination, was proposed in bad faith, and the Debtor's proposed settlement is an insider transaction that does not satisfy the Rule 9019 standard.

90. The tort claimants will vote against plan confirmation. The Debtor's plan, if confirmed, would take away the right to a jury trial, property rights, and the ability of tort claimants to collect from YesCare in the tort system. The releases are unlawful in every Circuit—not just under Fifth Circuit case law—given the lack claimant support and a plan that fails to provide for substantial compensation to the impacted class of creditors. *See Bank of N.Y. Tr. Co. v. 9 Official*

[17] Section 1129(a)(9)(A) of the Bankruptcy Code provides that: "Except to the extent that the holder of a particular claim has agreed to a different treatment of such claim, the plan provides that—(A) with respect to a claim of a kind specified in section 507(a)(2) or 507(a)(3) of this title, on the effective date of the plan, the holder of such claim will receive on account of such claim cash equal to the allowed amount of such claim." And section 502(a)(2) of the Bankruptcy Code specifies the priority of administrative expenses.

Unsecured Creditors' Comm. (In re Pac. Lumber Co.), 584 F.3d 229 (5th Cir. 2009) ("[T]his court has held that Section 524(e) only releases the debtor, not co-liable third parties.").[18]

91. The Debtor may argue that the releases under its plan are voluntary because the claimants can theoretically opt-out. But, again, the opt-out is illusory. Any claimants who opt-out could be barred from pursuing their state law rights against YesCare and its non-debtor affiliates and insiders. Anyone who opts out will be channeled into a brick wall. Confirmation would be challenged by the TCC, claimants and public interest groups intent on preventing this case from leading to further abuses of the bankruptcy system. No plan has been confirmed in a chapter 11 case that compares to what the Debtor and the UCC are proposing here.

C. <u>Conversion to Chapter 7</u>

92. Next, the TCC and the co-movants considered whether conversion to chapter 7 would be in the best interest of creditors. The problem with conversion is that it does not solve the problem that the Debtor is a Potemkin village with no hard assets and no funding source.

93. A trustee could try to negotiate a settlement with YesCare that YesCare would be willing to support. Alternatively, a chapter 7 trustee could litigate against YesCare (with no litigation funding unless the trustee was able to procure a loan) and attempt to bring funds into the estate that would ultimately be distributed to creditors. The risk would be that the trustee will be incentivized to reach a cheap settlement that imposes the same estate release ramifications as the Debtor's plan that most, if not, all the claimants would reject.

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[18] Courts outside the Fifth Circuit generally require at least 85% acceptance from the class affected by a nonconsensual third-party release in a chapter 11 plan. *See In re Millennium Lab Holdings II*, 945 F.3d 126, 132 (3d Cir. 2019) (93% acceptance), *cert. denied*, 140 S. Ct. 2805 (2020); *In re Specialty Equip. Cos.*, 3 F.3d 1043, 1045 (7th Cir. 1993) (95% acceptance); *Menard-Sandford v. Mabey (In re A.H. Robins Co., Inc.)*, 880 F.2d 694, 702 (4th Cir. 1989) (94% acceptance); *In re AOV Indus.*, 792 F.2d 1140, 1143 (D.C. Cir. 1986) (90% acceptance); *In re Am. Family Enters.*, 256 B.R. 377, 392 (D.N.J. 2000) (99% acceptance); *In re Purdue Pharma L.P.*, 633 B.R. 53 (Bankr. S.D.N.Y. 2021) (96% acceptance); *In re Blitz U.S.A.*, 2014 Bankr. LEXIS 2461, at *15-16 (Bankr. D. Del. Jan. 30, 2014) (95% acceptance); *In re Master Mortgage Inv. Fund*, 168 B.R. 930, 935 (Bankr. W.D. Mo. 1994) (95% acceptance).

94. Such litigation, which could take years and years to complete, would create more delay and prevent victims from seeking to hold YesCare and NewCo responsible in the tort system. As the *Aearo* bankruptcy shows, the fastest path to payment is dismissal because it forces YesCare and NewCo back into the tort system where they face the reality of litigation.

95. Further, a trustee is not needed to undertake this litigation, avoid the divisive merger, pursue claims against YesCare or NewCo, or recover for creditors. Our legal system already provides tort victims with legal remedies and a clear path to recovery, which path can be pursued if this Court dismisses the Debtor's case. These remedies already exist under state law.

D. Structured Dismissal

96. The claimants—who are the stakeholders in this case—have a path to payment if the case is dismissed. YesCare and the parties who orchestrated the fraud are liable for the claims against the Debtor and can pay such claims when they are liquidated in the tort system. The claimants here should be afforded these rights absent a plan that has clear and broad support. Further, the claimants can assert claims against governmental entities and other parties who are co-liable with the Debtor, YesCare, and NewCo. While bankruptcy is often a solution to problems, the unique circumstances presented by the YesCare Two-Step make bankruptcy the problem.

97. **Successor Liability**. YesCare, NewCo, and/or their affiliates are liable as the successor to Corizon.[19] Under state law, successor liability is not a cause of action.[20] Rather, successor liability is an equitable doctrine or a theory of liability that transfers liability for a claim from a predecessor to a successor when certain factors are present. A successor may become liable

[19] Corizon operated 50 facilities in over 27 different states. For tort claims, the place of injury and the place of conduct causing the injury typically determines which state law applies. *See In re Soporex, Inc.*, 446 B.R. 750, 762 (Bankr. N.D. Tex. 2011) (applying the Restatement's most significant relationship test to the choice of law question for tort claims and noting that "applicable law will usually be the local law of the state where the injury occurred."); *Kelly v. Corizon Health Inc*., No. 2:22-cv-10589, 2022 U.S. Dist. LEXIS 198725, *14 (E.D. Mich. Nov. 1, 2022) (applying Michigan successor liability and alter ego substantive law to claims against CHS and YesCare because "a state's interest in applying its law to citizens injured by foreign corporations [often] outweighs the interest of the incorporating state."); *accord Rowland v. Novartis Pharm. Corp.*, 983 F. Supp. 2d 615, 624 (W.D. Pa. 2013); *In re W.R. Grace & Co.*, 418 B.R. 511, 519 (D. Del. 2009). For this reason, successor liability and alter ego doctrines may be analyzed differently with respect to the personal injury and wrongful death claims at issue here (depending on the state where the injury occurred). *See Berg Chilling Sys., Inc. v. Hull Corp.*, 435 F.3d 455, 467 (3d Cir. 2006). The TCC cites to case law in various states in this section of the Motion, including Texas. But this should not suggest that any state law applies to any specific tort claim or any legal doctrines that impose liability on non-debtor third parties. For an injury that occurred in Florida, Florida law would likely apply to the tort claims as well as remedies (*i.e.*, successor liability and alter ego) brought in aid of that personal injury claim.

[20] *See*, *e.g.*, *City of Syracuse v. Loomis Armored US, LLC*, 900 F. Supp. 2d 274, 290 (N.D.N.Y. 2012) (holding that "'successor liability' is not a separate cause of action but merely a theory for imposing liability on a defendant based on the predecessor's conduct" and noting that courts in other circuits have generally agreed); *Automotive Indus. Pension Trust Fund v. Ali*, No. C–11–5216, 2012 WL 2911432, *8 (N.D. Cal. July 16, 2012) (holding that, in the context of ERISA, successor liability is not an independent cause of action but simply a theory for imposing liability based on a predecessor's ERISA violation) (citations omitted); *Tindall v. H & S Homes, LLC*, No. 5:10–CV–044, 2012 WL 369286, *2 (M.D. Ga. Feb. 3, 2012) (holding that "'[s]uccessor liability is not a tort. It is an equitable tool used to transfer liability from a predecessor to a successor'" (quotation omitted)); *In re Fairchild Aircraft Corp*., 184 B.R. 910, 920 (Bankr. W.D. Tex. 1995), *vacated on other grounds*, 220 B.R. 909 (Bankr. W.D. Tex. 1998) ("successor liability does not create a new cause of action against the purchaser so much as it transfers the liability of the predecessor to the purchaser"); *Robbins v. Physicians for Women's Health, LLC*, 90 A.3d 925 (Conn. 2014) ("[W]hile successor liability may give a party an alternative entity from whom to recover, the doctrine does not convert the claim to an in rem action running against the property being sold. Nor does the claim have an existence independent of the underlying liability of the entity that sold the assets."); *Featherston v. Katchko & Sons Constr. Servs., Inc.*, 244 A.3d 621, 733 (Conn. App. Ct. 2020) ("Successor liability is a theory of liability to be alleged in support of a claim rather than raised as an independent claim."); *Columbia State Bank v. Invicta Law Group PLLC*, 402 P.3d 330, 332 (Wash. Ct. App. 2017) ("a claim for successor liability follows an underlying cause of action" and "merely exists to extend 'the liability on that cause of action to a corporation that would not otherwise be liable.'"); *Brown Bark III, L.P. v. Haver*, 219 Cal. App. 4th 809, 823, 162 Cal. Rptr. 3d 9, 20 (Cal. Ct. App. 2013) ("[S]uccessor liability is not a separate claim independent of Brown Bark's breach of contract claims. To the contrary, successor liability is an equitable doctrine that applies when a purchasing corporation is merely a continuation of the selling corporation or the asset sale was fraudulently entered to escape debts and liabilities."); 19 C.J.S. CORPORATIONS § 901 (2023) ("Successor liability does not create a new cause of action against the purchaser of a corporate predecessor so much as it transfers the liability of the predecessor to the purchaser"); L. Hock, comment, *Successor Liability in Asset Purchases of Bankrupt Health Care Providers*, 19 BANKR. DEV. J. 179, 182 (2002) ("Successor liability is an equitable doctrine that depends on state law. It does not give rise to a new cause of action, nor does it create an in rem claim running against the purchased property. Instead, successor liability provides for a transfer of liability from the original corporation to the acquiring corporation.").

for the debts of the predecessor when the transaction amounts to a consolidation or *de facto* merger, the transaction is fraudulent or done with the intent to escape liability, or the purchaser is a mere continuation of the seller.[21]

98. A transaction amounts to a consolidation or *de facto* merger when it has the economic effect of a statutory merger but is in the form of an acquisition or transfer of assets. Non-exclusive elements of a *de facto* merger include a continuation of the enterprise of the seller corporation, continuity of shareholders, the liquidation or dissolution of the seller, and the purchaser's assumption of seller's obligations necessary for the uninterrupted continuation of normal business operations.[22]

[21] *See Farouk Sys., Inc. v. AG Glob. Prod.*, LLC, No. CV H-15-0465, 2016 WL 1322315, at *7 (S.D. Tex. Apr. 5, 2016) (noting that the Restatement of Torts allows for successor liability if: "(1) there is express assumption of liability; (2) the acquisition results from a fraudulent conveyance to avoid liability; (3) the acquisition constitutes a consolidation or merger with the predecessor; and (4) the acquisition results in the successor becoming a continuation of the predecessor"); *Allied Home Mortg. Corp. v. Donovan*, 830 F. Supp. 2d 223, 233 (S.D. Tex. 2011) (under Texas law "the only two circumstances in which a successor business that acquires the assets of another business also acquires its liabilities or debts are (1) the successor expressly agrees to assume liability or (2) the acquisition results from a fraudulent conveyance to escape liability for the debts or liabilities of the predecessor."); *United States v. Americus Mortg. Corp.*, No. 4:12-CV-02676, 2013 WL 4829284, at *4 (S.D. Tex. Sept. 10, 2013) (accord); *Ford, Bacon & Davis, LLC v. Travelers Ins. Co.*, No. CIV.A. H-08-2911, 2010 WL 1417900, at *6 (S.D. Tex. Apr. 7, 2010), *aff'd sub nom. Ford, Bacon & Davis, L.L.C. v. Travelers Ins. Co.*, 635 F.3d 734 (5th Cir. 2011) (accord); *see also Mozingo v. Correct Mfg. Corp*., 752 F.2d 168, 174 (5th Cir. 1985) (applying Mississippi law) ("There are, however, four generally recognized exceptions to this rule: (1) when the successor expressly or impliedly agrees to assume the liabilities of the predecessor; (2) when the transaction may be considered a de facto merger; (3) when the successor may be considered a 'mere continuation' of the predecessor; or (4) when the transaction was fraudulent."); *Stearns Airport Equip. Co. v. FMC Corp*., 977 F. Supp. 1263, 1269 (N.D. Tex. 1996) ("A successor may be held liable (1) where the successor expressly or impliedly agrees to assume the liability of the predecessor, (2) when the transaction may be considered a de facto merger, (3) when the successor is a mere continuation of the predecessor, and (4) when the transaction is fraudulent.").

[22] *See Suarez v. Sherman Gin Co.*, 697 S.W.2d 17, 20 (Tex. Ct. App. 1985) (factors that are indicative of a de facto merger include: "(1) There is a continuation of the enterprise of the seller corporation, so that there is a continuity of management, personnel, physical location, assets, and general business operations. (2) There is a continuity of shareholders which results from the purchasing corporation paying for the acquired assets with shares of its own stock, this stock ultimately coming to be held by the shareholders of the seller corporation so that they become a constituent part of the purchasing corporation. (3) The seller corporation ceases its ordinary business operations, liquidates, and dissolves as soon as legally and practically possible. (4) The purchasing corporation assumes those liabilities and obligations of the seller ordinarily necessary for the uninterrupted continuation of normal business operations of the seller corporation.").

99. Here, NewCo (or CHS TX, Inc.) is a mere continuation of Corizon. Its business operations are identical. The divisive merger was fraudulent and was done with the intent to escape liability. There was a continuity of shareholders, normal business operations continued without interruption, and the Debtor commenced a bankruptcy proceeding shortly after its creation. The doctrine of successor liability imposes on NewCo all the Debtor's liabilities. All claimants of the Debtor have a path to recover in full on account of their claims in the tort system.

100. These issues have already been litigated, with at least one District Court holding that NewCo is liable as Corizon's successor. *See Kelly v. Corizon Health Inc.*, No. 2:22-cv-10589, 2022 U.S. Dist. LEXIS 198725, *31 (E.D. Mich. Nov. 1, 2022) (adding CHS TX, Inc. [NewCo] as a defendant in a prepetition action and finding "[c]onsidering the totality of the circumstances here, I find that CHS TX is a mere continuation of pre-division Corizon . . . . Evidently, CHS TX picked up right where Corizon left off. Indeed, CHS TX holds itself out to clients as Corizon's successor.").

101. **Alter Ego / Veil Piercing**. The Debtor's beneficial owners are also liable as the Debtor's alter ego. Alter ego and veil piercing are also not causes of action.[23] They are also

[23] *See*, *e.g.*, *Peacock v. Thomas*, 516 U.S. 349, 866 (1996) ("Piercing the corporate veil is not itself an independent ERISA cause of action, 'but rather is a means of imposing liability on an underlying cause of action.'") (quoting 1 C. Keating & G. O'Gradney, FLETCHER CYCLOPEDIA OF LAW OF PRIVATE CORPORATIONS § 41, p. 603 (perm. ed.1990)); *Blair v. Infineon Techs. AG*, 720 F. Supp. 2d 462, 469 n.10 (D. Del. 2010) ("[p]iercing the corporate veil is not itself an independent [ ] cause of action, but rather is a means of imposing liability on an underlying cause of action."); *Villnave Constr. Servs., Inc. v. Crossgate Mall Gen. Co. Newco, LLC*, 201 A.D.3d 1183, 1187-88 (N.Y. Sup. Ct. 2022) ("Properly understood, an attempt to pierce the corporate veil does not constitute a cause of action independent of that against the corporation; rather it is an assertion of facts and circumstances which will persuade the court to impose the corporate obligation on its owners"); *A.L. Dougherty Real Estate Mgmt. Co., LLC v. Su Chin Tsai*, 98 N.E.3d 504, 515 (Ill. App. Ct. 2017) ("Piercing the corporate veil is not a separate cause of action but instead is a means for imposing liability in an underlying cause of action"); *Gallagher v. Persha*, 891 N.W.2d 647, 654 (Mich. Ct. App. 2016) (piercing the corporate veil is a remedy and not a separate cause of action); *Phillips v. United Heritage Corp.*, 319 S.W.3d 156, 158 (Tex. App. 2010) (holding that alter ego liability is not a substantive cause of action but "[r]ather, they are a means of imposing on an individual a corporation's liability for an underlying cause of action."); *In re Texas Am. Exp., Inc.*, 190 S.W.3d 720, 725 (Tex. App. 2005) (accord).

equitable doctrines or a legal remedy. Alter ego and veil piercing theories do not create new causes of action. Rather, they impose liability on the company's owner when certain factors are present.

102. These factors include: the parent and subsidiary have common stock ownership, common directors or officers, the parent and subsidiary have common business departments, the parent and subsidiary file consolidated financial statements, the parent finances the subsidiary, the parent caused the incorporation of the subsidiary, the subsidiary operated with grossly inadequate capital, the parent pays salaries and other expenses of subsidiary, the subsidiary receives no business except that given by the parent, the parent uses the subsidiary's property as its own, the daily operations of the two corporations are not kept separate, and the subsidiary does not observe corporate formalities.[25]

103. Here, there is common beneficial and actual ownership, common directors and officers, the parent finances the subsidiary, the Debtor was grossly undercapitalized at its inception, and the Debtor has no business function other than to exist in bankruptcy and try to obtain a release for its master. The proposed plan, which makes releasing YesCare and its non-

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[24] *See generally Ledford v. Keen*, 9 F.4th 335, 339 (5th Cir. 2021) ("Texas law permits courts to disregard the corporate fiction when the corporate form has been used as part of a basically unfair device to achieve an inequitable result."); *SSP Partners v. Gladstrong Invs. (USA) Corp.*, 275 S.W.3d 444, 451 (Tex. 2008) ("We have held that the limitation on liability afforded by the corporate structure can be ignored only when the corporate form has been used as part of a basically unfair device to achieve an inequitable result. Examples are when the corporate structure has been abused to perpetrate a fraud, evade an existing obligation, achieve or perpetrate a monopoly, circumvent a statute, protect a crime, or justify wrong."); 1 FLETCHER CYC. CORP. § 41 (2022); 15 Tex. Jur. 3d CORPORATIONS § 162.

[25] *See*, *e.g.*, *U.S. v. Jon-T Chemicals, Inc.*, 768 F.2d 686, 691-92 (5th Cir. 1985); *In re SMTC Mfg. of Texas*, 421 B.R. 251, 321 (Bankr. W.D. Tex. 2009) (noting that the Texas Supreme Court has held that "[a]lter ego applies when there is such a unity between corporation and individual that the separateness of the corporation has ceased and holding only the corporation liable would result in injustice. It is shown from the total dealings of the corporation and the individual, including the degree to which corporate formalities have been followed and corporate and individual property have been kept separately, the amount of financial interest, ownership and control the individual maintains over the corporation and whether the corporation has been used for personal purposes. Alter ego's rationale is: if the shareholders themselves disregard the separation of the corporate enterprise, the law will also disregard it so far as necessary to protect individual and corporate creditors."). In the Fifth Circuit, fraud is not a necessary element of alter ego liability when the underlying cause of action is a tort, especially if the alter ego corporation was undercapitalized. *See Jon-T Chemicals*, 768 F.2d at 692-93.

debtor affiliates and insiders the highest priority, shows that the Debtor functions solely as a façade for the Debtor's beneficial owners who have been pulling the strings in the background at all relevant times.[26] The doctrine of veil piercing imposes on these parties all the Debtor's liabilities. All claimants of the Debtor have a path to recover on account of their claims in the tort system.

104. **Fraudulent Transfer**. The divisive merger can also be unwound as a fraudulent transfer. State law allows for avoidance of actual fraudulent transfers made on or within 4 years before the petition date. *See* Tex. Bus. & Comm. Code § 24.005. To establish actual fraud, the movant must show that the transfer or obligation was made "with actual intent to hinder, delay, or defraud any creditor of the debtor." *Id*. at § 24.005(a)(1).

105. Actual intent is often inferred through circumstantial evidence and "badges of fraud." Badges of fraud include whether the transfer or obligation was to an insider, the transfer was of substantially all the debtor's assets, the debtor was insolvent or became insolvent shortly after the transfer or was made, and the debtor transferred the essential assets of the business to a lienor who transferred the assets to an insider of the debtor. *Id*. at § 24.005(b).

106. Here, the divisive merger occurred within the past 4 years, and was done with the actual intent to hinder, delay, and defraud creditors. The Debtor is a Potemkin Village with YesCare and its beneficial owners in total control. The Debtor was created to be insolvent and file for bankruptcy for the sole purpose of securing a cheap release for YesCare and its non-debtor affiliates and insiders.

[26] *See*, *e.g.*, *S.E.C. v. Res. Dev. Int'l, LLC*, 487 F.3d 295, 303 (5th Cir. 2007) (affirming District Court's piercing of the corporate veil due to debtor's use of the corporation for a fraudulent transfer); *JNS Aviation, Inc. v. Nick Corp.*, 418 B.R. 898, 908 (N.D. Tex. 2009), *aff'd sub nom. In re JNS Aviation, LLC*, 395 F. App'x 127 (5th Cir. 2010) (affirming Bankruptcy Court piercing of the corporate veil between corporations where the same owners of one corporation isolated the corporate family's liabilities in "a worthless shell.").

107. The divisive merger can also be challenged as a constructive fraud. Constructive fraud requires a movant to show that the debtor received less than reasonably equivalent value in exchange for the transfer, and that the transfer caused the debtor to be engaged, or about to be engaged, in a business or transaction for which any property remaining with the debtor was an unreasonably small capital, or that the debtor intended to incur, or believed that it would incur, debts that would be beyond its ability to pay as such debts matured. *Id.* at § 24.005(a)(2).

108. Inadequate capital turns on the nature of the debtor's business and whether it is "reasonably foreseeable" that the debtor will be able to "generate sufficient profits to sustain operations."[27] Importantly, inadequate capital includes financial difficulties short of equitable insolvency[28]—*i.e.*, whether the debtor can generate enough cash to pay its debts and still sustain operations. *See In re Vadnais Lumber Supply, Inc.*, 100 B.R. 127, 137 (Bankr. D. Mass. 1989). The test is "reasonable foreseeability." *Peltz v. Hatten*, 279 B.R. 710, 744 (D. Del. 2002).

109. Among the factors that courts consider in determining foreseeability is the length of time the debtor survived (or avoided a bankruptcy filing) after the transfer. *See ASARCO LLC v. Am. Mining Corp.*, 396 B.R. 278, 397 (Bankr. S.D. Tex. 2008) (debtor left with unreasonably small capital even though it did not file for bankruptcy for over two years after the transfer).

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[27] *See In re Lyondell Chem. Co.*, 567 B.R. 55, 109 (Bankr. S.D.N.Y. 2017) ("[T]he concept of 'unreasonable small capital' encompasses a test that incorporates an element of 'reasonable foreseeability.'") (quoting *Moody*, 971 F.2d at 1083); *Pioneer Home Builders, Inc. v. Int'l Bank of Commerce (In re Pioneer Home Builders, Inc.)*, 147 B.R. 889, 894 (Bankr. W.D. Tex. 1992) (unreasonably small capital signifies an inability to generate enough cash flow from operations and the sale of assets to remain financially stable).

[28] *See In re North Am. Clearing, Inc.*, No. 6:08-ap-00145, 2014 WL 4956848, at *8 (Bankr. M.D. Fla. Sept. 29, 2014) ("Although not defined in the Bankruptcy Code, the most common view is that 'unreasonably small capital denotes a financial condition short of equitable insolvency.'"); *Tronox Inc. v. Kerr McGee Corp. (In re Tronox Inc.)*, 503 B.R. 239, 321 (Bankr. S.D.N.Y. 2013) ("[T]he cases recognize that the unreasonably small capital test may be easier for a plaintiff to satisfy than insolvency because 'unreasonably small capital' means 'difficulties which are short of insolvency in any sense but are likely to lead to insolvency at some time in the future.'") (quoting *In re Vadnais Lumber Supply, Inc.*, 100 B.R. 127, 137 (Bankr. D. Mass. 1989)).

110. Here, the divisive merger allocated the Debtor—an entity with no business operations—with little besides liabilities. The Debtor was systematically stripped of its assets, which are now owned and operated by a highly profitable multi-million-dollar business. The Debtor has no means to generate positive cash flow and is now facing administrative insolvency. And the Debtor avoided bankruptcy for less than nine months following the divisive merger. Further, the professionals who advised on the divisive merger may face liability for aiding and abetting the fraudulent transfer and for engaging in a conspiracy to commit fraud—providing another source of recovery for victims.[29]

111. Like other Texas Two Step debtors, the Debtor and its conspirators here may argue that the operation of the divisive merger did not constitute a "transfer" under Texas state law. *See* Tex. Bus. Org. Code § 10.008(a)(2)(C) (a divisive merger takes place without "any transfer or assignment having occurred"). But Texas law does not use the same "without any transfer" language for the transfer of liabilities as it does regarding the transfer of assets, and thus the transfer of the liabilities to the Debtor would remain a "transfer" under Texas law. *Compare id. with* § 10.008(a)(3). With the transfer of liability undone, the liability goes to NewCo.

112. Further, the Texas Business Organizations Code states that it "**does not abridge any right or rights of any creditor under existing law**." *Id*. at § 10.901 (emphasis added). These rights include the right to challenge a transfer as fraudulent, as well as the right to hold successors and alter egos liable under Texas law. The definition of "transfer" in the Texas Uniform

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[29] *See*, *e.g.*, *In re Rest. Dev. Grp., Inc.*, 397 B.R. 891, 894 (Bankr. N.D. Ill. 2008) (denying motion to dismiss a claim against former attorneys of a restaurant company who allegedly engaged in a scheme to defraud the company's creditors); *Banco Popular N. Am. v. Gandi*, 876 A.2d 253, 263 (N.J. 2005) (creditors may bring claims against one who assists another in executing a fraudulent transfer); *Thornwood, Inc. v. Jenner & Block*, 344 Ill. App. 3d 15, 799 N.E.2d 756 (1st Dist. 2003) (refusing to dismiss claim against a law firm for aiding and abetting a client's fraudulent scheme). Under the Debtor's plan, the professionals who orchestrated the divisive merger are conveniently included within the definition of "Released Parties." *See* Plan at Art. I.A.100(bb).

Fraudulent Transfer Act "means every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with an asset or an interest in an asset, and includes payment of money, release, lease, and creation of a lien or other encumbrance." Tex. Bus. & Comm. Code § 24.002(12). This definition is broad enough to encompass a divisive merger.

113. The Bankruptcy Court in *In re DBMP LLC* (Case No. 20-30080, Bankr. W.D.N.C.), addressed this issue. In *DBMP*, the committee moved to avoid a divisive merger as a fraudulent transfer. The debtor in *DBMP*, like the Debtor here, was a made-for-bankruptcy entity whose assets were stripped on the eve of the filing.

114. The debtor moved to dismiss the fraudulent transfer claims argued that the allocation of assets and liabilities under the Texas divisional merger statute did not constitute a transfer within the meaning of section 548 of the Bankruptcy Code. The *DBMP* Court rejected this argument. *See Official Comm. of Asbestos Personal Injury Claimants v. DBMP LLC*, Adv. No. 21-03023-JCW (Bankr. W.D.N.C. 2021), July 7, 2022 Hr'g Tr. [Dkt. No. 85], at 23:24-25:4 (attached as **Exhibit C**). The result should be the same under the Texas Fraudulent Transfer Act.

115. This is just the tip of the iceberg. Claimants here can also bring actions against officers and directors for breaching their fiduciary duties. The description of the foregoing legal remedies available to victims is by no means exhaustive. And, critically, this litigation can be brought outside of bankruptcy. And claimants can pursue claims against governmental entities and other parties who are co-liable with the Debtor, YesCare, and NewCo.

116. Bankruptcy is not the best forum for this litigation to take place, particularly given the constraints imposed by the DIP financing and the lack of funding available to estate professionals to pursue causes of action that YesCare does not want them to pursue. In fact, when

faced with litigation in state court by parties YesCare does not control or influence, YesCare would be free to settle claims and pay judgments.

117. The legal theories upon which YesCare and other parties can be held accountable here are neither novel nor difficult to plead. Pending litigation shows that plaintiffs are already aware that YesCare and NewCo can be held liable for all the claims at issue in this case. The Court need only restore creditor remedies and eliminate injunctions and the stay so that parties can recover from YesCare and its non-debtor affiliates and insiders.

JURISDICTION

118. This Court has jurisdiction to consider this Motion pursuant to 28 U.S.C. § 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b). The statutory predicates for the relief requested herein are sections 105(a), 554, 1103(c)(5), 1109(b), 1112(b) of the Bankruptcy Code.

RELIEF REQUESTED

119. By this Motion, the TCC and the co-movants seek an order terminating the preliminary injunction, granting the TCC standing to prosecute, settle, and abandon certain estate causes of action, authorizing the abandonment of certain estate causes of action that may constitute property of the estate, and dismissing this case pursuant to section 1112(b) of the Bankruptcy Code.

ARGUMENT

I. The Court Should Terminate the Preliminary Injunction

120. As a threshold matter, the Court should terminate the preliminary injunction. No bankruptcy resolution is possible given YesCare's conduct. There is no possible rehabilitation here. This case was a fraud from its inception. The Debtor's arguments regarding shared insurance have proven to be illusory. Most of the claims do not have access to insurance. And, where they do, they are subject to substantial self-insured retentions.

121. To the TCC's knowledge, no insurer, other than LSA, has expressed any interest in settling. No insurer has agreed that its policies cover the claims at issue. Even if coverage does exist, the pursuit of that coverage is not inextricably linked to liquidation of the tort claims against YesCare or the Debtor. Such coverage would require the commencement of a separate proceeding by the insured against the insurer. To the extent that any insurance is property of the estate, claims against non-debtor insureds can proceed while leaving the issue of coverage for another day.

122. Whatever injunctions are presently in place to protect YesCare and its non-debtor affiliates and insiders should be terminated. This follows from the request that the Court dismiss this case under section 1112(b) of the Bankruptcy Code since dismissal would end the case and, therefore, terminate the automatic stay imposed under section 362(a). However, lest there be any doubt, the TCC also requests that the Court terminate all injunctions as part of the dismissal so that they are no longer in effect and no longer present a bar to litigation against YesCare and NewCo.

II. The TCC Should be Granted Standing to Purse Estate Causes of Action

123. Next, the TCC should be granted standing to pursue certain alleged estate causes of action against YesCare and its non-debtor affiliates. As a threshold matter, the TCC acknowledges that there is Circuit split over what constitutes an estate cause of action.

124. **What is an estate cause of action?** Section 541(a)(1) defines "property of the estate" to include "all legal or equitable interests of the debtor in property as of the commencement of the case." 11 U.S.C. § 541(a)(1). Causes of action belonging to the debtor prior to bankruptcy constitute estate property. A debtor has authority to pursue and settle such causes of action.

125. Whether a cause of action is available to the debtor and constitutes "property of the estate" is determined by state law. *See*, *e.g.*, *Butner v. United States*, 440 U.S. 48, 49 (1979). If state law allows a company to assert a claim against another party, the claim is property of the

estate, and a bankruptcy trustee can assert it. If a claim belongs to the debtor's creditors under state law, section 541(a) **does** **not** confer standing to assert such claim on a trustee.

126. A trustee has **no** **standing** generally to sue third parties on behalf of the estate's creditors. *See Caplin v. Marine Midland Grace Trust Co. of New York*, 406 U.S. 416, 434 (1972). If a claim is specific to a creditor, it is a personal claim and is a legal or equitable interest only of the creditor that suffered the injury. *Id.* If the "cause of action does not explicitly or implicitly allege harm to the debtor, then the cause of action could not have been asserted by the debtor as of the commencement of the case, and thus is not property of the estate." *In the Matter of Educators Group Health Trust v. Wright*, 25 F.3d 1281 (5th Cir. 1994).

127. Notwithstanding the Supreme Court's guidance on this issue, the Circuits are split on whether a bankruptcy trustee has standing to assert claims that belong to creditors under state law against third parties under the doctrines of successor liability and alter ego.[30]

128. Some Circuits have held that when the underlying claim against a debtor involves a personalized injury (*e.g.*, a tort claim against the debtor), such claim does **not** become an estate cause of action—or property of the debtor's estate—to the extent that such claim is asserted against a successor of the debtor or an alleged alter ego of the debtor under state law. These Courts recognize that when an injury gives rise to a claim ***against*** a debtor which can be brought against

[30] *Compare Ahcom, Ltd. v. Smeding*, 623 F.3d 1248, 1250-51 (9th Cir. 2010) (alter ego claim not property of the estate); *Board of Trustees of Teamsters Local 863 v. Foodtown, Inc.*, 296 F.3d 164 (3d Cir. 2002) (same); *In re RCS Eng'g Products Co.*, 102 F.3d 223, 226-27 (6th Cir. 1996) (same); *Steinberg v. Buczynski*, 40 F.3d 890, 893 (7th Cir. 1994) (same); *In re Ozark Rest. Equip. Co.*, 816 F.2d 1222, 1225-26 (8th Cir. 1987) (same); *In re Cincom iOutsource, Inc.*, 398 B.R. 223, 232 (Bankr. S.D. Ohio 2008) (same); *with In re Tronox Inc.*, 855 F.3d 84, 99-104 (2d Cir. 2017) (holding alter ego claims are property of the estate); *In re Emoral, Inc.*, 740 F.3d 875 (3d Cir. 2014) (holding successor liability claims are property of the estate); *Steyr-Daimler-Puch of Am. Corp. v. Pappas*, 852 F.2d 132, 135-36 (4th Cir. 1988) (holding alter ego claims are property of the estate); *St. Paul Fire & Marine Ins. Co. v. PepsiCo, Inc.*, 884 F.2d 688, 704-05 (2d Cir. 1989) (same); *Koch Refining v. Farms Union Cent. Exchange, Inc.*, 831 F.2d 1339, 1346 (7th Cir. 1987) (same); *Matter of S.I. Acquisition, Inc.*, 817 F.2d 1142, 1153 (5th Cir. 1987) (same).

a successor of the debtor or an alleged alter ego of the debtor under state law, that claim does not transform into a claim that can be brought ***by*** a debtor because the debtor has filed for bankruptcy.[31]

129. Other Courts, however, have reached a contrary result. The theory behind this view, as recently articulated by the Third Circuit in *Emoral*, is that while the claims of all creditors involve an "individualized" injury, the case that must be put on and proven to impose liability on a successor or an affiliate is common to all creditors. 740 F.3d 875.

130. The plaintiffs in *Emoral* were individuals who suffered injuries arising from exposure to chemicals manufactured by a company called Emoral, Inc. ("Emoral"). *Id.* at 877. Emoral sold its assets to a company called Aaroma Holdings LLC ("Aaroma"). *Id.* After the sale, the plaintiffs asserted their personal injury claims against Aaroma under a state law successor liability theory. Thereafter, Emoral filed for bankruptcy and a trustee was appointed. *Id.*

131. The trustee alleged that the asset sale to Aaroma was a fraudulent transfer—likely on the grounds that the purchaser paid less than reasonably equivalent value for Emoral's assets. *Id.* Rather than litigating the issue, Aaroma settled for $500,000. The settlement agreement was worded more broadly than just releasing the fraudulent transfer claim and provided that the trustee was releasing Aaroma from any causes of action that are property of the debtor's estate. *Id.*

[31] Because the tort claim requires proof of a particularized injury, it follows that every tort claim asserted against a successor under the doctrine of successor liability or a defendant under the doctrines of alter ego and veil piercing also requires proof of a particularized injury. A successor cannot be held responsible for a tort claim under the doctrine of successor liability absent proof of the elements of the underlying tort claim. To illustrate this point: consider a parent and a wholly owned subsidiary where the subsidiary has $500 million in bond debt and $5 million in contingent and disputed tort liability. If the tort claimant were to sue the parent, the tort claimant would first have to prove the merits of the tort claim. This would require proof that the tort claimant suffered an injury. If the tort claimant prevailed on the merits of the underlying tort claim, the next question would be whether the parent could be held responsible for the claim. If the tort claimant prevailed under the doctrines of successor liability, alter ego or veil piercing, the parent would be liable for the tort claim involving the injury to the claimant. But the parent would not necessarily become liable for $500 million in bond debt—particularly if the bond claimants were not part of the litigation between the tort claimant and the parent.

132. Post-settlement, Aaroma argued that the personal injury claims asserted against it under a successor liability theory were estate claims and were barred by the order approving the settlement. *Id.* at 877-78. The Court that approved the settlement disagreed and held that the personal injury claims were "not property of the estate" since they alleged injuries that were personal to the plaintiffs and were not generalized injuries "suffered by all shareholders or creditors of Emoral." *Id*. However, the Third Circuit held that the personal injury claims asserted against Aaroma under a state law successor liability theory were estate causes of action and, therefore, were barred by the Bankruptcy Court's order approving the settlement.

133. The Third Circuit reasoned that the "remedy against a successor corporation for the tort liability of the predecessor is, like the piercing remedy, an equitable means of expanding the assets available to satisfy creditor claims." *Id.* at 880 (quotation omitted). According to the Circuit, if successful, a finding of successor liability "would have the effect of increasing the assets available for distribution to ***all creditors***." *Id*. (emphasis added).

134. Thus, the Third Circuit held that a "cause of action" alleging successor liability is "a generalized claim constituting property of the estate." *Id.* at 881. Under this reasoning, that when a successor liability claim is successfully asserted by a trustee in bankruptcy on behalf of creditors, the result is that all the successor's assets are "available for distribution" to all the debtor's creditors—*i.e.*, the "pool of assets" available to all creditors increases. *Id.* at 880-81.

135. Applied here, this means that NewCo's assets may be available for distribution to all the Debtor's creditors. But the Third Circuit's ruling in *Emoral* was not favorable to the tort victims ***in that case***. Under the Third Circuit's ruling, the personal injury claims against Aaroma alleging successor liability belonged to the bankruptcy estate and, therefore, were included within the definition of released claims under the settlement agreement between Aaroma and the trustee.

Id. at 882. The personal injury claims ended up being barred and, in effect, released without so much as a vote on a chapter 11 plan or the victims' consent. The settlement approved in *Emoral* ended up functioning like a nonconsensual third-party release.

136. Further, it is doubtful that the trustee in *Emoral* believed at the time he settled the fraudulent transfer claims against Aaroma for a mere $500,000 that he was also settling successor liability claims which, if successfully asserted, would have made all Aaroma's assets available to pay Emoral's creditors. If the estate causes of action included successor liability claims, the settlement amount of $500,000 may have been well outside the range of reasonableness.

137. The Debtor—as controlled by YesCare—is likely to ignore the Fifth Circuit's ruling in *In the Matter of Educators Group Health Trust v. Wright*, 25 F.3d 1281 (5th Cir. 1994), and rely instead on the Fifth Circuit's decision in *S.I. Acquisition*, wherein the Fifth Circuit held that an action based on alter ego allegations was an estate claim. 817 F.2d at 1153. Such reliance is misplaced for several reasons.

138. **First**, *S.I. Acquisition* did not involve a debtor that was manufactured by the litigation target. The Fifth Circuit's holding in *S.I. Acquisition* was consistent with supporting those who attempt to "remedy" an abuse of the corporate form. 817 F.2d at 1153. The Debtor's bankruptcy turns *S.I. Acquisition* on its head by using a fictious legal entity (*i.e.*, the Debtor) created by the tortfeasor (*i.e.*, Corizon) to carry out an abuse of the corporate form.

139. *S.I. Acquisition* does not stand for the proposition that a tortfeasor against whom personal injury and wrongful death claims are asserted can seize control over those claims by undertaking a divisive merger (*i.e.*, the transaction that triggers successorship) followed by a bankruptcy filing of the manufactured debtor. If this were the law, then any defendant could

control tort claims asserted against it by committing fraud. This would not "remedy" an abuse of the corporate form. It would be an abuse of the corporate form.

140. **Second**, *S.I. Acquisition* was based on the Fifth Circuit's reading of Texas law. As explained above, for tort claims, the place of injury and the place of conduct causing the injury typically determines which state law applies. *See supra* fn. 19. Corizon operated 50 facilities in over 27 different states. The law in most states would not support the right of a debtor to assert a tort claim based on harm caused by the debtor based on the doctrine of successor liability or any other legal doctrine. *See supra* fn. 20 and fn. 23.

141. Here, the personal injury and wrongful death claims in this case give rise to a claim ***against*** the Debtor which can be brought against a successor or an alleged alter ego under state law. There is no explicit or implicit alleged harm to the Debtor. The Debtor was not forced to suffer in agony and live in its own fecal matter for four months. Claimants also have the right under state law to avoid certain fraudulent transfers made with the intent of hindering, delaying, or defrauding their ability to recover on account of their claims. These are the rights and remedies that exist because of Corizon's fraud and misconduct.

142. However, to eliminate this issue, to the extent that any of these rights or theories of recovery result in a determination that the causes of action belong to the Debtor's estate (and are not available to the claimants themselves during the pendency of the Debtor's bankruptcy proceedings) under *S.I. Acquisition*, *Emoral*, or similar case law, the TCC now seeks exclusive standing to pursue, settle, and abandon them for the benefit of the creditors whose rights may have been taken from them (without due process or compensation) due to the Debtor's bankruptcy filing.

143. **<u>Who has standing to assert estate causes of action?</u>** It is well-settled within this Circuit that Courts may allow, under appropriate circumstances, an official committee to pursue causes of action on behalf of the estate.[32] Although the Bankruptcy Code does not expressly authorize an official committee the standing to initiate an adversary proceeding and/or to pursue other causes of action typically brought by the trustee or the debtor-in-possession, the Bankruptcy Code does establish official committees for the express purpose of protecting the rights of their constituents and similarly situated creditors.[33]

144. To achieve this purpose, section 1103(c), which enumerates the statutory functions of an official committee, authorizes committees to "perform such other services as are in the interest of those represented." 11 U.S.C. § 1103(c)(5). To that end, section 1109(b) provides that:

> A party in interest, including the debtor, the trustee, *a creditors' committee*, an equity security holders' committee, a creditor, an equity security holder, or any indenture trustee, may raise and may appear and be heard on any issue in a case under this chapter.

11 U.S.C. § 1109(b) (emphasis added).

145. Indeed, this general right to be heard would ring hollow unless official committees are also given the right to act on behalf of the estate if a debtor-in-possession or a trustee that is explicitly granted the right to act for the estate unjustifiably fails to act.[34]

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32 *See Contractor Creditor's Comm. v. Fed. Ins. Co. (In re La. World Exposition, Inc.)*, 832 F.2d 1391, 1397 (5th Cir. 1987) (discussing how "[a] number of bankruptcy courts have held that in some circumstances, a creditors' committee has standing under 11 U.S.C. §1103(c)(5) and/or §1109(b) to file suit on behalf of debtors-in-possession…or the trustee."); *In re Chesapeake*, Case No. 20-33233, (Bankr. S.D. Tex.) Jan. 13, 2021 Hr'g Tr. at 325:5-11.

33 *See* H.R. Rep. No. 95-595, at 91-92 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6053-54.

34 *See Official Comm. of Unsecured Creditors of Cybergenics Corp. v. Chinery*, 330 F.3d 548, 568-69 (3d Cir. 2003) (holding that sections 1103(c)(5) and 1109(b) of the Bankruptcy Code implicitly authorize a court to grant a creditors' committee derivative standing to prosecute an avoidance action when the trustee or debtor-in-possession cannot or will not do so, or when the debtor-in-possession is unlikely to act); *In re iPCS, Inc.,* 297 B.R. 283, 290 (Bankr. N.D. Ga. 2003) ("[I]f a debtor has a cognizable claim, but refuses to pursue that claim, an important objective of the Code [the recovery and collection of estate property] would be impeded if the bankruptcy court has no power to authorize another party to proceed on behalf of the estate in the debtor's stead."); *In re Joyanna Holitogs, Inc.*, 21 B.R. 323, 326 (Bankr. S.D.N.Y. 1982) (holding that the right to be heard would

146. Courts in the Fifth Circuit have granted creditors' committees standing in connection with claims similar to the causes of action at issue here by operation of their equitable powers.[35] Moreover, the practice of conferring standing upon official committees to pursue actions on behalf of a bankruptcy estate is widely followed and accepted in other jurisdictions as well.[36]

147. In the Fifth Circuit, where an official committee seeks to pursue an action without the consent of the debtor, the committee must satisfy a three-part test to be granted derivative standing. Under this test, the committee may obtain derivative standing where:

(i) a colorable claim exists;

(ii) the debtor-in-possession refused unjustifiably to pursue the claim; and

(iii) the committee first receives leave to sue from the bankruptcy court.

La. World Exposition, 832 F.2d at 1397.

148. The TCC satisfies each of the elements of this test and should be granted standing to further pursue any estate causes of action that in substance constitute remedies that creditors could bring outside of bankruptcy in aid of their effects to hold YesCare and its non-debtor affiliates and insiders responsible for their conduct and fraud.

149. **Colorable Claims**. Asserting a "colorable claim" is a relatively low threshold to satisfy, requiring the court to find that the claim is "not without merit."[37] In granting standing to

be empty unless those who have such a right are also given the right to act when the debtors refuse to do so).

35 *See* cases cited *supra* at 32.

36 *See, e.g., Unsecured Creditors Comm. v. Noyes (In re STN Enters.),* 779 F.2d 901, 904 (2d Cir. 1985) (concurring with those bankruptcy courts that have held that sections 1103(c)(5) and 1109(b) of the Bankruptcy Code imply a qualified right for creditors' committees to initiate litigation with the approval of the bankruptcy court).

37 *In re Distributed Energy Sys., Corp.*, Case No. 08-11101 (KG) (Bankr. D. Del.) [Dkt. No. 315] ("[T]he colorable claim issue, of course, is plausibility. . . I don't even have to find that it has merit; I just have to find that it's not without merit."); *see also Adelphia Commc'ns Corp. v. Bank of Am., N.A. (In re Adelphia Commc'ns Corp.)*, 330 B.R. 364, 376 (Bankr. S.D.N.Y. 2005) ("Caselaw construing requirements for 'colorable' claims has made it clear that the required showing is a relatively easy one to make."); *Official Comm. of Unsecured Creditors v. Hudson United Bank (In re Am.'s Hobby Ctr., Inc.)*, 223 B.R. 275, 288 (Bankr. S.D.N.Y. 1998) (observing that only if the claim is "facially defective" should standing be denied).

the committee in *In re Chesapeake Energy Corp.*, Judge Jones remarked that the standard for a 'colorable' claim was akin to a claim that was not sanctionable under the Rules of Professional Conduct: "Colorability is a really low standard. It doesn't take a lot to get over the colorability standard. And I do find that the claims asserted by the Committee meet that….[T]here are plenty of lawyers who would put their name pursuant to Rule 11 on a complaint that sets forth those claims, and if that's not exactly the colorability argument or standard, it's awfully close."[38]

150. Here, as explained above, the tort claimants have personal injury or wrongful death claims that can be asserted against YesCare and its non-debtor affiliates under the doctrines of successor liability and veil piercing. And they can seek to avoid the divisive merger as a fraudulent transfer under Texas law (to the extent necessary to ensure their recovery on account of their claims). These claims satisfy the colorability standard. Indeed, it is difficult to imagine how YesCare and its non-debtor affiliates could possibly avoid summary judgment.

151. **Debtor in Possession**. Here, the Debtor is intertwined with, and beholden to, the targets of the causes of action. In fact, this is the key feature of the YesCare Two-Step—use a divisive merger to create an entity that (a) is controlled by YesCare and (b) can argue that it can settle the personal injury and wrongful death claims without the victims' consent.

152. The Debtor's board, management, and professionals are all entwined with YesCare and NewCo. The Debtor is a legal fiction created to perpetrate an obvious fraud. The purpose of this bankruptcy—as devised by the Debtor's owners—is **not** to maximize value for the benefit of creditors, but to transfer value **from** creditors to equity holders through a bad faith settlement.

153. This is not speculation. This is what the Debtor's plan does. The Debtor has already proven through its actions that it exists solely to secure a release for the benefit of YesCare

[38] *See In re Chesapeake*, Case No. 20-33233 (Bankr. S.D. Tex.) Jan. 13, 2021 Hr'g Tr. at 325:5-11 (attached hereto as **Exhibit D**).

and its affiliates to the detriment of victims and their families. The UCC is fully supportive of this outcome so long as its favored creditor group obtains a recovery it considers substantial and all administrative expenses are paid.

154. **The TCC Should be Granted Standing**. The TCC should be granted exclusive standing to prosecute, settle, and abandon the estate causes of action. To entrust the Debtor—an entity created, owned, and controlled by YesCare—with settling the estate causes of action would invite mischief. Rather than maximizing the value of the estate causes of action, the UCC and the Debtor (acting at the direction of YesCare) will find the lowest rung in the range of reasonableness and then attempt to settle at exactly that, to the detriment of the tort victims. This is not speculation. There can be no illusion at this point that the Debtor is controlled by parties willing to support an unreasonable settlement. Given this, the TCC should be granted standing.

III. The Court Should Authorize the TCC to Abandon the Estate Causes of Action

155. And, upon the granting of such standing, the TCC moves to abandon back to the claimants the estate causes of action that in substance constitute remedies that claimants could use outside of bankruptcy in aid of their effects to hold YesCare and its non-debtor affiliates responsible for their conduct and fraud. *See In re Wilton Armetale, Inc.*, 968 F.3d 273, 284 (3d Cir. 2020) (trustee can relinquish estate causes of action); *Kane v. Nat'l Union Fire Ins. Co.*, 535 F.3d 380, 386 (5th Cir. 2008) (when a trustee abandons an estate cause of action, the interest in the claim reverts as if the bankruptcy was never filed). The proposed Order included herewith sets out the necessary steps and timing of such steps to accomplish this result.

156. To be clear, the proposed abandonment does not involve any hard assets, real estate, business assets, or property that belonged to the Debtor prior to the commencement of its bankruptcy case. The Debtor is a legal fiction. The abandonment here is intended to restore the

claimants' legal rights ***to the extent that*** they are now impaired by this case so that injured parties can pursue their claims against YesCare and its non-debtor affiliates and insiders.

157. Upon dismissal, to the extent any causes of action involving claims (tort claims and commercial claims) that can be asserted against YesCare and its non-debtor affiliates and insiders based on any theory of liability (including successor liability and veil piercing) are property of the Debtor's estate, such causes of action can be abandoned and relinquished to the applicable claimants to pursue against YesCare and its non-debtor affiliates and insiders in the tort system.

158. The Debtor's temporary ownership of the claims against it and YesCare (if any) would end. Successor liability and alter ego are theories of liability that can be asserted by persons or entities that have suffered damages caused by a tortfeasor. Those theories—to the extent that they are currently property of the Debtor's estate—can be restored to their rightful owners.[39] The same is true for the ability to avoid certain transactions under state law.

159. **These are rights that belonged to the claimants under state law prior to the bankruptcy. And this should be done explicitly to avoid any argument by YesCare or NewCo that they acquired any new defenses because of this bankruptcy case**.

160. Again, one aspect of the Texas Two Step that is ripe for abuse is the control that "GoodCo" can attempt to exert over the tort claims against it. By arguing that the tort claims ***against*** TortCo and GoodCo (under a successorship theory) are TortCo's property under section 541(a), GoodCo can use the Texas Two Step to place itself in the position of ***both*** the plaintiff ***and*** the defendant, and then negotiate a settlement with itself in order to extinguish those claims.

[39] Again, the TCC does not believe that the personal injury and wrongful death claims asserted against YesCare, NewCo, and their non-debtor affiliates and insiders under the doctrines of successor liability or veil piercing are property of the Debtor's estate. A contrary result would mean that section 541(a) violates the Fifth and Seventh Amendments of the Constitution. The TCC raises and reserves the right to argue that section 541(a) violates the Fifth and Seventh Amendments to the extent that it means that such claims are the Debtor's property.

161. As applied to Mr. Kelly's lawsuit in the Eastern District of Michigan, NewCo's (or CHS TX, Inc.'s) position is that Mr. Kelly's lawsuit ***against*** NewCo (under a successorship theory) is now the Debtor's property under section 541(a) such that the Debtor (as controlled by YesCare and NewCo) can now settle Mr. Kelly's claims without his consent. *See Kelly v. Corizon Health Inc.*, No. 2:22-cv-10589, 2022 U.S. Dist LEXIS 198725, *31 (E.D. Mich. Nov. 1, 2022).

162. The proposed structured dismissal avoids this clear and obvious abuse by eliminating NewCo's ability to use the bankruptcy case to effectuate an insider settlement that attempts to deprive victims of their legal rights and remedies. Once the victims' rights are restored, there is nothing further for the Court to do other than dismiss this case.

163. Unlike most standing motions, the TCC here is **not** asking this Court to oversee the litigation against YesCare, NewCo, and the insiders who orchestrated this scheme. Nor is the TCC proposing that this Court liquidate or estimate personal injury or wrongful death claims. The TCC is not attempting to convert this Court into an alternative forum for the resolution of tort liability—the tort system in the United States already exists for that purpose. Rather, the TCC is seeking to free this Court of this case entirely so that it can focus on legitimate bankruptcy cases.

164. The only parties that could be expected to object to this are YesCare, NewCo, and parties who have negotiated preferential settlements for themselves and believe (mistakenly) that they will get paid quickly (rather than having to wait years while the plan is appealed before they get paid anything). But this is not a reason to deny the victims their legal rights. The victims here believe that YesCare, NewCo, and the parties who orchestrated this fraud are liable for hundreds of millions of dollars in damages and that they will recover substantially more in the tort system than YesCare or NewCo would ever contribute to this case.

165. YesCare and NewCo may assert that the Debtor's liability is less than asserted and that in their view the successor liability, alter ego, and fraudulent transfer claims are not meritorious. But they are not the parties who were harmed. They are the parties that caused the harm. This bankruptcy should not be run for their benefit. YesCare is entitled to test its defenses in the tort system, but its views are not a basis for this Court to deny victims of their legal rights.

IV. <u>The Court Should Dismiss the Case for Cause</u>

166. Finally, dismissal is the best outcome for creditors. Tort and commercial claims can seek recovery from YesCare and NewCo. Given the proposed abandonment, YesCare and NewCo will not be able to point to any aspect of this case to gain a litigation advantage over the claimants. The parties with meritorious claims will finally be permitted to seek justice.

167. Section 1112(b)(1) of the Bankruptcy Code provides:

> Except as provided in paragraph (2) and subsection (c), on request of a party in interest, and after notice and a hearing, the court shall convert a case under this chapter to a case under chapter 7 or dismiss a case under this chapter, whichever is in the best interests of creditors and the estate, for cause unless the court determines that the appointment under section 1104(a) of a trustee or an examiner is in the best interests of creditors and the estate.

168. Section 1112(b)(3) of the Bankruptcy Code defines the term "cause" to include, *inter alia*, "substantial or continuing loss to or diminution of the estate and the absence of a reasonable likelihood of rehabilitation." Here, the Debtor is administratively insolvent, which insolvency deepens by the day as the Debtor's and the UCC's professionals continue to accrue fees and costs in pursuit of YesCare's objectives, and the Debtor has no reasonable likelihood of rehabilitation given that its alleged "rehabilitation" amounts to a fraud. Consummating a fraud cannot constitute a legitimate rehabilitation under the Bankruptcy Code.

169. Dismissal is further warranted here since the Debtor's bankruptcy was filed as a litigation tactic. *Little Creek Dev. Co. v. Commonwealth Mortg. Corp. (In Matter of Little Creek*

Dev. Co.), 779 F.2d 1068 (5th Cir.1986) (the seminal bad faith case, which opined, *inter alia*, that it is bad faith to file bankruptcy as a follow on to state court litigation); *Investors Group, LLC v. Pottorff*, 518 B.R. 380, 384 (N.D. Tex. 2014) (affirming dismissal of chapter 11 case where case was filed "as a litigation tactic" and finding that filing for bankruptcy to gain a litigation advantage "on its own" is sufficient to warrant dismissal).[40]

170. Here, the Debtor was created for a litigation purpose—*i.e.*, to give YesCare and NewCo the ability to assert control over the fraudulent transfer claims and tort claims asserted against them under doctrines of successor liability and alter ego theories. The Debtor's sole existence is to serve as a liability management tool for the benefit of non-debtors so that their profits can be shielded from tort victims (including through non-debtor injunctions already implemented in this case). This case exists to harm tort victims, create undue delay, and pressure victims to capitulate and accept an unfair settlement. As such, this case presents a classic bankruptcy-as-a-litigation tactic maneuver that should be rejected.

171. And, finally, dismissal is warranted here as being in the best interest of creditors. The Court should walk a mile in the claimants' shoes. A family member who was incarcerated dies due to inadequate healthcare—a death that was entirely preventable had proper care been provided. The estate brings a wrongful death claim like the other wrongful death claims that have resulted in judgments against Corizon in the tort system. To avoid this litigation Corizon (aided

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[40] *See In re Capital Equity Land Trust No. 2140215*, 646 B.R. 463, 478 (Bankr. N.D. Ill. 2022) (finding cause for dismissal based upon "the totality of the circumstances" where bankruptcy case was filed as a "litigation tactic"); *In re Royal Properties, LLC*, 604 B.R. 742, 750 (Bankr. N.D. Ill. 2019) (weighting the "totality of the circumstances" in concluding that bankruptcy case filed as a "litigation tactic" was not filed in good faith); *In re Silberkraus*, 253 B.R. 890, 905 (Bankr. C.D. Cal. 2000) ("[I]t constitutes bad faith to file bankruptcy to impede, delay, forum shop, or obtain a tactical advantage regarding litigation ongoing in nonbankruptcy forum—whether that nonbankruptcy forum is a state court or a federal district court."); *In re HBA East, Inc.*, 87 B.R. 248, 259–60 (Bankr. E.D.N.Y. 1988) ("As a general rule where, as here, the timing of the filing of a Chapter 11 petition is such that there can be no doubt that the primary, if not sole, purpose of the filing was a litigation tactic, the petition may be dismissed as not being filed in good faith.").

by professionals, attorneys, and financial advisors) orchestrates a Texas Two Step. An injunction is entered, and all litigation is stayed.

172. The victims are then told following months of court proceedings that the proposed plan negotiated by the Debtor and the UCC will pay them pennies on the dollar, provide an illusory "opt out," deny them the right to a jury trial, and the right to seek compensation before federal and state courts from the wealthy parties that caused the death of their family members. This case gives bankruptcy a bad name.

173. Dismissal here is necessary to preserve the integrity of the courts. Victims should have the right to pursue their claims against YesCare, NewCo, and the other non-debtor parties who orchestrated the divisive merger. The TCC was charged with remembering those who were in prison, those who are in prison, and ensuring that their voices are heard in this case. Today those voices have cried out for justice. This case should not become another headline about bankruptcy abuse. This Motion is about doing the right thing. This case should be dismissed.

NOTICE

174. Notice of this Motion has been served on: (a) the U.S. Trustee; (b) counsel to the Debtor; and (c) all persons who have formally appeared in this Chapter 11 Case and requested service pursuant to Bankruptcy Rule 2002. Considering the nature of the relief requested herein, the Committee respectfully submits that no other or further notice need be provided.

NO PRIOR REQUEST

175. No prior request for the relief sought in this Motion has been made to this or any other court in connection with this case.

CONCLUSION

176. **WHEREFORE**, based on the foregoing, the TCC and the co-movants respectfully request that the Court grant the Motion and grant such other and further relief as the Court deems necessary and appropriate.

Dated: January 16, 2024
New York, New York

<u>/s/ Eric R. Goodman</u>
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EXHIBIT A

PROPOSED ORDER

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION**

In re: TEHUM CARE SERVICES,[1] Debtor.	Chapter 11 Case No. 23-90086 (CML)

ORDER DISMISSING CHAPTER 11 CASE

This matter, having come before the Court upon the Motion of the Official Committee of Tort Claimants pursuant to sections 105(a), 554, 1103(c)(5), 1109(b), and 1112(b) of the Bankruptcy Code dismissing the above-captioned chapter 11 case (the "Chapter 11 Case"); and this Court having jurisdiction to consider the Motion and the relief requested therein pursuant to 28 U.S.C. §§ 157 and 1334; and venue being proper before this Court pursuant to 28 U.S.C. §§ 1408 and 1409; and the Court having found and determined that notice of the Motion as provided to the parties listed therein is reasonable and sufficient, and it appearing that no other or further notice needs to be provided; and this Court having held a hearing on the Motion; and this Court having determined that the legal and factual bases set forth in the Motion establish just cause for the relief granted therein; and it appearing that the relief requested in the Motion is in the best interest of the Debtor's estate, creditors, shareholders, and all parties in interest; and upon all of the proceedings had before this Court and after due deliberation and sufficient cause appearing therefor,

[1] The last four digits of the Debtor's federal tax identification number is 8853. The Debtor's service address is: 205 Powell Place, Suite 104, Brentwood, Tennessee 37027.

IT IS HEREBY ORDERED AS FOLLOWS:

1. Capitalized terms used but not otherwise defined herein shall have the meanings given to them in the Motion.

2. Termination of Injunctions and Stays. All interim injunctions and stays arising under or entered during the Chapter 11 Case, whether under sections 105 or 362 of the Bankruptcy Code or otherwise, and in existence on the date of this Order shall terminate as of the date of this Order.

3. TCC Standing. The TCC shall have exclusive standing to prosecute, settle, and abandon the following claims and causes of action: (A) any and all actual or potential claims and causes of action to avoid a transfer of property or an obligation incurred by the Debtor arising under the Texas Fraudulent Transfer Act, or under similar or related local, state, federal, or foreign statutes or common law, including preference and fraudulent transfer and conveyance laws, in each case whether or not litigation to prosecute such claim(s), cause(s) of action or remedy(ies) were commenced prior to the date of this Order; and (B) solely to the extent that such claim or cause of action is or could be considered an estate cause of action that could be asserted by the Debtor or its estate, any claim or cause of action that has been asserted or is capable of being asserted by any non-Debtor party against YesCare, CHS TX, Inc., or any other non-Debtor party, including claims or causes of action based on theories of liability or recovery, whether based in contract, equity, tort, statute, law, or common law, that is based on, arising out of, or relating to: (i) breach of contract, (ii) alter ego, veil-piercing, or vicarious liability, (iii) substantive consolidation, (iv) successor liability, successorship, single business enterprise or common enterprise, partnership, de facto merger, de facto partnership, or mere continuation, (v) failure to supervise, (vi) negligent provision of services, and (vii) any other claim or cause of action brought

by a creditor of the Debtor or any third party seeking to impose liability on YesCare or any other non-Debtor party (together (A) and (B), the "Abandoned Causes of Action").

4. Abandonment of Abandoned Causes of Action. On the date of this Order, the TCC shall abandon and relinquish and shall be deemed to have abandoned and relinguished the Abandoned Causes of Action back to the claimants and creditors so that the applicable claimants and creditors can pursue recovery against YesCare, CHS TX, Inc. their non-debtor affiliates and insiders, or any other non-Debtor party free from any argument or assertion that such claimants or creditors are asserting claims that are property of the Debtor or its estate. YesCare, CHS TX, Inc., and their current and former non-debtor affiliates and insiders shall be barred and estopped from asserting, contending, or otherwise arguing that any claims against them or are barred by this Order or this Chapter 11 Case, or that holders of such claims lack standing to pursue, commence, file, continue or prosecute such claims against them due to this Order or the Chapter 11 Case.

5. Dismissal. Upon the abandonment of the Abandoned Causes of Action, this Chapter 11 Case shall be dismissed with prejudice pursuant to section 1112(b) of the Bankruptcy Code. For good cause shown, the Debtor shall be barred for a period of one (1) year from filing for bankruptcy before this or any other Bankruptcy Court.

6. Statute of Limitations. Pursuant to sections 105(a) and 108(c) of the Bankruptcy Code, this Order shall toll the expiration of any period under any applicable non-bankruptcy law, any order ordered in a non-bankruptcy proceeding, or any agreement that fixes a period under which a plaintiff is required to commence or continue a civil action in a court other than this Court on any claim asserted against the Debtor, its current or former insiders, professionals, or affiliates, including without limitation YesCare and CHS TX, Inc., and any other party protected by the PI Order until the later of: (a) the end of such period; or (b) sixty (60) days after notice of this Order.

7. Closing the Chapter 11 Case. This Court directs that the Clerk of this Court close this Chapter 11 Case promptly following the filing of a notice by the TCC, with the prior written acknowledgement from the U.S. Trustee, that there is no objection to the closing of the case and confirming the completion of the following conditions: (a) all monthly operating reports of the Debtor have been filed, (b) all fees due and owing in the Chapter 11 Case to the Clerk of this Court and/or the U.S. Trustee pursuant to 28 U.S.C. § 1930 have been paid in full, (c) notice of the Appeal Exhaustion Date (as defined below) has been filed with this Court, (d) all amounts requested pursuant to a Final Fee Application (as defined below) or a Post Dismissal Fee Application (all as defined below) have been paid by the Debtor or, if not paid, determined by this Court not to be allowable, and (e) if the amounts requested in a Final Fee Application or a Post Dismissal Fee Application are not paid by the Debtor as allowed by this Court, all Disgorgement Motions (as defined below) have been heard by this Court and determined pursuant to a final order. The date that the parties jointly file a notice with the Court indicating that all appellate proceedings, including proceedings for review or otherwise before the U.S. Supreme Court, involving this Order ("Appeals") are exhausted or resolved, or that the parties will not pursue the Appeals shall hereinafter be referred to as the "Appeal Exhaustion Date."

8. Procedures for Final Allowance of Fees and Expenses. All professionals retained pursuant to sections 105,327,328 or 1103 of the Bankruptcy Code ("Retained Professionals"), seeking compensation pursuant to sections 330 or 331 of the Bankruptcy Code shall file and serve monthly, interim and final fee applications for periods through and including the date of this Order within thirty (30) days of the date of this Order (the "Final Fee Applications"); and shall file and serve any fee applications for periods from the date of this Order through and including the Appeal Exhaustion Date ("Post-Dismissal Fee Applications" and together with the Final Fee Applications,

the "Fee Applications") within thirty (30) days of the Appeal Exhaustion Date. The Fee Applications shall be in accordance with the Bankruptcy Code, the Bankruptcy Rules, the Local Rules of this Court, and the *Order Establishing Procedures for Interim Compensation and Reimbursement of Expenses for Professionals* [Dkt. No. 357] (the "Compensation Procedures Order"). Any objections to the Fee Applications shall be filed and served on counsel for the Debtor and the entity submitting the application to which an objection is being filed no later than twenty-one (21) days following the filing of such Fee Application. The Court will schedule hearings, at the Court's convenience, to consider the Fee Applications and issue orders allowing the professional fees and expenses of the Retained Professionals.

9. Compensation Procedures Order; Reimbursement Requests; Post-Dismissal Monthly Fees. The Compensation Procedures Order shall remain in full force and effect through and including the Appeal Exhaustion Date, including as to requests for reimbursement of expenses incurred by members of the TCC and their representatives (a "Reimbursement Request") and the submission and payment of monthly fee statements by Retained Professionals. After the Appeal Exhaustion Date, the Compensation Procedures Order shall remain in effect as to the submission and payment of Fee Applications.

10. Request for Fee Disgorgement. If the Debtor fails to pay any amounts owed to any of the Retained Professionals for professional fees and expenses allowed by an order of this Court within thirty (30) days of such allowance, the Retained Professionals that (a) are not paid and (b) have not been paid on a pro rata basis (relative to the payments made to other Retained Professional during the Chapter 11 Case) for services rendered and expenses incurred in connection with this Chapter 11 Case may file a motion seeking the disgorgement of amounts paid other Retained Professional (a "Disgorgement Motion") to ensure that all Retained Professionals

are paid on a pro rata basis for services rendered and expenses incurred in connection with this Chapter 11 Case.

11. Limited Continued Existence of the TCC. The TCC shall remain in existence after the date of this Order solely to pursue or defend any Appeals and file a Disgorgement Motion, and its Retained Professionals shall be authorized to continue to perform services on the TCC's behalf and communicate with its constituents concerning the pursuit or defense of any Appeals and any Disgorgement Motion. On the Appeal Exhaustion Date, the TCC shall be automatically dissolved, and all members and professionals retained by the TCC shall be discharged from all duties, responsibilities, and obligations arising from, or related to the TCC. Following such dissolution, any attorney-client privilege and similar rights previously held by the TCC shall remain in existence and shall be enforceable by any person or entity that was a member of the TCC as of its dissolution (directly or indirectly through their respective counsel or other representative). Notwithstanding anything contained herein to the contrary, the TCC, TCC members and their representatives and the TCC's Retained Professionals shall be authorized to seek payment of fees and reimbursement of expenses in accordance with the Paragraphs 8 through 11 herein.

12. Discharge of the UCC. On the date of this Order, Official Committee of Unsecured Creditors shall be automatically dissolved, and all members and professionals retained by the UCC shall be discharged from all duties, responsibilities, and obligations arising from, or related to the UCC. Following such dissolution, any attorney-client privilege and similar rights previously held by the UCC shall remain in existence and shall be enforceable by any person or entity that was a member of the UCC as of its dissolution (directly or indirectly through their respective counsel or other representative).

13. Services of KCC, LLC ("KCC"). KCC is authorized to assist the Debtor with service of this Order. On or about thirty (30) days after the entry of this Order, KCC, as the Debtor's claims and noticing agent, shall (a) forward to the Clerk of the Court an electronic version of all imaged claims; (b) upload the creditor mailing list into CM/ECF; and (c) docket a combined final claims register containing claims against the Debtor. KCC shall be discharged from all duties, responsibilities, and obligations as the Debtor's claims and noticing agent in this Chapter 11 Case following the conclusion of such services pursuant to this Order and the closing of this Chapter 11 Case. KCC shall be entitled to payment and reimbursement of its fees and costs. KCC is authorized to take all actions necessary and appropriate to effectuate the terms of this Order.

14. Payment of Quarterly Fees. Not later than thirty (30) days after the date of this Order, the Debtor shall pay to the U.S. Trustee any quarterly fees owed through the date of the date of this Orde pursuant to 28 U.S.C. § 1930(a)(6). Any disbursements, including but not limited to, the payments of professional fees and expenses by the Debtor between the date of this Order through and including the Appeal Exhaustion Date must be reported on the Debtor's Final Report and shall subject to the payment of fees owed pursuant to 28 U.S.C. § 1930.

15. Continued Effect of Confidentiality Orders. Notwithstanding any other provision of this Dismissal Order, any obligations arising under confidentiality agreements, joint interest agreements, and protective orders, if any, entered into during the Chapter 11 Case in connection with the Chapter 11 Case shall remain in full force and effect in accordance with their terms.

16. Notice. On or before seven (7) days following the date of this Order, the Debtor shall serve notice of this Order (including a copy of this Order) pursuant to Bankruptcy Rules 2002(f)(2) and 2002(k) on the TCC, the U.S. Trustee, the Master Service List, the parties protected

by the PI Order, all entities that have requested notice pursuant to Bankruptcy Rule 2002, and such additional persons and entities deemed appropriate by the Debtor.

17. Retained Jurisdiction. Notwithstanding the dismissal of the Chapter 11 Case, this Court shall retain jurisdiction to hear and determine all matters arising from or related to the Chapter 11 Case, including without limitation, certification of any appeal of this Order, the interpretation, implementation, or enforcement of this Order and the Court's prior orders, and to hear and consider any Disgorgement Motion and any objection to a Fee Application.

18. Immediate Effectiveness. Notwithstanding any provisions in the Bankruptcy Rules to the contrary, this Order shall be immediately effective and enforceable upon its entry.

EXHIBIT C

DBMP, JULY 7, 2022 HEARING TRANSCRIPT

Case 22-90086 Document 126-1 Filed in TXSB on 07/11/22 Page 2 of 51

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

IN RE:	:	Case No. 20-30080-JCW
DBMP LLC,	:	Chapter 11
Debtor,	:	Charlotte, North Carolina Thursday, July 7, 2022 9:30 a.m.

: :

OFFICIAL COMMITTEE OF ASBESTOS PERSONAL INJURY CLAIMANTS and SANDER L. ESSERMAN, etc.,	:	AP 21-03023 (JCW)
Plaintiffs,	:	
v.	:	
DBMP LLC and CERTAINTEED LLC,	:	
Defendants,	:	

: :

OFFICIAL COMMITTEE OF ASBESTOS PERSONAL INJURY CLAIMANTS and SANDER L. ESSERMAN, etc.,	:	AP 22-03000 (JCW)
Plaintiffs,	:	
v.	:	
CERTAINTEED LLC, CERTAINTEED HOLDING CORPORATION, and SAINT-GOBAIN CORPORATION,	:	
Defendants.	:	

: :

OFFICIAL COMMITTEE OF ASBESTOS PERSONAL INJURY CLAIMANTS, on behalf of the estate of DBMP LLC, : AP 22-03001 (JCW)

Plaintiff,

v.

COMPAGNIE DE SAINT-GOBAIN S.A., ET AL.,

Defendants.

: :

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

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ALSO PRESENT (via telephone):

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P R O C E E D I N G S

(Call to Order of the Court)

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

We are back in the DBMP base case and adversary. This is a videoconference hearing, given that what we're doing today, primarily, is announcing rulings and talking about scheduling matters.

I see we have some folks in the courtroom. We're glad to have you. I don't know if y'all are announcing, but looks like we've got building staff.

But in any event, we do not have an appearances list today. That got overlooked. So I'm going to have to ask, first of all, that we get appearances by all the parties and I would suggest, in the interest of not talking over one another, that the lead attorney, or whoever is going to be the spokesman today, primary spokesman, announce other appearances for those allied with yourselves. Then we'll come back and pick up anyone who else, who wasn't listed otherwise and feels the need to make an appearance.

So starting with that, let me ask who's on the line for the debtor? Control --

MR. GORDON: Morning, your Honor.

THE COURT: Yes, Mr. Gordon.

MR. GORDON: Good morning. Greg Gordon, Jones Day, on behalf of the debtor. Also with me is Jim Jones from Jones Day and Jeff Ellman from Jones Day.

THE COURT: Very good.

MR. GORDON: Thank you.

THE COURT: Anyone else for the debtor, local counsel or otherwise?

MR. WORF: Good morning, your Honor. Richard Worf from Robinson Bradshaw for the debtor this morning.

THE COURT: Okay.

Anyone else?

(No response)

THE COURT: All right. Affiliates?

MR. STEEL: Morning, your Honor. Howard Steel at Goodwin on behalf of CertainTeed LLC, CertainTeed Holding Corp., and Saint-Gobain Corp. With me is my partner, Michael Goldstein, and Jack Miller of Rayburn Cooper.

THE COURT: Thank you.

Anyone else on, on the affiliates' side needing to announce?

(No response)

THE COURT: How about the ACC, then? Better unmute.

MS. RAMSEY: Apologies, your Honor. I'm rusty.

Good morning, your Honor.

THE COURT: Good morning.

MS. RAMSEY: Natalie Ramsey from Robinson & Cole on

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behalf of the Committee, along with my colleague, Katherine Fix from Robinson & Cole. Also appearing for the Committee are Todd Phillips from Caplin & Drysdale, David Neier and Carrie Hardman from Winston & Strawn, and Glenn Thompson from Hamilton Stephens.

THE COURT: Okay, very good.

MS. RAMSEY: Thank you.

THE COURT: Anyone else on behalf of the ACC?

(No response)

THE COURT: FCR, then. Ms. Zieg?

MS. ZIEG: Good morning, your Honor. Sharon Zieg from Young Conaway Stargatt & Taylor on behalf of the Future Claimants' Representative. Mr. Esserman is on the phone this afternoon as well, this morning as well. And we also have Ed Harron, Robert Brady, and Sean Greecher from Young Conaway and North Carolina counsel, Felton Parrish.

Thank you.

THE COURT: All right, very good.

Any, anyone else needing to announce?

(No response)

THE COURT: That got it?

(No response)

THE COURT: Okay.

There's a filed agenda in the base case -- it's, I guess, Docket No. 1495 -- that explains what's before the Court this morning.

Let me ask first. It's traditional to get case updates before we start.

Anything on the debtor's end?

MR. GORDON: Good morning, your Honor. It's Greg Gordon again. Just a very short list of things and I'll start with the one that's maybe a little mystifying to us.

I, I think we reported at the last hearing that we had a ruling in Virginia on a motion to transfer.

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

MR. GORDON: And there you may recall there was a motion to quash filed by matching claimants. The debtor filed a motion to transfer. That motion was granted. And nothing's appeared in the docket of either the Virginia court or this Court and we're puzzled by that because we just found out that according to Virginia, they actually transferred the matter on June the 1st.

THE COURT: Hmm.

MR. GORDON: And so we don't know whether it somehow got lost in transit or is lost somewhere in North Carolina, but that's something that I guess we need to follow up on and I'd appreciate any guidance your Honor might have in terms of how to do that.

THE COURT: Well, I think the simplest way on our end would be for me to ask the clerk to see if they have anything and then we'll send you an e-mail either way. Beyond that, I don't know that I've got much influence with the Virginia court, but, or the post office, for that matter, but I'm not sure how they transferred this. I assume they did it by paper means.

MR. GORDON: Yeah. I, I don't know if we know the answer to that. Jeff Ellman's on.

Jeff, do you know what the means of transfer were?

MR. ELLMAN: I, I do not. I'm sure we could find out. We, we had talked to the, the clerk this morning just to get an update and, and they said it was transferred the normal way. We didn't, we didn't inquire.

THE COURT: Okay.

MR. ELLMAN: I, I would assume it could be electronic, but I really don't know, your Honor.

THE COURT: If --

THE COURTROOM DEPUTY: Electronic, we'll get it like right away.

THE COURT: Right.

THE COURTROOM DEPUTY: What we --

THE COURT: Well, we'll go back and, and check. I don't think we've got anything in a SPAM folder, but who knows. If y'all will work on your end, though, and try to talk to the Virginia clerk and see if they can ascertain how it was transmitted, that would be helpful.

Anyone else got an interest in that? Need to say anything?

(No response)

THE COURT: Okay.

Any other updates, Mr. Gordon?

MR. GORDON: Yes. And, and I would say with respect to that particular matter, the Virginia transfer, we would like to, to get that motion to quash up for hearing in August in this court, assuming that we can track down the paperwork on that. So just --

THE COURT: Okay. That would be helpful.

MR. GORDON: Yeah. I'm just advising your Honor and the other parties --

THE COURT: Okay.

MR. GORDON: -- that would be our intention.

And then otherwise, your Honor may recall there was also a motion to quash filed in Delaware --

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

MR. GORDON: -- by the trusts and certain matching claimants and that matter is still pending. We haven't heard anything on that at this point.

THE COURT: Okay.

MR. GORDON: Otherwise, we are intending to have a meet and confer with the Committee and the FCR about discovery matters --

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

MR. GORDON: -- in the pending adversary proceedings and also, we're intending to have a meet and confer with the Committee and the FCR on their request for product-related information.

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

MR. GORDON: And in fact, that's scheduled, actually, for later today.

THE COURT: Okay.

MR. GORDON: I think, your Honor, that's, that's all I've got. Otherwise, we obviously have the status conference today on privilege log matters, but Mr. Jones will handle that when that matter comes up.

THE COURT: Okay.

Anything on behalf of --

MR. GORDON: Thank you.

THE COURT: -- the ACC? Ms. Ramsey?

MS. RAMSEY: Apologies, your Honor, again, for the delay.

No, nothing for us, your Honor.

THE COURT: How about the FCR, then?

Was it Control 6?

MS. ZIEG: Nothing else, your Honor.

THE COURT: Okay, very good.

Okay. Ready to move on, then, I suppose.

We've got one status matter and then two announcements. I don't know how y'all prefer to approach this. Why don't we talk briefly about the, what is denominated as Exhibit, as No. 3, the case management order in the adversaries with regard to the negotiations and the updates to the privilege log and the status of, of next steps.

MR. JONES: Thank you, your Honor. This is Jim Jones at Jones Day for the debtor.

THE COURT: Okay.

MR. JONES: And I believe -- and I see Ms. Hardman -- and we exchanged e-mails last evening or yesterday afternoon, last evening, on this topic. So with, with Carrie's permission, I, I will give what I understand to be the status and then she can weigh in and let me know what I got sideways.

THE COURT: Okay, very good.

MR. JONES: I believe, your Honor, that status is this, that is, the debtor, as it had committed, revised, reviewed and revised its previously served privilege log, which at last count numbered roughly 4,000 entries, and that log had been served as a part of the adversary proceeding on the preliminary injunction early in the case.

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

MR. JONES: That process was undertaken after the debtor received the February 4 letter from, 2022, letter from the ACC and the FCR about what they considered to be concerns and challenges with the log. So we undertook that, as we committed we would, the review and revision process and served the revised log when we said we would, on June 17, 2022. And with that log we provided a cover letter that explained the re-review and revision process in fairly short form, addressed at least certain of the concerns that weren't themselves directed to log entries but to privilege matters more generally in that cover letter, which was dated June 17 as well, and then we also produced that same day a relative few number of documents that upon the re-review were deemed to be not privileged. I think the total was 110 documents, 64 in whole, 46 in redacted form.

And then we waited for some period of time for reaction or response from the ACC and the FCR -- it's, it's 4,000 entries. So it, it would take some time to review -- and reached out thereafter, which I think was maybe Tuesday afternoon, to the ACC and the FCR via e-mail and asked if they were still in process of reviewing, as we expected they might be, and if they would like to gather and meet and confer about the revised log. We heard from Ms. Hardman yesterday afternoon, I believe, that they were indeed still reviewing and, yes, they still had some concerns and would like to meet and confer.

And then the last bit of status, I think, is my response last evening that we're happy to and I batted up some times next week when that could be accomplished.

THE COURT: Okay.

MR. JONES: So I think that is status as of now.

And I believe privilege-related matters on the go forward would include these. After the review of the log, I believe it is incumbent upon the ACC and the FCR to identify up to 50 documents off the log that they would like your Honor to review in camera and up to 25 privilege assertions that they think were inappropriate during the PI and that would occur, I think it's scheduled to occur within 30 days of service of the log. So 30 days from June 17.

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

MR. JONES: We're to respond with anything that we wish your Honor to review by way of counterdesignations 14 days thereafter which, if everybody took the maximum amount of time, I think would get us to, roughly, the end of July. And then there is a, a submission date that is, that the debtor is, I believe, obliged to provide to your Honor that which has been designated for in-camera review on, five days after the last identification. So if everybody took all their time, that

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would come the first week of August.

And then, I think the only other thing in the CMO that addresses or is directed, rather, to these matters is a status conference after your Honor has had a chance to receive, review, and consider whatever he wishes to receive and review and consider which I think is the, will be the balance of whatever is submitted.

So I think that is, to the best of my ability, an update for your Honor.

THE COURT: All right.

Ms. Hardman, where do you think matters lie?

MS. HARDMAN: I echo -- Carrie Hardman from Winston & Strawn on behalf of the Committee.

I echo a lot of what Mr. Jones has said. So I will not, will try my best not to repeat them.

The only, I think, issues I wanted to raise were, or points to make were simply that I think we might have received a few more documents than, than Mr. Jones had on his number. We had 185 in terms of the documents we received, but, you know, a hundred versus 185, I don't know that that makes a huge practical difference for, for these purposes. Some of the documents we received which we reviewed initially certainly provide some relevant information from those that were de-designated from the log --

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

MS. HARDMAN: -- and are providing a lot of the detail that we thought we would have questions about and we've been trying to understand relative to privileged communications documents that we think were otherwise subject to claims of privilege.

And we certainly appreciate the efforts of the debtor to review and revise the log and provide those limited documents to the estate representatives. We are, as Mr. Jones said, continuing to review those 4,000 entries because nearly all of them were edited in some manner. So we just simply need to get through them. As you may suspect, there will likely be additional issues that we will work through with the parties, or endeavor to, and if we cannot, we will be before your Honor. At this point we've identified a number of issues that do continue to permeate the log initially and remain unanswered from our perspective with respect to that February 4th letter that we sent. Those include sufficiency of description, including the claims of common interest which permeate 90, more than 95 percent of the log, and the fact that there are still no subject matter lines in the log at all. And those are issues that we'll talk about with Mr. Jones and his colleagues in the coming days and weeks. We look forward to addressing those issues in further detail on those calls.

And in the meantime, Mr. Jones is right. We do have a deadline of providing those 50 documents and 25 instructions not to answer to your Honor from our perspective. And that deadline is coming up and the 30-day window runs July 17th --

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

MS. HARDMAN: -- which is a Sunday.

While we certainly appreciate the Court's dedication to these cases, we thought if it was okay with the debtor and non-debtor affiliates and with the Court, that we would provide those to you on July 18th, which is a Monday, instead.

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

MS. HARDMAN: That way, the response deadline for Mr. Jones as well will be on a business day and we don't have to deal with any practical or mechanical concerns that the parties may have in submitting documents under seal or identifying information on, that would need to be under seal on a Sunday. It's just an odd, something I'd offer if --

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

MS. HARDMAN: -- the parties were amenable to it and the Court was as well.

THE COURT: Does the FCR have a stake in any of this? Do they need to be heard?

(No response)

THE COURT: Well, I'm glad you said "mechanical" and "practical" because I have one to add. Since we've moved out this far, on the 21st of July I have to have an arthroscopic procedure on my ankle. That means I'm going to be out of the office for three or four days afterwards and it will be practically difficult for me to -- well, I could review them, but if I, to the extent I'm on pain meds for a few of those days, it might not be a fruitful exercise for anyone.

But I would like to back up just a week or so so that I will have the opportunity to review those documents. I plan to be back here -- we've got an Aldrich hearing on the 28th and I'm planning to do that hearing. So if we could get those -- if we can back all the deadlines up so that the production is August the 1st, I think that would behoove all of us.

MR. JONES: Your, your Honor, this is Jim Jones for the debtor.

The production itself doesn't happen until August 5 --

THE COURT: Okay.

MR. JONES: -- under the current deadline. So the identifications come first.

THE COURT: Okay.

MR. JONES: You won't be seeing, you won't be seeing documents for in-camera inspection until the first week of August --

THE COURT: Okay.

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MR. JONES: -- at the soonest.

MS. HARDMAN: I -- for what it's worth, your Honor, I agree with Mr. Jones. This was simply to not file publicly information that maybe Mr. Jones or his colleagues believe is privileged. And so if we are identifying things that he would like to remain redacted --

THE COURT: Okay.

MS. HARDMAN: -- I just simply didn't want to do that on a Sunday.

THE COURT: All right.

MS. HARDMAN: It's not about submission of the documents to you until, until August.

THE COURT: I misunderstood what you were saying, then.

So that, that works fine. We've got a pretty full week the week after the 5th, but I'll try to get something back to you, some kind of reaction. I would suggest that we -- gracious. We go all the way to September the 15th before we have another hearing after that. If I get them on the 5th, I'm unlikely to be able to give you a feedback on the 11th of August. So I think we're talking about September, then.

So that's not ideal, but we'll do what we can.

Does anyone see a major --

MS. HARDMAN: Understood, your Honor.

THE COURT: -- headache there?

(No response)

THE COURT: Okay.

MR. JONES: Not, not for the debtor, your Honor.

THE COURT: Okay.

MR. JONES: And September 18 or, rather, July 18 is, the Monday, is perfectly fine with us.

And one quick footnote for Ms. Hardman. In the 185 document versus 110 document difference, Carrie, I believe is and, and I'm informed is a consequence of stuff you already have. It's -- we, we produced on June 17 with family members. So there will be documents that were not withheld before that are attached to the now newly produced documents.

So the diff, the delta there of whatever it is, 75, should be stuff you already have.

THE COURT: Okay, very good.

All right. So -- well, let's just aim for the, unless something else goes awry, I'll try to give you my reactions to those on the 15th of September, okay, at that omnibus hearing day.

MS. HARDMAN: Thank you, your Honor.

THE COURT: Okay. Anything else there? No other --

MS. ZIEG: Your Honor, Sharon Zieg from Young Conaway.

I just want to let you know that we're working with the Committee. I was a little late to the, turning on the camera and the --

THE COURT: Okay.

MS. ZIEG: -- off the mute button when you asked if we had anything to add.

THE COURT: So that's got it?

(No response)

THE COURT: All right, very good.

Okay. Well, we'll move on.

We had two different things that I needed to announce and it was regarding the case management order and the motion to dismiss. I don't know if the parties have a preference on which order to take those. I don't know that -- well, I think to a certain extent we may have more to talk about with regard to the case management matters.

So unless y'all have a decided preference -- and I'm asking at this point if you do -- I would just propose that we talk about the motion to dismiss next.

Anyone got a reason to think we go in another order? Okay.

MS. HARDMAN: no, your Honor.

MR. GORDON: No preference from the debtor, your Honor.

THE COURT: All right.

Okay. We're picking up in the Adversary 22-3000, Madam Clerk, with the motion of the defendants to dismiss the case.

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I'm going to be short and succinct about this. I could talk in, at length, but y'all've already said just about everything there is to be said about these matters in the briefs. I will say that, at least at this point in time, on a motion to dismiss I believe we've got a lawsuit and we've got a complaint that adequately states claims. Whether they prove out is something else and who knows at this juncture, but the bottom line is in the main, I agree with the plaintiffs' committee reps, future rep, and believe that there is a fraudulent conveyance lawsuit, etc., here and would deny the motion to dismiss.

I'm not going to say a lot about that, but at least for present thinking, subject to being, having that thinking changed, I generally agree with the position that the reps have been taking that, essentially, you can look at this two different ways. You can say this is, these are potential fraudulent conveyances because these would be assets of the debtor had they not been transferred and that the divisional merger effectively sticking one company, the debtor company, with all of the asbestos liabilities where the assets went otherwise, that effectively, you could make that the fraudulent conveyance seen through the debtor's eyes, or, alternatively, I think, given the, the way the Texas statute is constructed, you can alternatively view this as a fraudulent conveyance effectively by Old CertainTeed with the present debtor standing in the shoes of the old company. Because to do otherwise, it would never be raised. We all know the Texas statute contemplates that divisive mergers are not going to be prejudicial to creditors and we know that they retain their remedies if they, if the mergers were.

If the company, if you will for present purposes the bad company, the company with the, the asbestos liabilities and fewer assets as compared to the good company, the sibling that was created that has most of the assets, operations, and employees, if the bad company can't be seen to be standing in the shoes of the Old CertainTeed, then I don't know how anyone can challenge, as the Texas statute contemplates that a party would be able to challenge. It -- the bottom line is the good company would never have reason to challenge the divisive merger and the bad company, effectively, is, for fraudulent conveyance purposes, standing as the old company. I think you can look at it both ways, but the bottom line is the way this was structured -- and it was done so intentionally -- otherwise with a bankruptcy following the divisive merger, then no one gets to challenge the divisive merger and the allocations.

So I think either way at this point in time -- and I'm subject to having my mind changed later on -- I think that we've got standing here and there are transfers within the Bankruptcy Code. I'm fully sensitive to the plain meaning argument of what the Bankruptcy Code says that can be avoided, but plain meaning is subject to absurd results and that's the exception to plain meaning. If we take this in the very narrow way that the movants are asking me to, then effectively, you end up with the possibility that someone could engineer -- and I'm not saying that's what happened here. That's to be decided -- but if someone was craven and wanted to divide an otherwise profitable company just to get rid of certain liabilities that you just as soon not pay and you put all of the assets in a good company and all of the liabilities in a bad company, if the bad company cannot sue for that harm or the creditors of that bad company can't sue with a bankruptcy being filed immediately after, there's, the door is wide open to wholesale fraud and that cannot be, as Mr. Huff has opined after the fact, in his mind, was not what the Texas merger statute was designed to do. There's no indication. It's supposed to be neutral for debtor-creditor purposes.

So that just can't be the way it is. And again, if you are taking it at plain meaning likewise on the obligation side, the suggestion is, well, if there are obligations to be avoided, then those are the obligations that the, the debtor, DBMP, could avoid the obligations that were, it was saddled with, meaning the asbestos liabilities, and if you avoided those, then DBMP wouldn't owe the liabilities, but so, too, the new company under the wording of the Texas statute wouldn't be liable for those liabilities and Old CT has been dissolved as a result of the merger. Again, you end up with no recourse whatsoever and that's contrary to the stated intention of the Texas statute and it would be totally contrary to all Anglo-American notions of fraudulent conveyance law.

So bottom line is I, I think that part, we don't need to get there.

The other thing I wanted to mention. I, I generally agree with most of the arguments for present purposes made by the plaintiffs, but I did want to talk about in, intentions. One of the things our Circuit, like most, takes the view of is courts should be hesitant to dismiss complaints under Rule 9 where the defendant's been made aware of the circumstances which it will have to prepare a defense and which the plaintiff has substantial pre-discovery evidence of the facts. Those all come out of the Harrison case.

And in this instance we're in a very different situation than most parties, defendant parties in a lawsuit. We've been in this bankruptcy for a couple years now. We have fought a multi-day evidentiary personal, preliminary injunction fight after a year's worth of discovery and there can be no question by anyone as to what this complaint is about. It's detailed. But also, we have the backdrop of knowing what it's about and what the contentions are, generally, by the plaintiff group in this case.

So between the two, I think we've got an adequate complaint here. It's a little bit short on, at least in stated language, on whether or not for constructive trust purposes whether we have insolvency adequately pled or lack of reasonably equivalent value. As to that, I thought about that and wondered whether I, I would require a further amendment to just state what the liabilities were that were assumed in the, in the divisive merger, the asbestos liabilities, so that they could be compared as against the assets received. I decided after looking through the four corners of the complaint -- and again, knowing what we all know about this case -- that it's adequate. It's not superlative, but it's adequate. And we all know that, generally, reasonably equivalent value and insolvency tends to be fact issues at the end of the day.

We also know why this debtor was designed the way it was. It was intentionally set up so that it couldn't be too solvent because otherwise, there would be no need for the affiliates to come to the rescue, much like the calvary, to provide funding so that a 524(g) relief could be afforded to them.

So I think just by the structure itself, it is, it would defy logic for it to be a solvent entity.

We also know that we have the history of the tort litigation that's described in the complaint and we know the sums based on the debtor's informational briefs that the debtor has paid out over the years and we all know asbestos

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liabilities, you folks more than, than anyone. So we wouldn't be fighting all the facts that we're having at the present time or even having fraudulent conveyance litigation if all concerned didn't think that there was a substantial likelihood that this debtor was insolvent at the time that, based on the allocations or had reasonably equivalent value, lack of that.

So for pleading purposes, we'll fight about where we come out on insolvency and the like later on, but I think for pleading purposes it's sufficient. The same, too, for the other counts.

The one thing I do have a nit with. I'm not at all certain when it comes to remedies that punitive damages are, are possible in a fraudulent conveyance lawsuit. I'll keep an open mind about that, but I don't think I have to decide it for present purposes. Remedies aren't failure to state a claim. It's just some of the remedies you may ask for that claim aren't available to you. So we'll see where that goes.

But otherwise, I believe that the motion should be dismissed largely for the reasons that have been described by the plaintiffs in the action.

And would call upon the plaintiffs for a short order to that effect. Run it by the, the defendants for their comments and we'll go from there, okay?

Anybody got anything or are we ready to move on?

(No response)

THE COURT: Okay. Silence, so I assume that we're ready to move on.

Ms. Hardman, did you want to say something?

MS. HARDMAN: Just confirming we will submit an order to your Honor.

THE COURT: Okay.

MS. HARDMAN: That's all.

THE COURT: Thank you.

MS. HARDMAN: Thank you.

THE COURT: All right. Okay. Now we'll get into the ethereal part of the morning.

The CMOs. I think this would have been difficult under the best of circumstances. I think, given the short time period between when this was heard and when the Aldrich/Murray matters were heard last week and the fact that there was movement being had in Aldrich/Murray on negotiations between the, the relatively same parties, the ACC there and the debtors on what was going into the estimation case management orders, I'm not even sure I'm totally certain as to what the agreements are there and where the points of disagreement lie in that case.

My first question to you in this case -- and, and then the fact is what's been described in that case, or those cases and this one are not entirely the same, even though the cases are very similar. So I'm not sure I've got all of this and it, I'm a little reluctant to get too far in the weeds about resolving individual details. We may have to, but I would prefer not to.

My first question to you is has there been any movement since we were last arguing about this with regard to the CMOs and the discovery plan? Any resolutions whatsoever? Nothing like what's been in Aldrich or Murray.

MS. ZIEG: No, your Honor.

THE COURT: Okay.

MS. RAMSEY: Your Honor, we have a meet and confer immediately following this call with respect to one issue that might be relevant to the case management order on estimation and that is the issue of, I'll call it, sort of upfront discovery with respect to product --

THE COURT: Right.

MS. RAMSEY: -- product information and the like --

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

MS. RAMSEY: -- distribution information. Otherwise, that, that is correct. Ms. Zieg is correct. We, we have not.

THE COURT: Okay.

Everyone good, then?

(No response)

THE COURT: Okay. Well, to the extent that I can do this, I'm going to try my best. I have tried to do a comparison between your motions and your proposed orders and I have tried to compare them to the Bestwall CMO and to come up with some general thoughts about all of this and what I think I'm going to have to do, at least for, at the moment, is to give you the broad-brush impressions of the Court and then ask you to go back and talk some more about the, the way this would play out and what we do when and the dates and, and the like.

Let me just say -- if I can get my notes here -- at the outset that I am -- there we go. Now we're ready.

Let me say at the outset that I think part of our problem in all of this is the breadth and reach of the discovery that we all contemplate here that is going to be necessary in estimation and on a global level I would just like to say at the start here that it strikes me that a lot of the trouble is because the parties are not proposing, at least on their own behalfs, to sample and the parties are desiring to, to do some very broad discovery that is going to involve a great deal of discovery being occasioned on lawyers. That's going to cause a bunch of privilege problems. No surprise to any of you on that.

I would say on the first hand that as a general principle I'm not a big fan nor are the Rules on doing discovery on lawyers. You know what those Rules are, but the bottom line is that it, it quickly brings us into a morass of what is privileged and what is not privileged and a great deal

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of expense. And y'all've been telling me about Bestwall and how we started with a half a million, a million and a half documents being sought by the, the claimants in Bestwall and working that down to a mere half million documents that were subject to privilege claims. And now what? And all the problems that have been sued from then. And about, you know, that's not surprising to me at all if you're going to try to ask for every document that the claimants have. Similarly, if the debtor is contemplating a similar effort on the tort lawyers, we're going to have those problems all over again.

I would just at this point in time without ruling urge that we need some reasonableness here, folks. I see these cases grinding down and not moving anywhere other than spreading out into interminable discovery fights. Bestwall, these, I suspect the same is going on in front of Judge Kaplan in, in the LTL case, but the bottom line is that I don't know that that works to anyone's benefit and I would suggest to you that, that let's go back and all read Rule 1 of the Federal Rules. We're here "to secure the just, speedy, and inexpensive determination of every action." The action here is an estimation hearing, not even an actual adjudication of the claims.

So I would suggest to you that we need to have some perspective about what we're doing. And bear in mind that, if they are to be taken at their word, the claimants aren't going to vote for the plan even after I estimate. In Garlock, Judge Hodges came in at a low number, $125 million, for the aggregate liabilities. The claimants, as I recall, were asserting a $1.6 billion number. The ACC -- the FCR, I think, was a little lower at, maybe, 1.2 and we ended up with the case resolving itself not based on the estimation ruling, but two or three years later after a great deal of fighting and you settled for 5, 600 million.

So let's put this in perspective. Estimation is supposed to avoid the delays and expense of a full adjudication. If we're going to be just as gnarly as what, what's going to be done in a full adjudication, we are hardly doing ourselves any good with estimating. So the bottom line is that I would encourage reasonableness, negotiation, sampling. I would encourage you to work on, together, on privilege logs and the like.

So that -- that's the -- that's my preaching to the choir, I guess, in this case. I'll, I'll go on with what we talk about.

I want to hit the general topics and if we have to get into the details, we will. But as I said, I don't think that -- that's likely to be perilous. If I start telling you what the deadline are, you got to bear in mind it's been 28 years since I practiced law. I never practiced asbestos law. I never had the, a fight of the, discovery fight of the magnitude that y'all are about to embark upon.

So it would be much better and a better result for all concerned if you can work out the details after I tell you what I think about the large principles.

The first one, of course, is that we have a fundamental disagreement as to when written discovery is supposed to end, or at least when the deadlines all expire with the debtors wanting me to effectively say that we don't get to those points until they're satisfied with the PIQ responses and, and trust discovery. They've got to get all of that before we end anything. So the debtor's dates are all keyed to a, an event that none of us can say with any certainty as to when that is. Conversely, the reps, on the other hand, want specific dates and deadlines that are hard deadlines and effectively say that PIQ compliance isn't going to -- you're not really directly saying this -- but that putting PIQ compliance off to the side so it doesn't affect the estimation discovery.

I read both of those alternatives as an infringement on the function of the Court. The bottom line is -- I'm not accusing you of bad things. I understand why you want to do it -- but the bottom line is we're here to decide when y'all can't decide and to make adjustments when they're necessary and where cause is shown.

So I agree with the reps. I think we need some dates, date-driven deadlines, but I think the deadlines have to be subject to being moved upon a showing of cause. They're a little more than guideposts, but they're, they're certainly not like statutes of limitations, which are immutable.

So the bottom line is that I think we should go with the representatives' thoughts that we set the deadlines and I don't mind, in terms of trying to reach a, a Fall of 2024 estimation hearing. We've got some young folks in the courtroom listening and they might be shocked that we're talking about a two-year path to get to a motion hearing, but that's, that's what we're talking about. But the bottom line is that I don't think we can say now that we're going to set those dates and they're not going to be moved.

We're talking in the other case, <u>Aldrich</u> and <u>Murray</u>, about setting dates to take us through written discovery and then having a further pre-trial conference or a further pre-trial order to set the follow-on dates that supersede that. I see some wisdom in that and I would encourage you to consider it. If y'all want me to give you dates all the way through, then I'm inclined to, to do it here, but the reality is it's such a long period of time, the, the subject matter of the discovery is so broad, and what might come up between here and the, and an estimation hearing is so uncertain that I think any dates we put are, are going to be more like mileposts instead of anything else. They're, they will keep us at least more or

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less on tact, intact on following the path, but I can't think that we're going to be able to set them without some movement and adjustment as we go along and circumstances dictate.

I understand the debtor's desire to make sure that it gets the PIQs, the personal injury questionnaires, and the trust discovery before any deadlines run and before things move along. I agreed early on that the, with the debtors that that was general information in the case and not specifically tied to the adversary proceedings. I'm going to stick with that idea, but I recognize, also, that that information will be very important to the debtors, at least in their minds, on their theory of how we estimate and that that infor, they're going to be at a disadvantage if they don't get that information and the trust discovery before the rest of the discovery deadlines run.

So the bottom line is I hear you. I am certainly not going to reward obstreperous behavior. I'm not going to be very friendly if folks are willfully ignoring court orders and I certainly think that information should be provided because, otherwise, I wouldn't have ordered it.

So I'm keeping the PIQs and the trust discovery out of what we're talking about now, but telling you that I see that if there are failures to make discovery there that are wholesale or otherwise materially impairing the ability of the debtors to prepare for the estimation hearing, I'm going to make adjustments to the schedule and the estimation hearing.

So word to the wise there.

But I do agree with the representatives that we ought to go ahead and set firm dates so that we know what we're talking about and then adjust from there as need.

Now that's one place where I want to send y'all back to the drawing board because it is perilous for me to start setting those dates. I would only tell you that when it comes to these dates -- and I've gone through all of them in detail -- there's a knowledge that you need of what is being attempted here before you can really set them and know what's doable or workable. I'm not planning to cut anyone off at the knees with dates that aren't workable and I would suggest that you not do so, either.

So the bottom line is I want y'all to work on, on what these dates have to be and also consider do we need to go any farther than Aldrich and Murray are proposing in setting written discovery dates or should we do those, get them out of the way, get the disputes resolved, and then along towards the end of that you start negotiating as to what other dates would be usable and then if you can't agree, come back and talk about that maybe about a year down the road from here.

I'll leave that to your discretion. If you want, I'll set the dates all the way through. It just seems to me that once you get past about a year out or once you get past the written discovery period, whichever is longer, that it starts becoming fairly ethereal and the likelihood that those dates are going to stick is quite in doubt. But that's, that's where I want you to go back and talk first.

Second thing, initial disclosures. Obviously, the representatives want a, a broad amount of information from the debtor in the form of initial discovery, initial disclosures which, essentially, is the Court ordering the debtor to produce things. As in most things, you'll find that I want to follow the Federal Rules as much as I possibly can. And so I don't think Rule 26 really contemplates that sort of thing. I don't want to rewrite the Rules of Procedure based on, you know, a party's belief that it's at a disadvantage, especially in the case of the reps, the ACC particularly, where it's comprised of leading plaintiffs' firms in the country and they have access to quite a bit of information. But as to basic product information, the debtor's already agreed to give that and it was ordered in Bestwall and it doesn't seem to have caused any problems there.

So there, there's a good bit of information there that I think can be provided and call it initial disclosures, whatever you want, without causing anyone any heartburn.

Now under the ACC's draft or -- excuse me -- the reps' draft of this order in Document 1460 it wanted some more information that gets us off into contested discovery, in my mind. For example, the, the sites and locations of the

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products, the serial numbers, the photographs, the identifying information, the names of all distributors and installers, copies of all purchase and sales records, and all testing records. I think you need to ask those things in interrogatories and then we'll see where we are about doing that. I know there are questions about burden. There are questions about whether it's even possible, whether the debtor has that information, questions of proportionality. I want to use the discovery rules and the protections that exist there to address those.

There was also an initial disclosure request wanting to know, basically, the names of custodians and noncustodians with discoverable information. That was in the Bestwall ruling as well and I'm inclined to allow that. The number of the parties, we, we're fighting over whether for custodians we'd get 30 or 20 or 15 or 10. Bottom line -- maybe not 10 -- the bottom line there is I think we ought to start at a reasonable number, like 20, and then if there's, if there are fewer custodians or noncustodians with that information, then, okay, fine. Give what you can identify. If there are more, we're going to need to adjust at some point. But the bottom line, for starters here I think we ought to just go with the, with the 20 that, that had been identified earlier.

There was also a question about -- let me see if I can find the part in the ACC that was -- hang on a moment -- shared

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repositories and drives. I saw that in the Bestwall order, the debtor identifying those shared databases and drives likely to have discoverable information. That's close enough, in my mind, to a Rule 26 request to, to allow it. Bestwall had it. Again, I don't know what problems might have come out of that, but I hadn't, I'm not aware of any.

So those things, I think, in initial disclosures are fine. The bottom line, though, is I think the rest, once we start getting into other things, that -- and -- then I think we ought to use the discovery rules. Everybody needs to be, rest assured that I'm not going to move into an estimation hearing until everyone's had an, a fair opportunity to obtain discovery that they reasonably need with emphasis on the word "reasonably need" there. So bottom line, we'll do that.

As to the deadlines themselves, I don't mind us aiming for an October of '24 date for the estimation hearing and working back on, on deadlines if you want to go all the way there. I do think we ought to set the interim deadlines there.

Categorical privilege logs. Chances are with, if we're going to do discovery as broadly as what everyone foresees, we're going to need some of that. I don't think I have any business dictating it on the frontend, though. I don't think the law contemplates it in that fashion. The, the discovery's propounded to the debtor, the debtor reviews it, and the debtor tries to answer. If there's privilege logs, it falls to the debtor first, assuming the debtor is the party on which discovery is being sought, to do the privilege logs.

I would say, though, that it makes a lot of sense for y'all to work those issues out and save yourselves some time and trouble later on and a great deal of expense. I'm aware of what happened in Bestwall. I'm aware that neither the claimants nor Judge Beyer were satisfied with what was initially produced. I fully agree that, that there needs to be sufficient detail, as the Rules require, so that you can evaluate the privilege. And the bottom line is if we can't tell from categorical logs, then we're going to be talking about going back and doing document-by-document. Let's save ourselves some time and trouble there and try to work together on, on the idea of what we could agree to if we're going to use categorical logs and what we can agree to if we're not using categorical logs as to the, the categories, the standards, the basic information to be provided.

But the bottom line is to the extent you can agree, I think we have to go through the process. You may be assured that if Judge Beyer found it to be insufficient, I'm likely to find it insufficient as well. So I would suggest to all parties who are going to be claiming privilege in the estimation process, give us as much information as you possibly can. As we've already discussed in the adversary context, even with 4,000 documents at issue it's not practicable to expect the Court to do in-camera reviews of all that. If you're at a half million documents, then entirely impossible.

So we need to come up with a process here and I'm open for ideas of whether we need to have sampling on these documents. It would -- as a person who's not an expert in this field, it would seem to me that if you have a half million dollar privilege, half million privilege logged documents, that it is very likely that they're going to fall into set categories and that if you sample those documents, that you're probably going to end up with the same events that, that you would expect if you looked at all of them.

So I, I strongly suggest that you work on the basic contours of a privilege log for use in, in the estimation hearing in advance. The debtor has started with a proposal about what they would give with categories, plus metadata. The ACC's got some other thoughts, or the, the reps have other thoughts as to other information. I think you've, you're on a start there and I would strongly encourage you to work on that.

As to the timing of those privilege logs, we have a dispute as to when they should be provided, whether after every document production or whether after it was substantially complete. I think the latter makes more sense to me.

So I'd say that, let's say if you're at 80 percent of the documents, that probably is the time to do this. We don't need to do this two or three times because of the repetition between individual productions.

I think I told you at the last hearing when we're moving on to the expedited discovery motions and briefs, the ACC and FCR were proposing cutting down those deadlines to a 14-day motion, 5-day response, 2-day replies, and as I told you before, you folks are, for a judge that, in a two-judge court, you're taking up a lot of time now -- and I've got Aldrich/Murray as well -- I don't think I can accommodate any further reductions except in the case of emergencies and still get all your stuff read.

So I want you to stick with what the, the time periods we already have in our Local Rules.

The other thing I would say in that regard is not something y'all argued about, but which I need to mention. I'm seeing way too many briefs in these cases that exceed the 25-page page limits and what's happening in most is the parties file a 50 or 60 or 70-page brief and then file a motion to permit the, exceeding the, the time periods [sic]. Those are too long. The bottom line is if you want me to focus on the important stuff, you don't need to repeat all the extraneous things and all of the prior case history. And there's just a limit to what we can use.

So I don't want to start striking pleadings, but I'm telling you on the frontend you need to, to either adhere to the 25-page rule, or, if you need to get an exception, ask in advance of filing your brief and explain why it's not possible to live with that.

Now I've also noticed a tendency in these two cases for parties to start using their motion as their brief and, therefore, try to get out from under the page limits. I would discourage that. We're going to end up with the same thing going on. I understand we're fighting over some broad ground and where there's a need, when we get something as broad as, for example, the motions to dismiss the adversary that we just talked about, I'm going to give you the extra ground.

But otherwise, for routine and mundane case motions, don't try to have 50 or 60 pages instead of 25. It's, it's counterproductive to you because I'm going to be less inclined to, to pay attention to what you have and if I start telling you to rewrite your briefs, you're going to be in a real disadvantage there. So that's just an extraneous thought by me.

There was a request by the reps for a 502(d) order. I agree with the debtor here. The Court cannot mandate that. That would be a wholesale evisceration of attorney-client privilege and work product protections. On the other hand, I agree, especially if you're going to have discovery as broad as what we're talking about, that it would be a good thing to have some of that, particularly if we're talking about sampled items.

In making those rulings, I would also note that the representatives would like to see this case dismissed, been very vocal about it from Day 1. If I gave you under 502(d) all of the documents of all of the plaintiffs' defense attorneys from the tort system actions and then the case got dismissed, where does that leave the, the debtor or Old, New CertainTeed in defending those tort claims? You've then given the entirety of the other side's file.

So it just can't work that way. On the other hand, I think that we can start identifying common issues and come up with some examples and some, some sampling and maybe make good use of the 502(d) to illustrate issues and problems that need to be resolved.

Finally, the joint discovery plan. The ACC has taken the Bestwall plan and made what it considers to be minor modifications. The debtor wants to use the negotiated adversary discovery plan. I've looked at the various plans and while I'm hardly a tech person, absent agreement, I think we ought to just stick with what's been done in the Bestwall plan. That's kind of a halfway point between the two sides and we'll need to modify it based on the comments I've just made here, or whatever else you can work out. But that's basically it.

Now there were a lot of details about when we do what in this. If we are absolutely pressed to do that, I suppose I could go through, but, as I said, I'm reluctant to do so. I've probably caused enough disruption in what y'all've got intended by what I've said so far. I think the best thing to do would be for y'all to take what I've, I've given you as preliminary rulings and go back and see if you can't make this thing work a little better with deadlines that work for all of you.

But if you think there are other things we need to talk about, now's the time to sing out.

Anyone?

MR. GORDON: It's Greg Gordon, your Honor, on behalf of the debtor. Mr. Ellman may want to join in, too.

But no, I don't think there's anything else specifically we would raise. We very much appreciate your Honor's guidance. We recognize that that was a lot for the Court to work its way through and we appreciate the effort.

We will certainly get back together with the other side and, you know, with guidance we've been given and hopefully, reach a full agreement on everything and, if not, I guess we would ask your Honor's indulgence to come back one more time if there are any lingering issues. But I'm hopeful that that won't happen.

THE COURT: Ms. Ramsey.

MS. RAMSEY: Your Honor, I, I agree. I think that the Court's guidance was very helpful and, and I think we can probably resolve most of the issues through negotiation. Hopefully, we won't have to come back to the Court, but it could happen.

THE COURT: Ms. Zieg, feel differently?

Anyone --

MS. ZIEG: No, I agree, your Honor. I think, I think with your guidance we can and move forward and see what issues we can resolve and, and most of them should be. I think the only issue that, that may lead to some, some dispute will be timing.

THE COURT: Okay, very good.

Well, you've all made my day by saying that. I, I've detailed notes and I tried to, a comparison of your CMOs and those are the easy parts as compared to looking through the discovery orders. But I think that will probably serve you well. I had intended that if, to the extent we still had lingering disputes, that we talk about them at the next hearing, which is, what, August the 11th.

So that work for everyone?

MS. ZIEG: That makes sense to me, your Honor.

THE COURT: Okay, very good.

MR. GORDON: Yes. And that works for the debtor as well. Thank you.

THE COURT: All right.

Any other matters?

MR. ELLMAN: Your Honor, this is, this is Jeffrey Ellman on behalf of the debtors.

I, I do have one update on the report we gave earlier about the Eastern District of Virginia. While we were on this call, I had a, a colleague reach out to the clerk's office there.

I can, I can tell you a couple things. One, what they do is they mail in regular mail the order --

THE COURT: Right.

MR. ELLMAN: -- that transferred the matter to this court.

THE COURT: Okay.

MR. ELLMAN: They don't (audio skips). They just mailed it to Clerk, U. S. Bankruptcy Court, not address any person in particular, And it was just the order. So they, they don't send any of the other pleadings, like the motion to quash, the responses, all that stuff.

So somehow --

THE COURT: Hmm.

MR. ELLMAN: -- once we get it on your Honor's docket, I guess we'll have to find a way to, to refile those papers or have the parties submit them somehow. So it seems like we need to figure out how this should work.

But to the extent it did get to the court there in North Carolina, it would have come in regular mail some, somehow.

THE COURT: Okay. If we have it, I'm not aware of it.

But for those of you who are LTL veterans, when we sent the case to New Jersey, I think our electronic docket went to the bankruptcy court there. Now whether -- if you're talking about a district court you can send something, I have no idea. I'm the least tech savvy person in this room.

But the -- it would seem to me that we can get those documents filed in the appropriate spot. I will just go double check with my office and make sure they don't have anything and speak to IT.

Is there someone in particular on each party's side that should be the contact person for us to have our clerk's office respond to? Anyone?

MR. ELLMAN: Well, I mean, I'm happy to do that on behalf of the debtor. I, I can't really speak for the, the matching claimants, who, I don't think, are really even represented here today. But we, we could certainly send to the Court copy parties as to who we, who we know has appeared in, in the Eastern District of Virginia.

THE COURT: Okay.

MR. ELLMAN: But that's all we could really -- I think that's probably the best we could do at this point.

THE COURT: Well, this is, to my mind, a ministerial function. I just want to know who to have my tech people call to try to figure out where these things are and, and to know who you've been speaking to in Virginia, so. Okay?

MR. ELLMAN: Oh. Oh, your Honor, I can certainly talk to my colleague about who we've talked to at the clerk's office there and let the Court know that.

THE COURT: Okay, very good.

All right. My law clerk is out of the office at the moment. She's taking vacation this week. So I would suggest --

Mr. Bender, do you mind if we send that to you? Okay.

Kollin Bender, many of you know from our other cases, is our other law clerk --

MR. ELLMAN: Okay.

THE COURT: -- and he's sitting in with us today. K-O-L-L-I-N; B-E-N-D-E-R, with all the uscourts.gov information.

So if you'll send that to him, I think that'll -- that'll -- we'll try to get some IT people to take a look and see what we might have and how we can get that information from Virginia, okay?

MR. ELLMAN: We will do that, your Honor. Thank you.

THE COURT: All right.

Anything else?

(No response)

THE COURT: Okay. We'll stand down until 2:00 when we do much of the same thing in the other cases.

All right. Thank you all.

MR. ELLMAN: Thank you, your Honor.

MS. ZIEG: Thank you, your Honor.

MR. ELLMAN: Thank you, your Honor.

MR. GORDON: Thank you.

MS. RAMSEY: Thank you.

(Proceedings concluded at 10:38 a.m.)

CERTIFICATE

I, court approved transcriber, certify that the foregoing is a correct transcript from the official electronic sound recording of the proceedings in the above-entitled matter.

/s/ *Janice Russell* July 11, 2022

Janice Russell, Transcriber Date

EXHIBIT D

CHESAPEAKE, JAN. 13, 2021 HEARING TRANSCRIPT

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF TEXAS (HOUSTON)

IN RE:	Case No. 20-33233 (DRJ) Chapter 11 (Jointly Administered)
CHESAPEAKE ENERGY CORPORATION,	515 Rusk Street Houston, TX 77002
Debtor.	Wednesday, January 13, 2021 9:00 a.m.

TRANSCRIPT OF CONFIRMATION HEARING - DAY 13

BEFORE THE HONORABLE DAVID R. JONES VIA VIDEOCONFERENCE
UNITED STATES BANKRUPTCY COURT JUDGE

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I N D E X
1/13/21

I N D E X
1/13/21
(Continued)

(Proceedings commenced at 9:00 a.m.)

THE COURT: Good morning, everyone. Happy New Year. This is Judge Jones. The time is nine o'clock. Today is January the 13th, 2021. This is the docket for Houston, Texas. On this morning's docket we have closing arguments set in the jointly administered cases under Case Number 20-33233, Chesapeake Energy Corporation.

Just a couple of quick reminders. Please don't forget to record your electronic appearance today. You do that by making a quick trip to the website at any time prior to the close of today's hearing.

First time that you speak, if you would, please state your name and who you represent. That will give us a good voice print.

We are recording today using CourtSpeak, will again -- will upload both that portion of the closing argument as well as -- for transcript purposes -- as well as for CourtSpeak, during our lunch break.

I have -- just because of the number of people on the line, I have activated the "hand-raising" feature. You can do this at any time, but if you know you're going to be speaking, especially early on, if you'd go ahead and hit "five star," so that I can unmute you. But again, you can do that at any time, and hopefully we'll keep the sirens and other background noise to a minimum as we go through today.

All right. Mr. Nash.

MR. NASH: Your Honor, can you hear me?

THE COURT: Very well. Thank you.

MR. NASH: Good morning, Your Honor. Pat Nash from Kirkland & Ellis on behalf of the debtors. Your Honor, Ms. Schwarzman is going to be handling the closing argument today for the debtors. I rise to make Your Honor aware of a development late last night -- although it's probably charitable from the debtors' perspective to call it a "development." But if Your Honor permits, there is something that I wish to bring to your attention.

THE COURT: Certainly.

MR. NASH: So, Your Honor, at 11:53 p.m. Central last night, the debtors received -- and I want to be clear that it's our understanding that the Committee is a recipient of this in the same fashion that the debtors are.

THE COURT: Okay.

MR. NASH: So I don't think -- this didn't come from the Committee. But we received late last night for the first time what purports to be a competing, you know, equity proposal --

THE COURT: I read it.

MR. NASH: -- per its terms -- is there anything that Your Honor wishes me to say about it?

THE COURT: If there's anything that you'd like to tell me, I'm certainly happy to hear it. But I've read it. I understand it. At this point, I have no questions. I think that would be up to the debtors.

MR. NASH: Well, Your Honor, I'll just highlight. It purports to come from certain holders of unsecured notes and certain third parties. When we received it last night, it was unsigned.

My understanding is that a few minutes ago there was a two-page objection that was filed. I haven't read that objection yet, Your Honor. I think it -- you know, literally in the last few minutes. I'm told that there now is something that is signed.

I can also tell Your Honor clearly, though, that what we received is subject to documentation and diligence. It is subject to unspecified modifications to the plan that would need to be reasonably -- that would need to be acceptable to the backstop parties.

It clearly, in our view, would require resolicitation. It would require cramming existing secured lenders with equity. It's our view, Your Honor, that -- you know, it's a verbal preferred instrument with a scheduled maturity date and a cash pay component and coupon. We think it would be treated as debt for GAP purposes.

You know, there are other contingencies and infirmities. These are the ones that from our perspective we've identified at the outset. We think it's a country mile from actionable, and -- you know, with that, Your Honor, it's not something that we think we can or should, you know, quote unquote "do anything" with.

But I intended to make Your Honor aware of it. Even if an objection had not been filed -- although, like I said, my understanding is that at Docket Number 2835 there is a short objection. But I will tell Your Honor I've not read that objection.

THE COURT: It all has to do with --

MR. NASH: (Indiscernible.)

THE COURT: -- "you should take mine instead of the other." I see it for what it is.

MR. NASH: With that, Your Honor, I'm going to yield the podium to my partner, Alexandra Schwarzman.

THE COURT: All right. Ms. Schwarzman, I do not see you on video. Oh, you're there. I'm sorry. My apologies.

MS. SCHWARZMAN: (Indiscernible) Good morning, Your Honor. Alexandra Schwarzman of Kirkland & Ellis for the debtors. Your Honor, if there's no other opening remarks, I would just go ahead and get into it.

THE COURT: Go ahead, please.

MS. SCHWARZMAN: Great. So it's been now a whole month since we were in front of Your Honor for opening arguments at the start of this trial. And before I get into

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it, I do just want to take a moment to thank you and your staff, I think on behalf of all professionals and the company, as well, for giving us so much of your time over the last few weeks, particularly over the holidays. We are incredibly thankful and appreciative for that.

And I also want to thank the plan opponents, because although they may be our adversaries, they are not our enemies.

And just on a personal note, I know Your Honor knows how much work it takes to put on a trial such as the one that we've -- you know, we're concluding today. And I do just want to extend my thanks to the entire team of professionals that made it possible on our end, some of whom you've seen, but many who you've not. So just a really deep gratitude on my part for all their work.

So with that, turning to the main event. Your Honor, this is Chesapeake, an important American company. Provides over 1,600 jobs, operates across five basins, and is run by a management team that is focused on the safe and efficient operation that will maximize value of these estates now and into the future.

Your Honor, I would submit that the evidence has overwhelming demonstrated that we comply with each and every confirmation standard; and as a result, this plan should be confirmed.

Your Honor, Mr. Nash stated at the opening of this trial that the evidence would demonstrate the debtors' compliance with confirmation standards. And the weight of that evidence, coupled with Your Honor's view of value, has validated that statement, and they've left the Committee's objection in tatters.

First and foremost, at the $5.129 billion valuation set by Your Honor, unsecured creditors are unquestionably and prodigiously out of the money. That's true at the Committee's $6 billion hurdle Mr. Stark alluded to in his opening but notably is not in evidence, and it's true at the $7.3 billion hurdle as Mr. Antinelli testified. Unsecured creditors are regrettably entitled to no recovery at all. They are not the fulcrum.

And so whether you're a noteholder in Class 6 with dozens of worthless guaranty claims, or a trade creditor in Class 7 with just one, the answer is no different.

That is the reality and it means that the Class -- Classes 6 and 7 have no cram-down objections. The plan is by definition fair and equitable with respect to that. They have no more to complain about than old equity.

And those massively underwater unsecured creditors, Your Honor, they are receiving a package of consideration worth $207 million at Your Honor's (indiscernible). And if the Committee believes its valuation and believes the testimony of Dr. Shaked and Mr. Baggett, and perhaps the trading will prove

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them right, then they must believe that that package of consideration is worth (indiscernible) more, over 350 million at their valuation.

So by any measure, 12 percent of the primary equity plus one, "in the money" as we speak, it constitutes off-the-charts consideration for a group of creditors that are billions of dollars out of the money.

And so really that begs the question and leaves me wondering why are we here? What are we still fighting about? What is left to fight about? Well, apparently the Committee prefers a plan that would revolve around litigation against our plan sponsors, the one and a half liens and Franklin.

But the debtors have the benefit of exclusivity, and we have chosen a different path, a path that deleverages the balance sheet by over $7 million and gives the company its $3 billion of exit capital, and importantly allows this important American company to continue as a going concern to provide jobs across the country.

And because the Committee may not at this juncture propose a competing litigation plan, they must attack ours. And specifically they do so by challenging the debtor releases of the plan sponsors embodied in the plan, the releases the very parties who are providing significant benefits, $3 billion of exit capital, and very importantly equitization of claims, some of which are oversecured and Your Honor (indiscernible).

They are providing the benefits necessary to make a perpetuation of Chesapeake as a going concern possible. The releases are the quid to the quo. And no one seriously suggests that our plan could survive with those releases pulled out. No one seriously suggests that the new money and the equitization would be there without those releases, that the plan sponsors would fund litigation against themselves.

So the question then is really was this a proper exercise of the debtors' business judgment to choose a path of consensus, of peace and prosperity, in lieu of a path that would require us to wage a holy war against our plan sponsors, that would put the going concern at risk in the hopes of securing more for a hopelessly out of the money group of creditors.

The evidence provided (indiscernible) answer to this question, and it fully vindicates the debtors' decision to pursue that consensual path.

In the first instance, that's because the paramount objective of Chapter 11 is reorganization, not liquidation. And in the second instance, it's because the claims the Committee seeks to preserve and pursue are terrible. They are meritless. And I will walk through each of those claims and their shortcomings in a moment, but even if those claims were strong, and they could easily and cheaply be litigated -- and they are decidedly none of those things -- would it really be worth sacrificing or imperiling the going concern, the survival of this important company and all the livelihoods dependent on it, just to try to achieve a greater recovery for out of the money creditors? Obviously not.

The evidence showed that the plan sponsors' multi-hundred-million-dollar DIP to unsecured creditors is not only above the low end of the range of reasonableness, it could actually be characterized as unbelievably high. But that is the deal that the plan sponsors agreed to, and they are going to honor it.

And as to the Committee's good faith and best interest objections, Your Honor, I'll return to those later in the presentation, but suffice it to say the evidence has shown that there is no "there" there.

So to guide our examination of the evidence, because there is a lot of it, I would like to return to the opening statements that Mr. Nash and Mr. Stark made to Your Honor and their views of what the evidence would show with respect to these claims.

So up on the screen, Your Honor -- oh, I apologize. Can we give screen privileges to Mr. Schlaifer?

THE COURT: Of course. Give me just a second.

MS. SCHWARZMAN: Okay.

THE COURT: There we go.

MS. SCHWARZMAN: Thank you. So up on the screen,

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Your Honor, we laid out for you what Mr. Nash and Mr. Stark promised the evidence would show with respect to the estate claims. The factual and the counterfactual, as we call it. And as you can see, they promised you two almost diametrically opposing narratives on every single point.

Mr. Stark promised you smoky back-room deals, fraud, untoward behavior. Or, in the alternative, he promised you an incompetent or oblivious company, unaware of its predicament and incapable of (indiscernible).

In contrast, Mr. Nash promised you a steadfast fiduciary, one that progressed through its restructuring carefully and thoughtfully, at all times doing its best to maximize the value of the enterprise.

And so let's see what the evidence bore out. Turning to the first point, Mr. Nash promised the evidence would demonstrate the debtors had turned a new leaf under Mr. Lawler's direction, and worked tirelessly since he took over in 2013 to reduce outstanding liabilities and improve our operational efficiency.

In contrast, Mr. Stark promised you a "grow at all costs" debtor, a wild (indiscernible) on steroids, with no financial discipline and no hope of survival.

So what did the evidence show? Well, Mr. Lawler testified that he before he joined the company he believed it was, quote, "the greatest challenge in the entire oil and gas industry." And even with this view of the challenges that the company faced, Mr. Lawler testified that the situation was actually much worse once he got boots on the ground.

Mr. Lawler testified that when he joined the company he evaluated various financial, operational, and efficiency metrics to assess the company's performance versus its peers. And what he found was that on an overwhelming majority of those metrics, I think about two -- three quarters of those metrics, the company was in the bottom quartile. He found a company that had some $40 billion of on and off balance sheet liability, a company that had no formal budget process, no corporate planning function, and was comprised of over 30 non-core businesses.

So what did he do? Well, he testified, he put in place a four-prong strategy: financial discipline; practical and efficient growth, in company cash and resources; business development; and exploration. And his strategy, as Mr. Lawler testified, it allowed Chesapeake to move from that bottom quartile to the top quartile on a variety of the metrics that he measured, all while commodity prices were falling.

So how did they do that? Well, Mr. Dell'Osso testified, testified to a number of liability management transactions that were aimed at improving the balance sheet that consist of refinancing, purchases, asset divestitures and acquisitions.

And Mr. Lawler also testified to a number of operational initiatives aimed at reducing G&A, decreasing off balance sheet liabilities, and improving efficiencies.

And as you can see up on the screen, which is an excerpt from Debtors' Exhibit 52, from 2013 to 2018, Mr. Lawler's strategy resulted in significantly reduced liability, an over $20 billion reduction over six years. And that evidence, Your Honor, it is uncontroverted.

And while we heard a lot about liability management transactions generally, there are a few that the Committee focused on significantly in its pleadings and that Your Honor heard a lot about over the last few weeks, and one of those was the WildHorse transaction. And again there were contrasting promises made to Your Honor on this point.

Mr. Nash promised the evidence would illuminate for Your Honor the success in this transaction. Mr. Stark promised the evidence would show it was an abject failure. Again, Mr. Lawler, Mr. Dell'Osso, and also Mr. Martin all testified to the rationale for the WildHorse acquisition, which included a desire to add more oil to their portfolio, to generate higher margins compared to the company's natural gas assets, a desire to accelerate achievement of their strategic goals by acquiring significant and competitive inventory, inventory that was in basins that Chesapeake understood and that Chesapeake had developed with its strong capital efficiency, scale, and

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drilling technique, and a desire to improve cash flow by acquiring assets (indiscernible) EBITDA.

In fact, I believe that Mr. Lawler testified that the WildHorse assets were approximately 10 percent of the company's portfolio but contributed to approximately 31 percent of its EBITDA.

And you see the slide up on the screen, an excerpt from Debtors' Exhibit 38, it demonstrates how that WildHorse transaction aligned with the company's strategic goals. Mr. Lawler and Mr. Dell'Osso both spoke to this presentation, and they and Mr. Martin testified that the acquisition was a success.

Mr. Lawler testified that WildHorse assets -- oh, I mentioned that -- are 10 percent of the company's portfolio but 31 percent of EBITDA in 2019. And Mr. Dell'Osso testified that the company successfully integrated WildHorse's operations into Chesapeake, and that it is exactly Chesapeake's ability to integrate those assets, given its size and scale, that interested NGP in doing the transaction in the first place, and importantly in taking stock as consideration for it.

Mr. Martin testified that the board was very focused on WildHorse's ability to increase cash flow, improve leverage coverage ratios, increase the company's oil portfolio, and provide other synergies. And he testified that all of those objections [sic] were met.

Mr. Lawler testified that by the second quarter of 2019, the company was anticipating that it would be on the high side of its anticipated projected annual savings resulting from the WildHorse acquisition, and that the company had already driven down well costs, reduced cash costs, reduced asset down time, and improved capital efficiencies around modeling and well design. And that's reflected in Debtors' Exhibit 59, which is up on the screen.

Mr. Lawler testified that by the end of 2019, the company had reduced cash costs by $336 million year over year, and recognized the highest EBITDA per barrel of oil equivalent since 2014, even though commodity prices at the end of 2019 were approximately half of what they were in 2014. That is a significant achievement, Your Honor, and significant progress on the road to full financial health. And again, importantly, it is completely uncontroverted.

So the Committee's attempt to declare the WildHorse transaction as a failure just because of a commodity price drop, it is simply inaccurate, and it does nothing to detract from the fact that by every metric within the company's control, the transaction was a resounding success.

The second liability management transaction that the Committee focuses on, and one that's at the heart of all the conspiracy theories that we've heard about for the last few weeks, and really for the whole case, is the December 2019 transactions, the RBL amendment, the one and a half lien term loans, and the second lien uptier.

And really there are two main disputes with respect to the 2019 transactions. First, should they be viewed in tandem, as we -- and until recently, the Committee -- believed? And second, was there reasonably equivalent value? Did the transaction benefit all Chesapeake entities?

And Your Honor heard quite a bit of testimony on these points, as well. So starting with the first question, should the transactions be viewed in tandem? The Committee's latest position relies heavily on statements around legal conditionality, statements for example in the offering memorandum in the second lien note that disclaimed formal conditionality between the one and a half lien loans and the uptier. And that's up on the screen, UCC Exhibit 521.

Specifically, the Committee points to language in the second lien offering memorandum that those exchange offers are not conditioned upon completion of a concurrent transaction. And it's true that these transactions may not have been legally conditioned on one another. But the testimony from the business people, those involved in the transaction, both from the company side and the participants in this transaction, the creditors, they knew the transaction was interdependent.

Mr. Dell'Osso and Mr. Circle both testified on this issue. From the company's perspective, Mr. Dell'Osso explained that the company planned to complete the transactions together because they were integrated. He also explained that it would not be wise to tell the world that they were conditioned on one another. He testified that there are a lot of reasons, not just commercial reasons, that when you're going to negotiate something like an exchange, a highly negotiated transaction, you don't want to lay out the conditionality, like you do this, there's conditions on this. It gives people leverage, and that was a leverage that if you could structure around it, you would, and that's what Chesapeake did.

He knew that the size of the second lien uptier would be limited if they were not able to do the collapse at the same time. The company needed the incremental assets from the BVL silo in the parent company credit chain to do the full size of the uptier. And he said, so while we didn't have formal contingency, we certainly planned to do that together. And they were -- from an analytical standpoint, they were certainly integrated.

Mr. Circle, representing Franklin, an anchor participant in these transactions, similarly viewed them as, quote, "undeniably linked." Specifically, Mr. Circle testified that Franklin was unwilling to do the uptier exchange without a capital structure class, and the assurance that there would be sufficient collateral to support the new 2L bonds.

It's worth noting that, given the size of Franklin's holdings and the level of participation required to effectuate the transactions, that it would have been unlikely if not impossible to do the transactions without Franklin's participation. So if they wouldn't do them separately, they could have only been done together.

So in assessing reasonably equivalent value, all the steps for WildHorse refinancing and the uptier transactions should be collapsed to reveal the underlying economics. That's what the case law tells us. And I've noted a few cases up on the screen that speak to this point. I'm not going to read them, but they're up there for Your Honor. But again the evidence overwhelmingly demonstrates that these transactions were intended to be done together. They were interdependent, so they must be viewed together.

So with that, we now turn to whether the transaction established reasonably equivalent value. And in his opening, Mr. Stark promised this Court, he assured this Court on multiple occasions that there would be no evidence of any benefit of the December 2019 transactions. He said there are some brief assertions, Your Honor, that there are indirect benefits, that there is no evidence, and they won't give you any evidence, they can't give you any evidence because there were none. And that, just stating it boldly, isn't sufficient under the law.

Now, not only did the debtors provide evidence of the transactions resulting in the exchange of reasonably equivalent value, but the Committee did as well. When Mr. Baggett, the Committee's expert on the topic of reasonably equivalent value, when he was asked whether his position was that the transactions when weaved together did not provide reasonably equivalent value, he testified that was not his position.

And with the interdependent nature of these transactions established, the disagreement around whether these transactions benefitted the Legacy Chesapeake and provided reasonably equivalent value, it fades away. The transactions provided significant benefits to all entities, and we've listed some of those up on the screen for Your Honor. They expanded and diversified the debtors' asset base by consolidating capital structures. They reduced Legacy Chesapeake debt by approximately a billion. Importantly, and I'll talk about this in more detail in a minute, maintained the Chesapeake revolving borrowing base, critically important to provide liquidity to all entities.

It eliminating the technical going concern issue. It eliminated the threats of a near-term (indiscernible) coverage ratio, and it provided a path to pay down junior Legacy Chesapeake debt, among others. They were a significant benefit to all entities.

And that is true even if you look at reasonably equivalent value only with respect to the one and a half lien transactions and view that on its own in isolation. So even if we were wrong about the interdependent nature of these transactions, and I do not believe that we're wrong, there is still clear evidence and uncontroverted evidence of reasonably equivalent value.

And because the Committee has essentially abandoned its fraudulent transfer claims as they relate to the uptier transactions, I'm only going to look at the benefits in the one and a half liens. Mr. Dell'Osso testified to this. He said that by collapsing the capital structure, the company was able to pay off its BVL debt, which was clearly a direct benefit to WildHorse, but also a direct benefit to Chesapeake. As a purely legal matter, Chesapeake Energy Corporation's ownership of BVL means that what benefits BVL -- what benefits a subsidiary benefits the parent.

But as a more practical matter, the collapse allowed Chesapeake to pull assets from WildHorse into the parent company credit chain. And in doing that, Mr. Dell'Osso testified that Chesapeake pulled both the collateral value as well as the cash flow from those assets, so that they can now contribute to the (indiscernible) calculations of the parent company debt, a direct benefit.

And, Your Honor, this benefit cannot be overstated. The Committee argues the collapse of -- the collapse had no benefit to Chesapeake because Chesapeake Energy Corporation, the parent, as equity owner of BVL, already got the benefit of any residual value of BVL, and in fact value beyond its debt. And while it may be true on paper, it was certainly not true with respect to the RBL facility. An unrestricted subsidiary, the BVL entity did nothing to contribute to the covenant calculations under Chesapeake's RBL.

Collapsing the capital structures was the only way to take advantage of the significant value of those assets and to enhance the collateral coverage and EBITDA considered by the RBL lenders in calculating compliance with existing coverage at ratios in determining the go-forward borrowing base.

In fact, it was that EBITDA and just the WildHorse assets that allowed the company to stave off a borrowing base redetermination and maintain that cash, that asset through liquidity, critical to running the business, to maintain that for all entities, including the Legacy Chesapeake entity.

Mr. Dell'Osso testified that's what they did. He said the $900 million debt reduction from the uptier exchange, he said it was a huge benefit. But in addition to that, bringing the BVL assets into the parent company credit chain in exchange for taking on a billion and a half of debt was a very attractive element for everyone in that credit chain, not the least of which was the parent company revolving credit facility lender.

He said they no longer looked at the $3 billion facility with Chesapeake in an environment that most E&P credit facilities, certainly those below investment grade, were being reduced. They let us known through discussion that we should expect that without some improvement to our situation, we could expect a reduction coming in the spring of 2020.

And so when we discussed how this transaction would unfold with the lenders, they certainly noted that if we brought the BVL asset into the parent company, that there would not be a need to reduce our availability under the Chesapeake parent company's facility. And maintaining that liquidity, that extra liquidity that was $1.4 billion as of year-end 2019, it was very, very important to us. And to state the obvious, it was important to every (indiscernible) Chesapeake entity that tapped into that facility to fund its operations.

Mr. Martin testified to this very same benefit as well. He said that the 2019 transactions assured the company's ability to have a revolving credit line sufficient to meet its anticipated needs based on the 2020 business plan budgets that were being generated at that point in time. So this is critical, the lifeblood of the company. It is being maintained.

Now, the Committee argued, well, it wasn't increased, but that's not necessarily the litmus test. As Mr. Nash mentioned in the opening, you always have to be comparing what you have to your alternative, not nirvana. So the alternatives that we had were maintain our borrowing base or have it reduced. And obviously maintaining that borrowing base, that $1.4 billion of liquidity that Mr. Dell'Osso testified was available at year-end, that was a significant and a direct benefit solely from the one and a half liens and the collateral.

And finally, Your Honor, you heard testimony on these benefits from Mr. Circle. He testified that his understanding of the benefits of the transactions was in line with management, that the transactions provided asset-based level support to the Chesapeake revolving base credit facility, and gave the benefit of the guaranties on all assets to the broader enterprise. So far from being no evidence of any benefit, like Mr. Stark promised, the evidence of the benefits of the transactions is overwhelming.

Now, with respect to the 2019 transactions, Mr. Stark also promises the evidence would show that by late 2019, this board knew the company was sunk and they did it anyway. And he also said there would be evidence that show that this was a desperate act of a desperate entity to benefit an affiliated company. A desperate act of a desperate entity? Pretty bold statement, Your Honor. And as it turns out, it's one that's completely divorced from the evidence.

In fact, both Mr. Lawler and Mr. Martin testified that they bought equity in Chesapeake in late 2019 as a result of its belief in the company and its prospects. Those are hardly the actions of directors of a company that believe it's sunk.

Now, the Committee, in support of its theory that the company knew it was sunk, it latches on to certain comments made by Mr. Dell'Osso as reflected in the December 2019 board minutes introduced as Debtors' Exhibit 123, which is up on the screen. And specifically Mr. Dell'Osso noted in those minutes that there were liquidity challenges remaining following the December 2019 transactions.

On this point, Mr. Martin testified that the word "challenges" is an important one. He said, "Mr. Dell'Osso is an in a thoughtful fashion, communicated with all lending constituencies effectively, and it was also policies of the board with respect to external circumstances that we were facing as well as internal ones. And as I've indicated, $9 million to the debt fund, oil and gas activity in a volatile market of its size, is the number too big, and it was the intention of management and the board over time to get that down or to grow out of it with acquisitions that would create cash from a proven asset."

So in his view, in Mr. Martin's view, what Mr. Dell'Osso was reporting to the board is that we've made a step in the right direction. We reduced a billion dollars of debt, which would be less than nine at the end of the year, and

-- but that the same conditions that existed as of the fall of 2019 with respect to the capital markets, that they were going to continue into 2020, and we would need to wait until there was a recovery in oil or gas prices or both. And so I think that's a (indiscernible) discussion for him to share with us," he said.

So these comments -- this conversation that the board was having is not an indication of a company that thought it was sunk. It's an indication of a diligent board and a diligent management team. In the Committee's retelling, Your Honor, they say liquidity challenges is a terminal disease, just as negative (indiscernible). But these are not the basis on which to determine a company was insolvent, not unless the Committee's position is that this Court should find that anytime a company faces a liquidity challenge, all is lost and it's time to close up shop. That is not a fair (indiscernible).

In context of believing it was sunk in December 2019, Your Honor, Mr. Lawler and Mr. Dell'Osso testified the company was continuing to evaluate additional transactions all the way up until the events of March 2020 flipped the markets upside down. And Debtors' Exhibit 88 sets out a few of these transactions that were under consideration.

As Your Honor can see from this presentation, the company had additional levers to pull after the December 2019 transactions, including debt and equity exchanges and asset sales. But of course the events of March 2020 intervened, and the events of March 2020 are known to all, massive supply shock from the Saudi-Russian price war and massive demand shock from the COVID-19 pandemic. No one seriously contests or asserts these events happened or that they were remotely foreseeable. Of course they were not.

Both Mr. Lawler and Mr. Dell'Osso, industry veterans with a combined 50 years of experience in the oil and gas industry, they testified these events and this stress, it was unlike prior industry stress. They were on another level. As the kids would say these days, they were extra.

When asked how the events of March 2020 compared to previous challenges in the markets over the past seven to ten years, Mr. Lawler testified that this disruption was much more (indiscernible), much more significant. He said it was a very, very challenging market, unlike anything we'd ever seen.

Mr. Dell'Osso was asked a similar question, and he testified that the events of March 2020 were more severe than prior events. Specifically, he testified that, "We've never seen price classes of this nature that were viewed with such uncertainty of future demands. And when you marry that uncertainty of how we're ever going to get supply reduced to a level to meet that demand, it resulted in an investor sentiment that was, you know, non-existent for the space."

He said, "You couldn't even really call it negative. It didn't exist. There was no interest in any sort of investment, or even a long-term view of how to invest in oil and gas at the time."

I'm going to come back to that in a little bit. Mr. Martin, I believe, called the event a double black swan and Mr. Antinelli similarly described it as volatility that none of us had seen in our careers. And it was the onslaught of these unforeseen and these unprecedented events that forced the company into bankruptcy, that forced the company to begin exploring alternatives, nothing else.

Bankruptcy was not a foregone conclusion in December 2019. It was not a foregone conclusion by any stretch of the imagination or any stretch of the evidence by December 2019, or really at any point in time up until March of 2020. It wasn't even on the radar.

Mr. Circle, one of, if not the largest creditor of Chesapeake, he testified that he was not concerned about a near-term bankruptcy in December of 2019. He testified, "We did not anticipate a near-term bankruptcy filing at the time of the uptier exchange. Because as we sat here in December 2019, the company had a pretty substantial liquidity position."

He said ultimately that he believed the company had a $3 billion RBL at the time that had over a billion dollars drawn, but that there was sufficient liquidity from his perspective. He testified the company had minimal near-term maturity runway as it related to the entirety of 2020 and 2021, and that we had a really robust hedge book at the time. And he admitted there's always uncertainty in the commodity markets about where the underlying commodity is going to go. But ultimately, his comfort in terms of (indiscernible) maturity and liquidity profile, and the business profile of the company did not leave him with a great deal of concern about a near-term default.

(Indiscernible) that no bankruptcy was imminent or even contemplated by Chesapeake or its creditors at the time, it supported the fact that, as Mr. Circle testified, Franklin had the ability -- it had the opportunity to uptier more of its bonds and it elected not to do so. Certainly, if this was a transaction designed by Franklin, as the Committee alleges, or designed for the benefit or with the intention or with the knowledge that a near-term bankruptcy was imminent, certainly Franklin, a sophisticated investor, one of the largest money managers in the entire country, certainly they would have taken full advantage of the opportunity to improve their position in advance of the near-term bankruptcy. But those are just not our facts.

No. These transactions, they were designed by a thoughtful and diligent company that was focused on deleveraging its balance sheet and ensuring financial health.

Mr. Dell'Osso was asked if he believed the company was insolvent after this transaction. He testified that he believed it was solvent, and in support of this, he cited the value of the company's proved reserves at the time and its near-term liquidity.

Mr. Martin also testified his belief that the company is solvent as of February 2020 when he authorized -- he and the board authorized the dividends on the company's preferred stock. In fact, it had thought otherwise, he testified, would mean that Chesapeake was acting in contravention of the law (indiscernible) the Board. So we at Chesapeake, we followed the law.

Mr. Lawler also testified that bankruptcy was not a consideration as of late February 2020. He was asked, "As of February 2020, did you believe Chesapeake was going to have to file for bankruptcy?" Answer: "No, I did not." Mr. Circle testified to the same. The company clearly did not believe it was sunk, and neither did its creditors.

So while both parties put forward testimony on the solvency of the company in December 2019, you know, solvency, like water, it's a hard thing to pin down, Your Honor. It is nebulous at best. Your Honor heard the testimony and you will consider it, but I would submit that Your Honor does not need to reach an answer on solvency as the evidence of reasonably equivalent value is overwhelming. And without proving each element of Section 548, the Committee's fraudulent conveyance theory must fail.

So, Your Honor, I want to pause here for a moment in early March 2020, because what I just walked through, what was just discussed is really the entire evidentiary record with respect to TOUSA claims. And with respect to the Committee's (indiscernible) that the company was on the brink of bankruptcy as either a Machiavellian or an oblivious soon-to-be debtor. But the evidence is clear that the company was slowly but surely moving towards greater financial health, sluggish commodity prices notwithstanding. The evidence shows that the WildHorse transaction was a success, and that the 2019 transactions were interdependent and beneficial to all.

So despite Mr. Stark's views on the merits of his TOUSA theory, the evidence just isn't there. The UCC's claims and theories with respect to these transactions are meritless. The December 2019 transactions were not desperate acts, and this was not a desperate entity.

Mr. Stark noted in his opening that our plan couldn't possibly pass muster because to do so would require the Court to ascribe little to no value to these claims. And he suggested it in exasperation. He was in disbelief that that could ever be the case.

So, Your Honor, I would submit that is the case. There is no polite way to say that these claims have no merit, and they merit no recompense. They are based on a conspiracy theory that is unsupported by the facts. And with the TOUSA theory, which I believe Mr. Stark -- I'm sorry, Mr. Nash described as (indiscernible) meritless claim in the UCC'S complaint out the window.

I want to turn to the events leading up to the petition date, because these are the factual predicate to the Committee's remaining claims, including breach of fiduciary duty, aiding and abetting, equitable coordination, and what we've dubbed (indiscernible) preferences.

So again Mr. Stark made a lot of promises to Your Honor about what the evidence on this topic would show. He said that with respect to the breach of fiduciary duty, he said there is some evidence that at this time the company decided to back away to a monitoring or an observing role and allow the one and a halves and Franklin to negotiate against -- amongst themselves. He said three days before the lapse of preferences, the debtors had taken a back seat, were letting the one and a halves and Franklin and figure it out for themselves.

So now let's look at the evidence and let's see if those promises hold up. Well, first, Mr. Martin testified that the company and the board were laser-focused on maximizing the value of the enterprise consistent with their fiduciary duty. Specifically, he testified that at that time the company and its advisors' objectives were to develop strategies and options for the Board to consider and for the company to consider that would maximize the value of the enterprise in this unprecedented and difficult time.

In terms of how to achieve that goal and how to maximize the value of the company, Mr. Dell'Osso testified that his focus in the first instance was on reducing the balance sheet and securing sufficient capital to stay alive. He testified that once the company swallowed the tail and recognized that they would have to go through this process, he wanted to make sure that they had positioned themselves for a reorganization and not a liquidation. He felt that there was too much value in this company to let a liquidation happen, and I wholeheartedly agree with that, Your Honor.

And so management, Mr. Dell'Osso, was focused on making sure that the company had a balance sheet that would work on the other side so that they could have a business that could create return and create value for all stakeholders.

So as a result, the two things he was focused on was how do we get debt low enough to in light of projected cash flow from projected drilling to support the business? He testified that was chief concern number one. And so when we engaged in discussions around that, it was how do we get there, how do we get there in a way that we have a set of investors that makes sense on the other side, that's logical, and that's supportive.

Mr. Antinelli testified to the same thing. He said that we were very focused on positioning the company for success on the other side. I'm going to start to sound like a broken record on this, Your Honor. We wanted to make sure we could get out.

Mr. Antinelli testified that in assessing the options available to the company, he and the company's other advisors were focused not just on DIP financing, but on DIP to exit financing. He went on to say that he felt like the DIP into bankruptcy without a path out may not get us out given the current macro and capital market's impairments. And "may not get us out" is a polite way of saying liquidate and lose the going concern.

And you heard again, Your Honor, later in his testimony that he had grave concerns in this environment, going into bankruptcy with a small DIP with no plan or no strategy to come out. But it wasn't just debt capital that we were seeking, Your Honor. Mr. Antinelli also testified that the company was looking for a large equity check basically from the outset. He testified that by April 21st, every single DIP proposal we had received by that point in time, it required a significant equity check or a junior check.

That's reflected in Debtor's Exhibit 185, which is up on the screen, which is from our April 21st board deck. So no equity capital, no debt capital. No debt capital, no going concern. That was the framework of the company, and that's how we approached these prepetition negotiations.

Mr. Lawler echoed the sentiment. He testified that he knew at the time, in April of 2020, same time that this presentation was being given, that it was absolutely imperative for the company and the enterprise to secure new money and a new equity investment in this company. He said, it's very important for me to note that just a few days prior to the April '21 forecast, which was just up on the screen, he said that is when we saw oil close in the negative $30 a barrel range. That impact and that low credit environment, combined with a 30-million-barrel-per-day demand destruction that was being recognized, it created significant pressure on the company and the need for a new equity check. And where could we potentially source that check? He testified there were a limited number of places that we could source that new money.

Now, in terms of overall capital need, Your Honor, you heard testimony from Mr. Dell'Osso that we originally looked for a $1.3 billion DIP. And we heard testimony from Mr. Antinelli that we were originally looking for a $750 million equity rights offering and a two and a half billion dollar exit facility. That's approximately four and a half billion dollars of fresh capital that we were sourcing in spring 2020. Four and a half billion. That is a huge lift in any market, particularly one that was in shambles in the spring of 2020.

So how did we go about doing it? How did we end up securing this kind of capital? Well, two things happened. First, on the debt side, the company was able to create a competitive (indiscernible) and foster a competitive process. Mr. Antinelli testified to this at length, both during these proceedings and also at the interim and the final DIP hearings, as reflected on the demonstrative up on the screen, and this is pretty well-plowed ground, Your Honor, so I'm not going to spend much time rehashing that process.

And then on the equity side, the company had what I believe Mr. Circle dubbed a strategic asset of the estate, one that had gotten a lot of air time during these proceedings. And that is a potential (indiscernible).

Indeed, both Mr. Lawler and Mr. Martin testified that the Board was aware of these potential preference claims. When asked if the Board was aware of the preference period for certain liens granted in connection with the December 2019 transactions, that they may start to expire in mid-May, Mr. Lawler testified that they were aware, as the Board had discussed the capital structure and the timing of when those liens were perfected.

He testified that the Board was advised by counsel of these claims, that the management team had discussions with counsel about the preference period and preference claims, and that the Board had discussions with counsel about the preference period and the preference claims.

Mr. Martin also testified to this. He said the Board discussed potential claims all the way back at the March 20, 2020 board meeting. He testified the Board discussed the probability of success of the preference claims and that the Board was advised of potential defenses and merits of the potential defenses in such claims. And multiple witnesses -- Mr. Lawler, Mr. Dell'Osso, Mr. Antinelli -- they've all testified that the company used these potential preference claims as leverage.

Mr. Lawler testified that the company used the specter of preference litigations to secure a better deal with the secured lenders that they otherwise couldn't.

Mr. Dell'Osso testified similarly. He said that the potential preference actions were an important aspect of the decision that the Board was going to need to make, and that the company's advisors communicated to the plan sponsors that if the company was going to file and not pursue a claim, that we need to have an agreement that we felt would (indiscernible) those claims and give consideration to the fact that they may not exist anymore.

And finally Mr. Antinelli testified that we (indiscernible) potentially file the company and pursue the litigation to avoid the secured lender liens, unless we found a more value maximizing alternative.

But you don't have to take our word for it, Your Honor. Mr. Circle, who was on the receiving end of that leverage, he testified to the same. When asked whether the company used a threat of preference litigation in RSA negotiations, he said, "They certainly did." It was front and center when he got restricted. He testified that he remembered vividly a gentleman from Intrepid referring to the perfection of mortgages and the preference issue as the, quote, "strategic asset of the estate." That pressure would be applied and that the company would not walk away from the strategic asset without a clear plan with the support of as many parties as possible.

And just as important, he testified that the company was focused on a clear path to exit. And he said, in his words, "Because a plan without getting out of bankruptcy can result in a lot of pain, needing to raise capital at the end of the process. And again that was our focus. How do we get out? Indeed, as this Court knows well, sometimes that exit capital simply isn't there. Not every chapter ends in a reorg -- not every Chapter 11 ends in a reorganization or a going concern sale, and that is certainly true in the oil and gas space.

And that leverage that we had, Your Honor, it may have been of the mutually-assured destruction variety, (indiscernible) predicated on massive litigation, TOUSA claims and who knows what else. But on a case that puts the enterprise at risk, but that leverage, it clearly worked.

A little on the (indiscernible) group, they sent a letter and presentation to the Board voicing their displeasure they were being threatened with a lawsuit just mere months after they had loaned the company a billion and a half dollars of fresh capital. They and Franklin ultimately agreed, thanks to the efforts of the company and its advisors over the course of approximately three weeks, they agreed to provide the company with a $600 million fully backstopped equity rights offering. This was at a time that nobody was writing checks. They didn't do this out of the kindness of their hearts, Your Honor. They did it because we had leverage and we used it.

And this goes directly to the dueling narratives that we and the Committee have put forward in this case regarding the rights offering. The Committee has said that this rights offering is a benefit -- it's always been a benefit to the secured creditors as a way to steal value -- shield value from unsecured creditors.

In contrast, we say it was a burden that we imposed on secured creditors because, as multiple witnesses noted in their testimony, the plan sponsors bore the risk that the world would continue to deteriorate, that value would go down, and they were still on the hook.

So despite the fact that the evidence clearly shows that the company used every bit of leverage at its disposal, and that the plan sponsors bore the risk that the world would continue to deteriorate and value would continue to decline, the Committee objects to the rights offering on the basis that it was never marketed. Never marketed.

Your Honor, there was no market. Mr. Circle, who works for one of the largest money managers in the country, he testified that in the spring of 2020, the capital market could be described as dead at best. And Mr. Dell'Osso testified, as I mentioned, that there wasn't even negative sentiment. There was no sentiment.

Mr. Circle said at that time he didn't think he'd seen an issuance in the oil and gas space, let alone in the E&P space, in multiple months, either on the debt or the equity side of the ledger. He testified that it was hard for him to describe the market as anything other than dormant at the time. Commodity prices had precipitously dropped. He said one month they even went negative in terms of the front-month contract. And given the demand outlook, while we were all sheltering in our basements when we were negotiating this, it was hard to put a finger on exactly when demand was going to surface.

And so as a result of people's uncertainty as it results -- related to supply and demand in a commodity, he thought that there was very little appetite, in his observation, in the marketplace, and as reflected by security prices, not only Chesapeake but other companies across the industry.

So again setting aside the uncontroverted evidence that there was literally no market for oil and gas financings in the spring of 2020, and setting aside the fact the debtors, once we signed that RSA, we were bound, while of course retaining our fiduciary out, the Committee nevertheless argued that the rights offering failed under 203 and (indiscernible) because we never market tested it.

But of course 203 (indiscernible) is inapposite. 203 (indiscernible) concerns (indiscernible) market test financing provided by old equity in order to satisfy or (indiscernible) the new value exception of the absolute priority rule.

And just like the Committee's misplaced tooth analogy, this analogy similarly misses the mark. Those are not our facts. The secured lenders are creditors, not equity. And as the evidence shows, they are not insiders. They were not in control of the company. They were not in control of the negotiations of this restructuring. And of course there is no absolute priority issue here.

So the evidence also shows that neither the company nor its advisors until late last night received a single call, a single email, a single inbound from any party, whether involved in this case or not. No one so much as inquired about

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an alternate rights offering, no one. This argument holds no weight.

So I want to turn back to the RSA negotiations. And there Mr. Antinelli testified at length to the back and forth of these negotiations, which were moving at an incredibly rapid clip from the end of April, April 27 when we sent our strawman proposal, to mid-May. Mr. Antinelli testified to that strawman proposal that was sent on April 27th, and in that strawman proposal we proposed a couple of different structures, including one that had new money splits of 58.2 percent, 16.7 percent, and 25 percent to the one and a halves, the 2Ls, and the unsecureds respectively.

Mr. Antinelli testified that the one and a half lien ad hoc group got restricted on April 29th, and Franklin filed suit on May 1st. And he testified that this was an integral turning point because now we had principals. We had somebody to talk to. We had somebody to negotiate with.

He testified to multiple proposals exchanged between April 27 and May 13, each of which modified various terms of our proposal, including the terms of rights offering and the equity splits, and those proposals are summarized on Debtors' Exhibit 236 which is up on the screen.

Mr. Antinelli testified that by May 13th, I think he said there was (indiscernible) we got a joint proposal from the one and a half liens and Franklin. But at that time he noted, he testified, we the company, we had not signed on to that at that time. We still had issues, particularly around conditionality.

He was very clear in his testimony the company was not interested in signing on to a deal that had no certainty at close. And so we worked over the next few days to close out as much uncertainty as we could and make this as airtight as we could because as I've mentioned at least a half a dozen times, we wanted a path out. That was our number one focus. That was our number one goal. We wanted to keep this going concern alive.

With respect to the (indiscernible) negotiations, Mr. Antinelli testified that we reached agreement in principle with the one and a halves and Franklin on May 18th, and he testified that that agreement in principle on May 18th, that was ultimately the agreement in every material respect that was documented in the RSA and we signed on June 28th. And with the exception of Class 6/7 treatment, it is the transaction that is in front of Your Honor today under what is now the fifth amended plan we filed on a slightly amended -- not in a material way -- late last night.

And at a high level, Your Honor knows this transaction includes a fully backstopped $600 million equity rights offering, open for participation to the one and a halves and the 2Ls, (indiscernible) money splits of 76 percent, 12 percent, and 12 percent across the one and a halves, 2Ls, the unsecureds respectively, (indiscernible) to the 2Ls and the unsecureds, and releases to the plan sponsors and certain other parties.

Importantly, and perhaps most importantly, Your Honor, Mr. Antinelli and Mr. Martin testified that the board was engaged and apprised at every step along the way. That's reflected again in this demonstrative which we put up earlier. It's I believe Debtors' Demonstrative 6, and it was discussed at length by Mr. Antinelli and Mr. Martin.

In fact, Mr. Martin was asked, "Why did the Board meet so frequently during this time?"

And he testified that, "This was a company in crisis, and it was a time of crisis for the enterprise and the world. It was very important that the Board be diligent in understanding the circumstances of the company and the options that were available to the company to get through this period of time."

Now, Your Honor, those are not the words of a Chairman of the Board who's asleep at the switch or who abdicated his responsibility, as the Committee alleges. The Board was engaged, the process was thoughtful and thorough, and it was a success.

And so in the face of this robust process, what does the Committee say? Well, first the Committee alleges that the company's process was essentially a sham because we abdicated our role in the negotiations. But that allegation, Your Honor, like many of its others, it runs contrary to the evidence.

When asked whether he agreed with the Committee's allegations that the Board of Directors abdicated its responsibility in prepetition negotiations, Mr. Lawler testified that he disagreed, and he disagreed in light of the frequency of meetings, the discussions, and the process in which they evaluated and discussed the alternatives and the options for the company was quite extensive.

Similarly, when asked for his perspective as Chairman of the Board, did he believe that the company abdicated its role in negotiations, Mr. Martin testified that he did not agree, the Board did not abdicate.

And finally, when he was asked how the company -- how involved the company was in driving the deal, Mr. Antinelli testified the negotiations were all consuming.

But again, Your Honor, you don't have to take our word for it. Our creditors saw it the same way. When asked to describe the debtors' role in the RSA negotiations, Mr. Circle testified that it couldn't be described as anything other than critical. He said from his perspective it was certainly a multi-party negotiation, but hard for him to describe the company's role as anything but critical given the critical nature of the ultimate outcome, how much money was going to be raised from a rights offering, and ultimately he said the split mattered greatly to the company. And that was clear to him as such as we moved to negotiations.

So again, in the face of this overwhelming evidence of the company's involvement, the Committee points to the text in the May 11th board presentation, which is up on the screen for Your Honor. Again Debtors' Exhibit 236. And (indiscernible) said the company had not inserted itself into the dialogue as creditors constructively negotiate. And the Committee (indiscernible) is dispositive on the topic. This is all you need to know.

But of course, when asked about the meaning of this language, Mr. Lawler testified that it did not refer or imply that we were not actively talking to, negotiating, and encouraging creditors to come to the conclusion that we could go forward with. The highlighted area simply noted that we were not in the creditor-to-creditor discussions.

Mr. Antinelli also testified to the meaning of this language, and he (indiscernible) that its meaning was that the company did not demand that all conversations run through the company. But we allowed principal-to-principal discussion. And in fact, on this point, Mr. Antinelli testified that he believed it would have been counterproductive to require it all to run through the company because of course we're negotiating a very big transaction in a very short period of time. If we had to be in the room for every single negotiation, I do not believe there was any chance the transaction would have gotten negotiated in time.

And that's what we wanted to do. We wanted a path of consensus equal to achievement, we wanted to keep the going concerns alive.

Mr. Antinelli testified that the proposals went back and forth, the company was pushing both sides, and he testified that the company was fighting for new money, it was engaged with the principals, and we were fighting for unsecured creditor recovery. It's hardly an abdication, Your Honor.

So another variation in the Committee's argument that we abdicated is that the company cowered in the face of a letter from David Polk, and abandoned the preference claim as a result. I mean, this argument is sort of (indiscernible) Your Honor, but, you know, we have as evidence exactly on point, Mr. Martin and Mr. Lawler both testified that they did not view this letter as a threat. When asked why he didn't view it as a threat, Mr. Lawler testified that he viewed it as a letter that represented the views of creditors that David Polk represented. He said there was nothing in the letter that he wasn't aware of, or wasn't actively working on in the same email, and so he didn't consider it a threat at all. And importantly, Your Honor, he testified the board did not change its plans, did not give any different directions to its advisors based on this letter.

Similarly, when asked whether he saw it as a threat, Mr. Martin testified, he said, no, sir, I did not. He said he could only speak for himself, but he did not view it as a threat.

And when Mr. Jonas asked Mr. Antinelli whether the debtors abandoned the preferences in our May 6th term sheet, a day after receiving the David Polk letter, Mr. Antinelli testified that of course he didn't. He testified that we were a long way from giving up. That was our leverage, and we were continuing to wield it, and we were going to be prepared by the 14th to file the company without the benefits of a bargain given the short timeline. That's the end of that argument, Your Honor.

So unless the Committee argues, well, even if the process is thorough, and even if the debtors participated, the process is nevertheless fatally flawed because unsecured creditors were not a part of it. Setting aside the impossibility of having a creditors' committee that's not yet appointed participate in prepetition negotiations, and setting aside that no group of unsecured creditors ever organized before the case or until last night, the evidence is clear that the company was advocating for unsecured creditors, and certainly, it cannot be the case that a process is fatally flawed unless all constituents are at the table.

Mr. Dell'Osso testified to the fact that recovery for unsecured creditors was an issue that was important to the company during negotiations. That the company fought for recovery for unsecured creditors, and that the company did not leave it to one-half Franklins as the Committee -- and Franklin, as the Committee alleges that we did. Mr. Antinelli testified to the same. When asked who was looking out for the interests of unsecured creditors, he testified that the company was, even though unsecured creditors were billions of dollars out of the money.

And really important to this topic of who was looking out for unsecured creditors, Your Honor, Mr. Antinelli testified that certain of the secured creditors wanted us to make unsecured recovery a deathtrap, and we, the company, flatly rejected it.

So Your Honor, I want to pause, again, for a moment, on the package of recovery that we got for unsecured creditors under the plan. Your Honor noted a few days ago that offering a tip to out of the money creditors can unduly complicate the process. And perhaps you're wrong. Perhaps this month long trial is proof positive. But I do want to take just a minute to provide some perspective on what was going on in our minds back in the spring of 2020 when we were negotiating.

You know, the primary job of the company is to maximize value, maximize the value of the enterprise, and we used our strategic asset, those potential preference claims, to obtain massive equitization and massive amount of money in an atmosphere of (indiscernible). That was job number one, Your Honor, and we were successful. Had we left it at that, we believe that the company would have fully discharged its duties. As we say on Passover, Your Honor, Dayenu. That would have been enough.

Had we left it at that, that would have been enough, we would have satisfied our mandate. But we felt strongly that that was not enough, that we should do more. That we should obtain value for foregone and potential preference claims, because while they would not result in a single additional penny coming into the estate if pursued, they would potentially be settlement negotiations and leverage for additional recoveries to unsecured.

But if those preferences did not exist, if those potential preference claims did not exist, there surely would have been no basis to even ask for let obtain 12 percent of the equity plus warrants for a party that is billions of dollars out of the money even at Your Honor's valuation. And that was even more so the case in the spring of 2020. But we felt that as fiduciaries, saving the company and securing its future, while paramount, was not all that we should obtain. And so we fought for recovery for unsecured, a recovery that under Your Honor's TEV, is worth $207 million.

But Your Honor, we didn't stop there. The evidence shows that we refused to entertain that deathtrap, knowing full well that it provided a risk free opportunity for unsecured creditors to swing for the fences, and painful and expensive as this has been, we believed then and we believe now that that was the right and proper decision.

So where does the company -- or Committee go next? In the face of (indiscernible) and deliberate process carried out by a well-informed and diligent board, a process in which the company did not abdicate its role, and fought for unsecured creditors? Well, now the Committee says that transactions in the settlement reached as a result of this process must fail, because the board did not commission an investigation of potential estate claims and causes of action, before pursuing a global deal that provided the company with $4 million of fresh capital, significant equitization, meaningful credit recovery to all creditors, and most importantly, I'll say it again, a path to exit from bankruptcy.

While it is true, Your Honor, the board did not commission such an investigation. It also begs the question, so what? In the spring of 2020, the debtors, an E&C company in the middle of the most volatile and capital scarce environment of modern times, we were laser focused on finding the capital, as the evidence showed clearly. And as I already discussed, the capital markets were closed. Mr. Circle described them as

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dead, Mr. Dell'Osso said there was no (indiscernible). There wasn't even a view of how to invest in the oil and gas base. And as Mr. Nash said the other day, the company needed money like humans need oxygen. Without it, nothing else, including an investigation, mattered.

Securing the capital was priority one. But equally important, you heard from Mr. Martin on issues of investigation. The Committee established on cross that Mr. Martin was familiar with how to run an investigation, and knows when one is appropriate or not. And so when Mr. Wissner-Gross asked Mr. Martin whether the board conducted an investigation here, what did he say? Mr. Martin said, I didn't need an investigation. I lived it. Specifically, he said, sir, I lived each of these issues extensively, day in and day out over that period of time. And maybe my recall isn't perfect on occasion, but I understood what was going on with the company during that period, and each of the decisions that was being made. So he didn't need an independent investigation to understand how diligent this board was, and the decision processes that they went through.

And that is so true, and it is so important, Your Honor. This is not the typical investigation case that we often see. A case of a sponsor owned entity, where the sponsor is into equity and the debt and the (indiscernible) boards all over the place. There's a transaction that either takes money off the table, or moves assets away from creditors.

In those cases, yes, we typically see independent directors appointed, and an investigation undertaken with respect to the transactions that happened before the independent directors were on the board. But those are simply not our facts. Chesapeake is a public company with a completely independent board of outside directors, save for Mr. Lawler. You heard Mr. Martin testify to the bios of our directors. They are sophisticated and respected businesswomen and men. The transactions were public. They moved valuable assets closer to creditors, and as Your Honor heard at length during this trial, they were consistent with the company's march towards full financial health, and they were beneficial to all entities. These were not the machinations of a Machiavellian or an oblivious debtor, as Mr. Stark promised the evidence would show them to be.

So the Committee's arguments the board had a duty to undertake an investigation of whatever fantastical theory the Committee would divine in the future, is wrong on the facts and as a matter of law. No such duty exists. And the evidence clearly demonstrates that the duties that do exist, loyalty and care, were carried out to their full. Your Honor, this board, and this management company, it rescued the company from raging flood waters, and the Committee is here criticizing the Coast Guard.

So again, I want to pause, because this process that played out over approximately three months, it was thorough. It was fast paced and it was deliberate, and it was aimed at maximizing the value of an important enterprise, and obtaining recovery for all creditors, and it was successful. The overwhelming and uncontroverted evidence flies in the face of the Committee's breach of fiduciary duty theories, aiding and abetting theories, ethical subordination theories, and what we've done, the preference revival, preference resurrection theories, and of course, once lapsed, a preference cannot be brought back to life. To do so would rank the 90-day statutory lookback period out of the Code, and only Congress can do that.

Notably, Mr. Stark said no case in support of his Buddhist notion that these preference claims could be reincarnated in any form, fraudulent transfer, unjust enrichment, or otherwise. And it is true, Your Honor, the debtors pursued this consensual transaction without an executed RFA as of May 14th. I believe Mr. Nash described it as a calculated risk in his opening statement on the very first day hearing in this case. Mr. Martin testified that the board understood the significance of the 14th, and the board was supportive of the plan to pursue negotiations with secured lenders and the DIP lenders, and the new capital providers for consensual restructuring.

Mr. Antinelli agreed. He testified that we took a risk. There was a risk associated with pursuing a consensual deal, but we thought it was an appropriate risk to take, particularly in light of the available alternative, an alternative that Mr. Antinelli believed that -- he testified that he believed would be a liquidation in the worst market that anybody had ever seen. And Your Honor, it is universally recognized that reasonably calculated risk taking is entirely appropriate for a board, whether it is healthy or distressed. We know that from Quadrant. Quadrant told us that the biggest judgment rule protects the directors of solvent, fairly solvent, and insolvent corporations, and that creditors of an insolvent firm have no greater right to challenge a distressed -- or I'm sorry, a disinterested good faith business decision than the stockholders of a solvent firm.

And that's exactly what this was, Your Honor, a good faith business decision. It was made on an informed basis, aware of the settlement leverage that we were giving up in the potential preference claims, and a clear goal of what we were trying to achieve; maximize the value of the enterprise, keep the business intact, save jobs, and protect the going concern. And it avoided what we didn't want; a value destructive liquidation.

And it's important to note, Your Honor, that the deal that was in front of the board and the deal the principals agreed to in mid-May, that was documented on June 28th, in every material respect is the deal in front of Your Honor today, so whatever risk that was there, it did not materialize. This was a good faith business decision.

With the Committee's claims and allegations thoroughly discredited by the evidence, let's look for a moment at whether any of their true confirmation objections stand up. And Your Honor, it is our burden to demonstrate by a preponderance of the evidence that the plan satisfied all confirmation standards.

So I'd like to move quickly to the 1123(b)(3) standards of settlement, and a couple 1129 standards objected to by plan opponents, including good faith, best interests, fair and equitable, and regulatory approval, and I'll touch very briefly on subcon as I expect the Committee will raise it, and of course there is no subcon here. But if Your Honor would like to hear argument on any other confirmation standards, I'm happy to address those as well, but I wasn't planning on raising them if they're not the source of a disagreement.

So turning to the settlement, Your Honor, various parties including the Committee have objected to the settlements embodied in this plan. And the standard for approving settlements under the plan is well known to Your Honor, and requires an analysis of whether the settlement is fair and equitable, and in the best interests of creditors.

The fair and equitable prong is not only interpreted as compliance to absolute priority rules, clearly satisfied here. There are no classes junior to six and seven receiving a recovery. And the best interest prong is akin to the 9019 standard. It considers the probability of success in litigating the claims subject to the settlement, complexity and likely duration of the litigation, and the attendant costs in delay, and all other factors bearing out the wisdom of the settlement, including creditor support, and the extent to which the settlement is the product of an arm's length negotiation, and not the product of fraud. And we know that from Cajun Electric, and In The Matter of Foster Mortgage Corporation.

But picking through those factors quickly, as I just spoke about the claims at length, Your Honor, in terms of likelihood of success, the evidence is clear that these claims are meritless, and in terms of cost and time to litigate, the claims undoubtedly would take a long time and cost a lot of money to litigate. I mean, this trial right here, it's been a month, it's probably cost the estate tens of millions of dollars, and we're only talking about colorability at this stage. Any contention by the Committee that this would result in only a modest delay just does not square up with what we've seen already, and I believe even Mr. MacGreevey testified that this would not necessarily be a quick litigation. And moreover, the litigation would put the estate's exit and backstop commitments at risk, if they went beyond a few more weeks, and that, of course, would imperil the going concern.

In terms of the views and interests of creditors, you know, despite a one month trial, there's actually significant support for this plan, as evidenced by Debtors' Exhibits 406 and 435 before the voting reports. The plan is unanimously supported by Causes 3 and 4, almost unanimously supported by Cause 5, and it enjoys a significant amount of support from Cause 6 as well, I believe over 50 percent of claims by amount voted in favor of this plan. And finally, Your Honor, the evidence is clear that (indiscernible) they were negotiated at arm's length.

So the soundness of the settlement is clear, and it is equally clear that a court may not undertake a claim-by-claim (indiscernible) in making its determination, but it should analyze the settlement on a holistic basis. We know this from Nellis v. Shurgrue, a case out of the Southern District of New York, 165 B.R. 115 (1994). That case was up on appeal, and the objectors to a global settlement appealed, and they argued that the settlement should be overruled, because it did not contain sufficient detail of the claims being settled, their likelihood of success, or the amounts in controversy. Then-Judge Sotomayor, she disagreed. She said the appellants misperceive a bankruptcy court's obligations. A bankruptcy judge's sole and exclusive responsibility is to determine whether a settlement is fair and in the best interests of the estate. Although a judge must consider the fairness of the settlement to the estate and creditors, the judge is not required to assess the minutiae of each and every claim. The bankruptcy judge does not have to decide the numerous questions of law and fact raised by appellants. The Court may only (indiscernible) settlement to determine whether it is within the acceptable range of reasonableness. And I would submit that the evidence has made clear that this settlement well exceeds the lowest end of the range of reasonableness.

I believe the settlement is even more clear that that's sustainable considering, as the Committee pointed out to Mr. Antinelli on cross, that the settlement does not include the preference claims, because of course they lacked, and removing those from the equation, I would argue, lowers the cost of settlement even further. I would argue that in this case, the low end of a range of reasonableness, Your Honor, it is on the floor. We could trip and stumble over that hurdle. But we didn't do that. We didn't barely clear the hurdle, we didn't give them the bare minimum. We extracted meaningful value for unsecured creditors, as Mr. Antinelli testified. Even at the time we sent the RSA, it was 150 million in our valuation, 207 at Your Honor's, and I believe 350 at the Committee's.

And if the Committee does truly have the courage of its convictions, and it believes that this is worth

$350 million, then they can rest easy that the trade markets will bear this out. But also, if that's what they truly believe, then their arguments and their contentions that unsecured creditors are getting wiped out, that this plan is a deed in lieu of foreclosure, as Mr. Stark characterized it in his opening, that cannot stand. It is obviously none of those things.

So turning quickly to 1129, I'll start with (indiscernible). 1129(a)(3), as Your Honor well knows, requires that the proponent of a plan oppose the plan in good faith, and not by any means prohibited by law. And whether the plan is proposed in good faith requires an analysis of whether it was proposed with a legitimate and honest intention to reorganize and have a reasonable hope of success and we know that from <u>In Re Sun Country</u> from the Fifth Circuit.

Your Honor heard an overwhelming amount of testimony on this point, and there is no serious contention that the plan was not put forward to reorganize this company. It deleverages the company by over $7 billion. It infuses the company with $3 billion of fresh capital at exit, and on top of all that, Your Honor, through this process and this plan, we've reduced an additional $1.7 billion of outstanding midstream liability, (indiscernible).

On best interests, 1129(a)(7) requires that with respect to each impaired class of claims or interests, members

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of such classes that have not accepted the plan will receive as much or more under the plan than they would in a hypothetical Chapter 7, and this test is generally satisfied through a comparison of estimated recoveries under the plan, and a liquidation analysis. And we estimated our liquidation analysis at Exhibit 439(a). That's Mr. Stewart's best interest analysis. And he testified that under his analysis, all creditors do better under the plan than they would in a liquidation, and no one seriously contends that this plan doesn't satisfy best interests. In fact, nobody else actually put forward an alternate liquidation model, a bottoms up analysis, that looked at the assets, looked at the values, looked at the plain facts, and said ours was wrong. That's not what they did.

Your Honor, the Committee, what they did is, they put forward Mr. Brown, who testified that he adopted Mr. Stewart's model, he took it wholesale, and then he would change a couple assumptions, largely on the advice of counsel. Another assumption had to do of course with how value flowed, and every single one of those assumptions was intended to (indiscernible) value and deliver it directly to unsecured creditors. And I'm happy to walk through various of those assumptions and why they apply, Your Honor, but your head shaking makes me think that perhaps I'll just get back to my closing. I have a lot to say.

I think it's important to say one thing on this point, which is that one of Mr. Brown's instructions from counsel was about the treatment of the roll up DIP claim, and that they should not be applied against unencumbered assets. They should be treated as second class DIP citizens. And the Committee argues obviously (audio interference) because to do otherwise would be -- I think Mr. Stark's words were it would slow the collateral entitlement of the one and a half if the roll-up DIP claims were applied against unencumbered under the marshaling provision under the DIP.

But Your Honor, this is belied by the notion that Mr. Jonas asked at least a half a dozen questions on cross that indicated his view, or the Committee's view, that the roll up DIP claims do soak up unencumbered value. And I'll put those up on the screen, it was at 573. Here he has at least a half a dozen times, Mr. Jonas says, you know, the DIP, it soaked up the value (indiscernible).

We know that's true. First, that's what the DIP order allowed, what the Code allows. That's what the DIP order said on -- and that's why the Committee fought the DIP order so hard back in July. If the roll up had no impact on unsecured creditors that would not have been such a big issue. But again, in an attempt to roll that back, to roll back a statement about how the roll up works, they argue that it despoiled the collateral entitlement, and in doing so, they tried a complaint, collateral entitlement, as of the petition date with value of the collateral as of the petition date. And based on this sleight of hand, they go on to argue that because the line that has it has only been entitled to a certain portion of the value of their collateral as of the petition date, before the roll up and before the value of the collateral increased, that they should be allowed nothing further now.

And of course if true, that would mean a secured lender's recovery could never increase over the course of the plan, that they couldn't get the benefits of the rising value, even though they maintained the risk that value would go down. And Your Honor, there's a bunch of cases on this issue. I'm going to skip through them, unless Your Honor would like to hear about it, but we submit that that's just not correct.

So moving towards fair and equitable, Your Honor, I touched on it very briefly in the opening, but no class of claims junior to six and seven is receiving a recovery under the plan, and at Your Honor's valuation, there's no corollary to be concerned about, either. And I'm going to switch gears just briefly to head off an objection I believe we're going to hear from FERC's counsel about compliance with 1129(a)(6), and on this part -- or point, Your Honor, I would submit that 1129(a)(6) is not applicable here. No regulatory approval is required to approve the plan. As Your Honor is aware, rejection of first jurisdictional contracts, they do not result in a modification of the rate, and even if they did, even if there was a rate modification, it is not a debtors' rate modification, because of course the debtors are not subject to court regulation.

So those standards and some others that are not in dispute, those are the requirements of 1129, Your Honor, and I would submit that we comply with all of them. But I think you're going to hear two other arguments from the Committee, and so I want to touch on them briefly.

And of course, the first is sub-con, substantive consolidation. And that occurs when a court consolidates the assets and liabilities of various legal entities, providing different lenders with a common pool of recovery. But the hallmark of sub-con, importantly, is that, as we say colloquially, somebody's ox gets gored. There are different collateral pools at different estates, lenders entitled to different levels of recovery, and when those estates are consolidated, somebody wins, somebody loses. There's a redistribution.

But of course that cannot be the case. Six and seven are out of the money, whether you have one claim or 30 claims, as I mentioned at the outset, it does not change that. Without any redistribution, I don't believe sub-con is relevant to this claim.

And the second argument that I think you might hear from the Committee, it's a new one, it's one that's not found anywhere on the Bankruptcy Code. It's an argument that the plan fails because it does not (indiscernible) for unsecured creditors. The value -- the going concern value of an unencumbered asset, a going concern best interest, if you will. And just a few notes on this, and I'm happy to talk about it further either now or in rebuttal, in the event somebody brings it up.

And my first point I make is there are no unencumbered assets. They were all pledged as security under the DIP. Second, even if there were unencumbered assets, there's a waiver of marshaling the DIP order which is final and not appealable. Third, the only exception to that anti-marshaling provision is for avoidance action proceeds. Like here there are no avoidance action proceeds. Even if unencumbered assets had not been pledged to DIP lenders, which they were, and if none of the previously unencumbered assets were ever encumbered, not a single lien has been avoided during these proceedings, so no avoidance, Your Honor, no avoidance proceeds.

In fact, even if there were unencumbered assets, and even if some of those, some or all of those had been considered avoidance action proceeds, the claims of unsecured creditors are still junior to those of administrative and priority claims. I would submit, Your Honor, that the Committee is trying to fashion out of whole cloth the equivalent of a best interest test on a reorganization context, and it simply does not exist. Even if it did, it is highly unlikely that unsecured creditors would do better in that hypothetical going concern than under the plan.

So coming back to our burden for confirmation, Your Honor, we satisfied every one. Every one. And that brings me back to the question I proposed at the beginning. Why are we here? What are we fighting about? Well, we know of two things. We're not here because our plan was flawed. And we're not here because our plan doesn't satisfy the confirmation standards. And we're not here because there was a breach of fiduciary duty, or a fraudulent transfer.

We are here, Your Honor, because certain parties feel entitled to more, despite having no legal basis for it. As the evidence shows, unsecured creditors are entitled to nothing, but we got them over $200 million, a generous tip by any measure. But simply wanting more, Your Honor, is not a basis to object to confirmation, to deny confirmation, and absent any legitimate confirmation objection, Your Honor, the plan should be confirmed.

That is all I have for Your Honor. I would like to reserve time to respond to any arguments raised by the objectors, but unless Your Honor has any questions for me, I would seek (indiscernible).

THE COURT: Thank you, Ms. Schwarzman. You certainly will have rebuttal time, if required, and I don't have any questions. Thank you.

MS. SCHWARZMAN: Thank you, Your Honor.

THE COURT: All right. Mr. Zensky, did you anticipate going next?

MR. ZENSKY: Yes, I think as agreed with the debtors and other plans orders, we were to go next, Your Honor.

THE COURT: Of course. Whenever you're ready.

MR. ZENSKY: Would it be okay if you gave my colleague, Laura Warrick, sharing privileges?

THE COURT: Of course. Let me find her. Did she go last name first? Yes, she did. There she is. All right. She should have --

MR. ZENSKY: Thank you.

THE COURT: -- control. Yes, sir.

MR. ZENSKY: Thank you, Your Honor. For the record, David Zensky, Akin Gump Strauss Hauer & Feld for Franklin Advisors.

Let me start by echoing Ms. Schwarzman's thanks and appreciation to the Court and staff for the conduct of the trial, and let me also commend my friends at Brown Rudnick and Kirkland on truly excellent lawyering over the course of the case. There hasn't been that much for us to do up until this point, but I certainly enjoyed watching my friends go at it before Your Honor, and it was a pleasure.

Your Honor, I'm going to limit my comments this morning to the lack of merit of the proposed litigation claims that are relevant to Franklin, and embraced by the Committee's standing motion, and which are settled by the plan. Please stop me -- I know that you -- there's a lot of people you need to hear from today, if I'm going into something that Your Honor doesn't need argument on. I will not be offended, and if I don't pick up a head shake as Ms. Schwarzman did, please tell me to move on.

Your Honor, we've got here a list of the claims that were embraced by the Committee's standing motion which touch on Franklin any way. We've broken them into claims that allege or seek standing to allege that Franklin itself did something that's actionable, and then the larger group of claims which concern the creditor body at large, and let me take the second group first, just looking at our score card here, Your Honor.

The first line, of course, is the challenge to the Legacy Chesapeake guarantee, and liens associated with the FLLO facility that were probably the centerpiece of the Committee's evidence during the course of the trial, and of course we believe that the evidence showed that those claims are not colorable.

Count 2, which related to the WildHorse guarantee, the Committee withdrew that in the reply to the standing motion, Footnote 9. There wasn't really much discussion about that at trial, but certainly our understanding is from the express words of their brief that that claim is not part of the standing motion. Likewise, the constructive fraudulent transfer claim regarding the up-tier exchange. Mr. Stark explained to you in his opening that the Committee was withdrawing that, and the reasons for that.

Moving on from the constructive fraudulent transfer claims, we then have the claims which seek to recharacterize the last preference claims as something else, and you heard Ms. Schwarzman talk about those briefly. That's the preference forfeiture and unjust enrichment, and I'll get into those as well, and then finally, there were also intentional fraudulent transfer claims, I skipped over that, and I don't intend to discuss those in any length today, and I do not think there is a need to, based on the evidence before you.

So as Ms. Schwarzman just went through, and as I will touch on and come at from a different direction, I think the second group of claims lack merit. The debtors were entirely justified in settling and not pursuing those claims. Let me turn now to the top box, which purported to target Franklin specifically. With all respect to my friends at Brown Rudnick, Your Honor, these claims are a qualitatively different level of speciousness. They should have been withdrawn at the outset of the trial. If they weren't a dead letter on the face of the proposed pleading, they certainly are a dead letter at this stage. I believe that the evidence at trial showed that Franklin is a first rate, utterly honest institution, that did nothing but help the case of unsecured creditors here, participated in market transactions on the same basis as all other creditors, and that everything in the trial -- that you saw in the trial, bears out each and every fact that we set out in our opposition to standing.

The Committee made no effort to highlight these claims, to model these claims to convince you that it's in the interest of the estate to pursue them, and unless they're willing to tell you now they're withdrawing them, I'm going to start my commentary with those claims first.

So as you can see on Slide 3, Your Honor, the Committee told you in a standing motion -- excuse me -- yes, in a standing motion, that they were going to show that Franklin was able to coerce Chesapeake to take out its unsecured WildHorse debt at above market -- above market at par, and coerced it to borrow the FLLO facility in order to do so, and Your Honor saw no evidence whatsoever to that effect. That Franklin used a close relationship with Chesapeake to obtain a favored position with respect to the up tier transaction. You saw no evidence to that effect. Franklin was treated the same as all other creditors.

Further down, I believe in opening argument, Mr. Stark said that they would show that Franklin found a way to take somebody else's recovery, and keep it for itself. I certainly saw no evidence to that effect during the course of the trial. These are serious accusations that the Committee has utterly failed to back up.

So let's turn to Slide 5, Your Honor, just as a recap. You've already from Ms. Schwarzman of quite a bit of the testimony that Mr. Circle presented during the trial. Just to refresh on Franklin's position in the debtors' capital structure at the various relevant times, Your Honor, heading into the December, 2019 transactions, you can see that Franklin held more than $2.4 billion of unsecured notes in the company. Thirty-six percent of the then outstanding debt, and a smaller percentage of the WildHorse unsecured notes, about 20 percent. You heard testimony at length about Franklin's participation in the 2019 transactions, and coming out of them, Franklin now had a second lien position of 1.2 billion, and continued to hold unsecured debt of 575 million, or 576, and subscribed for $250 million of the new FLLO facility. Certainly not a major holder of the FLLO facility, or not a majority holder, rather, and still a very significant unsecured creditor.

When we turn to the prepetition or petition time frame, Franklin had sold down a large percentage of its FLLO position, still held a very large 2L position, and now held a larger unsecured position than it did at the time of the 2019 transactions. Your Honor also may remember that Franklin held equity at certain points in time, but all of that equity position had been exited well before the negotiations of the RSA.

Let me turn to the next page. So I'm going to start with the Committee's proposed claims that Franklin be treated as an insider, and be subject to a one-year lookback period, as opposed to a 90-day lookback period. Your Honor, this is the first of the Committee's three attempted workarounds to the fact that there are no viable preference claims. As we just discussed, of course, the liens at issue hardened well before the petition date, and the Committee has tried three different efforts to work around that. The first is to treat Franklin as an insider, the second is to recharacterize that claim as a fraudulent conveyance, and the third is to recharacterize it as an unjust enrichment claim. I'll come to those later.

So in order to treat Franklin as a non-statutory insider, the Committee would have to show, and this is the middle bullet on this page, Your Honor, that it's the closeness of the parties' relationship that was so great at the time of the transaction, that it can be fairly determined that the transaction was not conducted at arm's length, but rather on the basis of the parties' affinity. And needless to say, we don't see anything in the record to support a finding of that nature or even a colorable claim of that nature, in respect to the 2019 transactions.

And the flip side of that proposition, Your Honor, is that a customary debtor/creditor relationship, even one where the creditor can assert leverage, given the size or strategic part -- the strategic nature of its interest in the cap structure, that does not give rise to insider status, and never has.

So if we start to look at some of the testimony, and none of this is controverted, Your Honor, Franklin never had any control over the company or its board. In fact, Mr. Circle testified he'd never even spoken to a member of the debtors' board, with the exception of Mr. Lawler, who serves as CEO, and participated in certain calls or briefings. Franklin never appointed directors, and Franklin never attempted to influence the hiring of management or firing of management. No involvement in the operations of the company.

Similarly, when the 2019 transactions were laid on the table after Franklin got restricted, Your Honor, Mr. Circle testified, they had no input into formulating the debtors' proposed liability management transactions, and Mr. Circle told you unambiguously, quote, "We had no bearing on what they proposed to us in the first --" and what he was referring to was the first proposal, the slide deck that they got from Mr. Dell'Osso.

Let's go to the next page. Nothing would support an inference that Franklin had any affinity with the company or that the transactions were not at arm's length. Every transaction Franklin participated in, Your Honor, was on the same basis as every other similarly situated creditor. There was no preferential treatment, whether in the 2019 transactions, or at any other date. Let's go to the next page.

So again, despite extensive discovery, a three week trial that included testimony from Mr. Circle, the full and fair opportunity to cross-examine him, the full and fair opportunity to show him and show Your Honor, any internal emails or emails with the company, there's nothing here. All negotiations between Franklin and Chesapeake were at arm's length. And I think this is best described by taking Your Honor back to what I'll call the Perry Mason moment of my friend Mr. Aulet's examination of Mr. Circle. And Mr. Aulet actually elicited the admission that when Chesapeake came to Franklin and said, we'd like to tender for your WildHorse bonds at 95, Franklin said no, but we will sell that at par.

That was the highlight of the Committee's interrogation of Mr. Circle, Your Honor, and indeed, Mr. Circle went on to say that we were willing to sell or exchange at par, but did not demand a make-whole as other creditors were doing. So at the end of the day, I will give the Committee the props that they did prove that Franklin negotiated on behalf of Franklin, but certainly, telling the company that they were only willing to tender or exchange their bonds at par, is hardly the stuff that an insider status is made of.

So I'll move on from this claim and come back later if need be, even if this claim had legs of any sort, it would still be barred by 546(e), and by contemporaneous exchange. I don't think Your Honor will need to reach that, because it's not colorable to suggest that Franklin was an insider.

Let me turn to equitable subordination. This one is no more proper than the alleged insider preference. Your Honor is fully aware of the standards for this sort of claim. The Committee, for reasons still unclear to us asked for permission to allege that Franklin's claims should be equitably subordinated. They would have to show that Franklin engaged in inequitable conduct that would constitute either fraud, illegality, breach of fiduciary duty, or using the debtor as a mere instrumentality, and that comes from the In Re Jack Kline case out of this district, 440 B.R. 712, 743, and of course the three prong test comes from In Re Mobile Steel.

In addition to proving those elements, it's clear, or the need to prove that, the Committee would have to show that some misconduct, that misconduct somehow resulted in an injury to unsecured creditors, or conferred an unfair advantage and none of that is the case here. And finally, it's an extraordinary remedy and should only be granted in limited circumstances.

So looking briefly at the testimony, Your Honor, you'll remember my partner, Mr. Qureshi, batting cleanup for the debtors and asking the debtors' witnesses whether they had any concern with the way Franklin had conducted itself in negotiating either the 2019 transactions or the RSA terms with the debtors, and the answer is uniformly no, that they behaved exactly as you would expect a large creditor to behave, and that they had no leverage over the company beyond their holdings in the capital structure. That is not the stuff that equitable subordination is made of. Let's go to the next page.

You heard Ms. Schwarzman mention the Davis Polk letter, and why it was a non-issue for the board. We agree with that, but if it was an issue, the record is clear that Franklin was never part of the FLLO group that sent the letter, had no relationship to that letter or role, and in fact, Mr. Circle had never seen it until it was put up on the screen at some point during the trial for his testimony. There's no evidence that Franklin played any role in specifying the time at which the debtors would file, and did not have any ability to or attempt to coerce the debtors to agree to a term of the RSA that the debtors were not otherwise prepared to agree to.

And in fact, Your Honor, as you'll recall from the testimony and Ms. Schwarzman's comments, Franklin sought to enhance unsecured creditor recoveries. If we'd look at the next slide, you saw this a short while ago in Ms. Schwarzman's presentation, and we've blown up the column that shows the first FLLO proposal, and the first Franklin proposal, and you can see that in response to a proposal of 90 percent to FLLO's 4 percent to Second Lien and 6 percent of prime equity to unsecured, Franklin came back with a proposal of 60 percent to the FLLO group, 20 percent to the Second Liens, and full 20 percent of equity, pre-dilution, to the unsecured creditors. So it is impossible to walk away from this trial with any belief that Franklin engaged in any illegality or inequitable behavior, or that it did anything other than negotiate in a way that was beneficial to unsecured creditors.

Let me move on to the last Franklin conduct related claim, and that is aiding and abetting breach of fiduciary duty. Ms. Schwarzman just took you through a tour de force on the evidence, Your Honor, of how diligent this board was, and how it fulfilled its fiduciary duties. That's really the beginning and end of whether there could be an aiding and abetting claim, but beyond that, again, there is no basis to show that Franklin, as a third-party creditor, improperly influenced or induced a breach of duty by the board. Again, we've got testimony here that the centerpiece of this claim for the Committee that somehow the creditors forced or induced the company to delay filing. Franklin had nothing to do with that.

Also relevant to this, Your Honor, as you know, having seen the testimony of several of the board members and officers, Chesapeake is a company run by sophisticated, intelligent officers and directors. They were counseled by world class advisors, in the form of Kirkland, Wachtell, and Rothschild, and to suggest that the board -- that this board and this management breached fiduciary duties, and that creditors induced it is a non-starter. So unless Your Honor has any questions, I'll move on to the second bucket of claims --

THE COURT: I --

MR. ZENSKY: -- the ones directed to creditors at large.

THE COURT: Got it. I do not. Thank you.

MR. ZENSKY: All right, thank you. So first, we'll talk about constructive fraudulent transfer claims, Your Honor. You're familiar with the elements. We've laid the three elements out here, and more on the next page, Laura.

And as you know in addition to establishing these three elements, the parties agreed, and you've received evidence on the applicability of the safe harbor, which I will come to shortly.

The Committee's main focus of course, was the TOUSA claim. That was the shiny object that the Committee has been chasing here, and I believe Ms. Schwarzman's discussion, particularly of the reasonably equivalent value, crushes that claim, but I'm going to get into it in some detail as well. And before we get into this, I'd like to take you back to

Mr. MacGreevey's testimony. Mr. MacGreevey put up a slide on his direct that purported to risk adjust the TOUSA claim and the last preference claim. Your Honor, you may remember it had rows going across about what the recovery would be with a 25 percent chance of success, 50 percent, and so on.

And he admitted on cross that the bogey, effectively, for the Committee here was that 25 percent line, because unless the Committee had more than that chance of success, the plan recoveries were superior. Now, there were all kinds of other problems with the assumptions he was asked to utilize, and the debtors brought out those flaws in their cross. What I'd like to refresh Your Honor on from his testimony is that he agreed that the right way to think about it is to multiply the probabilities that the Committee could succeed on each independent element of the TOUSA claim and the last preference, so he conceded that if Your Honor believed, just for sake of argument, the Committee had a 50/50 chance on proving ultimately, insolvency, a 50/50 chance on reasonably equivalent value, and a 50/50 chance on 546(e), you'd have to multiply .5 times 25 times 25, and what you'd end up with was a 12.5 percent chance of success, comparing that to what he admitted was the Committee's bogey, the 25 percent threshold.

So let me turn first to the solvency prong. The Committee's only witness on solvency, Your Honor, was Mr. Baggett, and we don't think that his opinion was of any use to the Court, mostly because -- on solvency. Mostly because he made no effort to question the legitimacy of his conclusions compared to what the market tells us about Chesapeake's value at the time, and the only evidence before you is that there was an active and informed market for both Chesapeake's equity and debt security.

Now, evidence of market value is not always dispositive, Your Honor, but in a case like this, it is certainly reliable and highly relevant to think about both solvency and reasonably equivalent value back at the time of the 2019 transaction. And I know Your Honor's familiar with this. I think it's a fascinating area of the law, but I think Judge Peck's decision in Iridium is probably the godfather of this line of thought, in which he determined that the public trading market constitutes an impartial gauge of investor confidence, and remains the best and most unbiased measure of fair market value, and when available to the Court, is a preferred standard of valuation.

And then we've also excerpted the Verizon case out of the Northern District of Texas, which adopts the same approach. And it's not hard to understand the thinking, Your Honor. We have investors who were making bets in real time with their own economic resources, and making a judgment about the value of Chesapeake's assets, and its prospects for the future in real time, back in December, 2019, both before and after the transactions, and that's an unbiased measure of value. You contrast that with the after the fact expert testimony of both who were hired to promote an objective and don't have an economic stake in the outcome of their testimonies, so the market values are certainly relevant, and should be -- should have caused Mr. Baggett to question his conclusions.

So let's look at the next slide, Your Honor, and the next two slides, what we're showing you here are two columns on the left that are taken from Mr. Baggett's own demonstratives, in which we look at a base value of the company's debt, at the two dates that Mr. Baggett suggested, or that he looked at, rather, the first being December 3rd, and then on the right, we've added a column that Mr. Baggett talked about in another one of his demonstratives, but he never tried to reconcile the third column with the first two.

So the column on the left, Your Honor, shows what the base value was of the company's debt on December 3rd, and that's a date cherry-picked by Mr. Baggett. That was the nadir of the company's value. It was after the going concern announcement, but before the curative transactions in December were announced. So he picked this date, and he showed you that the total face value of the debt was $9.7 billion, and that the market value of the debt and equity was only about $7.9 billion, and left it at that.

But if you look at the third column, his NAB, his ground valuation for Chesapeake, Legacy Chesapeake, on December 3rd, was $4.5 billion. So what we have in the dotted box here is an unexplained delta between Mr. Baggett's after the fact valuation for Legacy Chesapeake, and what the market told us, and he made no effort to reconcile the third column with the second column.

Let's go to the next page, because the delta is even more dramatic. This is the second date that Mr. Baggett included on his demonstrative, and this is January 6th. And you can see in the left-hand column, Your Honor, that the total debt has gone down because of the billion dollar deleveraging in the up-tier exchange, and you can see in the middle column that the market value of the company's debt and equity had increased by $1.8 billion to 9.7, showing a very substantial equity cushion.

Now let must stop here, because the comparison between the last line and this one should be the beginning and end of any fraudulent conveyance claim. How can it be that a company that was defrauded by the December, 2019 transaction, that were harmful to its creditors, and reduced the ability of the company to pay its creditors back, jumped $1.8 billion by market value between the pre-announcement date and the consummation of the transactions? There's never been a fraudulent conveyance case that I'm aware of that was made out on facts like that, and I don't believe the Committee can point you to one.

But going back to the dissonance in Mr. Baggett's expert testimony, he told you that Chesapeake was insolvent by $4.9 million as of January 6th, Combined Chesapeake. How can you reconcile his after-the-fact opinion on the value of these assets with the market value? He says that value of the assets is half what the market placed on them. Now, there may be an explanation for this, and if the Committee ever got standing, although we certainly think Your Honor shouldn't grant it, maybe there would be an explanation. However, maybe Mr. Baggett has one. He certainly didn't offer it to you during the course of the trial, and that's after we pointed out in our papers that one needs to take these market values into account.

And on Page 20, this is the totality of testimony that Mr. Baggett offered to you on how to explain market value versus his opinion. And he said, well, we've all seen in all the bankruptcies that we've been working on that that's not the case, meaning that a positive equity market cap means the company was solvent. And then he pointed out, sometimes companies have value even on the eve of filing.

Your Honor, I would submit this is the (indiscernible) of all (indiscernible). Okay? This is the opinion of an expert that, because I don't want to deal with this issue, it's not a problem, okay. I would suggest, Your

Honor, that his failure to even attempt to deal with it, is the problem.

The last line I'll show you on this, Your Honor, I think if there's still any questions. What we're showing you now is the percentage of the market equity capitalization at the two dates we just talked about, that's December 3rd, 2019, January 6th, and then the petition date itself, or the last trading day before the petition. Now these numbers all come from Mr. Baggett's demonstrative, the two columns on the left, where his demonstrative shows a billion and a quarter of equity value on top of a $9.7 billion debt stack on December 3rd; 1.7 billion of market equity cap on January 6th, on top of 8.9, and what we've done here is just run the leverage ratio, and shown it at the top. Then, the last trading day before the petition, equity was worth $115 million, or 1.3 percent. Mr. Baggett's testimony would like Your Honor to conclude that all three of these things are the same, and I would submit to Your Honor that one of these is not like the others, and that the fact that parties speculate on stock on the moment before a company files is no answer for the very robust market valuation of the equity at the other relevant dates.

Finally, the last indicia of market behavior I would point Your Honor to, and Ms. Schwarzman touched on this, she reminded the Court of Mr. Circle's testimony that Franklin, who remember was restricted, and would have had as visible access into the company's financials as anyone, held back almost $500 million of eligible debt from the up-tier exchange, preferring to ride out the unsecured position because of the upside associated with that. But if you look at the box on the right, Your Honor, Franklin wasn't the only market participant that made that judgment. These are numbers taken right from Mr. Baggett's demonstrative, and you can see that we've isolated the five issues that were eligible for the up-tier exchange, and you can see that the total face amount that was eligible was 4.5 billion, and that at the end of the transaction, that there was still 1.3 billion, approximately, left in these issues outstanding.

So Franklin accounts for part of that, Your Honor, but not all of it. So other market participants also made the judgment that they would prefer to keep their equity position rather than trade up.

So before moving on quickly to reasonably equivalent value, Your Honor, there are other financial tests. The inadequate capital, and inability to pay debts. I believe Ms. Schwarzman covered -- the testimony covers those. All of the witnesses testified that they believe this company had adequate capital moving forward, and were very comfortable with where the company stood, albeit, with further work to do until the double black swan event. So I'll move on now to reasonably equivalent value.

So Ms. Schwarzman covered this at length. We adopt her argument on that you should look at this as interconnected transactions. She took you through all the different aspects of value to Legacy Chesapeake from the combination. I want to take you just to market implications of the transaction, again, which speak as loud or louder than anything.

We know from ASARCO and the VFD case, which we cited to Your Honor, that market values are relevant not just to solvency, but also to the question of whether a debtor received reasonably equivalent value for a transaction.

So this is Mr. Baggett's demonstrative, again, and you'll remember Mr. Brown elicited testimony from him that between the dates he picked on the pre-transaction side, December 3rd, and the date he picked on the post-transaction side, that all of the debt traded up. What Mr. Brown did not have time to do was actually to bring out the degree of that increase.

And we've highlighted three of the issues here, Your Honor, two of which were -- excuse me, one of which was eligible for the exchange and two of which were not. And you can see that the 4.875 notes of Legacy Chesapeake due 2022, which were not eligible, traded up from 66 pre-transaction to 8.144 post-transaction, a very material increase.

If you look at the next two lines, the 8 percent senior notes due 2026 traded up from 4.875 to 6.013 between the last date before the announcement and the closing of the transactions. These are not mere flips. These are hundreds of millions of dollars of value that people are bidding up the prices of this debt in realtime.

And remember, post-transaction, Your Honor, this debt was behind the revolving facility, the FILO, and the 2L debt, and the prices were bid up following the transaction that the Committee wants to allege lacks reasonably equivalent value. Again, it's impossible to square the market evidence with the theories and allegations of the Committee.

The last thing I'll say here is that the sole explanation or attempted explanation that you heard from Mr. Baggett was, well, the values went back down later on after the transaction closed. And he's right. But what he admitted on cross was that that downturn coincided with a downturn in the script and the spot pricing for the commodities.

And if there was any question, he fenced with me over the materiality of that decline. But if you look on page 24, we've blown up a portion from Mr. Miller's report, which is in evidence, and you can see on the left that the spot price at Henry Hub trended nothing but down following the closing of the transactions, and that the WTI spot price also traded materially down in that window. So to the extent the debt did come back down, it's not because these transactions lacked fair value. It coincided with change in the prospects for the company well after the transactions were closed.

All right. Now I want to talk about TOUSA, Your Honor. Again, I called it the shiny object of the Committee in this case. The facts have been laid out by Ms. Schwarzman in detail, and I think I've supplemented some of the relevant facts.

Your Honor, my firm represented the Committee in TOUSA. I argued the standing motions in TOUSA, so I think I know a little bit about the differences between TOUSA and Chesapeake, and Chesapeake is not TOUSA, and TOUSA is not Chesapeake.

TOUSA was an extremely egregious act of commercial conduct by the debtor that has no analog in any case I've read since, and certainly not this case. And what the Court determined there, there was no rule of law that when a subsidiary assumes or issues a liability or assumes a guaranty for debt that it was not previously responsible for, that that is constructive fraudulent conveyance.

Rather, TOUSA was a fact-driven case. And what the Eleventh Circuit said in its review was, quote:

> "It has long been established that whether fair consideration has been given for a transfer is largely a question of fact as to which considerable latitude must be allowed to the trier of fact."

In other words, the Court needs to think about all of the facts and circumstances that were presented to you concerning these transactions. The Eleventh Circuit reviewed the factor of (indiscernible) and said that it was not left with definite and firm conviction that the bankruptcy court had clearly heard. So these are factual issues. There is no legal rule, as much as the Committee would like it, that gives it a constructive fraudulent conveyance claim on behalf of (indiscernible).

So let's look at some of the most material differences between the cases, Your Honor, because it is a factor of an analysis. Next page.

Okay. So we've excerpted what I think are the material facts at play in TOUSA, and we asked whether they're present in Chesapeake. So issue number one, did the transaction at issue provide a material economic benefit to the subsidiaries that guarantied the new debt? In TOUSA the answer was no. The parent company simply caused the subsidiaries to assume a new debt to pay off creditors that they were not responsible for, and all that happened was it was able to keep the parent company out of bankruptcy for a few months.

In Chesapeake, of course, the answer is yes, and Ms. Schwarzman took you through all of the benefits of the transaction for Legacy Chesapeake, and the market agrees that there were benefits for Legacy Chesapeake.

Issue two, was the company on an inevitable path to bankruptcy at the time of the transaction? In TOUSA, the answer was unequivocally yes. External observers, insiders at TOUSA recognized that the housing markets in which TOUSA operated had begun their free fall long before the transaction under attack, Your Honor. In this case, the answer is no. No one thought the bankruptcy was near term for any considerations in December. Ms. Schwarzman again took you through that testimony, and in fact you heard testimony that Mr. Waller and Mr. Martin bought stock in the company at the time. So the cases couldn't be further apart on that issue.

Let's go to the next page.

The next issue which is closely related is whether management believed in the wisdom of the transactions or doubted them. In TOUSA, management begged the controlling stockholder not to force it to do the transaction. Okay? The controlling stockholder said do the transaction because I want to keep my equity check alive no matter how damaging and dangerous it is. There were dire predictions about the effects of the transaction internally exchanged between the officers of the company. And you may remember that the CFO predicted in an internal email that the transaction would likely end in a crash and a very colorful word, which I will not use during today's proceedings.

You weren't shown anything like that from the company here. What you were shown was a company that's diligently worked, to the best of its ability, to put itself on an appropriate path. None of the officers of this company questioned the wisdom of these transactions or that the company would come out stronger and better.

The next issue, completely different status of the housing market from the ENT market at the relevant time. The housing market was collapsing at the time TOUSA engaged in this transaction. Here, while you heard about the double black swan event in March, back in November and December, the market was stable. Stock prices were stable and the script was stable. No relation to TOUSA.

Finally, let's go to the next page, and I think this is perhaps the most important distinction, Your Honor, and one that I don't believe has been discussed yet. In the structure of the TOUSA transaction, remember, the parent was liable for debt that had been assumed by a new joint venture called the Transeastern Venture, and the parent caused the TOUSA subsidiaries to issue guaranties to borrow money to pay off the lenders who had funded that venture.

But that venture did not come along and guaranty the new debt. The venture, the entities that were formerly responsible for that debt, pranced off into the sunset without any help to the TOUSA subsidiaries in meeting the new debt.

In this case, that's not what happened. The WildHorse entities come into the fold as a result of the collapse. Mr. Baggett said that those assets were worth, by his calculation, 1.4 billion, and I think we have a mistake here; we said 1.3. He said that WildHorse is worth 1.4. So it's not as if Legacy Chesapeake took on the responsibility for what used to be the WildHorse debt at the RBL in bonds. WildHorse itself remained responsible for that debt. That wasn't TOUSA. And on that fact alone, the Court could easily determine that TOUSA has no application here.

And then, finally, I've already touched on this, TOUSA had a board that was acting pursuant to the direction of its controlling stockholder, and here Chesapeake had a completely independent board that made the best judgment they could in the interest of all its stakeholders.

So unless Your Honor has any questions, I'll move onto 546.

THE COURT: Yeah, I do not. Thank you.

MR. ZENSKY: Okay. Again, I don't think that the Court will ever need to reach this. We only reached the (indiscernible) if the Committee has colorable fraudulent conveyance for preference claims. Those have no legs to begin with, but if they did, there is a very strong safe harbor defense here, Your Honor. And what we'll show momentarily is that the WildHorse transfer, that's the pay down of the holders, pay down to the holders pursuant to the tender offer, the PBL debt. The FILO lien and the 2L liens, those were all transfers that were made in connection with securities contracts, and they were made to or for the benefit of financial institutions.

Let's go to the next page. I'm going to go quickly through these, Your Honor, because these elements are not contested by the Committee.

First, it's undoubted that we had transfers here. Indeed, the Committee couldn't avoid or seek to avoid these transactions unless there was a transfer. So we're all agreed that the payment to the holders of WildHorse debt, the issuance of the FILO lien, and the issuance of the 2L lien all constitute a transfer.

Next slide.

There's also no dispute that there were multiple securities contracts at play here. The first and most obvious, Your Honor, is the WildHorse debt tender offer itself. A tender offer for debt or equity instrument is the quintessential securities contact under the definition in the Code of 101 -- excuse me -- 741(7)(A)(I), and that defines the securities contract as a contract for the purchase, sale, or loan of a security. Excuse me. So the Committee did not dispute this in its papers.

Next, we also have the Uptier Exchange. The Uptier Exchange was effectively an offer or tender by the company for holders of unsecured debt to send back their unsecured note and receive instead the new 2L notes, and there was also cash pay for accrued interest. So this -- the Uptier Exchange in itself constitutes a securities contract under 741(7)(A)(vii), which says that a securities contract means, quote, "Any other agreement or transaction that is similar to an agreement or transaction referred to in this paragraph." And I would submit, of course, an exchange offer is similar to a tender or purchase offer, and I don't believe there was any opposition to that in the Committee's papers.

Where the Committee takes issue with the 546(e) defense is whether these transfers were in connection with the securities contracts that I just identified. Now, the law is clear, and Mr. Stark is right. These cases are from the Second Circuit, and the Second Circuit has had the opportunity to rule on many 546(e) cases. That doesn't mean that these cases are not properly cited, and the Committee has not pointed you to cases that take a contrary view.

So we've excerpted here three cases that address the breadth of the "in connection with" requirement in 546(e), Your Honor. And you can see that in Boston Generating, the standard that the Court set was that the in-connection requirement sets a low bar between the securities contract and the transfers sought to be avoided. In Judge Peck's Lehman decision, he said that the words "in connection with" are to be interpreted liberally and should be interpreted to simply mean related to.

And then again we've cited the Second Circuit for the law-bar standard. So let's apply that standard to our arguments here.

So the first question is whether the FILO liens were issued in connection with the securities contract. So Your Honor knows at this point that the FILO term loan was the way the debtors funded the WildHorse debt tender offer. Those two transactions were inextricably intertwined, and while the Committee changed its position on whether to collapse the Uptier Exchange and the WildHorse tender in its reply, there is no dispute about this. The FILO loan and the debt tender offer are two sides of the same coin. That was the only financing available to the company to buy back the WildHorse notes, and the documents explicitly condition one on the other.

The debt tender offer says on its face that the closing is conditioned -- that the closing of the loan is conditioned on getting consents to do the tender offer. And then, on the face of the debt tender offer, it says explicitly that it can be made, quote, "In connection with the concurrent secured term loan financing."

Now, of course, that's not dispositive of applying the statute, but that's the way the transaction is described. The FILO term loan is in connection with the debt tender offer. And if the debt tender offer doesn't go forward, the loan doesn't go forward, and if the loan doesn't go forward, the debt tender offer doesn't go forward.

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So given that debt that was raised by the FILO facility was necessary and inextricably intertwined with the debt tender offer, we say that the liens at issue to secure that debt are a transferring connection with the securities contract. That is the nub of the issue. We say clearly in connection with and the Committee disputes that.

Let me turn to the next page and discuss the SunEdison case and its facts, because they are exactly on point with what I just described, Your Honor. And this is 620 B.R. 505. In the SunEdison case, SunEdison contracted to buy various equity interests in a separate, unaffiliated company called First Wind and entered a purchase and sale agreement back in 2014.

Now, to finance the purchase, it formed a special purpose vehicle, a subsidiary called Seller Note, and Seller Note in turn borrowed $350 million from the market in exchange for exchangeable notes. And then Seller Note transferred the cash to Sun to buy the First Wind equity interest. In order to secure that financing, Sun transferred down to Seller Note, and Seller Note transferred and posted as collateral equity interest in various companies that Sun owned.

And that's the transfer that was being attacked in this case, the pledge of stuff to the lenders that financed the purchase and sale agreement transaction. The analogs to our case are on all fours. The purchase and sale agreement is the analog to the WildHorse debt tender offer, right? It's the securities contract and market transaction, and Judge Bernstein said it was.

Then he went on citing that low-bar standard that the pledge of the collateral that the company had to do to secure that financing was a transfer in connection with the securities contract. So that's the analog for the finding of law, and he said that that easily satisfies the "in connection with" requirement.

And just to sum it all up, he wrote, quote:

"The January 15th transfer" -- that's the pledge of the stock -- "related to and was associated with the 2014 purchase and sale agreement" -- that's the securities transaction -- "because it was the means of affecting the partial payment of the purchase price under the 2014 PSA through the issuance of the exchangeable notes secured by the pledged collateral."

And we think that that is sound reasoning and applies here, Your Honor.

We also cited the <u>Boston Generating</u> case. I'll skip over that in the interest of time. We've explained it in our brief and also applies an in-connection requirement in a materially similar way.

So the Committee's argument is, well, the FILO

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agreement itself in isolation is not a securities contract, and they're right. But that's not the test. The test is whether the FILO facility agreement and the lien at issue was entered in connection with a securities contract, that being the debt tender offer for the BBL notes, and I think we've just established that that's the case.

Very briefly, the same argument holds true on the Uptier Exchange. We've already discussed how the Uptier Exchange offer was a securities contract in its own right, and the 2L lien which issued to secure the 2L notes was a transfer in connection with that very securities contract and satisfies the "in connection with" requirement.

The last prong, Your Honor, is whether these transfers were made by (indiscernible) to the benefit of a financial institution. The FILO parties or the FILO group and the 2L trustee have submitted briefing that all holders of this debt are financial institutions by virtue of the agency relationship with various banks. Franklin adopted that argument and I'll leave it to others to address that today.

Independent of that, Franklin itself is undoubtedly -- or the Franklin entities that held the debt are financial institutions. You heard Mr. Circle's testimony that 100 percent of the BBL notes that were sold back in tender were held by a 40 Act fund, 99 percent of the cash provided for the FILO term loan came from Franklin funds that are 40 Act funds, and 97 percent of the funds that hold second lien notes and received the second lien are 40 Act funds.

And, of course, the 40 Act fund is an explicit financial institution under 101(22). So whatever Your Honor rules with respect to the rest of this discussion and the creditors at whole, no fraudulent conveyance of preference claim can be made out against the Franklin entities.

The last thing I want to say, and this relates to Lehman Brothers, and that goes to the underlying debt claims and guaranties, Your Honor. This is a very interesting question that Judge Peck addressed in Lehman, and you may remember the fact patterns here that (indiscernible) JPMorgan's, according to the estate, of coercion from Lehman to post substantial new collateral and issue guaranties from various affiliates on the eve of Lehman's bankruptcy filing. And in a very well art -- or discussed decision, Judge Peck determined that none of the constructive fraudulent conveyance claims or preference claims to void those liens could go forward because they were all (indiscernible) to work for the benefit of JPMorgan, which is a financial institution.

And that was notwithstanding the Committee's arguments in that case that the entities that issued those guaranties got no value for the guaranties or for the lien (indiscernible).

The question that's relevant here, and that Judge

Peck addressed, is what does that mean for the underlying debt claims? And here the Committee is seeking to avoid the claim of Franklin for its FILO debt and its 2L debt in which Judge Peck said and ruled and has never been disputed, reversed, or questioned by any other Court, is that where the debtor or a committee cannot avoid a lien, it cannot avoid the underlying and connected debt claim. Even though 546(e) on its face does not speak to obligations, it only speaks to transfers, it's a (indiscernible) victory to let a committee attack an underlying debt claim if the lien stands. And this goes to the very purpose of the safe harbors, as well, to protect the very kind of transactions that were conducted here.

And what Judge Peck said was that trying to avoid the obligation is, quote:

> "A dead-end for purposes of obtaining recovery, and those obligations are resistant to successful challenge because they connect so directly to transfers that are exempt and beyond reach by virtue of Section 546(e)."

Now, Your Honor doesn't have to rule on any of these matters. You're canvassing the issues, but the point here is that there's an extraordinarily strong safe harbor defense that has to be factored in to the settlement and the debtors' refusal to bring the claims.

So the score card at the end of the day, Your Honor, on the next page, is that every one of the preference claims the Committee is asking for standing for or constructive fraudulent conveyance claims have either been withdrawn or are all subject to safe harbors, even assuming that there was a colorable case on solvency for lack of reasonably equivalent values.

I'm going to skip over intentional fraudulent transfer. We've briefed it. I can't imagine on these facts how one could argue that any of the badges of fraud are present or that these debtors intended to defraud any of their creditors.

The last thing I'll touch on very briefly is the preference claim -- excuse me, the attempt to work around the absence of a preference claim through calling it a constructive fraudulent conveyance or calling it unjust enrichment. Ms. Schwarzman talked about this. Your Honor, the 90 days is the 90 days, and if Congress wanted to allow for preference claims against non-insiders after 90 days, it would be in the Code.

There is no legal basis to say that a lapsed preference claim can be reasserted as a constructive fraudulent conveyance claim or as unjust enrichment, and that's really the beginning and end of this discussion. I've already touched on the lack of evidence to Cole Franklin insider, but just if you had any doubt about the cognizability of these claims, Your

Honor, we briefed the fact that the contemporaneous exchange for value defense would have applied and would mean that the preference claims would have no value even if you could resurrect it as a constructive fraudulent conveyance claim or as an unjust enrichment claim.

So Your Honor is familiar with that defense effectively to preference claims and the inquiry about contemporaneous exchange. We've excerpted the (indiscernible) Rivera case here, which has been cited in this district and that is -- I believe by Judge Isgur actually -- that inquiry should be focused on the risk of fraud, the intention of the parties, the reason for the delay, and the nature of the transaction. And this defense is a flexible concept and requires a case-by-case analysis.

You heard testimony from Mr. Circle about how critical the issuance of the liens was through his willingness to fund the FILO transaction, and you saw an email from Mr. Circle to JPMorgan, in their capacity as the arrangers, insisting that the debtors perfect the pledge of liens and mortgages within 60 days. That was the contemporaneous intent of the parties to provide collateral for these loans, and there was -- would be no FILO loan and no Uptier Exchange without the issuance of the liens.

There's no fraud. There's no rush to the courthouse to dismember the debtor. None of the policies underlying 547 itself are present here. The only issue is the industry that we're dealing in, and that you can't perfect thousands of mortgages the day after the credit is issued. And Mr. Circle and the other lenders agreed that 60 days was an appropriate period of time. And why did they agree to this? If you look at Page 52, the industry standard is that it takes 60 to 90 days to perfect the lien granted by an E&P company.

And we pointed here to admitted exhibits -- Franklin Exhibits 10, 11, 12, and 13, with the ECF numbers, and these are credit agreements by tier companies, all of which had 60- or 90-day periods to perfect the pledge of collateral. It was perfectly reasonable for the creditors who were extending credit or exchanging debt here to agree to a 60-day window, and that should not be challenged after the fact as a lack of substantially contemporaneous value.

The only case the Committee really cites here is Judge Isgur's Bison Building Holdings case, Your Honor, and I think Your Honor knows that on the facts, it has no obligation to a multi-billion-dollar E&P company borrowing money. It involved the sale of a number of products to the debtor, with the vendor taking credit terms and getting paid back 45 days routinely after the issuance of the invoice, and Judge Isgur rightly said that we don't have an intent for contemporaneous exchange here, and that was the end of that.

So we don't think that that for a moment would undercut a 547(c)(1) defense. Any holding to the contrary, Your Honor, would put lending practices at stake, and companies would be very wary of extending secured credit to an E&P company, particularly at the time it needed it most.

So to sum up, Your Honor, again I started with the Franklin specific claims and that there's no -- nothing there. We've now layered in the 547(c)(1) defense, and you can see that -- next page, Laura -- all of the claims the Committee would like to assert here and that the debtors have settled for more than fair consideration are lacking in merit, they're safe harbored, or they're barred by 547(c)(1) and had no value, even if they could be resurrected.

Unless Your Honor has any questions, that's all I have.

THE COURT: All right. I do not. Thank you, Mr. Zensky.

MR. ZENSKY: Your Honor, I have one housekeeping measure before I cede the podium.

THE COURT: Yes, sir.

MR. ZENSKY: And we can deal with this at lunch. We had emailed Mr. Alonzo about an error in the transcript of Mr. Circle's testimony that was actually material. No one has objected to the -- what we had said in our email to Mr. Alonzo, the correct transcript would be, having listened to the audio. I don't know how Your Honor wants to deal with that, but we would like to correct the record at some point.

THE COURT: So what I -- thank you for reminding me about this. I do not have the ability to unilaterally, without a record, modify a transcript. So what I would like for you to do is, if you would file something, include a certification by the person that went through and did it and let me sign an order that becomes part of the public record. I would ask that you circulate it amongst the parties that participated and that way, there is a clear and unambiguous, hey, we found a problem; we brought it to everyone's attention, everyone was given an opportunity to complain, and the Court signed an order with full notice and opportunity to object by all concerned. Can I ask you to do that?

MR. ZENSKY: Yes. Of course, Your Honor. Thank you for that guidance.

THE COURT: All right. Thank you.

Mr. Schaible, are you next?

MR. SCHAIBLE: I am, Your Honor. Can you hear me okay?

THE COURT: I can hear you very well. Before we get started, do I need to give control to someone on your team or to you?

MR. SCHAIBLE: You do, Your Honor. If you wouldn't mind giving control actually to Mr. Schlaifer of Kirkland.

THE COURT: All right.

MR. SCHAIBLE: I'm capable of some things, but running my own slides is not one of them.

THE COURT: Yeah.

MR. SCHAIBLE: Luckily, Mr. Schlafer was willing to do it for me.

THE COURT: We're going to keep working on that. He -- Mr. Schlafer has control, Mr. Schaible. Whenever you're ready.

MR. SCHAIBLE: Thank you, Your Honor. Your Honor, for the record, Damian Schaible with Davis Polk. I'm here with a number of my colleagues, and we are appearing on behalf of the Ad Hoc Group of FLLO Term Loan Lenders.

First, Your Honor, as the other parties did, I'd like to offer extreme thanks to the Court and to Your Honor for the time and the diligence through this long process and this very long trial. Also, as others have done, I'd like to offer great commendation to the excellent lawyers on all sides. It's been a pleasure to be a part of this trial, Your Honor.

Your Honor, just about one day and one month ago, we rose to urge Your Honor to confirm the debtors' plan of reorganization. We told Your Honor that the plan before the Court represents a monumental achievement, a hard-fought, value-maximizing, equitable settlement of potential estate causes of action. We told Your Honor that the plan would provide these debtors with a fresh start and with the certainty

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and liquidity they need to emerge from bankruptcy in this challenging, uncertain environment and thrive as a going concern. We told Your Honor we were confident that the evidence we presented at trial would bear all that out, that this plan not only satisfies the requirements of the Bankruptcy Code, but frankly, it represents the very best of restructuring practice.

Your Honor, the plan sponsors have satisfied their burden, and we're proud to rise once more in support of the confirmation. Your Honor has heard a mountain of evidence in these proceedings. The debtors and counsel for Franklin have ably summed up for you why this evidence more than suffices for confirmation. I see no reason to belabor the points they've made, but I do want to just take a moment and spend some time reviewing, from the perspective of the FLLO ad hoc group the case for confirmation and why the Committee's objections just do not pass muster.

We view the Committee's objections in this case, Your Honor, as relating to two distinct moments in time: the past, which includes the events of April and May of 2020 and this Court's entrance of orders on the DIP and the rights offering , both of which were entered and have become final, and then the present. I'm going to start with the past.

The Committee's challenge has been (indiscernible) tell the story that we shared with Your Honor many times before, the story about -- that has now been borne out at a trial. It's a story that begins with the world in the light of March of 2020, a price war between Russia and Saudi Arabia which sent unprecedented shocks through our oil and gas market, and the pandemic, which is unfortunately still with us today as we address Your Honor virtually, causing at the time and now unimaginable harm around the world, and at the time, shuttering much of the global economy.

Your Honor heard at trial that the extreme state of the world simply derailed Chesapeake's otherwise -- at the time -- successful and longstanding commitment to deleverage its balance sheet and left the company in need of a near-term emergency restructuring.

The Committee, of course, tells a different story, a story of secured lenders that took advantage of the foundering enterprise, bringing a company to heel while leaving unsecured creditor and other constituents worse for the wear. But the facts will never fit that story. Neither does the evidence. That version of the story, to borrow a phrase oft repeated during these (indiscernible) is at home only in fantasyland.

So what happened? What actually happened? What has the evidence shown? The evidence has made plain that these debtors enjoyed a position of massive leverage over their secured creditors. Back in 2019, as Your Honor knows -- in December of 2019, as Your Honor knows, the FLLO lenders provided Chesapeake with a $1.5 billion new-money loan. Then a mere few months later, Chesapeake called them up and threatened to file a (indiscernible) bankruptcy case specifically to avoid the lien securing that recently provided loan unless the FLLO lenders provided the debtors with a (indiscernible) value.

At this point, I believe we should be putting Slide 1.

This is leverage that the debtors used, I must admit, very effectively. They drove an extremely hard bargain. And the deal that we negotiated was a tough pill for a group of secured lenders to swallow. Full equitization. Substantial value for value to junior creditors, and the requirement to provide a long-term and firm commitment to provide a significant new money equity investment at a time of nonexistent capital markets.

It's worth pausing here for a moment just on how absurd the Committee's version of this story really is. In the Committee's telling, the FLLO ad hoc group overwhelmed the Chesapeake board's independent business judgment as well as that of Kirkland & Ellis and Wachtell Lipton and all of their commitments, the fiduciary duty and professional responsibility and (indiscernible) didn't take very much to do that. Just one letter in one slide deck.

We've known all along the Committee's story on this score flew in the face of the truth. Is it credible that a letter and a few slides, even from me, could send ambient restructuring professionals and a serious and independent public company board of directors cowering for cover? The uncontrovuted -- uncontroverted -- excuse me -- evidence at trial showed an engaged Chesapeake board and a management team that did not in any way perceive the materials that we sent as a threat. Nor did the materials cause them to change their course of action at all, and the slides that we're flipping through now show excerpts from the transcript that show that clearly.

Rather, Mr. (indiscernible) testified that the letter, quote, "did nothing" except to confirm that there was a interest in reality to continue to try and negotiate the debt to -- in other words, a value mathematical transaction.

Ultimately, Chesapeake chose at the direction of its board to negotiate and RSA with its senior creditors rather than fight them in court. They chose to settle potential causes of action rather than pursue them with endless, expensive, uncertain litigation. They chose a certain path to bankruptcy with committed exit financing and a bright future as a going concern over a free fall and the liquidation that may well have ensued.

The linchpin of those April and May negotiations, Your Honor, as you know, were the rights offering. Your Honor has heard the debtors recount this morning the testimony of

Mr. Antinelli. The rights offering, from the debtors' perspective, was a critical component of their plan to emerge from bankruptcy as a going concern. Without that rights offering, the debtors could have no certainty that they'd be able to fund a Chapter 11 case and no clear path to exit from Chapter 11 with sufficient liquidity to operate on the other side.

But wishing for something doesn't make it so. The debtors weren't going to get this new money equity from just anywhere, and as Your Honor heard from Mr. Antinelli and Mr. Circle, capital markets at the time simply didn't exist. The slides that we're putting up show that testimony.

In May 2020, there was simply no appetite to provide an oil and gas company on the brink of bankruptcy $600 million worth of equity. Literally none. And so the FLLO ad hoc group and Franklin stepped up, in a time of unprecedented distress and volatility, to provide the needed new money equity investment. Why? Because the debtors successfully deployed the substantial leverage (indiscernible). They obtained a rights offering that has allowed these debtors to shore up the exit funding and liquidity (indiscernible) to remain competitive into the future.

Your Honor, the Committee has tried, so far in vain, to flip the new money equity commitment story on its head. We expect the Committee to expend significant time again today challenging the rights offering. Rather than a vital shot in the arm, the Committee will describe the rights offering as an impermissible value drag at unsecured creditor's expense. Your Honor should simply remain unpersuaded, and I'd like to take a few minutes to explain why.

For starters, the Committee's arguments here are simply too little, too late. They've been asked and answered. This Court has already approved the backstop commitment. Your Honor may not countenance the Committee's attempts to relitigate the past.

But even putting that aside, the Committee's arguments here are simply without merit. As the evidence at trial showed and as we've reminded Your Honor all day today, the debtors wrestled a rights offering from their secured creditors by successfully using the leverage at their disposal in order to obtain $600 million equity investment in a dark -- indeed a dormant -- time for the oil and gas capital market.

But not only that, Your Honor. (Indiscernible) from the FLLO ad hoc group, this remains open over an incredibly long time frame. The debtors, mind you, have always had the opportunity to walk away. For two months from when the commitment was publicly announced until when Your Honor approved the commitment, they could have walked away for free. Post-approval, they'd just have to pay a break fee. And Your Honor heard Mr. Antinelli's testimony on this point. The debtors would have been delighted to entertain a competing rights offering.

We urge Your Honor to keep this in mind as the Committee claims that this rights offering wasn't market tested. That's just wrong. The terms of this rights offering were completely public and have been for many, many months. At any point, an investor could have come along and proposed an alternative -- a committed alternative, an actionable alternative -- on more favorable terms. And until this morning's strategic and questionable half-proposal, no proposal's even been received, let alone actionable alternatives.

Your Honor, we deal with reality here, not the hypothetical and not the fantastic, what our colleagues at Kirkland & Ellis have repeatedly called the art of the possible. And this rights offering is the only committed, enforceable, and actionable rights offering available to the debtors today. Nor is it the case that the FLLO ad hoc group and Franklin pushed the debtors to use the total enterprise value favorable to them. To the contrary. As the evidence made clear, the $3.25 billion valuation came from the debtors. We merely accepted it to be true. In fact, the debtors made a number of assumptions that we perhaps wouldn't have made to ultimately increase that value to $3.25 billion.

Finally, we'd like the Court to consider the practical implication of the Committee's continuing challenge to the rights offering. The participants of the rights offering, as Your Honor knows -- the participants of the rights offering, as Your Honor knows, the backstop party in particular, had held upon its commitment to purchase $600 million worth of equity in a medium oil and gas company during a global pandemic for many months. Volatility has worked in the debtors' favor recently and all the better. But Your Honor well knows the volatility could have worked against the debtors as well. If it had, had $600 million at a 35 percent to a $3.25 billion valuation become an unattractive investment, Your Honor can be certain that these debtors would have held our feet to the fire. These new money investors would not have been allowed to walk away. That's the very nature of the investment. Sometimes it goes up. Sometimes it goes down. And blowing up this rights offering simply because markets have improved since last June (indiscernible) long-term commitments (indiscernible) one-way options. Investors on the hook, no matter what. Debtors allowed to walk away at their leisure.

The Committee has also tried, again in vain, to relitigate aspects of the DIP order that this Court entered more than five months ago that happen to be harmful to its confirmation objection. We expect the Committee to spend significant time today arguing that the roll-up DIP loans should somehow be treated as they were never rolled up, as if they were pre-petition RBL loans which should only be able to be permitted to recover from pre-petition RBL collateral even though the DIP loans were rolled up and there's deep additional collateral post-petition. And even though this Court approved a surcharge waiver and a marshaling waiver.

We expect the Committee to argue for a reverse marshaling of assets to ensure that secured creditor recoveries are minimized while unsecured creditor recoveries are maximized, even though the DIP order includes a marshaling waiver.

Your Honor, I've enjoyed numerous long and multi-case conversations with you on marshaling and we both understand one thing: that marshaling is a secured creditor remedy. The unsecured creditors simply have nothing to say about it. But also, again, the Committee's arguments here are too little, too late. This Court already approved the DIP order. The Committee did not appeal, and the Committee must now abide by its terms. Attempting to relitigate final orders entered many months ago in support of a plan rejection should just not be countenanced.

All of that brings us now, Your Honor, to now. Fundamentally, before this Court is a settlement plan. The debtors have decided, in their sound business judgment that the settlement embodied in this plan is fair and equitable and in the best interest of the estate. The evidence shows that the debtors reached this conclusion after carefully laying the benefits of the settlement against the likely rewards of litigation. The debtors have chosen the settlement rather than litigation. Reorganization rather than liquidation. And we think the evidence has shown that the debtors have chosen wisely.

Your Honor, we've covered the benefits of this value maximizing settlement at length. It settles potential estate causes of action in exchange for significant concessions from the FLLO ad hoc group, including subsequent recoveries to out of the money creditors and to review equity financing. In every respect, the settlement is fair, equitable, and reasonable. And it provides a certain path to Chesapeake's emergence from bankruptcy, well positioning Chesapeake to thrive as a going concern upon exit.

All along, Your Honor, the Committee's ignored these benefits. Instead, it would set the company on a different path of endless litigation against major constituency (indiscernible) that would very possibly result in a value destructive liquidation of the company. The Committee has steadfastly ignored the drawbacks and hurdles of litigation. Were this Court to grant the Committee's standing motions -- and it manifestly should not. The Committee would face a steep -- and we believe insurmountable -- uphill legal battle that could leave the carcass of these debtors on the battlefield.

If you could turn to the slide.

Your Honor, Mr. Zensky covered these claims, and I'm not going to go through them in extreme detail, but each and every one of these claims that the Committee's seeks to bring and the Committee believes the debtor should litigate rather than settle at best faces significant hurdles, and in our view, is utterly meritless. The obstacles explained in detail in our papers and Mr. Zensky covered them and Ms. Schwarzman covered them -- so there's no need for me to repeat them here. However, I'm going to give to you what you've not heard after a trial spanning nearly one month. As we touched on earlier, you have not heard any evidence that would support a claim that FLLO ad hoc group aided or abetted breach to the fiduciary duty. To the contrary, the uncontroverted evidence demonstrates that the debtors were not at all threatened by the FLLO ad hoc group, that the debtors had the leverage in the negotiations, and that the debtors board, management, and advisors made a sound decision to use that leverage in pursuit of a value-maximizing consensual deal.

The Committee's premise on the FLLO ad hoc groups alleged bad acts aiding and abetting, unjust enrichment, equitable subordination would just fail all the way. There are many and meaningful legal obstacles to this (indiscernible).

Your Honor, you've also heard (indiscernible) about the Committee's revival of preference causes of action. Revival is a misnomer. This is a claim to imagine non pro tunc if the debtors actually filed for bankruptcy before May 14th, 2020, and that they successfully prosecuted preference claims that never came to be. There's simply no legal support for such a novel claim, and certainly nothing in the record supports crafting such a claim out of pure equity.

Second, Your Honor, as set forth in detail in our papers, the Committee's proposed avoidance actions, the preference claims, all of their (indiscernible) -- their preference claims, their constructive fraudulent transfer claims, and any (indiscernible) fraudulent transfer claims are all barred in our view by Section 546(e). We could engage in a lengthy and fascinating legal argument on the merits of Section 546(e), but it's really a straightforward application of the statute. Mr. Zensky did a good job of beating that horse, so to speak. While he focused mostly on the WildHorse transactions, all of the Committee's proposed avoidance claims fail for the same reason.

The point here is that we believe it's a complete defense to these claims that can be established as a matter of law and basic undisputed fact, and as Mr. Zensky explained, the key legal obstacle to the Committee's proposed claims would be full litigated and would, in our view, result in the claims coming to a quick conclusion. Any assessment of the value of the Committee's claims and the reasonable and recommended settlement must face the very really risk posed by the Section 546(e).

Third, Your Honor, the record demonstrates amply that the TOUSA claims are utterly without merit, even if you set aside 546(e). Certainly, there's been no evidence that Chesapeake sought to either delay or defraud creditors. And as the debtors and Franklin explained at length, the FLLO provided numerous and meaningful benefit for Legacy Chesapeake.

Your Honor, the Committee's preferred path of litigation is not just unlikely to return value to the estate. It would be ruinously expensive, potentially hundreds of millions of dollars in admin costs and professional fees and enormously complicated. The survey of recent fraudulent transfer cases that we include in our confirmation brief makes clear that the timeline would measure in years, not months, and litigating the Committee's proposed complaints would undue all of the certainty this settlement brings. With settling comes the sure path for reorganization and a bright future as a viable going concern. With litigation may well come liquidation. The debtors have more than reasonably avoided that value-destructive path. So too should Your Honor. The plan is satisfying the requirements of the Bankruptcy Code in all respects, of course, but it does much more than that. Two, the plan maximizes value for these debtors and for all the stakeholders, including Chesapeake's more than 1,000 dedicated employees. It provides these debtors with a fresh start, a sure footing, and a chance to emerge from bankruptcy as a thriving going concern, and it embodies the very best of the restructuring process.

Your Honor, we respectfully submit the debtors and the plan sponsors have more than satisfied their burden of proof, and we ask that after considering the evidence presented, Your Honor enter an order confirming the debtors' plan of reorganization.

Unless you have any questions, Your Honor, I will just preserve time further, and I thank Your Honor.

THE COURT: Thank you, Mr. Schaible. I do not have any questions.

Let me ask are there -- I'm sorry. Ms. Hagle? Thank you. Good morning.

MS. HAGLE: Good morning, Your Honor. Can you hear me all right?

THE COURT: Perfectly. Thank you.

MS. HAGLE: Thank you, Your Honor. I think I'm on deck, if that's okay with Your Honor.

THE COURT: Of course it is. I'm sure someone's got a list that I just didn't get, so I'm just -- whoever pops up will go next, so whenever you're ready.

MS. HAGLE: Okay. Thank you very much, Your Honor.

Jennifer Hagle of Sidley Austin on behalf of MUFG Union Bank in its capacity of administrative agent under the DIP facility, the pre-certification senior revolving credit facility, and the proposed exit facilities.

As you know, Your Honor, you have heard very little from MUFG over the course of this trial. There is a reason for this. Even though the Committee made reference to MUFG in certain of its draft pleadings and its opening, it never actually presented any evidence that would challenge MUFG's rights under it's pre-petition documents, the DIP, or the plan.

According, at this point, MUFG's primary interest is in the debtors' exit from bankruptcy in a time frame generally consistent with the DIP facilities and the RSA milestones for the benefit of all stakeholders, including the unsecured creditors. By all accounts, Your Honor, the bankruptcy process has done in these cases what it was intended to do. The pre-petition settlement contemplated by the RSA has been subjected to a vigorous, extended, and very transparent vetting process. In the end, the debtors have more than satisfied their statutory burden to exit Chapter 11 with a strong restructured balance sheet, adequately capitalized, and well positioned to reclaim its competitive position as a leader in the oil and gas market.

Your Honor, I will not attempt to rehash the closing statements you've already heard. Instead, I think it's important to look at what you did not hear over the course of the trial, especially as it affects MUFG. In particular, I want to focus on a lack of evidence from the Committee regarding the need for a DIP and the need for an exit facility, the lack of evidence to support the technical complaint underlying the standing motion, and the lack of evidence supporting the proposition that this company could somehow survive as a going concern without confirmation of the debtors' plan.

First, let's take the lack of evidence against the DIP. The Committee, in their opening, and in particular, in the lead-up to trial, argued that the DIP was somehow improper. On December 4th, you responded to these baseless accusations from the Committee by saying it, quote, "may even cross over a line", end quote, and if the Committee wished to attack the integrity of counsel, it should do so quote, "based upon an evidentiary record, not someone simply making statements in the public record", end quote. Despite Your Honor's warning, in the end, we are left with nothing but Committee counsel's assertions and arguments. Indeed, there is no evidence in the record after 12 days of testimony that the DIP was negotiated in bad faith, nor any evidence that can lead to an inference that the DIP was the product of anything but a hard-fought arms-length negotiation among sophisticated commercial parties.

Mr. Dell'Osso testified that the debtors need access

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to cash. It should come as no surprise, and in fact, it came as no surprise to Your Honor at the final DIP hearing that he testified the debtors wanted more money and the DIP lenders wanted to commit less. And in the end, surprise, a number somewhere in between was negotiated. Again, it should not come as a startling revelation to any seasoned restructuring practitioner, let alone Your Honor.

Mr. Antinelli discussed the DIP negotiation process in detail. Reiterating his testimony from the DIP hearing, the process was competitive, there was a specific competing DIP proposal, and that MUFG and the DIP lenders ended up giving significant concessions including delivery of a fully negotiated exit financing package in an effort to reach agreement on the final terms of the DIP.

The Committee introduced evidence showing that the DIP borrowing ultimately ended up being lower than initially forecast. We don't dispute that fact. That said, there is simply nothing inappropriate, suspect, or even surprising about that fact. Experienced financial advisors routinely generate conservative projections taking into account the unknown and general volatility that accompanies a bankruptcy filing. The debtors' witnesses testified the commodity prices improved from filing to today, improving the debtors' cash position. And finally, they also testified the Mid-Con sale further improved the company's cash position by over $130 million that was not initially taken into account in the debtors' initial DIP budget.

The fact that the debtors obtained the benefit of a number of unexpected positive financial developments should not now serve as a basis to call into question the appropriateness of the DIP terms as they were negotiated on the front end, especially in the context of unprecedented uncertainty and volatility in the oil and gas market.

The Committee offered no evidence in rebuttal. Instead, they simply regurgitated their arguments from the final DIP hearing. The Committee lost those arguments in August. In the following months, they did not appeal. They did not file a motion to reconsider. If their utter failure to support their argument with evidence was not enough, their five-month failure to comply with the proper procedural steps to contest the final DIP order certainly must doom their arguments against the DIP.

Next, the lack of evidentiary and legal support for the technicals complaint involving MUFG. The Committee said in their opening -- while defending our attempt at relitigating the settled DIP order -- that quote, "everything in the technicals complaint is an avoidance action, and therefore the DIP lenders can only look to those otherwise unencumbered assets last". That is, to say the least, Your Honor, an interesting position. In making the argument, Your Honor may recall that the Committee's opening referred to the recent Chapter 11 proceedings for Legacy Reserves. In that case, Judge Isgur was confronted with the very same need avoidance argument. His response, and I quote, "This does not apply to anything that they're alleging is a defective lien, I don't think, because I don't think those are Chapter 5 recovery. They're simply not liens."

Now, the Committee tries to strain their argument even further. Avoidance action proceeds encompass not only alleged defective liens, but also certain other assets that everyone agrees and the debtors and secured creditors stipulated were never encumbered in the first place.

Beyond the Committee's strained legal positions, the Committee utterly failed to establish the value of the assets referenced in the technical complaints that it argues are unencumbered. Indeed, the Committee's own expert testified that he did not recall which counties had mortgages filed inside the preference period on behalf of MUFG and which had mortgages filed inside the preference period, only with respect to the FLLOs and the 2Ls.

He further testified that if a mortgage was filed in the preference period, he considered the asset subject to that mortgage to be unencumbered in his analysis, regardless of whether its essential prosecutions or the preference actions would lead to avoidance of liens as to all three of the pre-petition funded debt facilities or only the FLLO and second lien.

In other words, if a probably was mortgaged by the RBL lenders outside the preference period and then also mortgaged by the FLLO and 2L lenders inside the preference period, the Committee considered it unencumbered, even though it is not even alleged that the RBL lien is avoidable. Bottom line, at the end of the day, it doesn't matter whether FLLO and 2L mortgages might be subject to a preference claim if the RBL mortgages are not because in that case, those assets are nevertheless encumbered. As a result, Your Honor, this fundamental mistaken assumption destroys the credibility of the Committee's valuation of unencumbered assets, even if its technical complaint were to be successfully prosecuted in all of other respects.

The Committee also argued in their opening the DIP lenders would not look first to assets that were unencumbered pre-petition. Each side's experts made a legal assumption with the debtors' expert assuming, on advice of counsel, that DIP lenders would first look to otherwise unencumbered assets, and the Committee's expert, assuming on advice of counsel, the DIP lenders would collect pro rata from otherwise unencumbered and encumbered assets.

For the same reason the Committee's unencumbered asset valuation falls apart, the Committee's assumption on

MUFG's enforcement of its DIP lien is simply not valid. With only minor changes due to trading activity, the DIP lenders and the RBL lenders are virtually the same. This is almost axiomatic in Chapter 11 proceedings implementing DIP financing. However, the Committee completely ignored that the liens securing the RBL, FLLO, and second liens overlap.

Exhibit UCC-429, available at ACF2323-29, is in evidence, Your Honor. That document is the creditor agreement between the secured creditors. Section 2.04 of that agreement provides, and I quote, "The parties hereto acknowledge and agree that it is their intention that the priority lien collateral, the second lien collateral, and the third lien collateral be identical". It then goes on to provide minor enumerated exceptions. The collateral trust agreement, also in evidence, has similar language.

As pointed out by Ms. Schwarzman, it is simply unreasonable to expect that a bank would weaken their own collateral position when they have an alternative. Why would a bank want to risk recovering less on (indiscernible). That is precisely why MUFG negotiated so hard -- and believe me, Your Honor, I was there -- to include the language addressing marshaling in the DIP order, specifically, and I quote, "the DIP agent may use commercially reasonable efforts to first apply proceeds of the DIP collateral that is not existing collateral to satisfy the DIP obligations before applying proceeds of DIP collateral that is existing collateral to satisfy the DIP obligations", end quote.

Third, the Committee has offered no evidence showing that this company can survive indefinitely without the DIP financing and without exit financing and the rights offering. As Your Honor correctly pointed out during the direct of Mr. Baggett, the Committee has offered no evidence that the debtors have anything other than the two obvious options: confirmation or liquidation. There's no in between compromised position. Without imminent confirmation, the DIP financing will inevitably go into default.

The DIP order provides that confirmation must occur by 195 days from the petition date. Your Honor, that date was last Saturday, January 9th. I will represent to the Court that the DIP lenders have granted a short extension of that deadline, but you can be sure any further extended delay will most certainly put the DIP financing at risk of default and termination.

An open-ended extension with no plan in place during which time going concern value is somehow miraculously preserved is simply not a reasonable assumption, and of course, the Committee has offered no evidence to the contrary.

Your Honor knows this is a large and complex case. Even with a highly negotiated pre-petition RSA, the tenure of the bankruptcy has now spanned over seven months. As

Mr. Schaible pointed out with respect to the rights offering, the DIP and exit commitments have been in place for that entire time, patiently waiting for confirmation, during a period of unquestioned market uncertainty. Without confirmation, the DIP will go in default and could terminate. The DIP in default, the termination of that will also likely be triggered under the RSA. And the debtors will be left to wallow in a free fall bankruptcy with no exit in sight, without access to capital, in a price environment that remains volatile, compounded by political unrest and a raging pandemic.

Your Honor, I'm not going to rehash the debtors' arguments in support of the plan, but we certainly join in the argument and submit that they have satisfied their burden. The Committee has simply failed to present the evidence to support their objection and their standing motion, and we respectfully the Court deny the Committee's standing motion and confirm the plan.

Thank you, Your Honor.

THE COURT: Thank you, Ms. Hagle.

Anyone else wish to make argument that supports confirmation of the proposed plan?

Mr. Mitchell? Mr. Mitchell?

MR. MITCHELL: Your Honor, can you hear me okay?

THE COURT: Very well. You got a new headset.

MR. MITCHELL: Thank you. Well, I'm actually in the office today, Your Honor, so I have a new background too, so --

THE COURT: Ah, got it.

MR. MITCHELL: Appreciate it. Thank Your Honor.

And Your Honor, I don't need anybody to take control. Just a couple of minutes from Energy Transfer, if you don't mind.

THE COURT: Certainly.

MR. MITCHELL: Good morning, Your Honor. Again, John Mitchell for Energy Transfer.

Your Honor, about a month ago, when I gave opening remarks on behalf of Energy Transfer, to start this confirmation trial in opposition to the plan, I reminded the Court of the long and substantial history between Energy and Transfer and Chesapeake. And even though Energy Transfer likely was the largest single unsecured creditor and likely had a longer relationship with Chesapeake than any other creditor in these cases, it was not invited to participate in the pre-petition restructuring discussions. Instead, one of the debtors' first steps in this case was to pursue litigation against Energy Transfer and depending on how that litigation would ultimately play out, Energy Transfer would hold unsecured claims against these estates in the billions of dollars.

And due in large part to the proposed treatment of those unsecured claims, including the unfair and disparate treatment among unsecured creditors, Energy Transfer objected to the plan. But I rise today to express Energy Transfer's support of the plan, and should the Court approve a compromise that will be brought before you very soon, Energy Transfer and Chesapeake will have laid the groundwork for commercial -- excuse me -- a continued robust commercial relationship that hopefully will last for years to come.

Now, it's important for Your Honor to understand that the agreement reached between Energy Transfer and the debtors likely would not have occurred had the debtors not heeded this Court's comments and amended their plan to provide parity and treatment among classes 6 and 7.

Now, the Court will recall an interesting cross-examination of Mr. Lawler, the debtors' CEO, when a dialogue ensued between my co-counsel Mr. Yetter and Mr. Lawler about whether or not there was or wasn't a commercial deal. And while that isn't necessarily the purpose behind a confirmation trial or even cross-examination for that matter, it certainly led to a concerted effort by both parties over the holidays, concurrently with the ongoing of this trial, to get the deal done, and key to getting that deal done were the modifications contained in the fourth amended plan and the proposed treatment of the unsecured creditors contained therein.

Now, Your Honor, the plan isn't perfect, and yes, Ms. Schwarzman, Energy Transfer certainly would have wanted more. But it is a fair treatment of the unsecured creditors. Energy Transfer would urge the Court to confirm the plan as proposed.

Your Honor, if I might just reserve a couple minutes for rebuttal, if necessary.

THE COURT: Of course.

MR. MITCHELL: Thank you.

THE COURT: No. Thank you for your statements, Mr. Mitchell.

Let me -- Mr. Siegel, I think came on the same time as mr. Mitchell, so let me take him next.

Mr. Siegel?

MR. SIEGEL: Thank you, Your Honor. First, I want to join with everyone in thanking the Court and all of the court officials and their patience and their availability in going through this remarkable Zoom confirmation hearing. I know this is not Zoom but it's --

THE COURT: Yeah. This --

MR. SIEGEL: -- we all call it Zoom.

THE COURT: -- the folks at GoToMeeting would be very upset with you.

MR. SIEGEL: Yes. And I will try to only call it GoToMeeting going forward.

I also just want to say how I marvel at the skill of all the lawyers who made their presentations during this incredibly difficult trial and I think we should all be very pleased that in this really difficult time, we've found a way to do our jobs and try and allow this company (indiscernible).

THE COURT: I agree.

MR. SIEGEL: Having said that, Your Honor, I just want -- I don't have much to say, but specifically, all we really wanted to say is just really nothing has changed from our opening. At the end of the day, we do not believe that the creditors' committee has done anything to overcome the debtors' case to further the plan. We think that they have not demonstrated, absent the lawsuit, that they can meet the -- or they can (indiscernible) the confirmation requirement.

And with respect to the lawsuit, we do not think they have demonstrated that there's any justification for the sale. In particular, as it reflects our holders, we do want to make the point that we don't believe that they've instituted anything that overcomes the safe harbor protection that 2L holders have. And additionally, they have not demonstrated how they can fashion a remedy that would not inevitably harm innocent 2L investors who invested in this caper without participating in any of the prior actions they suggest were perpetrated on the company of the unsecured creditors. And -- actually, that's really it.

Thank you very much, and I'm happy to cede (indiscernible).

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THE COURT: Thank you, Mr. Siegel.

I think -- and I'm going to get this wrong. And I do apologize. Is it Mr. Geoghan? You -- I can see you talking to me. I cannot hear you. Had you hit "five star" or do you have yourself muted from your end? So you hadn't hit "five star." You have hit "five star." But you don't have yourself muted from your side. Want to give me another try? Oh, there you go. Oh, there you go. 646 number?

MR. GEOGHAN: Yes, Your Honor.

THE COURT: Got it. All right. My apologies. And tell me your name, and I apologize for getting it wrong.

MR. GEOGHAN: No worries, Your Honor. Dan Geoghan from Cole Shotz.

THE COURT: Geoghan. Thank you. My apologies, sir. Geoghan.

MR. GEOGHAN: No worries, Your Honor. No worries.

Your Honor, Dan Geoghan from Cole Shotz here with some of the members of our team and the Arnold & Porter team. Your Honor, we represent G-L-A-S, GLAS LLC as the term agent for the term loan.

Your Honor, we will be the briefest of all. We rise to join the arguments that were made by the debtors, the lenders, and the other parties thus far. We will not -- excuse me -- in confirmation -- in support of confirmation of the plan. We're not going to provide a closing at this time, and instead, we'll reserve any time for rebuttal if necessary.

THE COURT: Thank you for your statement, sir. And -- all right.

MR. GEOGHAN: Thank you, Your Honor.

THE COURT: Thank you.

Let's see. I think -- Mr. Binford, I think you were next.

MR. BINFORD: Good afternoon, Your Honor. Jason Binford representing the Attorney General's Office on behalf of the Texas Controller, Unclaimed Property Division. We are among the parties, which it looks like our turn to speak, which objected to the plan but are no longer objecting to the plan because we worked things out. The language that we agreed to is at paragraphs 178 through 181 of the confirmation order. We hope that those high numbers of paragraph doesn't take away from how important we consider this issue.

And I am going to advise that -- put on the record what I told debtors' counsel that I was going to do which is in paragraph 181, it is a general reservation of rights for important issues including pending matters, and by pending matters, my understanding of that is that this does not resolve the adversary proceeding that the Texas controller brought regarding the declarations we are seeking from this Court. So we will -- we do intend to go forward with that adversary proceeding. It's just important that there's no misunderstanding about that.

But we are pleased with the language that we have in the confirmation order and do not oppose confirmation.

THE COURT: Got it. So Mr. Binford, I appreciate you working through the issues. I have had an opportunity to read the redlines, and you know, all the interesting stuff is always at the end in the high numbers. So that's -- I had ample opportunity to see it. I appreciate you working through it, and we'll deal with the other remaining pending matters in due course.

MR. BINFORD: Thank Your Honor.

THE COURT: Thank you.

All right, Ms. Brown?

MS. BROWN: Yes, Your Honor. If I could have the screen as well.

THE COURT: Everyone's going to watch because everyone's going to be amazed that you're going to do this yourself.

MS. BROWN: Now you just jinxed me.

THE COURT: All right. You should have it.

MS. BROWN: Now, I never know if you can see it. Do you have it up there?

THE COURT: So I will tell you when you can see it in the little box that will come up on your screen, that's when we all can see it. So you can't see it because I can see it in your glasses -- you can't see the little box yet, and neither can we.

So if you share your screen, then you'll get the box as to what you want to share, be it an application or a screen.

MS. BROWN: Well, you know, I'm just going to do it without it. I don't understand why it's not coming up.

THE COURT: I did not mean to jinx you. The system confirms that you have control.

So when you click on the bottom, on screen, what does it do?

MS. BROWN: Yes. I clicked on that and my main monitor, and it's not coming up.

THE COURT: Well, no. So it will -- it won't necessarily come up on your main monitor. There you go.

MS. BROWN: All right. There we go. Okay.

Thank Your Honor for walking me through that.

So we'll just start with what's the big issue for us. The largest stakeholder here at 237,000 royalty owners. And we heard some discussion during the opening about all parties and wanting to make sure all parties were involved in the plan process. We are now, but we weren't prior, and that's been a big issue in the case, and we don't want that to go unnoticed. But we are here to support confirmation of the plan.

In that support of the confirmation of the plan, we do want to make a couple comments just going forward because there are some royalty owners that I believe are still objecting. Almost all, I believe, have reached some type of concession or agreement with the debtor, but there are some outliers.

And just to kind of explain the process that royalty went through, the royalty committee is constituted to represent the small royalty owner interest. The royalty committee members should be recognized and commended for their service. They have been diligently following along in the process, reading everything we send them, asking questions, and having meetings. These aren't royalty owners that have a lot of legal experience. Some have some oil and gas experience. One is a farmer in Louisiana whose talking to you while he's building his fence. There's others that were -- one is a former legislator from Pennsylvania who lives in a small country town as well whose husband actually handled all her royalty interests and passed away recently. These are people who understand the every day issues for royalty owners.

And as discussed in the testimony, it's been uncertain times. We would like to thank the Court for all his time and effort in this case. Last Wednesday was an exceptional day, where the Court was dealing with a multitude of issues and never missed a beat, and we really appreciate the Court's savvy in dealing with the electronic issues that come up in this new world and being able to keep the case going in the way that it has.

The royalty committee's priorities have been to be professional, pragmatic, and practical. Have we heard frustration from all the Committee members? Yes. Is there anger at Chesapeake? Yes. But their role, as they see it, was to be pragmatic and to move forward with the best treatment for royalty owners generally. The resources they wanted royalty owners to have included somebody that they could ask questions to, such as us. We were told to answer every call that we had. If there was a proof of claim question, whatever the question, answer the call. And when it came to the plan process, they wanted that to be simplified for royalty owners, and we put together a video so that royalty owners could understand that process.

Here's some of the problem for the royalty committee. They were dealing with diverse interests with people from different states with different laws and different strengths to their claims. Pennsylvania, Oklahoma, Texas, Louisiana, Wyoming, Ohio. And as the Court well knows, there are different rights that are assigned to all of those royalty owners based on the law of those states. In the original plan, the debtors wanted to treat all royalty owners as unsecured creditors. We were able to get that change whittled away pretty quickly, because they're not all unsecured creditors. They all have different interests that they'll have to preserve, reserve, and prosecute, at some point. The plan today says that secured claims are secured claims. Unsecured claims are unsecured claims, and you have the option of going with a convenience class or the equity option. And those that are claims that it's not property of state are able to pursue those claims.

And I need to make it known that yes, the royalty committee did want funds segregated. That was a big sticking point for royalty committee members. They wanted financial control. In some ways, we wanted to -- the royalty committee members wanted to have added protections that may not have been in the leases. So from a legal perspective, while that was a goal, there wasn't necessarily a lot of standing to make that a reality without the consent of the royalty owners on those leases as well as the debtors. So they understood that as a practical matter, but also wanted the pitch to be made that the funds should be segregated as a good business practice, and hopefully, the debtors will be doing that in the future -- the reorganized debtors, I should say.

Nothing prohibits a royalty owner who has a claim that property is not property from the estate from pursuing those claims as I appreciate the plan and seeking a remedy at a later point in time to segregate whatever that disputed amount is, seek injunctive relief, or do whatever it is to protect those rights. The royalty committee could not protect the rights of 237,000 parties on the specific fact that relate to each of their claims, and so what it worked to do is to come up with the most general language that is as protected as possible. And I think as the Court may agree, that language became more and more protected as time went on, and I think it's a much better position than we started with the first plan.

Here's where we were at thee opening -- on a perilous fence with alligators and crocodiles on one side or the other. Here's where we are today. We're on a more stable fence, but still cautious, and a bit cloudy because there are some interests that will have to be pursued post-confirmation. But as an administrative claim, a claim that's not property of the estate, and all royalty owners need to know that, that it's not final. If you've got claims during that gap period, after the petition was filed and before confirmation, there are still rights to be pursued. And I don't use a dog just because the Court has made it known that he likes dogs, but because there's a symbolism there, and I hope that Chesapeake sees that symbolism and honors the loyalty of the royalty owners going forward.

The royalty committee raised a series of objections: increase the time to allow for admin claims, check. That's been done in the new plan, 120 days. Modify the term language in Article 4, check. That's been done. Adopt basic financial

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controls. We failed on that, but we did have an attestation that they will follow the law and the rules and provide the disclosures that are required under the law, and so that those reading that order will know that they can go look to what their state law is and the provisions that allow for open access to their royalty information. We asked for a simplified claims management process, check. That's been done.

So for the most part, the Committee's objections have been resolved one way or another -- maybe not as we proposed or that has -- as we would have liked, but it does make it better for royalty owners going forward.

We told the Court during opening that the testimony was so -- almost a wholesale lack of interest including royalty in the plan discussions, and while we did a standstill with the debtors after we came to an agreement, we actually had testimony showing that that was exactly the case. And that is Mr. Lawler's testimony on the first day, where he acknowledged that there was nothing in the plan process that dealt with whether they were unsecured, secured, or how a royalty would be treated. And I'm not stating this to put any type of blame on the debtors or to castigate the debtors in any way, but we heard from debtors' counsel today that there was a proposal that was submitted late last night to the unsecured creditors' committee and the debtors, and that was filed early this morning. Those parties also seemed to wholesale reject the

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importance of royalty owners in the company, because they didn't think to reach out to the royalty as they made that proposition. And so going forward, I think all stakeholders in the case, all stakeholders who own an interest in the debtor going forward need to recognize the importance of royalty owners. And while this may be standing on a soap box a bit, I'm going to do that. I would encourage some of the suits to go to Louisiana, go to Mansfield, meet with some of these people, get a better appreciation for what you're dealing with and not just looking at it in dollars and cents.

We heard some hyperbole as well, both in openings or testimony and during argument throughout the trial. Let's just put the hyperbole aside and start a process that the debtors, I believe, have started, to treating the debtors' business in a better, more professional way, and treating royalty with the respect that they deserve.

I missed my boat here. It's not nirvana, as the debtors said, but the royalty community does support confirmation, and we do thank that the debtors, the UCC, their counsel, and the Court for the time and energy put into this, and we have the best of hopes that Chesapeake reorganizes and does well in the future.

Thank you, Your Honor.

THE COURT: Ms. Brown, thank you. I want to take just a moment because I don't want to forget this. I understand what you've undertaken, and I understand that process that you've gone through. I thank you and your firm for what you've done. You've listened. You have been very balanced and even-handed, and I very much appreciate that. You've reduced what could have been a roar to a very professional, easy-to-understand issue, and I know the debtor hears you when you tell them, on behalf of 237,000 people or entities, that they need to be good stewards. I hear it. I know they heard it. And I thank you for your involvement.

MS. BROWN: Thank you, Your Honor.

THE COURT: Anyone else that supports confirmation that wishes to make any closing arguments?

All right. Mr. Stark --

MS. SMITH: Your Honor?

THE COURT: Yeah.

MS. SMITH: Frances Smith.

THE COURT: I'm sorry, Ms. Smith.

MS. SMITH: Can you hear me, Your Honor.

THE COURT: I can hear you. I can't see you. I know I saw you early this morning.

MS. SMITH: (Audio interference) camera on active.

THE COURT: Okay. Then Ms. Smith, are there comments that you wanted to make. I wish you could be on video, but if you can't, then we'll just do it by audio.

MS. SMITH: Judge, it seems it's having a hard time -- the software's having a hard time loading.

THE COURT: Okay.

MS. SMITH: Your Honor, Frances Smith of Ross and Smith on behalf of the Petty Business Enterprise, LP and their related entities.

THE COURT: Yes, ma'am.

MS. SMITH: Your Honor, the Petty entities support plan confirmation today. At the beginning of the case, Ms. Ross advised this Court that the Petty entities wanted this debtor to survive, and that is still Petty's desire, that this company survive. Petty has negotiated changes to the plan and to the confirmation order that preserve its rights to continue its attempts to get paid on its pre-petition claims and preserve its rights going forward, but for purposes of today, Petty is satisfied and would like the plan to be confirmed.

THE COURT: All right. Thank you, Ms. Smith.

Anyone else?

All right. Then, Mr. Stark, my thought was is that I give you the lunch break to sort of incorporate anything that you heard into your closing or to sort of think through what you heard and react to if you want to. Also, if you don't need it and you want to go ahead right now, we can -- I'm perfectly happy unless someone's got an issue -- I'm perfectly to take a 10 or 15-minute break and then just let you get started.

MR. STARK: Your Honor, can you hear me?

THE COURT: Yes, sir.

MR. STARK: Oh, thank you, Your Honor. You know, I've been listening very intently to what everybody has said. I've made copious notes. I've made them in my outline. I don't really believe I need a lot more time.

THE COURT: Okay.

MR. STARK: But we're going to spend some time together, just little ole me versus the world, and we should talk for awhile, so if Your Honor would like a lunch break, I'm happy to accommodate whatever Your Honor wants. But I'm otherwise ready to go.

THE COURT: Let's do this, just -- because I've -- we've got the entire day, and I haven't even given folks a -- of course, most people have turned their cameras off so they can walk away when they want. Let's do this. It is 12:30. Let's take a break until 1:15. Would that work?

MR. STARK: Certainly, whatever works for the Court.

THE COURT: All right. And so I will tell folks, just because I'm looking at the number of people that are on the video, don't terminate the meeting because you may not get back on. There have been in excess of -- there have been in excess of 500 people that have tried to get on. As you know, the video is limited to 251, the audio to 400. So what I'm going to do is I'm just going to leave -- I'm going to mute everything, but I'm not going to turn anything off, and I urge you to do the same, just so we don't have problems when we come back at 1:15. All right?

MR. STARK: Your Honor, before we break, Your Honor, may I just ask one question, please?

THE COURT: Of course.

MR. STARK: We have a set of slides, and I wanted to just to make sure Your Honor has them, and I just didn't -- I know that's it's important sometimes to have a hard copy. There we go. All right. So I don't need to send somebody over there quick.

THE COURT: Nope. They walked in the courtroom as we were talking and delivered the package.

MR. STARK: Perfect. Okay. Thank you, Your Honor. All right. We'll see you shortly.

THE COURT: All right. Thank you. We'll be adjourned until 1:15, Central time.

(Recess taken at 12:27 p.m.)

(Proceedings resumed at 1:15 p.m.)

THE COURT: Good afternoon, everyone. This is Judge Jones. The time is 1:15. Today is January the 13th, 2021. It's the continued closing arguments in the confirmation hearings in Case Number 20-33233, Chesapeake Energy Corporation.

Mr. Stark, whenever you're ready.

MR. STARK: Thank you, Your Honor. First and foremost, can Your Honor see me?

THE COURT: Very well.

MR. STARK: Am I coming through on my -- okay, good. Thank you.

I can't help but start by saying throughout the entirety of this case, I desperately wanted to be in the courtroom, and no more than at this moment right now. This has been a very trying experience obviously for everybody. We'll talk about that in just a minute, but really to have a good, thoughtful, analytical conversation about everything that's going on really should be done in person, and I really sorely miss that opportunity.

So forgive me, Your Honor, if at a point I become colloquial. I'll pretend that I'm in the courtroom with you, and maybe I can even (indiscernible) you even to ask me questions and we can engage on some of these very tough topics, because they are tough.

But I do first want to express, as every -- as all of the other professionals did, our thanks to the Court and the staff, but more so in a little bit of a different way. Fighting the deal in this kind of scenario where the company controls the timing and the narrative, and as many different wonderful law firms that we're against, you had many bleary-eyed committee professionals in your courtroom who were inelegant at various different points in time. So we do very much appreciate the patience in allowing us to get it in. Sometimes it was a little bit more by sledgehammer than otherwise intended, but I think it's there and I think we can talk about what it all means now.

I also do want to congratulate all of my opposing counsel. Your Honor knows the respect and affection I have for Ms. Schwarzman, Mr. Nash, and Mr. Schaible, but also Mr. Zensky, who I've known for 20 years. We've had a very interesting trial with lots of very interesting issues, and now it's time to actually unpack it.

As I said at an earlier hearing, I used a gloss of a farm animal that somebody put lipstick on, but -- and that's inappropriate. But a lot of the narrative is surface and a lot of it was not -- is more in the documents than it is in the persona that presents on the stand. And a lot of it is in the engineering and the mathematics. And so it's analysis. It's analysis that drives what we have to do slowly and methodically, thoughtfully, about a very large case and what's happening here, and that's what I'd like to do.

And even though I would love to have a debate with you about two year versus five year and inflation adjustments and NAV versus DCF and efficient market hypothesis versus reverse behavioralism, Your Honor knows that I could talk for days about that, and sometimes I even do, but I think, Your Honor, hopefully you and I can debate that at a VALCON presentation in the future because I'm not going to engage in it today.

THE COURT: That would be great.

MR. STARK: Your Honor, we may not agree with 5.129, but we respect the Court's judgment. And even though Your Honor called it a preliminary view, we know better than that. At least, we know that Your Honor was thoughtful about it, and so we're going to respect that. Again, lodge our disagreement, but today's presentation is not to revisit that number. It is to discuss the implications of that number, and that's what I'd like to do if Your Honor will allow me.

THE COURT: Sure.

MR. STARK: First and foremost, I want to talk about what that number means, and what it means in the scheme of this case and the value allocation. And then in particular I want to talk about what it means in terms of the encumbered versus unencumbered, what we call the technicals complaint, for lack of a better phraseology. Certainly we'll talk about the causes of action, and (indiscernible) you've already heard an awful lot about it, and we'll slowly and methodically unpack the evidence.

We'll spend a little time on the collapsing of Classes 6 and 7. Not a lot of time, but I think we do need to talk about it. Then we have some final issues. And at the end of this presentation, this discussion that hopefully Your Honor

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and I will have together, we'll talk about where we think or respectfully propose this case goes from here. Okay? Does that work for Your Honor?

THE COURT: Sure.

MR. STARK: Okay, good. Let's -- if you wouldn't mind, then can you move it, please, to Slide 4.

This is our plan schematic. This is where the value flows, but with a caveat. This is where the equity value goes. And it shows the pre-rights offering and then shows the after-the-rights offering effect. Okay. You can see now in the row that is just below the bottom row, unsecured notes and general unsecured creditor claims are now merged into a consolidated Class 6 and 7 for the 4 percent.

There is an increase now in the amount of claims that's an updated number from the company that's been making settlements with mid-streams, and so the numbers are increasing. So that's the latest number we have, but this is the plan schematic, and this is what people are getting without the warrants.

Next slide, please.

Mr. MacGreevey testified about his calculation of warrant value, and his model is in evidence, or at least his testimony about his model and the demonstrative laid out his calculation of the warrant value. All we did here is we increased -- we plugged in the 5.129. We used the same model.

We used 5.129 TEV and we increased the debt (audio interference) number. Okay. And this is what the model spits out.

If at any point Your Honor wants the natives of any of this, we're perfectly happy to provide it, but --

THE COURT: Okay.

MR. STARK: -- this is a printout, and I'll make the representation those are the only changes that have been made about what otherwise has been presented to your Court. Okay.

We can still do this as a Black-Scholes under the -- some of the warrants are (indiscernible) money at 5.129, but we assume that people may hold that because there's extra option value out of that, so we used that value instead. Okay.

Slide 6 takes the first slide, the value allocation is equity, and merges in the warrant value using the same schematic in 5.129 and the updated claim amount. We have for exit financing 2.125 billion, but we assume that some portion of that will be debt and the 600 million in equity, okay? So we just sort of take the 1.525, subtract that from the enterprise value to get sort of a stock value, and then we allocate accordingly.

And you'll notice in the box all the way to the right, the recovery box, how people fair at this stage. We're not done yet. This is just the first flood of value allocation. The FILOs get nearly 130 percent. We'll come back to that.

Next side, please.

Now, we're migrating a lot of value around because what we do in the first (indiscernible) in terms of equity allocations are then revisited by the rights offering, which moves 67 percent of the stock around to different places. Okay. So you'll see up at the -- all the way up in the column all the way on the right, you'll see what the allocations were prior to the rights offering and then how it migrates as a result of the rights offering. This is just math, 5.129 minus the debt following the equity allocations and the rights offering. Okay.

What's important to realize is that 25 percent of the rights offering is reserved for the backstop parties. It's not an even spread of rights; 25 percent, 77 percent of that amount goes to Mr. Schaible's clients, the ad hoc committee. That's worth about 447 million. Twenty-three percent of that amount goes to Franklin and that's worth about 134 million. Together that's 561 million. 63.75 percent of the rights go to the FILO class generally. That's on top of the backstop. And 11.25 percent of rights goes to the second lien class. So that's the mapping of where the value flows.

Next slide, please.

Well, let's put a value on those rights. We can do that with 5.129. Remember that the warrant is struck at a discount at 3.25 billion TEV. That's a 67 and a half percent discount to enterprise value as Your Honor is judging it. Okay. And they don't just get to buy a little bit of it, they get to buy 67 percent of that. Okay. So if you're a rights offering participant, you can buy any kind of percentage. Collectively the group gets $1.844 billion worth of stock for $600 million.

And we'll state that in ways that an English major like myself can understand. If I put a dollar in, I get $3.07 of stock coming out based upon Your Honor's judgment. Okay. And here is the math for that.

Next slide please.

Now, let's exclude the backstop rights. Let's only talk about the 75 percent of the backstop that's allocated to the different classes. If you are a FILO creditor, but you're not part of the backstop group, you don't get that extra (indiscernible) of the backstop. You're getting 108 percent return on your claims in this case. If you're a second lien creditor, excluding Franklin, as a backstop participant, you're getting 28 percent. The unsecureds, earlier they were getting around 7 percent. Now they're getting 4.3 percent. The 4.3 percent equates to two -- around $235 million.

So I think Ms. Schwarzman used a different number, but their modeling tries to anticipate what our modeling would come up, they said that it would be a little bit less than that. Our model shows a little bit more than the 200 and change number, to around 235 million by our model. Okay.

Now let's include the backstop rights. If you give the backstop -- if you allocate the value to the backstop participants, here's what you find out. If you are a member of Mr. Schaible's group, the FILO ad hoc committee, you receive 133.4 percent return on your claims in this case. If you are not a member of his committee -- now, he has up to 85 percent of the class represented. If you're not a member of his committee, so around that 15/16 percent, you get 108 percent.

On a blended basis, that is a little bit less than a 130 percent return on the class claims. And if Your Honor looks at the bottom line, subtotal after backstop allocation, and you look at the column in the middle, total value received, including rights offering, less new money costs, so we've backed out the 600 million we had to pay for the stock, you're getting $1.977.1 billion of value on the claim amount of 1.625 billion claim amount. That's about 452 -- that's $452.1 million over par that is going to the FILO class and the backstop parties away from others.

If we flip the slide and we look at how does Franklin fair, remember it too is a backstop party, we know from Mr. Circle's testimony that Franklin holds a small amount of the FILO, about 78 million, but a ton of the second lien paper. The second liens don't get an awful lot of the rights offering, but Franklin does. So whereas other second lien creditors receive 28 percent return on their claims, Franklin gets 41.3 percent on its claims. Granted, some portion of that, some very small portion is their FILO piece, most of that is their second lien, raw disparity for Franklin.

Next slide, please.

Now we're going to talk about the technicals complaint in a minute, but it is useful to think about, at this moment, what would unsecured creditors be due from unencumbered value away from the 2L deficiency claims? The FILOs are being paid off and then some. The 2L deficiency claims. How much are the combined Classes 6 and 7 due because there's so much unencumbered value? We notice about 30 percent of the estate is unencumbered value. We have the unmortgaged oil and gas assets, about 10.6 percent of TEV, and then we have those cash-up mortgages, FILOs and the second liens. Just as the company was racing to prepare itself for bankruptcy, they filed a whole bunch of catch-up mortgages, stuff that they admit, so that's 17.6 percent of the enterprise value.

Using a 5.129 billion TEV, that's $1.445 billion of unencumbered value. This is the first of a couple of grave errors that Ms. Schwarzman made in her presentation to you. When she talks about unsecured creditors being out of the money, she confused aspects of this trial. Of course we've been making the argument that the enterprise is larger than the claim hurdle. We were unsuccessful. That doesn't end the inquiry because a third of this company's value is unencumbered value.

So even if we never crossed the hurdle, unsecured creditors are due on just the O&G assets, 1.445. Well, that's not actually right because we have to back out the second lien deficiency claims. A big chunk of that has to go to the second liens for their deficiencies.

What's the residual -- let's even do this a little bit more slow. There's another slide later I'm going to show you, there's some additional unencumbered value that gets added to the 1.445 to get to around 1.7. That is a full basket of unencumbered value. It includes the headquarters and some other miscellaneous assets with additional liens on them. From there we subtract the cost of exiting, administrative expenses, including the $60 million breakup fee that needed to be for the rights offering. But that calculates around 200 million.

So there's about 1.5 billion in unencumbered value. The second liens are entitled to a deficiency claim for that. Okay. That backs out about 600 million that goes to the second liens, leaving 900 million of unencumbered value that all other things being equal should go to the combined Class 6 and 7. We don't get $900 million. We get $235 million. We are short-changed by $670 million. That's just math. That's how it works.

THE COURT: You left --

MR. STARK: The formation --

THE COURT: I mean, Mr. Stark, in all fairness, you left out a couple of things, didn't you?

MR. STARK: I'm not sure. What did I leave out?

THE COURT: Well, I'm going to listen to your argument. I'm just telling -- go ahead. It would be better if you --

MR. STARK: No. I want to engage with you, Your Honor. If there's something that you think I'm not hitting, I'd like to hit it.

THE COURT: You know that you're not. You know that you're ignoring some things. I'm not going to debate this with you. It would be much better if you would just be candid about where the Committee stood. You want to ignore those things you don't like and that's not right, but go ahead.

MR. STARK: Your Honor, I am candid. I am honest. I'm thoughtful. If I missed something, it's an error. It's nothing more than that. I just asked that our people run the model straight through. I understand the issue with respect to the roll-up DIP. If that's what Your Honor's talking about, I'm going to address that in a minute.

THE COURT: Okay.

MR. STARK: But if there's something else I missed, then I just don't know.

THE COURT: Go ahead. I'm listening.

MR. STARK: Is that the issue?

THE COURT: I'm listening, Mr. Stark.

MR. STARK: Okay. I'll continue. The summation that I have, it sounds like Your Honor gets it, is that there is an overpayment of a substantial amount to the FILOs, and that's where a lot of our value goes, the unencumbered value goes for that. Okay? That's about $450 million.

The FILOs get a fair amount as well. Maybe that's the differential of 150. It's hard to calculate, okay. But there is a massive shortfall, and that's what we want to talk about. Okay?

Your Honor heard a lot of argument today, or a lot of framing of the way to think about this case, that there was a deal in the spring and neither the natural consequences of the company coming forward seven months later and the chips fall where they may. That may be principled in terms of the way in which they presented the case, but that is not law. The law could not be clearer. It's in the statute. Valuation has to be done today. Creditors cannot be paid more than 100 percent on the dollar, even if it's justified on a deal way back when. That the law is clear as day.

Now, I'd like to -- if I'm intuiting correctly, Your Honor, about I've missed out a couple of things, it's the roll-up DIP. Maybe I -- I may have missed other things, and if Your

Honor will -- I really did want to engage and address. But my next sets of slides talk about the roll-up DIP.

THE COURT: Go ahead.

MR. STARK: If we could move then, please, to Slide 15.

This is sort of the same (audio interference) you had before about $543 million of unmortgaged assets, 902 of the catch-up mortgages. Here you have delineated the headquarters which is a stipulated value of 170 million. There's non-core assets of another 103, 208, and then there was some unencumbered gathering assets of about 9 million. That's where we got the one-seven number from, and all of that's in evidence. Okay. So that's the backing out of the residual pieces of assets that weren't on the prior page. Okay.

There are three justifications for the migration of the value from what we perceive would be unencumbered value to others. The first one, and we didn't hear a lot of this today other than the fact that it's history that must carry forward. But again we have to look at it at today's valuation standards, okay, and the company has increased in value.

The first point was the debtor said we need the capital. We must have 600 million to deal with structure so as to enable the company to have equitization capital of $600 million and the cost of capital are not market. Okay. Because of the company's improved performance over the course

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of the case, the debtors only need, by their own books and reference and assessments, as Mr. MacGreevey put that before Your Honor, 185 million at most.

And as far as the proposed cost of capital, this is excessive of market by a long shot. You heard testimony that 59 percent discount to 4.1 billion was well beyond commercial norms. 67.5 percent is facially absurd. There is no support for that in any even financial (audio interference) that I'm aware of. And yes, it's conceded it was never shopped. It was part of the deal.

So to the extent that this was financing that is deemed necessary for a company that's dramatically improved in value, I would propose to Your Honor that LaSalle is incredibly fitting for this situation right now. Okay. And the fact that -- and I take huge issue with Mr. Schaible's statement about, well, it's all been shopped because the case is open. Your Honor, there is no market test by a case that's pursuing forward in a litigation posture.

The debtors have made very clear to anyone and everyone, including this Court, that it cares about getting out as soon as it possibly can. It has its deal and it's fine with it. It doesn't care who its new owners are. It just simply wants out. Okay. You've heard me say it. No one will negotiate with us. They like their deal too much. And everyone in the marketplace has heard that in open court. That is not a market test.

Even if litigation could ever be a market test, and it certainly isn't, this case has always presented itself as the fix is in, don't bother. This is not a LaSalle process.

The next slide, Slide 17, Your Honor, is Mr. MacGreevey's taking of the books and records, the source of the (indiscernible) of the company has said that it needs for exit financing, and it is adjusted for the 2.256, and now with today, because there haven't been new money draws, no liquidity draws on the debt, that's gone from 600 million to 185 million. That is the evidence on the record.

The second justification as to why it is that the migration of value from unsecured creditors to the secured creditors is because they have defenses to the assertions that that value is truly unencumbered. They have the 546(e) defense, and we'll talk about that in a minute, but I intend to suggest that it would be uprooted from the entire statute if not completely pioneering and no court has ever ruled on it in any way shape or form that doing a catch-up mortgage filing for bank debt is a 546(e) safe harbor security contract.

Mr. Zensky presented about the contemporaneous exchange defense, and I didn't hear him accurately, but I may not have heard him accurately, but I think he's confused about the statutory requirements. Okay. There are two of them, and that's what Bison Builders talks about. That was the issue in

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Excco (phonetic). And Mr. Nash and Your Honor know so well that the intent has to be reflected. It's not by circumstantial evidence, but by the document itself of a swap transaction of actual contemporaneity.

It doesn't matter that the market standard is that we lend the money on day one and 60 days later we deliver the mortgages. That may be the realities of the lending practice, and it may be simply a pragmatic problem that lending in that space has, but that is not a reflection of actual intent of a swap transaction. Sixty days is too far.

But even if it was somehow thought to be (audio interference) a swap in the scheme of financing, catch-up mortgages filed five, six months after the money flowed can never be. There's no cases that say that that's a substantially contemporaneous exchange. It just isn't.

So that takes us to the big argument, the DIP soak-up. Okay. And I'm asking Your Honor to think really deeply and engage with me about this because this is actually really, really, really important. It is simply too easy to say, well it's a roll-up, they've got an admin claim, they get all the unencumbered value. And that, Your Honor, we submit is very, very wrong as a matter of foundational bankruptcy law.

On top of that, just to frame the issue, and I've been very clear about this since way back when. For a very long time, I said it. I said it at a disclosure statement hearing. I said it at the opening here. This issue itself I believe is a fundamental violent wrong that's being done in this case, and I want to talk about it because I really think that this is something that fits within a category of observation that scholars and others are looking around at our bankruptcy process today and saying that it's a confidence game. They really are.

That there's a sleight of hand and it's being done in the DIP, and it's being -- these roll-ups are being adorned to something that's critical and necessary, and that is financing. And it causes a massive reallocation of value in ways that defies bankruptcy, defies what our historical precedent is about lending requirements and norms and rights, violates corporate finance principals, and is most of all inconsistent with the deal that the lenders themselves cut pre-petition. Okay.

THE COURT: So, Mr. Stark, let me ask you --

MR. STARK: The first --

THE COURT: This is about the fifth or sixth time that your firm has accused the debtors' lawyers and the lenders' lawyers of committing a fraud on the Court. I gave you --

MR. STARK: That's not what I'm doing.

THE COURT: Mr. Stark, I didn't --

MR. STARK: That's not --

THE COURT: Mr. Stark, do not interrupt me again. We will cut your --

MR. STARK: Apologies.

THE COURT: We will cut your time short. I don't take that from anyone, despite the fact that you are my friend. You will not do that to me. Understood?

MR. STARK: Understood. I apologize.

THE COURT: I'll start again. This is about the fifth or sixth time that you have accused the lawyers for the debtor and the lawyers for the lender of committing fraud. You've used that word in your comments to the Court. And after 12 days, 13 days, you offered no basis for that allegation, yet you continue to argue it here. I would -- I warned you once before. I would genuinely like to understand why it is you think that that's acceptable conduct. You can now speak.

MR. STARK: Well, Your Honor, and I jumped again. I apologize. I'm really not trying to be.

Your Honor, I'm not accusing anybody of fraudulent behavior. I'm accusing the transaction of resulting in an outcome that's inconsistent with law, and it is a strategy that is being utilized in cases. It's not fraudulent behavior. It is open expectations of parties. Okay. But by putting things into a DIP loan that caused value migration, it's an open part of the deal. It's not accusing anybody of misleading the Court.

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But it is inconsistent with what we're trying -- what I think bankruptcy law wants us to do here. And it is something that I think is a business wrong without causing -- calling people anything other than their advocates for their clients trying to negotiate the best deal. That doesn't mean that it's the right deal. It may not -- it may be a deal that is inconsistent with bankruptcy principles, but they're being good advocates.

Your Honor knows that I have wonderful relationships with the lawyers in this case and I am not accusing them of anything wrongful. They're advocates for their clients doing the best they can for their clients, but the transaction may still be wrong.

I don't know if I satisfied Your Honor's response, but that's honestly how I feel. I believe that what's being done here is a bankruptcy law wrong, and people are observing it in a way that is creeping the way in which DIP loans are presented to courts. That is what I think is inconsistent with bankruptcy principles and foundational principles of corporate finance. Okay.

THE COURT: It may be how you feel; it's not what you've said.

MR. STARK: Well, that's what I intended, and if I misspoke, then I will eat my words and I apologize. That's not my intent. It is a sleight of hand in the sense that it has an impact. There's a strategy at play that is broader than just financing a company to get through its bankruptcy process. It is intended to result in massive migrations of value relief that's not consistent bankruptcy process.

It is the strategy that people are observing. It is the strategy which is becoming an accepted part of a transactional bankruptcy practice, and it is inconsistent with what I at least understand bankruptcy to mean and how it's supposed to work.

And here are some points of observation, if I can have Slide 20.

Okay. We have 1.5 billion in value, unencumbered value that I believe our model shows should go to unsecured creditors. It excludes the deficiency claims of the 2L. And it is deemed by the plan not to pay the DIP advances -- cash advance -- post-petition cash advance like liquidity where there aren't any or distributions from secured creditors, but rather to pay the pre-petition rolled-up debt. Okay.

The purpose of the plan structure is to relieve the senior-most mortgage on the pre-petition collateral so that the junior-most secured creditors are allowed to take more of a collateral base.

THE COURT: How do you know that?

MR. STARK: Okay? And --

THE COURT: What's the evidence in the record?

MR. STARK: Well, that's the entire -- that's the entire structure of the deal.

THE COURT: That's your belief.

MR. STARK: Entire --

THE COURT: Where's the record?

MR. STARK: No, no, no. It's effectively stipulated, Your Honor, because what is -- what are they doing in the plan? The plan says they're taking 1.5 billion of value, and they're using it to pay off the DIP loan, and the final and the second liens take all of the secured debt. That is the structure of the plan. That's the architecture of the plan. That's why we don't get any value.

It's being deemed -- Ms. Schwarzman said it in her representation of opening remarks. It's being deemed to pay off the RBL. That's the entire structure -- that's the entire architecture of the plan. It's the only reason as to why it is unsecured creditors don't get $1.5 billion. That is how it works.

And it's important to realize, Your Honor, that this payoff doesn't arise in a DIP default and exercise of remedies, a liquidation. It's a plan that pays off the RBL lenders in full. Okay? So the DIP protections that were given to the DIP lenders are rendered moot.

I need to unpack for Your Honor why, because of that and because of the way the architecture works, it is inappropriate as a matter of law. Okay? Some backup if you will, Your Honor, on Slide 21.

Ben, can you go to slide 21, please? Okay.

So as of the petition date, we had about $2 billion drawn on the RBL. We had about 1.5 billion on the FLLO and 2.3 billion on the second lien debt. Okay?

The contractual waterfall is, as it's been presented to the Court, the RBL is first always. The FLLO is junior to the RBL. The second lien is junior to the FLLO. And they all share collateral and in waterfall format. The FLLO would have to turn over any collateral proceeds to the RBL, and the second liens have to turn over any collateral proceeds to the FLLO.

It also goes on to say in these agreements that if the RBLs ever want to make a DIP loan, the FLLOs and the second liens can't object in any way. So they're -- so they're silent. That's normal. And the FLLOs and the seconds waive any sort of marshaling or other equitable responsibilities vis-a-vis the RBLs' ability to take their collateral first. That's the deal. It's pretty normal, standard stuff. Okay?

Next slide, please.

I believe counsel to the RBL DIP lenders confirmed this, but the RBLs and the DIP lenders are the same. There's a subset of the RBL lenders who've made the DIP loan. But what happened is it was a cashless exchange. It was a deemed roll-up. There was no money that changed hands. 1.25 billion of the prepetition RBL was made by the order into the DIP loan. Okay?

And they gave the RBL lenders for that rolled-up portion protection, gave them adequate protection. They now got security not only on the shared collateral, the collateral they share with the FLLOs and the second liens prepetition, they also have liens now on unencumbered value, the 1.5 billion that we're now talking about.

And they also got protected from an admin -- they also got protected from cram-down, because they got an admin claim, and 1129(a)(9) says you have to pay off the admin claim in full. Okay? So they couldn't be crammed down. So that was the added protections the RBLs got.

But if you look at it from the perspective of the FLLOs and the second liens, nothing really changed. The roll-up -- prior to the roll-up, the RBLs were first on the shared collateral. The FLLOs were second. The second liens were third. After the roll-up, the RBLs remained first, the FLLOs remained second and the -- and the second liens were third. Or sometimes (indiscernible) FLLOS one-and-a-half.

You can envision in your mind, if you will, Your Honor, some collateral. Let's just say it's a box that's worth 75-. And the RBL lenders had 50-, and the FLLOS had 50-. Well, prior to the roll-up, the RBLs were covered by their first lien on that box at 75-. Their 50- was covered by the prepetition collateral. The FLLOs were only 50 percent covered, because the bottom 25- of the collateral value went to them, but then they had 25 -- a 25 deficiency claim. After the roll-up, it remained exactly the same.

Today -- can we flip the slide, please?

Today, that's all that's left under the DIP. The DIP itself -- there haven't been -- there have been, I think, incremental months -- monthly draws for short-term liquidity needs. But at the end of every month, there's just not been any draws on the DIP.

So there's nothing outstanding besides the roll-up. That's the nature of this entire dispute. Okay? And there's no need for adequate protection, as Your Honor has ruled, we started the case with a 3.25 billion TEV. That got adjusted by the debtors to 4.1 billion TEV. And Your Honor's ruling at 5.129 billion suggests all O&G assets have increased in value. And so here we are without any real argument on adequate protection for the collateral value. Okay?

So the FLLOs and the second liens on that box, maybe their portion of the 25- with the 25- deficiency, maybe that 25- is now 35-, but there's still a deficiency there, because they're still behind the RBLs. Okay?

If you can go to 24, please.

The roll-up was intended to benefit the DIP lenders, of course, but only the DIP lenders. I have no quarrel with anything that counsel for the DIP lenders said during her presentation. She's right. Everything that was done in the DIP order was to protect them and to make sure that they got paid at the end of the case.

But the rights -- those rights only went to the DIP lenders, including the roll-up piece. Okay? It made sure that they had multiple different ways to get paid if we didn't find ourselves at the end of the case with a plan that paid them off.

No other party -- the debtors, the FLLOs, the second liens, the Committee -- nobody has the ability to step into the shoes and argue for any of the rights or benefits that were afforded to the DIP lenders. The order is about as clear as day on that. Okay?

The marshaling bars apply to everyone. Nobody can make any marshaling arguments, it seems, against anyone with one exception, and that's the avoidance stuff. And we'll come back to that in a minute. Okay?

And the roll-up came early on. Again, I'm not saying anybody did anything wrong, but the case facts had not yet been developed. We said at our objection, hey, you know, this feels wrong; it feels like we're moving in a direction where this case will have a bad outcome as a result of this. Your Honor overruled that objection.

And Your Honor's ruling was the roll-up was necessary because it was adjoined -- adjoining to liquidity, and we needed the liquidity. Understandable. Okay? But there was no finding at the time, and the order doesn't reflect it or the transcript, nor could there have been, that any of the protections in the DIP order were for the benefit of the FLLOs or the second liens or to advantage the subordinated creditors to the detriment of unsecured creditors.

The FLLOs and the second liens weren't providing any liquidity to this company. They were junior creditor -- junior prepetition creditors. They'll get at the end of the case whatever it is they'll get.

So you could have blown me over with a feather when I heard Mr. Schaible make the argument just a little while ago that the junior creditors who didn't provide any capital have the right under the DIP to channel and to allocate value as if they were the DIP lender, because that's not what the rule was.

25, please.

The plan -- and, frankly, any plan in this case -- and there will be a plan in this case -- will pay off the RBLs in full. The value has rapidly increased in this company. There's credit quality to take out the RBLs under any circumstance here. Okay?

But the DIP order, it -- you know, you have to think about it this way. Since there's no exercise of remedies, it's true that the RBLs could have -- in a default scenario, in exercise of remedies, in a liquidation, it was for the RBLs to decide as a roll-up -- the DIP lenders, I should say. They could choose which collateral -- unencumbered prepetition collateral, whatever they wanted to. They could look at any asset of the estate for repayment on their debt. Okay? But only in that context.

It says, specifically, in connection with any disposition or exercise of rights and remedies do they get the choice to allocate. That's not our circumstance. They're getting paid off. There's no trigger for them to do an allocation themselves, and any right of allocation only arises in that trigger event.

Slide 26, please.

So that begs the question: if you don't have a DIP default, if the DIP's getting paid off, and there's no adequate protection entitlements for any of the junior creditors, okay, who pays for the roll-up? It's not as easy and as quick as one may think.

Secured lenders come to bankruptcy courts with protections for the lien position that they had coming into the bankruptcy case. Whatever it was coming in, they get adequate protection to make sure that, at the end of the case, they get that. Using my hypothetical, again, of the $75,000 block where the RBL takes the first 50 million, the FLLO takes the next 50- but has a 50 million deficiency claim, the <u>Radford</u> rule, the

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Supreme Court precedent, affords the FLLO only the $25 million. The deficiency claim is its deficiency claim. Okay?

The debtors assume that because the RBL also has an admin claim that they have the right to pay off the entirety of the RBL with unencumbered value. That's an assumption. There is no case law authorizing that at all. Okay? That is, in effect, allocating value even though allocation rights are only given to the DIP lenders, not to the debtors and certainly not to the FLLOs or the second liens. And they only arise in the context of a default scenario, exercise of remedies or liquidation.

That's a usurpation of a DIP lender's protection for strategic purposes for plan confirmation. And the result is this: you kind of magically get rid of the RBL. The prepetition debt that got rolled up, you get rid of it with unencumbered value as if they had liens prepetition on that unencumbered value.

What that does is it relieves the FLLOs and the second liens of that $50 million senior lien that I mentioned in my block before. It goes away. Now, the FLLOs and the second liens then get to move up. They get to assert the entirety of the collateral rights on their prepetition collateral as if they were providing that post-petition liquidity and they got the benefit of the roll-up or they had liens on that unencumbered value or that they were entitled to adequate protection. They don't have any of that. Okay?

So what that does is that's where the explosion happens. It expands and explodes the FLLO and second liens' lien entitlements as if they had liens on things that they don't have. It artificially relieves them of the -- of senior collateral entitlement, and that's inconsistent with the expectations of the parties.

And the one thing that Collier makes clear is that the bankruptcy protections for lenders ensure only that the secured creditor receives the value, essentially, what he bargained for. That would be the subordinated position that the FLLOs and the second liens have on that collateral, not that they get relieved of that by way of unencumbered value. Okay?

Now, you can try to call it -- and I've heard it in conversations away from this court. Well, this is marshaling. But you're not allowed to marshal. The order says marshaling is not allowed for anybody against anybody. Okay? Marshaling is also disallowed under the collateral trust agreement, and marshaling isn't allowed -- wasn't allowed on the first day of the case, because it was sitting below -- before Your Honor approved at the final DIP hearing to roll up, it was sitting behind, and marshaling wasn't available.

And, by the way, marshaling is an inter-lender argument. It is one secured lender bringing an action against another secured lender to marshal collateral as they see fit, not estate representatives migrating value and marshaling unsecured creditors that way. Because, in the end -- and this is the most important --

Ben, could you move to 27, please?

This is the most important bullet. It's the third bullet down. Marshaling is, at its core, an equitable remedy. It is not an equitable doctrine that a court of equity is allowed to use -- the jurisprudence is about as clear as day on this -- to give people value that they don't have liens on. That is an inequitable result that is inconsistent with the benefit of the bargain, that is excessive of the secured lender's protections both under the Radford rule, Fifth Amendment, and the Bankruptcy Code. To do this is overcompensating the secured lender in ways that they never protected themselves with proper liens.

Next point, please. Next slide, please.

Oh, and I should say, and this is on surcharge. This is important. I heard somebody here this morning, this is -- well, this -- we're not -- we're surcharging their collateral. That couldn't be farther from the truth.

Surcharging is taking administrative expenses of some sort and saying the collateral has to be -- your collateral return has to be deteriorated to offset for the admin expense. That's not what we're doing at all. Our model's always said,

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you take that $200 million of admin expenses and charge it against the unencumbered value, and we divvy it up from there.

What they're doing is they're taking somebody else's value and saying I should get it on account of liens that don't -- that I don't have. That's the circuitous route that is (indiscernible).

And here, Your Honor, after this big, long-winded speech is where 506(a) comes in. Okay? Because 506(a) says we are supposed to bifurcate the junior secured creditor's claim. If the junior secured creditor has collateral and sits behind a lien that is senior to it, and that creates a deficiency claim, then we don't soak up other people's unencumbered value. That means they have an unsecured claim that goes into the unsecured claim pot, the deficiency claim, and shares with other unsecured creditors.

That's how 506 in the Bankruptcy Code works. That is what they're trying to avoid here. Okay?

The question of bifurcation -- there's questions of value, but we're sticking with 5.129-, and then we're just doing the math off of that. Okay? So the real question on bifurcation is when you're supposed to do it. When is the court supposed to do the bifurcation claims for the FLLOs and the second liens, knowing that prepetition and post-petition they sit behind the rolled-up RBL? Well, the RBL and now it's rolled-up RBL. When are you supposed to do it?

The Houston Sports Network case says the court has discretion and flexibility. Well, that's consistent with the statute. It says it in the statute. Okay?

But you're not supposed to ignore the fact that the FLLOs and the second liens are junior subordinated lenders. You're not supposed to do the bifurcation in ways that changes that result. Okay? And so if the roll-up is charged to unencumbered value, it's as if you've given the unencumbered value to them. Okay?

So let's talk a little bit further about the timing of the bifurcation process, please.

Can we flip the slide, Ben?

Okay. Now, Your Honor could have chosen or we could have made a motion or some other contested matter could have been presented to your Court to do the 506(a) bifurcation at the beginning of the case. At that time, enterprise value was much lower. The RBL was -- presumptively was covered. I think all of the evidence that came out at the DIP hearing was that the -- that it was covered. Okay?

But the FLLOs and the second liens' collateral on the prepetition collateral, it would have been less. Again, that's increased over the course of the case. But a bifurcation would have yielded for them some portion that would have been covered by collateral and some portion a deficiency claim that would now share.

We didn't do that. There was no bifurcation at the beginning of the case. We could go back and do that now, but that would mean that the 1.5 billion wouldn't belong to them. It wouldn't go to them.

We could do the bifurcation as of the final DIP hearing date. After Your Honor approved the final DIP hearing, the roll-up happened. The RBL lien position got a new name. It was now a DIP. It was a cash (indiscernible), but it still sat at the top of the collateral stack. The FLLO and the second liens were still behind it. No change other than, perhaps, there was some value -- collateral value accretion between the beginning of the case and the final DIP hearing.

We could do it right now, Your Honor, right this very second. We could do a bifurcation by 506(a) of the collateral entitlements of the FLLO. And it's not hard to do. The evidence is there. The 1.5 billion, they do not have a lien on it. That is not theirs to take.

So, therefore, they can have everything else. Their deficiency claim -- they don't have a deficiency claim, because they're getting overcompensated. But their deficiency claim wouldn't share. The second liens' deficiency does share. And so we go from 1.7- down a lot, because they get about 600-, 700 million of value. I can't remember the exact figure. But they would get that for their unsecured deficiency claim. Right?

We could do that now, but that's how that would come out. The 1.5 would still be available -- or the 680 million would be available for class sixes and sevens. Okay?

The only way in which it works, the only way in which their structure meets with 506(a) is if you do the bifurcation not at the petition date, not at the final DIP hearing, not at the confirmation hearing but after the plan's effective date. Because that's the time in which the money comes in. The 600 million comes in. The new draws come in on the exit lines and pays off the RBL which, in turn, relieves the RBL of its senior lien position, and the FLLO and the second lien can then encroach upward.

It is the only time in which bifurcation actually can work. And I searched real hard, but I can't find a single case that allows bifurcation of a -- the junior secured lender's claim after confirmation, after the funding on the effective date. It doesn't exist.

If you can go to slide 30, please.

Now, roll-ups are disfavored lending structures. We cite the transcript from Judge Isgur. I think Your Honor probably knows he's not a fan of them. And the Court's complex case guidelines require close scrutiny and the same with other sophisticated bankruptcy courts around the country who have complex case guidelines: Delaware and New York.

Roll-ups are almost invariably used with skepticism, and it's a very rare day that you're supposed to do it. Okay? And when they're -- and when they are allowed, they're allowed because there's a perception that -- rightfully, that they are necessary components of liquidity that the company needs to run through its Chapter 11 process. It's a necessary evil.

And DIP roll-ups are approved to protect the DIP lender and the DIP lender only. So the quid pro quo for providing the DIP loan is you get a little bit of extra collateral, and you can be assured on a roll-up you don't get crammed down for that debt. But they're never, ever in any court intended to create economic advantage for junior creditors that do not provide any post-petition liquidity. They don't get the benefit to tag along on the coattails of the DIP lender and say I'd like the benefits by you channeling -- not the DIP lender channeling the default but the debtor channeling unencumbered value paid off so that my prepetition collateral entitlement can increase. That is not what any court, at least any court that I've ever been in front of, has ever said or approved or an written opinion and said that's what roll-ups are about.

And that's especially true where in a case the roll-up happens early on, and we haven't yet figured out the case implications of it, many cases, most cases, but also where the DIP creditors agree in the DIP order, in the prepetition credit agreement that they have no rights, that the RBL lenders, as a prepetition lender or as a post-petition lender, have. They can't assert -- they can't tack on to those rights. Okay?

If we can go to 31, please.

I think this accretion of collateral value is just so bedrock violative of principle, but I do believe it's important to think about what the implications of it are. You could conceive of a parade of horribles where there is wrongful conduct in a case, okay? There's liability claims. The junior lender seizes collateral, does something wrong like that. Management takes something that it shouldn't take and cuts a deal with the junior lender. Okay?

There's unencumbered value that comes in for one reason or another. Call it tort claims or other claims or what have you. And the deal making can happen in the back room that effectively says I'll -- we'll use it to pay off the DIP, and I'll make it go away in the plan.

That's the gaming problem. That's the opportunism problem that I was talking about, about sleight of hand. That's what people are observing about the confidence game of the bankruptcy process itself. Again, I'm not accusing anybody. It's just how we're creeping in that way.

But what it really does is, it writes 506(a) out of the Bankruptcy Code. It essentially says we'll never, ever have a deficiency claim for a junior secured creditor, because we'll channel all the unencumbered value strategically to pay off the RBL, and we'll make you a fully secured creditor. That is gaming.

I have a fallback provision -- a fallback argument on this. To the extent that it's marshaling, that that's what's going on here -- I don't think it is, because only secured lenders can argue marshaling against each other. But one of the things that we argued in the court is that avoidance -- at the final DIP hearing is that avoidance actions shouldn't be included in this. Avoidance theories should be left alone for unsecured value. And Your Honor ordered that there be a carve-out for this very provision in the order so that they're going to use commercially reasonable efforts to use DIP collateral other than avoidance actions to repay the DIP obligations. Okay?

Let's go back to our split on the 30 percent. We have two different kinds. We have the unmortgaged -- the 10.6 percent of unmortgaged assets. Those assets, a security interest and conveyance was done. They just never perfected it. They never filed the mortgage. So the estate's strong-arm powers under 544 trump the unperfected security interest. That's a Chapter 5 avoidance action.

But even if there's any ambiguity on that, the 17.6 percent, the 900 million of cash (indiscernible) preferences, there's -- that is absolutely an avoidance action in everybody's book. And the order says that that will be set aside for unsecured creditors and will not be used to repay DIP collateral.

Your Honor, in summation on this point -- and I want to be sure that I've addressed any questions Your Honor may have -- we believe that (indiscernible) classes 6 and 7 are short-changed here by $670 million. That value can be tracked into the rights offering. It can be tracked over to an overcompensation to the FLLO classes. And we can't -- we at least can do the 450-. We can't calculate so readily how much Franklin might be overcompensated. Maybe not. But that's where most of that values goes. It gets covered over and gets explained away by this DIP roll-up construct which we believe is utterly inconsistent with the Bankruptcy Code. It is not what the prepetition lending bargain was. It would require bifurcation late, or it would write bifurcation out of the Code.

There's equitable considerations. To the extent marshaling and the plan's good faith confirmation requirement are -- are principles of this Court's equity jurisprudence, we would suggest, Your Honor, that this is not equity jurisprudence. This is not fair. That's not right. And, again, we have the DIP carve-out that says that this value, at least much of it, needs to be set aside for unsecured creditors and not go to the other -- the junior secured creditors.

Your Honor, that's the final point that I wanted to make on this particular section. Do you have any questions or comments for me about it?

THE COURT: Not at this time.

MR. STARK: Okay. That takes us to the causes of action. We'll start with the TOUSA theory. We have what I call the squandering preference theories and then illegal dividends. I think we've made it clear we're not going to be pressing, at least for purposes of closing, (indiscernible) exchange with an intentional fraudulent transfer or the other claims. We're going to focus on the three that are at the top. Okay?

And as Ms. Schwarzman conceded in her opening, the plan doesn't provide us any value for these claims. So it's their burden of proof and persuasion under TMT Trailers, et cetera, that that's the right answer, that these claims are valueless; there's nothing to them. Okay? So let's analyze them.

On 536 -- and I'll just do this as a throwaway. In constructing the plan, the testimony is the debtors didn't actually investigate any of the claims that are asserted here. Ms. Schwarzman said that. It's conceded.

I've done a lot of big bankruptcy cases, a lot of big bankruptcy cases where litigation and claim disputes are at stake. They're, in fact, in the center of the case. I've never seen zero record of an internal analysis along those lines. I think that's meaningful, but we can just put a point in it and move on, and we'll come back to it in a little bit.

Let's talk about TOUSA, the black letter legal principle right at the top. It's an affiliated company, transfers liens and guarantees that go to lenders of a second affiliated company, a fraudulent transfer claim may arise. You have to establish the elements. And the prima facie elements are the value transferred to the FLLO guaranty on liens, by the Legacy Chesapeake debtors, the non (indiscernible) entities.

The second element is reasonably equivalent value. Was it received by Legacy Chesapeake in return?

The third element is solvency. Was Legacy Chesapeake insolvent at the time under the three tests?

And then there's the alternative test, which is intentional fraudulent transfer. Was there, in fact, intent to hinder or delay Legacy Chesapeake creditors?

Now, the evidence -- of course, there was cross-examination about the prima facie case, but there was no rebuttal evidence submitted. Okay? There were affirmative defenses in the good-faith lender defense.

And then we have Mr. Zensky's discussion on the 546(e) defense, and I'll come back to that. But I couldn't help but write a little note on this page when he was speaking, drawing the distinction between TOUSA and Chesapeake, saying, at the time of TOUSA, the housing market in Florida was terrible. But E&P has been fine. I've been -- as Your Honor knows, I've been spending a lot of time in Houston over the last couple of years. I don't think the E&P industry has been fine in this country for quite a while. Slide 39.

I don't think there's a dispute about the value transfer. If the liens and the guarantees that Legacy Chesapeake debtors transferred to the FLLOs, which happened on December 23rd of 2019, and those are the transfers that are at stake in the Committee's complaint -- excuse me -- their complaint.

So we go to the second element of the prima facie case, was there reasonably equivalent value. Well, let's talk about the law and then we'll get into the facts. Okay? The law says we look at reasonably equivalent value on a debtor by debtor basis from the vantage point of the creditors of the conveying debtor.

So, in my mind's eye, I think about somebody who's in Pennsylvania who's doing trade business with Chesapeake Appalachia. Let's say they're providing sand or trucking services, were stationary. And they're providing it on credit to Legacy -- to Chesapeake Appalachia and thinking about, I know these people, I understand the credit risks associated with them, I'm prepared to deal with them on unsecured credit terms because I understand the credit quality of Chesapeake

Appalachia. They told me; I understand it. Okay. That's how -- that's the person that we have to walk a mile in their shoes.

When they wake up one morning and find out the FLLOs have gone ahead and put $1.5 billion of secured debt on top of that creditor's unsecured claim, that creditor wakes up and says, okay, well, can we get $1.5 billion of value at Chesapeake Appalachia. And the answer is, no, it went off to benefit a far-off facility, a far-off affiliate in the Eagle Ford area of Texas that you've never done business with. That's the person that we have to think about reasonable equivalent value issues.

The second legal point is we have to ask if there's an affiliate conveying something here. Here, we have Chesapeake Appalachia conveying to the FLLOs. We have to ask what did Chesapeake Appalachia get in return. It's a get-and-give kind of a thing. Okay?

On the next slide, please, if it doesn't lift off the page, if you can't see it immediately, okay, you go to indirect benefit. And the doctrine in indirect benefits is pretty, well, well-created in the jurisprudence.

Intangible unqualified indirect benefits don't work. They have to come in a much more concrete format. Or to use the Smith court's phraseology, fairly concrete. And the burden of proof on indirect benefits is not the plaintiff. It's not on the defendant. There's a burden shifting and all of the cases say that. It is not my burden to disprove indirect benefit. It's their burden to show that there were, in fact, concrete, tangible indirect benefits.

So here is the evidence, in a nutshell. And we'll walk through it pretty quickly. Okay. The trial testimony, and you can to back to 38, not a nickel of the money went to Legacy Chesapeake. It went to repay WildHorse creditors. The FLLO wasn't enough. They needed -- Legacy Chesapeake needed to draw another $194 million under its own RBL to help complete the payoff of WildHorse creditors. Okay. This new debt load, the increased RBL draws, plus the FLLO, increased Legacy Chesapeake's capital costs by around 250 million on a present value basis. Okay. That's all clear, clear and concrete issues.

To prevail, the debtors have to show concrete indirect benefits in a response that offset on a reasonable basis all of that liability. Okay. So let's go through the evidence. Oh, I'm sorry. And there are two -- 542 says there are two indirect benefits of debtors who come forward. And you heard Ms. Schwarzman talk about that. The first is that WildHorse became obligee. They agreed to become obligors on Legacy Chesapeake debt, the RBL and the second lien. Okay. We have to unpack that one. And then Legacy Chesapeake got commensurate value back in the up-tier exchange. And we have to talk about that. But what -- with the evidence, when you actually position it in law, and I know that the cross-examination went quickly and we focused on other things. So it may have gone so quick you didn't even realize how important it was, the quick testimony or the summation. But these don't work. Let me show you why. Okay.

So WildHorse gave commensurate value back by assuming Chesapeake's debt. Okay. Well, you heard Mr. Baggett. He testified that Legacy Chesapeake was worse off, by about $550 million, even though WildHorse accepted certain debt, guaranty obligations on Legacy debt.

And this breaks down to two different things. Okay. The first is you have to think about, let's just assume for the sake of discussion, that WildHorse has value, has equity value. Okay. That evaluates the constants and the green in the middle. As a result of the transaction, Legacy Chesapeake's debt goes up more than $200 million on the whole. And the present value of its interest is about an incremental 200 -- excuse me -- and it goes up -- excuse me. The debt goes up about 400 -- 40- to 50 million. And then the incremental interest on top of the interest, the earlier interest it was paying, now it's paying higher interest payment. You present value that, you're about $300 million worse off if WildHorse had equity value. We'll go the next slide.

WildHorse was not solvent. WildHorse was woefully insolvent. So, as a result, all of that debt that was trapped in WildHorse did not leak out of because that debt was only -- there was no Legacy Chesapeake --

(Recorded voice indicates a conference extension code needs to be entered)

MR. STARK: -- goes for Legacy Chesapeake. Mr. Baggett used the two-year with, the accelerator adjustment, which is more upbeat in terms of value. And that showed about $250 million worth of leaking out value, leaking out losses, by Legacy Chesapeake. If you want to use Mr. Miller's more dour five-year NYMEX pricing, that loss to Legacy Chesapeake goes from 550, to about 850. So there was no reasonably equivalent value even though Legacy Chesapeake became a nominal obligor on the debt. It didn't do anything to help Legacy Chesapeake at all. This was expressed in demonstratives and we have those on Slide 45. So you can see the quantifications of it in a separate way. Okay.

So they go to their real argument, which is collapse. Okay. Chesapeake, the theory goes that they got -- if you collapse the 2L exchange into the FLLO, there's benefit for Legacy Chesapeake because the 2L exchange had a certain amount of unsecured bonds that got converted into a lower quantum on a principal basis of secured bonds. Okay. And they net those two together. Okay. We're going to get into the law in just a minute.

But I think it's very important, as I heard the opening presentations today, he says if they were one and the same transactions in people's minds, that people were motivated to do this, as if subsumed within the WildHorse situation. That's not true. Creditors do up-tier exchanges all the time with companies that are in distress. That has nothing to do with repurchasing of, you know, debt in a conglomerate. It's done because the company is failing, and they're looking to up-tier to get liens so that they are in a better position than their compatriot unsecured creditors. And here, too -- here, as well, the second lien up-tier exchange was only offered to a select few. It wasn't opened up to everybody. So the purpose of the up-tier exchange is very different than having anything to do with the FLLO and the WildHorse transaction, notwithstanding what you've heard in court.

But let's get even more granular, to what the law says about collapsing. It's a three-factor test. All of the cases, and there's many that are cited, have the same three-factor test: whether the parties involved had knowledge of the multiple transactions; whether each transaction would have occurred on its own; and, whether each transaction was dependent or conditioned on the other. Okay. Those -- that's the test.

The knowledge part really gets down to notice. Did the parties have notice of the -- how -- of the transaction terms. Did they know that they were -- as they were reflected in the documents, that this was going to be an integrated deal, or not. Okay. If the documents and notice facially reflect that it was not an integrated transaction, collapsing's just plain not allowed. The law is as clear as day on this, without exception. The component parts are instead treated as "simply different transactions towards the similar ends." Every single case says that over and over and over again. If you didn't set up the deal to be integrated, in a meaningful legal way, and if everybody knew that to be the case, you cannot collapse for REB purposes. Okay.

That's where the testimony and the -- really, the documents really hit home. Because they say it over and over and over again, that these deals were never intended to be together. They are not integrated, they're not conditioned. They're thought to -- they're marketed separately and their terms close separately. Here is the up-tier exchange offering memoranda. Focus on the bottom line. The offering -- the exchange offers are not conditioned upon the completion of the concurrent transactions. Next slide.

Repeated (inaudible). In addition, each exchange offer is being made independently of each of the concurrent transactions and is not conditioned upon the completion of any of the concurrent transactions. Go down to the left.

In addition, the exchange offers are not conditioned upon the completion of the concurrent transactions. Go to the right.

In addition, the exchange offers are not conditioned upon the completion of the concurrent transactions. Next slide.

On December 4th, 2019, the company met with prospective FLLO lenders. And it gave them a presentation about the FLLO and the second lien. And they said that the FLLO is not -- excuse me -- the second lien is not conditioned upon completion of the FLLO term loan. This is in the marketing of the deal. Hasn't even happened yet. Flip side.

You can try, in vain, to search the FLLO credit agreement, conditions precedent or the rest, that has any sort of notation about it being connected, tied, conditioned upon, in any way, shape, or form, the 2L up-tier exchange which, again, had a different purpose. Next slide.

At trial, again, so quick you may have not even noticed it. Mr. Lawler confirmed that the filing of the second lien up-tier exchanges were not conditioned on each other. Next slide.

At trial, Mr. Dell'Osso confirmed that the FLLO term on credit agreement did not contain any conditions precedent based upon the effectiveness of the second lien up-tier exchange. Next slide.

Mr. Brendan Circle confirmed his understanding that

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the FLLO was not conditioned upon the consummation of the second lien up-tier exchanges or any minimum threshold related to the up-tier exchanges.

The upshot of all of this, Your Honor, is that they were two separate transactions that were not intended to be connected. They had different purposes, they were never marketed as integrated, the contracts don't show that they were integrated, they have no integration terms. They are "simply different transactions towards similar ends." And there is no law available to support the notion, other than some testimony that, well, we thought that they were together because they were around the same time, and it was how we thought about the credit. That is woefully insufficient under the law, period, done. These transactions cannot be collapsed for reasonably equivalent value purposes. That's why we stopped arguing it, as soon as he started taking the depositions and we studied it deeper. Next slide, please.

The third element of the cause of action is that there remained, when the Legacy Chesapeake debtors were insolvent, it bears reminding this Court that there's, what, $10 billion of debt on this company. We had a big fight about its value. But it started at 3.25-, got to 4.1-. And Your Honor figured it was half the collateral value. This company has been insolvent for a long time.

The unrebutted testimony, they cross-examined but didn't produce their own witnesses, even though they certainly had them waiting, that Legacy Chesapeake was -- the evidence is unrebutted that Legacy Chesapeake was insolvent under all three tests in December of 2019, all three. I only need to hear one, but all three. Next slide.

Before the transactions happened, on the balance sheet test, you have -- Mr. Baggett testified. He wasn't able to value the PUDs or the possibles because the data wasn't available. But the gap to solvency was so incredibly big, billions and billions of dollars, that there was no possible way that the possibles and the PUDs could cover that difference. Next slide.

Before the transactions, unreasonably small capital and inability to pay their debts due, this is important. This company issued a going concern qualification in November. It put the world on notice that it was really struggling. You had management's acknowledgment in documents that it expected a covenant to fall by the third quarter of 2020. You had management's only projections showing that liquidity was declining and capital spending was greater than the operating cash flows. You had debt trading levels that were reflecting the debt was in distress plan. All of that was in the public domain before the transactions happened. Every lender involved knew that. The debtor knew it. Next slide.

Mr. Dell'Osso testified. Again, sometimes our cross-examinations go so fast you may not have even noticed it, that, in December of 2019, the company was facing a de-listing, a de-listing notice from NYMEX -- excuse me -- from the New York Stock Exchange. And it was facing liquidity challenges. And the board knew it. Next slide.

Let's look at it from after the transaction happened, okay. It was left insolvent on all three tests. Two, balance sheet, starting again. Mr. Baggett couldn't -- didn't have the data to do the possibles and the PUDs. But the gap to solvency was billions and billions of dollars. There was no way this company was solvent. Liabilities exceeded assets by $4.1 billion. Next slide.

You have documents from the company showing that -- now, admittedly, this is a November document. But it was anticipating the closing of the FLLO and the second lien up-tier exchanges at the level that actually consummated. And the company's own prognostication was, if you have a 2-to-3-percent decline in commodity prices, this company was going to hit a covenant pressure, 2 to 3 percent for a company as big as Chesapeake. And this is December of 2019. They were going to hit 2 to 3 percent. That was certainly a foreseeable problem. That is unreasonably small capital. You can't weather that kind of storm. Next slide.

This may be Mr. Zensky's favorite slide because he likes to talk about markets. And I do too at times. Okay.

Let's look at the price index throughout the entire time period, before and after. Okay. Let's look at the bond pricing. Pick your day. Before the transactions, they're trading at 43 cents on the dollar, 47 cents on the dollar, 45 cents on the dollar, 59 cents on the dollar. After the transaction, they're trading at 52 cents on the dollar, 41 cents on the dollar, 52 cents on the dollar. The market, the bond market, did not show solvency, not by any stretch.

Mr. Zensky observed something that is kind of fun to think about and talk about. And I'd actually written on this a little bit, which is stock market capitalization could be outside of option value, while the debt value could be trading at monstrous discounts to par, because the stock pickers may have a different view of upside than the debt holders may have. And we have some very weird conversations about the admission -- efficient market hypothesis. If one were to look at massive debt discounts, right, you're looking at 9.7 billion hard debt trading up to the transaction at a debt capitalization of 7.12 billion. Okay. 2.6 billion off of par. And, after the transaction, you've got debt, 8.9 billion. So we lost that billion from the up-tier exchange, trading at 7.7 billion. The debt markets did not like this company's future. Or at least it had a skeptical and (indiscernible) view of what the company's future would be.

If you go to the next slide, at trial Mr. Lawler said

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that Chesapeake never intended that the FLLO and second lien transactions were "the end of the road" of its financial problems. Those problems preceded December 2019 and they continued. But what I do take tremendous exception with is the notion that the black swan issues of spring of 2020, which were true, COVID happened and the Saudi Russian deal happened, okay, it wasn't like this company was doing great up until then. And that shockingly changed their entire dynamic. This company had been doing poorly for quite a while. And it was working through those issues. But solvency does not rise or fall based upon the black swan timeframe. This company was insolvent for a considerable period, before it had way too much debt for a considerable period before. Your Honor has more than enough evidence to show insolvency at the time in question.

That takes us to the alternative element. This one's a little bit harder because you had some very -- you had some excellent executive witnesses. And I'm sure they are excellent executives. I'm not suggesting that they're not. Okay.

Intentional fraudulent transfer theory, though, doesn't anticipate that people are bad people. The Elizabethan deadbeat scenario is not our modern corporate world. Today's intentional fraudulent transfer theory follows what we call the natural consequences doctrine, which says that those in control have good intentions. But, if it was natural, naturally foreseeable, as a natural consequence, that if Legacy

Chesapeake provided the FLLO financing for the WildHorse debt, that those creditors at Legacy Chesapeake would be hindered and delayed in their ability to get repaid that.

Think back to our trade supplier in Pennsylvania providing sand, Chesapeake Appalachia, who woke up one morning and found that they're now sitting behind 1.5 billion of secured FLLO debt, to pay off the debt of another affiliated company. Okay. The natural consequences of what happened here was that that sand provider is no longer -- would get paid. And that was foreseeable and that's enough.

We do have badges of fraud. I'll go through them quickly. And Mr. Baggett and Mr. Brown testified WildHorse and Legacy Chesapeake were insolvent before and after the transaction. Here is the kind of interesting -- the second one is kind of interesting, because the Elizabethan deadbeat scenario is generally thought of in a context with the tax man's a-coming. And so you hand your sheep off to your brother for a penny, but you get to keep the sheep. Okay. And when the tax man comes, says you can have my penny, but I keep my sheep. Okay.

Here, you had an insider affiliate transaction like an Elizabethan deadbeat. You had Legacy Chesapeake providing the value to keep WildHorse afloat, burdening up its value for the benefit, as the tax man was a-coming to WildHorse. Okay. Third, WildHorse did not give Legacy Chesapeake reasonably equivalent value because it was insolvent. There was that leakage of debt over to Legacy Chesapeake that it didn't know (indiscernible) it was otherwise trapped down there. Okay.

And the FLLO didn't resolve the conglomerate's problems. The company was in trouble before. And, as Mr. Lawler said, it wasn't ever intended to be the end of the road to solving all those problems. It was a step along the way. And, of course, we have those liquidity forecasts of the company, at 2 to 3 percent liquidity shortfall would tough.

This is a good case, Your Honor. This is not a (indiscernible) case. This is proven. This is prima facie and the evidence is there for it.

So they come with their defenses. They start with the good faith lender defense, 548(c). Okay. The good faith lender defense is only available if you -- or it's not available if you knew or should have known that the obligor could be insolvent, that the guarantor could be insolvent, as a result of its transaction. Okay. If you knew or should have known of Legacy Chesapeake's potential insolvency, this defense is unavailable. The law is clear as day on that. There was so much public disclosure, discussion, information in the public domain about it. There's no way that -- and we put the evidence out there, that a good faith lender defense could hold.

So that takes us to the last ditch effort which is

546(e), the safe harbor. That's it. I mean, the case is a good case. The evidence is there for it. And the defenses don't work. So it's only 546(e). Now, the safe harbor is set up. And there is where I love to listen to Mr. Zensky because he and I have, for years, have spent so much time talking about 546(e). He's usually on the other side, saying 546(e) doesn't ever apply. And if I put (indiscernible) even right now, I'm sure he'd tell him to tell me, in a pique of honesty, that he doesn't think applies here too. But I'll leave that aside.

The safe harbor was set up so that if a Wall Street firm collapses, it doesn't create systemic risk and take down the rest of our financial market. That's the statutory objectives. And what's going here with a guaranty mortgage fraudulent transfer case for bank debt, obviously, has nothing to do with Wall Street. But the language of 546(e) isn't particularly clear. And that's always been the problem with it. In the clause that they focus on we've kind of isolated here. The trustee may not avoid a transfer made to or for the benefit of a financial institution in connection with a securities contract except under Section 548(a)(1)(A) of this title. Well, that's the intentional fraudulent transfer scenario. So if Your Honor follows the evidence and the logic and natural consequences (indiscernible) an intentional fraudulent transfer claim would have a motion to dismiss would be asserted here, then 546(e) doesn't apply, statutorily.

But, under constructive fraudulent transfer theory, we've got two inquiries. Okay. The first is was the transfer made to or for the benefit of a financial institution. The second is was the transfer made in connection with a securities contract. Okay. And the defendant's theory, Franklin's theory, as Mr. Zensky articulated, in a nutshell, Legacy Chesapeake transferred liens to MUFG, the collateral agent. Put asterisks on agent. MUFG is the financial institution. Alternatively, and this is sort of the statutory trick, the workaround. We'll talk about that in a minute. MUFG, as agent, renders all of the FLLO lenders, financial institutions themselves, as a customer trick. I got to talk to you about that. And then Franklin separately contends it's a financial institution.

As far as in connection with a securities contract, well, it's not the FLLO bank debt, because bank debt isn't a security. So the in connection with is a different contract altogether. It's a securities contract to repurchase the WildHorse bond debt with the proceeds of the FLLO and the RBL, incremental FLLO, RBL FLLO. That's their theory, in a nutshell. Let's break it down.

The next slide, the pink, is the FLLO debt rate. That's the actors in it, that's the participants in it, that's the obligors on it. The green is when you send the money over there, and some different people, WildHorse, goes and tenders for a debt. Most of it went to WildHorse's bank debt. Some of it went to WildHorse bond holders. And it's saying it's that that bond, the tendering to bond holders, that overshadows everything, subsumes the whole thing, and makes it 546(e) in connection with the securities transaction. Okay. That's the schematics. Okay. So let's break it down. 66, please.

Was the transfer made to or for the benefit of a financial institution. Mr. Zensky's wrong. Our argument doesn't start with in connection with. We go there next. But MUFG was not a financial institution. It was a conduit. And here you got to read the Supreme Court's Merit decision. Okay. In Merit, the Court held that financial intermediaries, conduits, are not counted as financial institutions. And this makes intuitive sense. The FLLO's rights as a secured lender are held by those lenders, not MUFG. FLLO lenders themselves hold those rights. They can buy and sell their debt at will. They could novate their agreement with the company if they chose, they could give waivers and forbearances, they could recover value from this bankruptcy case. Okay. They were the ones that negotiated the plan with the company. MUFG didn't do any of those things and can't do any of those things.

Because if you take a look at the agreements, MUFG has no substantive agency authority or responsibility whatsoever. It's a repository, it's a bookkeeping, it's a mail drop. Okay. As the agreement -- this is the collateral trust agreement, Section 4.05. And if you look, five lines up from the bottom --

Can Your Honor hear me? I just got a message.

THE COURT: No, perfectly.

MR. STARK: Okay, good. Thanks.

If Your Honor will look, five lines up, in the middle, the line that starts, the use of the term trustee --

Can Your Honor see that? I meant to highlight it and we just didn't get there in time.

THE COURT: I'm with you.

MR. STARK: Okay. The use of the term trustee in this agreement with reference to the collateral trustee is not intended to connote any fiduciary or other implied or express obligations arising under agency doctrine of any applicable law. Instead, such term is used merely as a matter of market custom and is intended to create or reflect only an administrative relationship between independent contracting parties. The trust agreement goes further, on the next slide. Here, we did highlight it.

(Counsel confer)

MR. STARK: MUFG acts only at the FLLO's specific direction. They have no discretion and no power to act unless directed to do so. They can't act prior to such direction, as the bullet below says. And, while there's shared collateral with the RBLs, it can't do anything anyway. Because the RBL lender, the RBL agent, actually has all of the rights (audio interference) collateral. It is utterly powerless to do anything. It is the post office drop box. Next slide, please.

Because of that, we didn't name them as a defendant in the complaint. The economic substance of the transactions did not go to MUFG. It went through MUFG. And if we successfully prosecuted TOUSA, MUFG bears no liability and can do nothing. It can provide no recovery on that litigation. The FLLO lenders, not MUFG, receive that substance. They were the ones that get the benefit of the guarantees from the liens. They're the ones that bear the economic impact. MUFG is -- you know, one way of thinking about it, some of the phraseology you see in the case law, is that is MUFG on either side of the transfer, as the Committee defined it. It's not. It's a go-between conduit. And Merit says you got to disregard it.

And on this point, in particular, I'll talk a little bit more about it. I'd urge Your Honor to read the Greektown case. Because the District Court in Greektown specifically said that somebody occupying a role just like this, is a mere conduit, and it doesn't matter, under Merit. Okay.

This is the reason why we didn't name MUFG on the TOUSA counts in the complaint. We named the FLLO lenders directly. And that pleading decision has significance because, according to Merit management, the only transfer that we're supposed to look at is the transfer that the plaintiff seeks to avoid, the flow through of MUFG. Okay. Next slide, please.

Now, there is a workaround to this rule. Okay. It is incredibly controversial. It's the Second Circuit's Tribune decision. It's the workaround to conduit rule. Okay. The definition for financial institution has this weird clause in it. It says that it also includes any "entity," I added the comma to make it easier, that's acting as an agent or custodian for a customer in connection with a securities contract. Then it's that customer. In other words, if somebody hires a agent or custodian to do something for them, then the customer itself can be a financial institution. Tribune decision is weird. It says that the debtor, Tribune, hired an escrow agent as it was doing its LBO. That was the intermediary. And, for Merit, that intermediary would've been a conduit. And so, under Merit, the Tribune claim would be viable.

The Second Circuit didn't like that. So it did the workaround and said, well, no, the escrow agent's effectively a -- acting as an agent for the customer, which is Tribune. So Tribune is the financial institution. That's, like, weird and shocking, and nobody academically thinks that makes any sense at all. But that's what Mr. Zensky is pressing we should do here. We should look to Tribune as persuasive authority, that because MUFG is a conduit, we'll just skip it. And we'll make the -- we'll make the FLLO lenders themselves, who hired MUFG, the financial institution. And that doesn't work. Doesn't work for a couple of different reasons.

The first is that the FLLO loans -- it's not a securities transaction. And if you look at the -- if you parse the words carefully on the definition, this workaround definition, even if MUFG actually was an agent, which it's not, (indiscernible) Greektown felt it should, okay, it's not an agent for a customer in connection with a securities contract. They got the wrong contract. Right. It's an agent for the bank debt, not the agent for the WildHorse bond repurchase. So it doesn't work.

Also, as I said before, MUFG had no agency authority, re: Greektown. Okay. The workaround is also very suspect. Tribune, a cert petition was filed in Supreme Court. The Supreme Court asked the solicitor general as to whether or not it was so violative of Merit the cert should be granted. That's still pending right now.

They are a couple of cases out of the Second Circuit that follow Tribune because they have to. That's Sun Edison and Boston Generating. But it's not a good rule. But, even if it was, it's really distinguishable here because there, the agent, the escrow transfer agent, was intermediary for a securities contract specifically. Transaction was a securities transaction, facially. Here, MUFG's agency relationship is purportedly in connection with the FLLO bank debt which is, in turn, in connection with a securities contract. That's one in connection with too many. So the workaround doesn't work. Okay.

So under Merit, 546(e) doesn't apply, nor should it because it has nothing to do -- the avoidance of liens under a TOUSA theory has nothing to do with a securities transaction. And MUFG is a conduit. Okay. But now you're going for the -- the part which is what Mr. Zensky was talking about, which is is it close enough. Is the FLLO range close enough to be in connection with the securities contract. Okay. And you got to stretch from, the pink side of the page to the green side of the page, to find that securities contract.

Remember, Legacy Chesapeake had no liability on the WildHorse bond debt. The WildHorse -- WildHorse came to Chesapeake in early of 2020 -- excuse me -- early 2019 as an acquisition that came at that debt pre-existing. And none of Legacy Chesapeake had anything to do with any of that debt's issuance. And, frankly, WildHorse, operating under Eagle Ford, didn't really have much to do with any of their entities either. And so it's a fully standalone entity that would rise and fall on its own.

And yet, so that creditor up in Pennsylvania, who's dealing with Chesapeake Appalachia, if you were to say to that person, oh, yeah, you're now behind FLLO debt because we had to pay off the WildHorse bond debt in Texas, they'd scratch their head and say, how am I involved in that, how -- there's no securities that Legacy Chesapeake at issue here, there's nothing going on that my debtor has anything to do, other than the fact that we're now burdened up and paying for that securities issue all the way down in another part of the company, that has no distance operations with us at all. It's just too far removed. And Merit requires closer scrutiny.

"The transfer that the trustee must -- that may not avoid is specified to be a transfer that is either a settlement payment or made in connection with a securities contract." Not a transfer that involves, not a transfer that comprises, but a transfer that is a securities transaction covered under Section 546(e). This is too attenuated. Okay. Back to Sun Edison and Boston Generating, those were actual involvements in the transaction. Here, it is just sources and uses of money. That's the only connectivities.

So, Your Honor, we do not -- next slide, please.

TOUSA, in sum. We have a prima facie case here. It's a good case. There's been ample evidence to support claims liability. And remember, we're still at the (audio interference) stage. Okay. The debtors did not introduce any substantive rebuttal evidence. All they did was cross-examine ours. Their contentions respecting indirect are they aren't supported by the evidence. WildHorse signing on to Legacy Chesapeake that hurt Legacy Chesapeake, not the other way around. And collapsing doesn't work under the law as the evidence we have. And it's pretty clear on that point.

There's far too much information in the public domain for a good faith lender defense. And you got to really stretch the facts and law under Merit. Or Your Honor has to adopt the Second Circuit's Tribune decision -- again, go read Greektown and see what it says about Tribune. You got to really stretch that even further than Boston Generating and Sun Edison to sort of say 546(e) has a bearing here. These claims have value. And we've gotten none of it. That is wrongful, we think. And it violates 1129(a) and (b).

Does Your Honor have any questions for me on TOUSA?

THE COURT: No, sir.

MR. STARK: Okay. Let's talk about the (indiscernible) preferences. Okay. Let's have a little bit of legal framework. Chesapeake's an Oklahoma company. We don't have any Oklahoma precedent on point. We're squandering, we're lapsing $3.8 billion in preference claims. That's a big thing. But we don't have any law about that.

I made a second cite here. It's sort of shameless, self-indulgent. Forgive me. But I do some writing with Professor Jared Ellias. There's a book coming out that goes through the history of American jurisprudence on fiduciary duties in insolvency situations. It's a white paper. I thought it was just the cleanest way of a lot of law for hundreds of years, American corporate jurisprudence, used the trust fund doctrine. That lays all of that law out. Eventually, it heeded the business judgment rule. But there were important stops along the way in Delaware, to the extent that that was viewed by Oklahoma as a good precedent or a persuasive precedent. We have (indiscernible) and famous footnote 55, the possibility of insolvency can do curious things to incentives, exposing creditors to risk of opportunistic behavior.

That launched a whole new wave of thinking about what boards should do at the time in which a company becomes insolvent. It's sort of, I think, started its own of insolvency and stuff like that. Today, Delaware's jurisprudence is really very thin. You've got Trenwick, Gheewalla, and Quadrant. That's it. 13 years of change to jurisprudence and you've got three cases. Okay.

The rule has been tightened up a little bit. At least Gheewalla does it. Do these follow traditional business judgment principals. And they're owed to the company itself, not to any particular stakeholder. Okay. But it does not authorize a swashbuckling attitude when it comes to a massive, massive asset, like 3.8 billion in preference claims. Okay.

Now, we don't have any case law at the state level, Oklahoma, Delaware, and Texas, New York, with respect to evaluating something as big and impressive as that. We do have two federal cases, the Skorheim (phonetic) case and Exide, where in -- on the District Court and, in Exide, Judge Kerry (phonetic), in Delaware, said that, if the company intentionally lapses the preference claims, that can be a breach of fiduciary duty. In fact, Exide has a lot of similarities. The company cut a deal with the secured lenders for a quick restructuring, for a program that gave all the value to the secured lenders, the creditors committee. And they filed on the 91st day. They allowed the mortgages to harden. The creditor's committee -- I wrote the complaint. The creditor's committee lodged a breach of fiduciary, fiduciary duty, and fraudulent transfer to the equitable subordination complaint. And Judge Kerry said those claims survive a motion to dismiss.

Next page. Now, the law also tells us that when you're in distress, purchasing officers need to really, really study the situation. Judge Rakoff's decision that came down just a few weeks ago in the Nine West case is really instructive. There was an (indiscernible) that was done, and the allegation from the complaint was they didn't study the implication decision that they were making, and Judge Rakoff said that's a claim. You don't get the benefits of business judgment if you didn't really look at it. From here, I go back to Mr. Lawler's testimony: I don't need to study it; I live it.

Next bullet. At some point, squandering assets lasting values can be so great because even if you studied it, it's corporate waste.

Next slide, please. There is Judge Chapman's decision (indiscernible), and I believe that one, too. Judge Chapman dismissed the fiduciary duty and avoidance theories from the failed merger of Forest and Sabine. I don't think an awful lot of this opinion, and I'd love to talk about it, but it's not necessary.

To the extent Judge Chapman quickly draws a distinction between decision making and avoidance theories that bring value into the company, recovering payments made, for example, versus value allocation, she doesn't rest her opinion on it. She rests her opinion on the Creditors' Committee's inability to put forward evidence that if you prosecuted this claim, it actually would end up yielding value to unsecured creditors. That's not what -- we've done that here. The Creditors' Committee in Sabine did not do that. That's why those claims were dismissed. But if anybody wants to read Sabine as seeing a distinction, and I gather the debtors do, between avoidance actions that bring in money versus those that allocate, I don't find that in the statute, or in corporate -- in (indiscernible) corporate law anyway. I think if that's the reading, then Sabine (indiscernible) your opinion, and I don't, I just don't think it's right because if you avoid nearly $4 billion of liens, that's good for a company. That's a good thing.

And of course, there's claim, even if you can't go after the D&Os for the business judgment, that side will tell you, as to other authorities, that you still can go after the lenders who received the benefit of the last preferences. I'm not recreating something; that still can be a theory that works. Enterprise proved positive, they filed on the 91st day and they -- and that was a joint deal between the lenders and the company, and an equitable subordination claim alive and unjust enrichment was always available in an equitable circumstance.

So let's go to the next slide because the debtors' case narrative, they aggressively used the preference thread to secure a badly-needed rights offering, and you couldn't get it any other way. Chesapeake FLLOs and Franklin breached that deal around before May 14th, and they got those concessions by the threat of the preference litigation.

You have their argument that the company fought really hard in these negotiations to obtain these great recoveries from secured creditors and that they could not have risked the freefall because they didn't have financing in place in that scenario. Okay? And again, I don't -- I'm not faulting the executives. Life is hard. But I don't think that's an accurate narrative.

What you'll see from the evidence, and we'll go through it, is that the FLLOs did threaten, not people intentionally, I don't -- I think they're probably honest when they tell you, oh, I wasn't really worried of a lawsuit against me. But they threatened a litigious and hostile Chapter 11 case, which we know quite well, that this company really just wanted to get in and out of bankruptcy as soon as it could. And having to file those in a litigious posture was something that scared them, so they folded. They didn't get any sort of tolling agreement, no forbearance; they simply let them go. And when they -- and by doing that, they relieve the FLLOs and the second liens of litigation risk. There's no real evidence that they spent it.

The DIP financing was available, and actually, there was potentially less expensive equity financing. Okay? One of the FLLOs relieved of the lien avoidance risk, they went off on their own, and they structured the deal, and they told the company what the deal would be. Okay? And the debtor signed on after the fact. And ever since that day, it's been a hard push. They don't want to talk to me; they don't want to negotiate with me. A hard push to push that deal forward, the one that they (indiscernible). Okay?

So now let's look at the actual evidence. Okay? 77, please. There was -- Ms. Schwarzman, as Mr. Nash did in his opening, go back to 2013. I don't care about 2013. I don't care about anything until just before the bankruptcy case. May 14th was the stipulated date. That was the date. If you filed by May 14th, then most of the FLLO and second lien mortgages would have been avoidable under a preference theory and a pretty darn good one. Okay?

Let's go back only a few weeks before that time. The Board was told of the FLLO second lien preference risk. They were given an analysis that was done by the companies' professionals that showed that there was big preference risk, and that they were prepared to discern how much unsecured creditors should get in the case. Based upon this analysis, it was the company's perspective that the negotiating offer should be for FLLOs and the Franklin 25 percent of new equity goes to unsecured creditors, even if that would reduce enterprise value. Okay?

Next slide, please. Two days later, on April 30th, the Ad Hoc Group responded by threatening -- yeah, they threatened them individually, and everybody shrugged their shoulders, but they threatened the hostile and litigious bankruptcy process and that they should not and could not file during the case if that's what they were looking at.

In the same presentation, the FLLO lenders said, we know that Kirkland is telling the Board that you both have a fiduciary duty to preserve those certain alleged preference claims, and then they launched into why it is they should just disregard them.

Now we go to 79. This is Mr. Nelly's (phonetic) testimony about May 5th. Okay? The Ad Hoc -- the FLLO Ad Hoc Group delivers a restructuring proposal, and it has a weird term. I've been doing this for a long time, and I've never -- I've negotiated a lot of deals, but I've seen a term like this in a term sheet. No bankruptcy filing before June 30th. It was a deal point made at this point that if you want to negotiate with us, you better not file on the 14th.

The same day, the Board votes to pay themselves, to pay the executives 19 million in bonus payments. I'm not attacking the decision that they did that, but it's clear that they did that because they knew that bankruptcy was going to happen, and like most debtors nowadays, they might do it beforehand to avoid the 503(c) scrutiny. So this is evidence that they were thinking hard to prepare for the bankruptcy with no problem, at least when it came to their bonuses.

Next slide. On the next day, as Mr. Antinelli testified, the FLLO groups sent another letter reiterating, we're going to have ourselves (indiscernible), which is a bankruptcy case, if you file on time. A few hours later, after the company receives that letter, the second letter in, like, three days, two days, the company then sends back a term sheet to the FLLO term lender group saying, okay, we're going to do -- we'll change the term sheet, and we'll get rid of unsecured creditor fixed amount; we'll leave that as TBD.

Next slide. Remember that? That's -- so now we go five days later. We have this presentation on May 11th. Okay? This is the document. You've heard Mr. Antinelli and others say, well, this really isn't a good reflection of what truly happened. But it says the company has not inserted itself in the dialogue as creditors have constructively negotiated.

I'm sure that there's truth to both assertions. I'm sure that Franklin and the FLLOs were all talking among themselves about what a deal should look like. And I'm sure that the company said, have those conversations, keep us informed, let us know how it turns out, see if we can be helpful. That's how assertion works. But the notion that they were leaving it, that the (indiscernible) bankruptcy practice as I know it, is far more likely that, in fact, those guys were meeting separately to talk amongst themselves, in part because if you see here, Franklin was offering an exit -- a backstop rights offering that was substantially cheaper than what the FLLOs were offering. They were prepared to do it. Okay? So they went off to talk amongst themselves about that.

Mr. Lawler testified to the extent that if there's any ambiguity on the point of who was leading who, Mr. Lawler testified that it was not Chesapeake, but the FLLOs and Franklin who determined for themselves what unsecured creditors would get in this case. And that's despite the analysis they got a week earlier about the substantial unencumbered value that should go to the unsecured creditors.

Next slide. We've had a lot of discovery in this case, but we haven't seen a single document on or prior to May 14th where the Board received any other analysis about the 3.8 billion in preference claims. What could it be done? What kind of financing could come in here? What kind of deal could be achieved? There's no records at all about anything else. Even though we have analyses, we don't have any that look like that. Okay?

There's -- and then as far as the Board decision, all we have is on May 10th there was an information session. Nothing was decided. Okay? There's no vote. No votes were taken. No records exist to corroborate that the information session actually involved a deliberative process to determine not to file. There are no minutes to that extent.

Now we get into the 14th, where it's time zero. On this date, as both Mr. Lawler and Mr. Antinelli testified, there was no restructuring deal. There wasn't even a deal in principle yet. They were still talking. The decision was then made to lapse the preferences.

Next slide. The Board didn't -- Mr. (indiscernible) said the Board decided not to file, but we don't know when that decision was made. There weren't even any Board meetings on May 13th or 14th; it just kind of sort of happened. So the debtors got nothing. The testimony is, there was no legally binding deal, the creditor groups -- they were talking, and they may have been intimating what they might want to do, but they could walk at any time, they could demand the deal be changed. The leverage was allowed to dissipate, and the RSA didn't come together until later.

Next slide. But we know this is a designated deposition testimony. MUFG was prepared to provide the DIP for filing on May 14th. They had committed financing. They may not have had the equity committee commitment that Ms. Schwarzman talked about before, but this company could have filed. It was -- it had the commitment to get the financing done, it just didn't want to execute on that.

Next slide. And the FLLO/Franklin rights offering was not the only option. Franklin was willing to backstop its equity rights offering at the lower price reflected on Slide 80. What happened? Why didn't that come to be, Mr. Circle said, because the debtors never asked.

Next slide. Franklin also never believed this company was worth 3.25 billion. It was a sham. Mr. Circle testified that the Chesapeake was worth, in his mind, far in excess of the RBL and the FLLOs. And here we go back to a quote that I had back in the first day -- at the beginning of this, my opening slide, the Warren Buffett quote, quote, "The best thing that happens to us is when a great company gets into temporary trouble. We want to buy them when they're on the operating table." Okay? That's -- this company was on the operating table, and Franklin was a buyer, and so was the FLLOs, and they figured out a price point that would be a really, really inexpensive buy for them.

I'll just pause for a moment. Mr. Zensky made a point about, you know, that everybody saw before this period of time the equity upside because bondholders didn't go into the second lien exchange. And it kind of, you know, made me think about this particular slide because people do what they do for the economic reasons they have at the time. Unsecured bondholders may have been offered the opportunity to go to the second lien exchange. They may not have wanted to do it because they'd have to sign an intercreditor agreement; they lose all optionality. People don't go into second liens all the time if they're in a subordinated lien position because the senior lienholders tell them what they can and cannot do with the collateral.

Here you have exactly what Franklin wanted to be. They're in a position to be a buyer, and they can -- and they're not hampered by what the senior lenders tell them what they want to do, what they should do.

Next slide. Again, the debtors always knew that there was significant value -- a significant unencumbered value and they let Franklin and the FLLOs construct their deal on their own to take it. They knew about the 10.6 percent, that's in here, okay, but they deferred to those negotiations, and what came out of those negotiations, rather than the 25 percent that was initially asked, was what later became 17 percent.

The FLLOs and Franklin decided to give the unsecureds 12 percent, close enough, I guess to the 17, but then they took it back. They did the 3.25 rights offering and took eight percentage points and reallocated back to themselves.

Now they find themselves having to back up. Now that the company has actually grown in value, and exposes how that kind of came together, they're backing into this RBL roll up way of trying to get done because at the time deal was done, it may have been okay as the TEV was there then, but it is not okay as the TEV is today.

Last slide in this section.

RECORDING: Our system will end this conference in five minutes. To extend this -- (phone buttons pushed) -- your contract has been extended for 60 minutes.

MR. STARK: -- in our complaint. That was basically lying that that was in our complaint. They didn't have analyses; they didn't look at them; they didn't evaluate them. Once Franklin and the FLLOs did their deal and told them what the unsecureds were going to get, they signed on, when is the bankruptcy, and we've been marching like soldiers ever since.

Summation, Your Honor, on 93. It is a very big deal under the law to last 3.8 billion in known and viable preference claims. That is a very, very big deal. There is no case law that says, oh, yeah, you've got business judgment rights, you can just dispense with that. Okay? There is no decision like that. Not out of Delaware, not anybody else. There is case law saying that if you do this, you do run the risk of breach of fiduciary duty; you better study it hard.

Second point. Lien avoidance is good. Lien avoidance is not bad. The FLLOs may not have liked the fact that they went into a bankruptcy and they couldn't control the other side of it, and the debtors may have preferred, literally, they preferred, that they wanted a bankruptcy that was more of a transaction that they knew the outcome. Okay?

The lien avoidance is an acceptable way to go ahead and reorganize the company. It's the traditional way to reorganize the company. But if you're going to let them (indiscernible), you better work awfully hard. The Chesapeake (indiscernible) without having made any preparations for bankruptcy. They've had the opportunity to have the DIP financing by May 14th, and they didn't secure it. They didn't tie it down. There's no documentary evidence, again, that they really studied the issue, except Mr. Lawler says he know -- he lived it and that was good enough. Okay? And they didn't secure any deal. They let their leverage dissipate before the deal, and there's no evidence they even convened a board meeting to face these things, they just let it go.

And it is not true that Chesapeake aggressively mandated the deal. They didn't lead the discussion. As Mr. Lawler testified, the FLLOs and Franklin dictated the terms of what unsecured creditors and others would get and then they gave it to the company, and we've been marching like soldiers ever since. This is the (indiscernible) case outcome, Your Honor, I don't -- I know that I'm marching against, you know, bankruptcy practice and great professionals, and everybody is working really hard, but 3.8 billion squandered, the people who are the target of the suit, walk away with the company, for convenience sake. Okay? And now we're going to be overcompensated when the company itself knew all the way back here that unsecured creditors should be due is a terrible case outcome. It should not be exonerated under 1129(a) or (b).

Your Honor has been very patient with me and I'm trying not to belabor. I have a few more sections. Does your Honor have any questions for me about that?

THE COURT: No, sir.

MR. STARK: Okay. There's sort of a low hanging fruit claim, legal dividends. An Oklahoma company that pays self dividends when it's insolvent violates Section 41 and 52 of the Oklahoma General Corporations Act. Section 53 of the Act makes the directors liable for that. $22 million has been paid per quarter in dividends to preferred stockholders. There's no collectability issue. The company's got ample D&O, and there's no insurance along with the Committee that's going to stand and prosecute it. Okay?

We know that the 22 million equity dividend was done in December of 2019, and we have evidence of solvency. We know how 22 million was done as (indiscernible) on board and was valuating you know, preference risks, things like that. That is low hanging fruit, the 44 million, and there may even be more if we go back to earlier quarters, depending upon whether they were paid systemically and whether insolvency can be proven back there. Those are released as well for no consideration. That doesn't make sense to us either.

Again, I don't want to -- on Slide 98, we learned from reading Sabine that Creditors' Committees that bring litigation claims have to produce to the judge evidence that actually prosecuting would be beneficial to the unsecured creditors their constituency, so we provided those litigation models.

People can differ as to whether or not the model assumptions are right or wrong, but if you were to avoid the liens and the guarantees issued in connection with the FLLO, if you were to have a remedy provided for the lasting of the preferences, if you were to provide -- if those illegal dividend claims are prosecuted successfully, that is unencumbered value. That renders or delivers unencumbered value of significant quantums and that evidence has been presented to Your Honor.

If you will, Your Honor, on Slide 101 and 102, the collapsing of Classes 6 and 7. The thing that I've been trying to do from the beginning of this case to this very moment -- and if Your Honor will allow me and I'm going to be intense -- it begins with a fair outcome. I haven't been trying to, you know, stick it for people. I haven't been trying to avoid negotiations. I've been making proposals and trying to get anybody to negotiate to avoid this day as much as possible. And just nobody calls me back. Okay?

Collapsing a 6 and 7 as done in the middle of a trial, I didn't play for time; I said, okay, we'll study it, and we'll see what the implications are. But it's not particularly fair. And consistent with our entire theory of fairness, we said, well, what is fair, right.

So when we looked at the company, and we said, there are some entities in the company that are asset rich, and there are some entities in the company that are asset poor, like any other large conglomerate. If you have a claim at an asset-rich entity, generally speaking, you've done your credit risk profile, and you've made your commercial decision about providing credit one way or other about that entity, you should get the benefit of your bargain.

Some other creditor who chose to contract with a less rich entity should not get the benefit of that bargain. That is ETC's problem. That is why Mr. Mitchell was fighting, you know, the separation between the bond and the trade. He made a very component argument, it's true, that doing holistic across the board, separation of bonds and trade isn't sensible. That's not fair.

But in order to substantive consolidation, because Energy Transfer and, frankly, a whole lot of other creditors don't have claims at very asset-rich entities, they have them at certain entities that have value and some that don't have value. And so that's now glomming onto a solution, he created -- he identified the problem persuasively. The solution creates problems for everybody else. And that's not fair.

The slides here sort of show that. It sort of shows that if you do, this is Mr. MacGreevey's analysis, and we can just use the books and records (indiscernible). Okay? And if you combine it so that everybody -- and this is the combined full distributions, everybody gets 2.6 percent recovery.

If you go company by company, and people who have got claims of asset-rich entities get their allocation based upon the asset pool, it's different. If you do it with intercompany claims, but the companies do migrate values between themselves to intercompany claims, a lender -- a debtor-by-debtor analysis gets 3.8 percent for Class 6 and .5 percent for Class 7.

If you do it without the intercompanies, if you sort of just write those off as equity contributions and dividends as opposed to intercompany debt, it's a little bit different;

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it's 3.7 and .8. We just want the fair outcome, Your Honor. And the fair outcome should be people should get paid based upon what their legal entitlements are, not for convenience sake. So that's what we would suggest.

Miscellaneous issues, and then I'll wrap up, on slide 106. The confirmation order provides at paragraph 242 that the Committee goes away immediately. There are no signs of the confirmation order, there's no more committee anymore.

THE COURT: It's 276 now.

MR. STARK: Okay. Apologies. That's not consistent with bankruptcy practice or appropriate, in our view.

THE COURT: I agree.

MR. STARK: There is a -- the waiver, the 14-day stay, obviously, we're bringing substantial issues here. If Your Honor were to overrule our issues, I'd have to talk to the Committee about our appeal options. So this is intended to prevent that from happening. I'm not suggesting that we wouldn't come and talk to the Court about it or the other parties, but to -- before we even have an opportunity to hear your ruling and to think about it, it's being taken away.

There's the opportunity to modify the plan, which was carte blanche, and we don't think that's right either.

The last issue is that there's value being given in the form of equity and warrants to various bonds creditors here. We have indenture trustees, they've been very active.

They've been very constructive members of the Committee. If they have to go and sell all of the stock on the market to satisfy their charging lien, that's not -- that's going to really hurt people. The normal convention is to pay their fees in cash, and so we're supporting -- we're asking that that be done here to conform with other cases.

I promised I would conclude, Your Honor, by offering an alternative view about how to proceed. It is not a different way to proceed than any of the other times have been before Your Honor, in a sense. This case, proceeding with soldiers marching, and that's just not good bankruptcy process. These are substantial issues, and we should sit and talk about them.

You asked Mr. Baggett did the Committee prefer liquidating his company, and the answer is an unreserved no. That's never been what we're about. We have always been willing, ready, and able to negotiate a fully professional deal. Your Honor knows me. That's how I practice. I want to get to a win-win for everybody, but you have to engage with us if we're meaningful in the case.

THE COURT: Mr. Stark, here's the problem. And I've hinted at this all along. You can't stand up and accuse someone of malfeasance and then expect them to sit down and negotiate a resolution. And you did it from day --

MR. STARK: Well --

THE COURT: -- one. I'll get Mr. Schaible, and I'll get Kirkland on here, and I have every belief they'll tell you that they were offended and insulted at some of the things you've said that they engaged in. I heard it. But you can't expect people to say, okay, I'm going to put that aside, and I'm going to sit down and negotiate with you when I don't think you're entitled to something and you've impugned my reputation, which is all that lawyers have.

MR. STARK: Well, Your Honor, as far as impugning a reputation, again, there's only so many times I can apologize and say I'm sorry, and I think everybody in this deal and this Court knows me.

THE COURT: Actually, this first --

MR. STARK: Your Honor, I have --

THE COURT: This is the first time you've actually said that you would apologize. Every other time, you said you didn't do it.

MR. STARK: Well, I'm sorry, Your Honor. I thought I apologized many times at the beginning of the case. If I -- again, I'm tired. I don't think that I've impugned anybody, but if I have, and if I've offended, I'm certainly apologetic. Your Honor knows that I have all respect in the world for those professionals. I work with them all the time on lots of different cases. I have great affection for them and call them my friends.

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THE COURT: Well, I've --

MR. STARK: They've been doing this job --

THE COURT: -- been very surprised at some of the things that you have said. I've been very surprised, especially when I've got nothing in the record.

MR. STARK: Your Honor, again, the theory of this case is that a deal was struck for the purposes of economic improvement of the people that were bargaining. There's nothing wrong with that. That's commerce. That's America.

THE COURT: I agree. That would be the only way I would understand.

MR. STARK: The lawyers and the bankers hate the situation that they have, but they negotiate for their clients to the best of their ability. That's what they did. That doesn't mean the deal is right. That doesn't mean that a faulty transfer and other claims don't arise because of the structuring of that deal, that aggrandized the people who are allowed to negotiate it.

THE COURT: I totally agree. But that's not what we were talking about, was it?

MR. STARK: I --

THE COURT: You have complained. You have complained, hearing after hearing after hearing, that no one would talk to you. Now, in all candor, I don't care. But you cannot expect someone to want to sit down and negotiate with you when you position this the way you did. That's what we're talking about.

MR. STARK: Well --

THE COURT: And so I just don't think it can be that big of a surprise.

MR. STARK: Your Honor, we started this case being told you're out of the money, you get nothing; and you're going to have to litigate your way to get something; you've got three months to figure out a standing motion.

We handed everything to the other side and said we don't wish to file any of this. We don't wish to litigate. We wish to sit down with you and negotiate. We're prepared to go to judicial mediation. We were told that's not available to you, we would prefer that you go ahead and file this and start your litigation, we like our deal too much.

I said, okay, what am I supposed to do? I'm an advocate for a client. It -- I think -- I believe -- I personally believe that what happened here is a gross migration of value that belongs to unsecured creditors to those who were allowed in the room and it is wrongful.

THE COURT: I --

MR. STARK: I don't know how to say that in a way that people that negotiated or participated in the deal -- if they want to put on their hats as a commercial party and say, okay, if you've got leverage, we'll negotiate; if the Court thinks you've got no leverage, we won't.

If there are multiple -- if they feel that they're maligned because I said to them I think the deal you cut is wrongful, and I think the way that you -- if you put it into the DIP loan, as a means to kind of make sure that it was impossible for us to be able to actually litigate this, because we've seen that trick before.

I don't know what to say. I've got a job to do. But I did not shoot first. I've been trying.

If they don't want to talk to me because they don't like me, and they don't like my rhetoric, they don't like the way I smell, they don't like the way that I present myself, okay.

THE COURT: Mr. Stark. That's --

MR. STARK: This is a big case. This is a hard --

THE COURT: Mr. Stark. That's enough. You're ending exactly where you started. Thank you, sir.

All right. Anyone else have closing argument that they wish to make that opposes the plan?

MR. HEBBELN: Your Honor, this is Mark Hebbeln on behalf of Wilmington Savings Fund Society. Can you hear me?

THE COURT: Mr. Hebbeln, I can. I cannot see you. Should I be able to?

MR. HEBBELN: I've been having trouble with my camera all day, Your Honor.

THE COURT: Okay.

MR. HEBBELN: It doesn't seem to be working for me. I can't see anybody. If it's okay with you, as long as you can hear me, and see our slides, I'm willing to proceed if that works for you.

THE COURT: So let me -- that's -- that'll be a good question. Are you actually on GoToMeeting?

MR. HEBBELN: Yes.

THE COURT: All right. And who did you -- what's the login name?

MR. HEBBELN: For sharing the slides, Your Honor?

THE COURT: Yes, sir.

MR. HEBBELN: Jennifer Huckleberry, please.

THE COURT: Jennifer Huckleberry. Ah, there she is. She went last name, first. Got it. Okay. She should have control and I can hear you just fine.

MR. HEBBELN: Okay. My camera actually looks like it may be working so I may hop in there in a second, Judge.

THE COURT: Terrific.

MR. HEBBELN: Thank you, Your Honor. Again, Mark Hebbeln, Foley & Lardner, on behalf of Wilmington Savings Fund Society, FSB, as indenture trustee.

And Your Honor, just as a little background, I think, as Your Honor knows, Wilmington Savings Fund Society is the indenture trustee for nine sets of the debtors' unsecured

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notes. And the total outstanding principal amount is approximately 2.9 billion, which is the vast majority of the 3.4 billion of unsecured notes in these case -- cases, that were issued by Chesapeake Energy Corporation and guaranteed by 29 of the debtors.

Your Honor, what I'd like to talk about is the issue that Mr. Stark -- one of the issues Mr. Stark ended on, which is the combining of Classes 6 and 7 in the fourth amended plan. And I know it's a relatively narrow issue in the grand scheme of this case, but one that is important to our constituency. And I'd like to walk Your Honor through why we believe that it shouldn't be done in the way proposed by the fifth amended plan.

And, Your Honor, I expected Mr. Stark would steal some of my thunder on this issue and, in fact, he did, but -- which is fine. But of course, we have a slightly different way of looking at a couple of different points. But if I become repetitive of what Mr. Stark said, please let me know and I'll move along as quickly as I can.

THE COURT: Just fine.

MR. HEBBELN: So just -- thank you, Judge. So just a preview of our argument.

Your Honor, we start with the third amended plan, which provided for separate distributions to Class 6 and 7. As you know, Class 6, unsecured notes, got new common stock and warrants, and it was a relatively modest recovery. 2, 3, 4 percent was the estimate. One thing it did allow -- and I'll come back to this in a minute -- is it allowed for a single distribution to the noteholders, on or shortly after the effective date, because all of the noteholder claims are allowed under the plan, and they weren't sharing their distribution with any creditors whose claims were not allowed.

Class 7 obviously had the $10 million cash and we'll talk about this a little bit too. Distribution to those creditors were to be done on a debtor-by-debtor basis and they respected multiple claims that creditors had against the various debtors. And as I think Your Honor recognized, it was a disproportionately low recovery to those unsecured creditors. And what the disclosure statement basically said, noteholders have guarantees, the trades don't, so the noteholders get a greater recovery. And you know, reading between the lines a little bit, we think the third amended plan basically attempted a sort of rough justice to account for the presence of the noteholder guarantees.

Then the debtors filed the fourth amended plan and now they filed a fifth amended plan. And those plans have Classes 6 and 7 sharing in the new common stock and warrants that were previously going only to Class 6. And they created a new convenience class. We think this resulted in some issues, Your Honor.

First of all, it substantially diluted the distribution of unsecured noteholders rather than just increasing the distribution to the general unsecured creditors, which would have been an option. It turned a single distribution to noteholders, that I referenced on the last slide, into multiple distributions, potentially requiring significant OPEX, reflecting the unliquidated general unsecured claims.

And then, contrary to the fact that it's not a substantive consolidation plan, it didn't -- it does not contemplate debtor-by-debtor allocations and it wipes out the multiple -- the claims that multiple -- the creditors may have against multiple debtors. And that includes not only the noteholders, but trade creditors who might have multiple claims against debtors. And it ignores that most of the unsecured note obligations are obligations of 30 debtors holding most of the oil and gas assets, while the general unsecured claims are primarily against a few of the entities holding less of the gas assets.

And so we think -- we don't think this cured the rough justice problem of the third amended plan. In fact, we think it just bent it in a different form of rough justice on the unsecured noteholders because it completely disregarded their guaranteed claims against multiple debtors. And the beneficiaries of that rough justice were the trade creditors because they were now receiving distributions of value that is allocable to debtors against which they may not have claims. So in essence, in the fourth amended plan, the rough justice pendulum merely swung from one end to the other.

And our argument implicates, you know, substantive consolidation, new potential unfair discrimination issues, new potential DIP lien issues, and as I referenced the distribution mechanics and holdbacks that made the list, delay distributions. So, Your Honor, our view is that rough justice be -- not be visited on either group.

THE COURT: Okay.

MR. HEBBELN: In response to Your Honor's -- I'm sorry?

THE COURT: No, no, no. I was following you. I just said, okay.

MR. HEBBELN: Oh. Oh, sorry. Sorry, Judge. in response to Your Honor's concerns about the recoveries for Class 7 under the third amended plan, we obviously would have preferred to see the plan proponents just increase the distribution of Class 7, but they didn't go that way. Instead, they lumped the bonds and the trades together, so now they're both getting the same percentage recovery. And this seems, at first blush, Your Honor, as fair. After all, unsecured creditors are getting the same percentage recovery. But we would submit that it raises more problems than it solves including the ones I've already discussed.

THE COURT: So is the right -- I'm sorry.

MR. HEBBELN: No, go ahead. I'm sorry, Your Honor.

THE COURT: I mean, is the right answer -- is it just that 6 and 7 get nothing?

MR. HEBBELN: No, Your Honor. We think that the right answer is that 6 and 7 get the current gross distribution they're supposed to get, but that the distribution is recognize multiple claims that the creditors may have against debtors. And that includes not only the noteholder claims, which they have about, you know, one is short, one plan against the short and 29 claims against guarantors, but also trade creditors. Some trade creditors undoubtedly have multiple claims against debtors, and we think those should be, you know, honored also.

And in fact, the third amended plan -- I was just going to go to the next slide on this, if I may, Your Honor.

THE COURT: Sure.

MR. HEBBELN: To point out some language -- I'm sorry -- that just shows that -- I'm sorry. That slide just shows that it's not a sub-con plan, and nobody thinks it is. Ms. Schwarzman confirmed that in her closing.

THE COURT: Right.

MR. HEBBELN: This slide, Your Honor, this shows, if you look at Class 7 treatments, and if you look at the highlighted language, the -- those creditors received their full share of the general unsecured claim recovery amount allocable to the debtor for which such claim is asserted. So that plan actually contemplated allocating the $10 million among various debtors and then having creditors assert their claims. It could be one claim, it could be two, it could be three against those debtors and getting their share of that recovery.

And the next slide, Your Honor, is just Article 6(j) of that plan, which just kind of drives that point home that the holder of an allowed claim against more than one debtor may recover distributions from all co-obligor debtors until it's paid in full.

The next slide, Your Honor, is this is what I -- this is from the disclosure statement. And it just says, you know, that highlighted language, as a result, the distribution to such holders -- we're talking about the general unsecured creditors under the third amended plan will depend on the allocation of value between the debtors.

So -- and the next slide, Judge, is a chart that we included in the disclosure statement. It kind of set out what the -- where the claim against the debtor -- those debtors, resided with general unsecured creditors, and the recovery that you could have against each of those debtors. If you had a claim against more than one debtor, you got more than one recovery, so the debtor-by-debtor analysis. So it's clear the debtors could do that if they wanted to.

On the next slide, Your Honor, I'm going to segue to the fourth amended plan, but first I want to just hit -- this is the -- back one slide, please, Jennifer.

This is the discussion of the treatments and basically of the Class 6 and 7 claims and it gives as a justification the guarantees for the disparate treatment between those creditors.

THE COURT: Okay.

MR. HEBBELN: And I think Your Honor notices this is a particularly rough justice for the bondholders who were projected to get a 2-to-4-percent recovery and trade was getting just above zero.

So they filed the fourth amended plan, and again, I put the treatment up on this next slide just to show that -- the thing I'll note here, Your Honor, is that distributions are not being allocated on a debtor-by-debtor basis anymore. That concept which was in the third amended plan for Class 7, has disappeared from the plan altogether.

THE COURT: Okay.

MR. HEBBELN: And that's just confirmed on the next slide. The definition of pro-rata was changed to make that clear also. And on the next slide, Your Honor, interestingly, Article (j) --

THE COURT: Can we go back and I'm sorry, you just went faster than I. Can you go back one?

MR. HEBBELN: Yep. So that's just shows Your Honor, that one did change -- that's in the fourth amended plan that shows that basically you pool all the --

THE COURT: Got it.

MR. HEBBELN: -- noteholder claims, and general unsecured claims, and you get your pro-rata share of whatever that denominator is.

THE COURT: I got it.

MR. HEBBELN: But only on the claims once. And there's a further clarification of that in the fifth amended plan that I'll hit in a second.

THE COURT: Okay. Thank you. I'm sorry. I just wasn't able to keep up.

MR. HEBBELN: No problem. Sorry if I was going too fast.

Next slide, please, Jennifer.

So interestingly, Your Honor, Article 6(j) was still in the fourth amended plan despite the last couple of slides that we looked at, that seemed to pool the claims of the general unsecured creditors and the bond holders, so that each only had one claim. This still allowed -- seemed to allow creditors to assert claims against various co-obligor debtors' estates. So at this point, Your Honor, the fourth amended plan seemed a little self-contradictory since it wiped out the multiple claims the Class 6 or 7 creditors had while at the same time, seemingly preserving them.

So what happened next, Your Honor, last night, the debtors filed their fifth amended plan and they, I think, noticed -- must have noticed the ambiguity created by Article 6(j) and made it clear in this provision, this 6(j) and the highlighted language, that you only get one allowed claim.

Sorry, Your Honor, I'm just reading to make sure that --

THE COURT: Yeah, read that --

MR. HEBBELN: I've got my --

THE COURT: Read that again. I'm not sure just your highlighted language, that the holder of an --

MR. HEBBELN: Your Honor, I --

THE COURT: Sorry, go ahead.

MR. HEBBELN: No, I'm sorry, Judge. I think that might be the wrong -- we were scrambling a little bit this morning to get this in, because it was filed last night. But let me check 6(j). I think that might be the wrong reference.

MR. HEBBELN: Judge, I --

THE COURT: So it would be 2833, right?

MR. HEBBELN: Yes.

THE COURT: Okay. 6(j).

MR. HEBBELN: Oh, I'm sorry, Your Honor. Yeah, I think -- Your Honor, the language that was added to 6(j) carves out allowed unsecured note claims and allows general unsecured claims from the operation of Article 6(j).

THE COURT: Okay. Let' see. I am on -- let me get to 6(j). I want to read this. All right. I have it. It's on Page 48 of 64, if anyone's following along.

MR. HEBBELN: Yes. And I think it's actually -- now that I'm looking closer at it, Judge, it's on this slide. It says -- that section starts:

"But the holder of an allowed claim other than an allowed, unsecured notes claim, or allowed general unsecured claim against more than one debtor, may recover distributions from all co-obligor debtors' estates."

THE COURT: Got it.

MR. HEBBELN: Yeah. Sorry for the confusion there, Judge.

So that was just making it patently clear that the unsecured creditors basically have one recovery. And, Your Honor, on the next slide, they did something to the definition of "pro-rata" last night, which basically, in my view, did the same thing. It made it clear that (indiscernible) second-from-the-bottom line, says, "shall be counted once." So it's just driving home the point that you don't have multiple claims anymore. You have one claim.

Okay. So, Your Honor, this is just 1129(b). I think what this does is it just raises the specter of unfair discrimination. And you know, given that, Your Honor, that the fourth amended plan was filed after the start of the confirmation hearing, we obviously didn't have a chance to brief the issue. And if Your Honor thinks that would be helpful, we'd be happy to do it.

The next slide is actually a slide that Mr. Stark just looked at also, so I won't belabor it. We realize that -- I don't want to make more of it than it is. I understand Mr. MacGreevey made certain assumptions that people disagree with. I understand these numbers aren't necessarily solid gold, but we think directionally this shows that there is some discrimination against the unsecured noteholders who are having their guaranteed claims essentially wiped out. And it would do -- this does more damage to unsecured noteholders who have 30 claims than it does to, say, unsecured trade creditors who have one, two, or three claims in the proposed pooling of this recovery.

So, Your Honor, in a nutshell, this is not a substantive consolidation plan. We understand why the third amended plan was problematic in how it treated general unsecured creditors, but the fourth amended plan is equally problematic in not recognizing those guaranteed claims. But we don't have to have a plan that's problematic on this score. With a few word changes to the treatment of Class 6 and 7 the definition of "pro rata," I'll bet we can do it in fewer than 20 words. And the deletion of this new language and the fifth amended plan, I think we could cure these problems pretty easily. And we would, in our view, avoid implicating chief -- implicating issues of unfair discrimination and gifting, which is kind of lurking in the background here.

So again, Your Honor, if you think that briefing on this issue would be necessary or helpful, we're happy to do it. But more importantly, if those amendments are made to the plan to recognize the separateness of the debtors and the claims against each of them, I think those issues become moot. And the rough justice pendulum will swing back to the middle, which is probably where it should be.

And Your Honor, the only reason we can think of not to do this is administrative convenience. But we would submit that mere administrative convenience is an insufficient reason to substantively affect substantive rights.

And no matter what happens here, Your Honor, if the Court confirms the Chapter 11 plan, we will work closely with Kirkland and Ms. Sullivan from Epiq and the debtors' other professionals like we do in many other cases to get the largest distribution out to the unsecured noteholders as possible, as quickly as possible. Because that is an issue that we want to let Your Honor know is kind of lurking out there, and we're trying to -- we've raised it with Kirkland, and we're going o work together to try to get the best solution we can, get as much of the distribution out to the unsecured noteholders as possible.

THE COURT: Thank you.

MR. HEBBELN: And that is all I have.

THE COURT: I thank you -- don't go anywhere, just if you would.

MR. HEBBELN: Okay.

THE COURT: Stay on the line. When I -- I want to hear the rest of sort of these one-off objections and then I'm going to come back and hear from Ms. Schwarzman, and I have a belief that she'll at least have thoughts about some or all of these. Okay?

MR. HEBBELN: Of course. Thank you, Judge.

THE COURT: All right. Thank you.

Mr. Austin?

MR. AUSTIN: Good afternoon, Your Honor. Can you hear me now?

THE COURT: Yes, sir. Thank you.

MR. AUSTIN: Yes, sir. Thank you.

MR. AUSTIN: May it please the Court, Your Honor. Good afternoon. I'm Joshua Austin on behalf of EJS Investment Holdings, LLC, a creditor in this case.

Your Honor, EJS Investments continues to object to the rights offering. Mr. Stark went through a lot of that problematic math and, as a foreign affairs major, I'm not much better at it so I'll try not to -- oops.

THE COURT: You still there?

MR. AUSTIN: Apologies, Your Honor. My dog just started barking at a neighbor.

THE COURT: That's quite all right. Puppies are most important.

MR. AUSTIN: I'm going to try and bribe her with a treat really quick. See if that works.

THE COURT: It often -- it works on me if that's any consolation.

MR. AUSTIN: Yes, Your Honor.

Under the company's unamended total enterprise valuation, the discount is inappropriate and it was fully briefed in our objection. However, in light of Your Honor's indication that the company's TEV is more like 5.129 billion, that discount dilution is even more draconian. At a 5.2 billion enterprise value with current net debt of about 1.79 billion, that would bring the value of the equity to $3.4 billion.

THE COURT: Right.

MR. AUSTIN: The backstop fee of the rights offering is either 60 million in cash, or 60 million in stock at the 949 million equity valuation, which could work out to approximately $200 million in value as of the updated TEV Your

Honor has indicated. There's also a holdback amount of 150 million at that 949 million valuation for backstopped parties, which would be approximately $540 million of value for 150 million of cash.

THE COURT: Right.

MR. AUSTIN: This would make the total of the current backstop and holdback approximately 590 million which may be -- and like I said, I'm not a math major, but I believe that would probably be closer to 550- to 570- with the warrants, of the dissolution.

THE COURT: Right. So let me --

MR. AUSTIN: Now, in our opening, your --

THE COURT: Sorry. Let me --

MR. AUSTIN: Sorry, Your Honor.

THE COURT: -- just from a practical perspective, if it turns out and just make this assumption. If it turns out that I made a mistake and I never should have approved it, what am I supposed to do at this point, in your mind?

MR. AUSTIN: Your Honor, I think that we could either get a more equitable deal related to the current rights offering, maybe a movement on the TEV value or the discount rate or something like that, and keep the current rights offering in place. Or, the next point I was going to get to, we did file with the Court this morning that there is a fully backstopped alternative, a fully financed proposal that

Jefferies and Jones Day are backing.

THE COURT: I read that this morning.

MR. AUSTIN: Yes, Your Honor.

THE COURT: And you understand the war that that precipitates, right?

MR. AUSTIN: Yes, Your Honor, we understand that there could be problems with that. But we also believe that it's something that would get the FLLO folks to par. It would provide additional benefit to the 2L group and the unsecureds and the GUPS (phonetic) would also have an increased recovery. And it would also allow participation across all classes.

THE COURT: And --

MR. AUSTIN: It's a bit more democratic.

THE COURT: So don't I just avoid the whole rights issue by converting the case to a Chapter 7? That way, I don't have to worry about if I got it right.

MR. AUSTIN: Well, I think we've had plenty of testimony the last few weeks, now that converting this to a Chapter 7 would create a whole lot of waste with potential --

THE COURT: Well, you --

MR. AUSTIN: -- capital and --

THE COURT: Yeah, but you know you hear that. Everyone says, no, I don't want it. But the argument -- but the lawyers all argue that that's exactly what they want to have happen.

And I get that it's all a threat, but I mean, I'm looking genuinely for help. I mean, everyone is sitting here suggesting that, well, if you just threaten them enough, they're going to come around. That's -- you know, the game of chicken was played and it was lost.

And maybe I shouldn't have approved that rights offering. I did -- I made the best decision I could at the time. Maybe I was wrong. But having done it, you know, the Court process doesn't meant much if I can simply change my mind because I learned something later, right?

MR. AUSTIN: Well, Your Honor, there is a fiduciary out that the debtors have and we feel really confident that if we had even just three days, four days, to work with Jefferies Advisors, and those folks with the company, I understood --

THE COURT: So --

MR. AUSTIN: -- this morning that --

THE COURT: Now, let me ask you something. So you'll never convince me that my determination of value precipitated anything. There is no investment banker at Jefferies that cares two iotas about what Judge Jones thinks a TEV is except for purposes of confirmation. They care about the market and they know far more about the market than Judge Jones does.

I mean, how long has this been sitting out there? Why did I just get this at 8:30 this morning?

MR. AUSTIN: Your Honor, I've been -- we've been trying to find someone. In our opening, we mentioned about EJS specifically was trying to talk to people about bringing up some sort of unsecured note-backed rights offering. And I can tell you this all just -- Friday afternoon, it was gas on the fire.

THE COURT: Okay.

MR. AUSTIN: That was the first I got involved in this was over the weekend.

THE COURT: I got it.

MR. AUSTIN: And people have been working around the clock.

THE COURT: Okay. I interrupted you and I apologize. Go ahead, please.

MR. AUSTIN: No, Your Honor. I believe the discussion we've had is probably sufficient for most of what I noted. I would just note that if you were to look at this alternative, it is more democratic. It would dilute everyone far less and it wild still allow for the FLLO to be essentially made whole related to the issue that Mr. Stark has with the discount and the value that's actually being transferred to the FLLO and the 2Ls.

We're just trying to be a solution to a problem, Your Honor. And the market listens. The market sees things. And we're in a better position today than we were in that nadir and I think Kirkland did their best at that time, and did what they could there. But, you know, as we've heard lots of times here throughout the past month that there's no market. We didn't test it because there was no one out there.

People are out here with real money, real backing. Jones Day and Jefferies are real financial institutions. This is fully-backed stock. They're offering 500 million but they'll go up to 750 million, which the company said they'd actually like more money. And it would be at a far less dilution.

So Your Honor, we think the rights offering as currently formed here is inappropriate and the discount is just far too draconian, setting aside any other alternative measure, but it is just another thing we wanted to make Your Honor aware of that could be a potential tool in your toolbox. That's all.

THE COURT: All right. Got it. Thank you very much.

Mr. --

MR. AUSTIN: Thank you, Your Honor.

THE COURT: Is it Mr. Barkasy? So Mr. Barkasy, if I'm getting that right, I can see you talking to me. Had you hit "five star"?

Ah, there we go. How about now?

MR. BARKASY: Yes, Your Honor. Can you hear me?

THE COURT: Very well. Thank you, sir.

MR. BARKASY: Thank you, Your Honor. My name is Rich Barkasy. I'm from the Schnader Harrison Segal & Lewis firm, and we represent several Pennsylvania oil and gas lessors, royalty owners. Objections were filed for these parties at Docket Numbers 2122 and 2128, and there was a joinder filed by several lessors at Docket Number 2142.

I -- we're heartened that, as Ms. Brown described during her presentation that there have been improvements to Article 14 of the plan as it applies to royalty owners, Your Honor. As to our specific Pennsylvania royalty owner parties, we are looking for some further clarifications with regard to their rights, and we've supplied some language to the debtors in that regard for the confirmation order, and hopefully, we're able to resolve that language. I just wanted to mention those for the record.

Our objection was filed before the modifications to the plan, and for example, in our objection, we contend that our clients' interim claims for termination of the debtors' interests in oil and gas leases would not be subject to the discharge, because they're interim claims, not in personam claims. Now, with the modifications to Article 14, we're just seeking a clarification that our clients' rights with regards to those interim claims are preserved. We -- and the same is also true of the claims made with regard to the issues concerning whether unpaid or underpaid or wrongfully deducted royalties are property of the estate.

THE COURT: So --

MR. BARKASY: It --

THE COURT: I'm sorry.

MR. BARKASY: We had a -- and we're just looking, like I said, we're referencing the confirmation order, reserving our positions and the debtors' positions in that regard. We just -- what we understand the basic idea of Section 14 to be.

With regard to the -- another one of our objections, we believe that the post effective date royalties are not subject to the discharge. If the reorganized debtor doesn't pay royalties due from the effective date on, that the bankruptcy discharge and the plan can't bar or preclude those claims. We're asking for some clarification in that regard, and a clarification that parties, if post-effective-date royalties are not paid by the reorganized debtors, will not have to come to this Court and seek stay relief or discharge injunction relief in order to be able to proceed with claims for post effective dates and royalty claims against the reorganized debtors.

The last item, Your Honor, relates to the automatic stay. That Article 14 describes certain things that the bankruptcy court will decide, like issues relating to the discharge. We think that that language does not preclude requests for relief from the stay, to -- so one of them better were to liquidate or determine the amount of unpaid or underpaid royalties, or to determine interim rights under oil and gas leases under Pennsylvania law. However, we were seeking a clarification in that regard.

Finally, we're seeking clarification as to our clients, to the extent that their secured claims are allowed, they will be paid in full in accordance with the other secured claims provisions of the plan. And we've provided language proposed to the debtor -- the debtors, and hopefully we'll be able to include those things in the confirmation order, but I wanted to state those objections for the record, just in case there was an issue that arises.

THE COURT: Fair enough, and I tried to take good notes, and quite honestly, as I was trying to think and write, you went faster than I could write and process, and so let me -- there were some things in there that puzzled me, so like for instance, plan goes effective -- I don't understand why there's an issue of the automatic stay anymore. It's a discharge injunction issue, not an automatic stay. The stay's going to terminate.

MR. BARKASY: I -- so I -- I agree with you, Your Honor.

THE COURT: Okay.

MR. BARKASY: I agree with that. There would be an issue if, post-effective date, royalties were not paid as to the discharge injunction and clarification in advance that we wouldn't have to come back to Your Honor and first file a motion for relief from the discharge injunctions to proceed with that kind of a claim might be helpful to the extent that those claims may arise post-effective date.

THE COURT: So -- and again, I hate to venture down this path, because I don't know the factual scenario, and I don't know what conversations that you've had with counsel. A claim that arises after the effective date? I struggle to see how that could be implicated by the plan. Now, if there was a claim that arose post-confirmation, pre-effective date, different issue, and obviously, pre-confirmation, same issue. So I don't really have a good sense of what you're talking about.

But I will just tell you, just as a general notion, and again, you know, I've read the plan a couple of times, but as you know, it's a long, complicated document, and unless you're reading with a specific question in mind, you don't obviously absorb everything. You know, if a claim truly arises post effective date, I can't imagine how it's implicated by the bankruptcy plan. Now, if it -- you know, if it arose pre-effective date, but you want to bring it post effective date, then yes, I think there are issues there, and I just don't know. And so I don't really know what you're searching for from me.

It sounds like to me, you understand all the issues, and I'm not even sure they're confirmation issues. They are -- they may be plan interpretation issues, or this set of circumstances has arisen and so we need to know what we can do and what we can't do, or we think the plan says this, and we want to go do something different, and we just want to make sure that nothing -- you know, that no one says we did something wrong. I don't know -- I'm -- again, I hate to venture down a path that I don't fully understand, and I'm just trying to give you my reaction.

MR. BARKASY: Your Honor, I don't disagree with really anything that you're saying. To put it in a factual context, we have a number of clients who allege that over a period of several years, the debtors have wrongfully deducted sums from royalty payments. There's some expectation that that could possibly continue after the effective date with royalties that would come due from the day after the effective date in the future, and --

THE COURT: So --

MR. BARKASY: -- I guess instead of creating an -- you know, it would just eliminate an issue if we understood that those claims could be pursued as if there had -- they were unaffected by the plan. It's not anything tricky or sneaky, we just, you know, the need for these claims to be filed somewhere post-confirmation, and then post effective date, may be required, and that's all. There's nothing -- it's not a -- I

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can assure you, not some kind of major strategic item that we're trying to push. It's just the idea that it would eliminate and provide some comfort in the event that those actions are necessary. I agree with you with regard to pre-effective date royalties that obviously are either impacted by the bankruptcy stay, and as I read the plan, the parties wouldn't be precluded from moving for relief from the stay to arbitrate those claims under the lease provisions requiring arbitration and the like.

But -- and Your Honor may or may not grant that, and then Your Honor may decide those issues. But I understand that's how issues that would arise post-petition, pre-effective date, would be handled.

THE COURT: Got it. And so let me just give you a reaction, so try -- so it gives you some context, and again, I will be the first --

(Recording interrupts)

THE COURT: Sorry about that. So let me give you just a reaction, and let me be the first to profess, I don't understand Pennsylvania oil and gas law. So start with that presumption. So what I'm going to give you is a Texas answer, because I do have a pretty good sense of Texas oil and gas law.

So if there were a claim pre-effective date for underpayment of royalty due to an improper deduction of some sort, let's say. And I'm trying to define something very generic. It is my view that that is a legal claim that would get liquidated, and then it would be paid pursuant to the plan. Let's say that the plan went effective March 1st, and then beginning -- let me pick something that can't possibly anyone quibble with -- let's assume that on June 1, there was then a new alleged improper deduction going forward. I'm just creating a gap in time for purposes of example.

I think, at that point, the plan is irrelevant, and I think that you could then go do whatever Pennsylvania law says you can do, and again, that's just Jones' reaction. Obviously, that's not put to me, and you know the rule. There's a good reason why they tell judges not to make advisory opinions, but I think I just gave you one. And so -- but I -- just to try to draw an example for you of, you know, what I think is effective and what's not. Okay?

MR. BARKASY: Thank you, Your Honor.

THE COURT: Thank you. All right. I think, Mr. McCune, I think you were next?

MR. MCCUNE: Can you hear me, Your Honor?

THE COURT: Very well, thank you, sir.

MR. MCCUNE: Excellent. I don't intend to be long. Your Honor, this is Patrick McCune. For the record, I represent Caddo Parish, Louisiana, and several of the persons and entities listed in the objection to debtors' Second Amended Plan, found at D.E. 2134. I apologize that I'm rising out of order here, but I was waiting for an amended proposed order for confirmation the plan to be filed by the debtors before speaking, to note we have resolved our objection.

THE COURT: So --

MR. MCCUNE: And since one has now been -- sorry, Your Honor.

THE COURT: No, no, no. So the -- is there now a further revised order?

MR. MCCUNE: Yes. 2847.

THE COURT: Ah. I looked at 2845. Thank you. I don't even know --

MR. MCCUNE: No problem.

THE COURT: I don't even know that there is a 2847, I haven't refreshed my docket.

MR. MCCUNE: Well, since one has now been filed, Your Honor, can I make a brief statement regarding that order as it concerns my clients?

THE COURT: Of course. Do you want me to follow something along, or do you just want to make a statement for the record?

MR. MCCUNE: I just want to make a quick statement for the record.

THE COURT: Then please go ahead.

MR. MCCUNE: Thank you. Your Honor, as you may recall, we filed an objection at D.E. 2134 and offered extensive arguments on the same during the opening arguments in this hearing. Similar to the sentiments of Ms. Deidre Brown expressed earlier, while we are not fond of several components to the plan, we've elected to resolve that objection through inclusion of certain language in the order confirming the plan. At present, that language appears in Paragraphs 260 through 270 of D.E. 2847, the Amended Order for Confirmation of the Plan, addressing the Caddo DeSoto owners. In part, we have incorporated and reiterated therein much of the language from the current Article 4, Section T of the plan, which was recrafted with the input of the hardworking royalty committee, in line with the goals Ms. Deidre Brown so eloquently expressed earlier to reserve and preserve rights regarding current and future disputes.

I want to thank debtors' counsel, in particular Tricia Swaler (phonetic) and Annie Drysback (phonetic) for working with us late into the evening to complete work on the insert, and I thank you for allowing me to make this brief statement. And one more thing: I'd just like to express my sincere admiration of the Court's management of this online trial, and to offer my congratulations to the attorneys who have managed the bulk of the presentations during the same. I think everyone acquitted themselves exceptionally well. That's all I have, Your Honor.

THE COURT: Thank you, Mr. McCune.

Mr. Pitta, and I hope you didn't put the puppy in the closet. I hope --

MR. PITTA: No, no. She's just heading elsewhere.

THE COURT: All right.

MR. PITTA: I'll miss her, though. Thank you, Your Honor. Thomas Pitta from Emmett, Marvin and Martin. We represent the Bank of New York Mellon Trust Company, which is the indenture trustee for about $425 million of the debtors' unsecured bonds, and a member of the Creditors' Committee.

Your Honor, I won't be long. You know, I would adopt the arguments made by the Committee, and earlier by Mr. Hebbeln on behalf of WSFS, who is the, you know, the indenture trustee for a substantially larger portion of the unsecured bonds.

I would agree, though, with what Mr. Hebbeln said. It appears that what's happened twice now is that following comments by Your Honor, and arguments made by certain trade creditors, the debtors have tried, in what appears to be a couple of clumsy ways, to fix a problem that Your Honor pointed out. You know, and, you know, when the fourth amended plan was filed, you know, the debtor reacted to statements that the, you know, the distributions to Class 7s were relatively negligible, and much lower than Class 6, and instead of increasing those distributions to Class 7s, they reached into Class 6's pocket and transferred some value to them. You know, and as Mr. Hebbeln pointed out, we think that ignores the relative value of the claims of the holders in Class 6, and creditors in Class 7.

You know, and then the fifth amended plan, it kind of just looks like a couple of Band-Aids put over the wounds created by the fourth amended plan. It -- you know, the debtors have said that this is not a substantive and consolidated plan, Ms. Schwarzman argued that specifically this morning and said it's not a substantive and consolidated plan.

But with respect to Classes 6 and 7, particularly with this language that's been added to the fifth amended plan, this is a substantively consolidated plan. It says, notwithstanding what claims you may have as different entities, you're only getting one distribution, you know, and that is substantive consolidation, and not only did the debtors not make a case for substantive consolidation, but one, they've argued that they're not substantively consolidating, and two, I think they actually made a pretty confident case that these estates should not be substantively consolidated, that they do track the books and records on an individual basis of these debtors, and so, substantive consolidation is inappropriate here.

And to go back to 6, you know, I think this is a couple of clumsy fixes to a problem that Your Honor pointed out, and, you know, the third amended plan, for all the deficiencies that we think that it did have, I think

Mr. Hebbeln described it well. It did a kind of a rough justice between Classes 6 and 7s, and it actually attempted -- and even the disclosure statement was very specific about the fact that it attempted to weigh the value of the relative claims of the parties in those classes. And the fix that they came up with, rather than actually just putting some more value into the plan to address the claims in Class 7, was just to take money out of the pocket of Class 6 and transfer it to Class 7, and doing it in a way that looks and smells like substantive consolidation, but we're being told it's not.

THE COURT: Sure. So let me --

MR. PITTA: And so, you know, absent a -- go ahead.

THE COURT: No, no, because I -- this is actually very helpful to me. So when I posed my -- when I posed the problem, I had no idea what the ultimate valuation -- what conclusion I was going to come to regarding the valuation. What I could -- the assumption that I made was that there would be value that would flow down on this -- in those classes, and so that -- that disparate treatment issue was problematic for me. And not asking you to agree or disagree with the valuation, but the valuation that I've now made, does it matter? I mean, wouldn't we be --

MR. PITTA: Well, I think --

THE COURT: -- if we really --

MR. PITTA: -- it's --

THE COURT: -- if I really wanted to make this plan work, I'd just say, you know, value is what value is. There's no value that goes to those classes, they voted no, so it doesn't change anything.

MR. PITTA: Well, I think, Your Honor, that obviously your finding on value is relevant. It does matter.

THE COURT: Okay.

MR. PITTA: But I don't know that it's the end of the discussion.

THE COURT: Okay.

MR. PITTA: You know, I think the Committee has made a substantial case that valuation is not the only issue --

THE COURT: Agreed.

MR. PITTA: -- that goes to whether unsecured creditors are entitled to a recovery here. You know --

THE COURT: So let me ask you this, as a member sitting on the -- as a member of the Committee, if that language changed so that -- because I don't like predetermining things. I like for the process to work itself through. If it just said -- if it just talked about allowed claim, but didn't reach the conclusion as to what an allowed claim was, would that solve your concern?

MR. PITTA: Your Honor, I guess the question I would ask to clarify that is, are you intentionally saying we go back to the fourth amended plan language?

THE COURT: No. Because that predetermined the other way.

MR. PITTA: Well, Judge, I just want to make sure that you're -- real quick, the fourth amended was the one that we had as of yesterday, where -- I mean, I believe everybody's interpretation of that plan, notwithstanding what I think was just some legacy language that was left in Paragraph 6-J, I believe everybody's understanding of that was that the changes made last night were to clean up language, but not to change what's supposed to happen here.

THE COURT: Right. So -- but the whole problem with both what I'm just -- what I'm going to call three and four, and hopefully that's clear enough. The whole problem with three and four is that it was determinative of an issue in different directions. And I actually don't think that plans are the place where you determine what -- you know, who's got what claim? I think plans are where you determine, once you figure out what the body of allowed claims is, then that's how they get treated.

The disclosure statement is supposed to give you some idea of what the range of the claims could be, but, you know, my view of a plan is it's for treatment purposes, and so if we just went back to a definition of allowed claim, and we made it, and, you know, we can effectively track the code, why does -- and I don't know whether your issue is, you know, the right issue or not. I'm not going one way or the other, but obviously, I've had two people bring that up, and it just seems to me, in order to stop people trying to push it to the left or to the right, if the goal is to really get it in the center, we just go back to a very simple, you know, just the holder of an allowed claim. And the holder of an allowed claim is what it is. Doesn't that fix the problem?

MR. PITTA: So theoretically it does, Your Honor, but I think that it begs the question, what is the treatment under the plan?

THE COURT: Well, the treatment is whatever --

MR. PITTA: And is the treatment under the plan --

THE COURT: If you have five allowed claims --

MR. PITTA: Is the treatment under the plan -- sorry, go ahead.

THE COURT: No, no, no. This is so hard on video.

MR. PITTA: All right?

THE COURT: Yeah, go ahead.

MR. PITTA: So we may have allowed claims, we may wind up having allowed claims as 30 (ph) debtors, and I believe that's actually -- that's baked into the plan, and nobody disputes it. The unsecured noteholders have claims against the issuer, Chesapeake, and 29 guarantors.

THE COURT: Right.

MR. PITTA: So we'll wind up with claims at 30 entities. But it begs the question, does the plan that you're envisioning allow for treatment by 30 entities? So are 30 entities distributing stock that makes up 12 percent of the common stock of the new reorganized debtors?

THE COURT: So --

MR. PITTA: And I don't know how we -- I mean, I think we could do that, but I don't think that either of the plans that have been filed, any of the plans that have been filed really contemplates doing that, and that's part of the problem, is that, you know, from the beginning, while this is not a substantively consolidated plan, this has been effectively a substantively consolidate plan. The third amended plan talked about the noteholders getting one distribution of 12 percent of the common stock in this reorganized entity. The fourth amended plan still talked about one distribution to the noteholders, but in this case, it's just being diluted further by the claims in Class 7.

THE COURT: Right.

MR. PITTA: And so I agree with you that if we had 30 allowed claims, we would be taking a step in the right direction, but the treatment provisions of the plan stop us short of actually achieving the proper solution.

THE COURT: Well, so you want to go back to the debtor-by-debtor issue, and here's the -- and it's not that that's a bad result. If there were truly value down in each of those entities, then that is probably an exercise that we would need to do, and maybe that is ultimately what we do need to do. I'm just trying to figure out what it is you're really asking for, because this has a practical implication to it, and I like practicality, I like realism.

MR. PITTA: It does, Your Honor, and, you know, part of the problem here is that this is a problem that was created halfway through a trial.

THE COURT: Uh-huh.

MR. PITTA: You know, and so, it didn't lend itself to nuanced solutions in the time that it came up, and so I, you know, your statement that maybe that's what we have to do, I think is theoretically correct, but, you know, I have listened to Your Honor, I hear where you're at, and I don't think that's where we're going --

THE COURT: Okay.

MR. PITTA: -- and so I think, you know, what --

THE COURT: If you were writing the order --

MR. PITTA: -- the solution to this problem is --

THE COURT: If you were writing the order, what would you write? I have a basket of goods with, you know, a certain percentage of the new common equity and some warrants to tag on to that. If you were writing the provision, and I'll just -- you know, if you make the assumption that everybody's going to get treated equally, and I mean, equally by having the same

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opportunity. If somebody's got a -- you know, somebody provided bottled water, and has a guarantee from six entities, then theoretically, it could file six proofs of claim. If a bondholder has a guarantee from 32 entities, then theoretically, it could have 32 claims. If you were writing the language, what would you say?

MR. PITTA: Well, Your Honor, I think part of the problem here is that this isn't really a thing that should be fixed in an order, it should be fixed in a plan, and, you know --

THE COURT: Well, we're going to fix it --

MR. PITTA: -- if you're calling balls or strikes, and I think the answer is to call a strike here, but I think that the practical solution is to tell the parties, if this is your inclination, I'm inclined to confirm this plan, but this problem needs to be fixed, and then I think that a commercial solution could be reached, but I think that that commercial solution is to say, if you're inclined to say that yes, the unsecured creditors can only get 12 percent, because that's what this plan says, and I'm inclined to confirm this plan, I think the solution is to say, it's 12 percent, but parties should receive a -- it's not a perfect solution, because these entities do not have equal value, but to the extent that parties have claims against multiple debtors, they should -- the definition of pro rata for unsecured creditors should --

and I'm going to not do math on the fly here, or even write math on the fly here, but the definition of pro rata should incorporate the number of claims that you have relative to the number of claims that other unsecured creditors have.

THE COURT: So why should the language -- as opposed to putting numbers in there, why should the language not be that in order to figure out what each person is entitled to receive, you take the sum total of the claims held by that person or entity, divided by the total number of claims asserted? By everyone? Why isn't that the right --

MR. PITTA: At each entity?

THE COURT: Well, I just -- globally, I mean -- because if you do that --

MR. PITTA: Well --

THE COURT: -- because, I mean, how do you allocate the equity between entities?

MR. PITTA: I think I actually just figured out what you were suggesting. So your suggestion being, if we have a claim against the issuer in 29 guarantors and we have a $425 million, our claim would be 425- times 30. 425 million times 30, and then, we would share in an unsecured creditors pool, pro rata, based on everybody else's claim, times the number of debtors they have claims against.

THE COURT: Yeah. And I wasn't trying to say that -- you know, I mean, because I can see -- let me draw up a really weird scenario where you're owed something by Entity 1, and Entity 2 has a 50 percent guarantee, and another entity has a 50 percent guarantee.

So obviously it wouldn't be the claims times three. It would be the claim -- I mean, you get my point. I was trying not to be limiting. And I don't know -- I mean, that's potentially right. So both the numerator and the denominator will be reflective of what the ultimate disposition is, and I don't know what it is. I mean, I'm not trying to -- I'm certainly not trying to resolve that today.

MR. PITTA: No, I appreciate that, Your Honor. You know, it brings me to, you know, one of the other -- "injustices" may be the wrong word, but one of the other injustices that the forth in the fifth amended plan have visited upon the noteholders here, which is that under the third amended plan, on the effective date, 12 percent of the stock was going to be distributed through the DTC to the holders of the unsecured notes, and they would be on their merry way.

THE COURT: Uh-huh.

MR. PITTA: Under the fourth and fifth amended plans --

THE COURT: Doesn't happen.

MR. PITTA: -- you know, there are substantial rejection damage claims that have to be liquidated here, other unsecured claims that need to be liquidated, and we're looking at -- we don't know what magnitude of distribution is going to be available.

Now, to the extent that we have to then -- or the debtor has to engage in a process where it's figuring out the best pro rata share, you know, that probably exacerbates that problem from the noteholders' perspective, and leaves them in limbo for even longer.

THE COURT: Sure. But it's fair.

MR. PITTA: You know -- and I don't -- I don't necessarily disagree with you on that at all, Your Honor. You know, but again, it feels like Your Honor raised an issue with a provision of the plan and the -- what looked like a neat solution is actually fairly clumsy and creates a lot more problems.

And you know, I -- you know, this is the -- I've heard you say this in multiple cases. You are not the -- you know, you're not the kind of judge who says go in the hall and fix this. But I think there is some value here to say you have a problem that you've created in this plan, and this is a problem that's created by the circumstances of this trial. This was a solution to a problem that was dropped into the middle of trial, and I think if the parties had more opportunity to have worked through this ahead of this trial, you know, there would have been and there could have been a

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more neat solution to this that was a little more fair, and also logistically worked better.

But I think that there's some value to say whatever you're going to say in this trial -- and I can read tea leaves, but I, you know, whatever you're going to say at the end of this trial, I think it can be accompanied by -- and it sounds like Your Honor understands the issues that this creates and has some issues with it, at least, an instruction to the parties that you need to think about what you've done here.

And I encourage you to take some time -- and it's not -- I don't think this needs a lot of time -- but take some time and go find a solution to this that gets us back to rough justice for the noteholders while also providing a -- you know, a modicum of justice to the other creditors, including creditors who were in Class 7 but actually have multiple-debtor claims.

THE COURT: Right.

MR. PITTA: You know? This is not just a noteholder issue. But I think -- I think that's what makes the most sense here, rather than you and I trying to fix this on the fly over a Zoom.

THE COURT: Sure. So --

MR. PITTA: Or a GoToMeeting.

THE COURT: No, no, no. So the way -- and just -- I mean, I've been thinking about this a lot. And you know, the problem is -- and I know you appreciate this -- is the debtor has nothing to offer. The debtor doesn't care who its shareholders are. Or it shouldn't. And so this is a -- you know, this is a Tom Pitta versus Damian Schaible discussion, best I can tell.

MR. PITTA: Your Honor, I think that's a discussion that Tom Pitta and Damian and Mr. Stark and Mr. Zersky (sic) you know, can engage in. And Mr. Hebbeln, you know, can engage in. And I really think, you know, all the members of the Committee have an interest in this. You know, and to be frank, Your Honor, I think that having your ruling may be --

THE COURT: Helps. I got it.

MR. PITTA: -- helpful, you know, to reaching a solution on this. But I think -- I think it does warrant a neater solution. And I see Ms. Schwarzman has jumped back on, and I just wanted to address one other thing, which is that -- you know, even to the extent that one would argue that this is a gift, I don't believe that much in the munificence of the banks in Mr. Schaible's group, or Franklin, for that matter. And this gift is given on account of some belief that there is at least, you know, a holdup value here.

And, you know, I don't think they just decided they want to give a few hundred million dollars of value away. And so I don't think it's as simple as saying this is a gift, you don't have to care about where it goes --

THE COURT: Yeah. I got it. You and I both --

MR. PITTA: -- because I don't think that's really how it works.

THE COURT: You and I both know this was done to try and entice Class 6 to vote for the plan, and it didn't work. That's why --

MR. PITTA: Yeah.

THE COURT: That's why it was done.

I've got -- don't go away. If you would, just hang on the line. Let me --

MR. PITTA: I'll be here.

THE COURT: Let me finish the circle.

Mr. Kincheloe, I know you're there.

There's one thing -- Mr. Alonzo got an email from an individual by the name of Jon Winick. And, Mr. Winick, I saw you on earlier. Are you still with us?

MR. WINICK: I am, Your Honor.

THE COURT: Is it possible -- I really like to see people. Is it possible for you to turn your camera back on?

MR. WINICK: Yes. And I'm going to apologize. I couldn't get into the meeting before. So I didn't think I could be on video, so I didn't dress appropriately, so --

THE COURT: That's quite all right.

MR. WINICK: -- I apologize for that.

THE COURT: So I -- number --

MR. WINICK: I just want to just --

THE COURT: Go ahead. I'm sorry.

MR. WINICK: That's okay. No, go ahead. Sorry, Your Honor.

THE COURT: No, the podium is -- I was just going to say the podium is all yours.

MR. WINICK: Thank you, Your Honor. My name is Jon Winick, CEO of Clark Street Capital. I'm a holder personally of the bonds, and sort of informally represent a group of us. I'm not an attorney. You know, this whole process has been an education.

You know, first off, Your Honor, I really appreciate the time you've spent on this case, the thoughtfulness. And I mean, the fact that you came up with your own valuation, which we will respectfully disagree with, but, you know, certainly not something a typical judge does. So, you know, I appreciate your engagement in this process.

You know, my background is in the world of banking and, you know, one thing that sort of struck me as being odd about the U.S. bankruptcy process is, you know, at least in the banking world, no regulator would ever let a management team who kind of drove a financial institution into the bus retake the keys. You know, to give you an example, Wells Fargo had a scandal a couple of years ago. They had about $10 million in damages, and they essentially required the firm to fire two

CEOs and replace the entire board of directors.

THE COURT: I remember.

MR. WINICK: This particular -- this particular management team at Chesapeake has presided over a catastrophic loss of value in American history. You know, part of the flaw of the banking process is we're presuming that this group is qualified here to get the most value. I disagree. I think the Court should consider hiring an examiner and see if we've got the right management team to pull off this Chapter 11 plan.

The other thing that's bothersome is this company's been filing -- has been thinking about this for years. To paraphrase Michael Corleone, this company's been filing the same bankruptcy for years. Seems like they've been looking for the perfect time to file in order to essentially walk over billions of dollars of unsecured creditors.

To me, this looks like this company took a dive -- you know, you want to call it a "flop," but they basically waited for the perfect time to burn through billions of dollars in value. And you know, this plan, based on their made as instructed $4.1 billion valuation basically implies that the current management team has burned through -- what is that, $8 billion in cash. And now we're being asked to trust them again, and I think it's amazing that anyone would seriously believe that the stakeholders are best served by this management team.

If you confirm this plan, you would send a message to any public company, be a reckless steward of your shareholders' money, collude with your favorite lenders against the interest of the stockholders and other stakeholders, and put together a slick bankruptcy plan, hire great counsel, and go from there.

I was encouraged by the first day of the process, where you seemed to want the two parties, Brown Rudnick and Kirkland, to get together and work on an solution. I think it's disappointing that the debtors' counsel has refused to negotiate with anybody. And you made these comments regarding -- Your Honor made these comments regarding the trade creditors, and their solution was to collapse 6 and 7. You know, we have guarantees from 26 entities. They may have a contract with one subsidiary. So believe it's totally unfair to treat 6 and 7 essentially the same.

Your Honor, I hope you'll do what is right here and reject this plan. You've rejected their valuation, and I urge you humbly to reject this plan. I also urge you to allow us to prosecute our claims.

THE COURT: Thank you.

MR. WINICK: With that, I appreciate the time to speak, and hope we move forward, reject this plan, and start over.

THE COURT: Thank you, Mr. Winick.

Mr. Kincheloe.

MR. KINCHELOE: Good afternoon, almost evening, Your Honor. My client's objection has three issues. The first, which I think is probably the -- both easiest and most difficult in different ways, the jurisdictional issue. The plan contains what has been in a lot of cases, it's a retention of jurisdiction. And I don't remember who said this -- it was sometime this morning that it was talking about the preference actions and how the 90 days couldn't be extended because Congress was the only one that could extend it. It makes total sense. Valuation and all that's not my issue.

But it does kind of carry over here that only Congress can expand jurisdiction. And that's been the subject of a lot of litigation. I know we have Stern v. Marshall, but when it comes down to subject matter jurisdiction, that's defined by Congress.

THE COURT: Yeah. Marshall was actually constitutional authority, not jurisdiction.

MR. KINCHELOE: Sorry. I may have misspoke. That's what I was trying to say, was Stern v. Marshall talks about constitutional authority and the statutory jurisdiction has to fit within that. But the basic concept of subject matter jurisdiction is statutory. And that, like 547 and the 90 days, is set by Congress. This plan expands what 1334 provides. 1334 gives the Court exclusive jurisdiction over the case, and then 1334(b) says that the Court has non-exclusive jurisdiction over matters arising under, arising in, or related to.

Now, "arising in" isn't in Article XI of the plan, but "arising out of, or related to" are. And it says that the Court's going to retain exclusive jurisdiction over those two categories. That's beyond what 1334 provides.

And I know I've made a similar argument to Your Honor before, and the Court suggested that we say okay, the Court retains jurisdiction to the maximum extent permitted by law. In a normal contested matter, that probably is okay. The problem that might client's concerned with in this case is the Supreme Court's decision in Espinosa. And at least as I read Espinosa, it says to the extent a confirmed plan conflicts with the statute, the plan controls.

THE COURT: Right.

MR. KINCHELOE: Okay. Well, I mean, I could come up with arguments why that case probably shouldn't apply to jurisdiction. I don't want to have to make them, and my client doesn't want to have to make them, and so I'd rather just object here.

Right now, the plan expands -- would expand the Court's jurisdiction, and I don't want to risk either me or my client with some other counsel having to argue whether Espinosa applies later.

THE COURT: Can you take me --

MR. KINCHELOE: And so --

THE COURT: I'm sorry, Mr. Kincheloe. Can you take me to the specific language in the plan that you're talking about?

MR. KINCHELOE: So there's one spot in the plan and two spots in the confirmation order. It's -- I'm looking at Document 2833. And the page number at the top, it's Page 58 of 64. If you're looking at the page numbers on the bottom, it's actually Page 54 of the plan.

THE COURT: Yeah. Hold on. Oh, I had 2833 up. Sorry.

Okay. I'm sorry. I have 28 -- and it's what of 64?

MR. KINCHELOE: It's Page 58 of 64.

THE COURT: 58 of 64. Okay. So retention -- so --

MR. KINCHELOE: And it says, you know, dot dot dot, "shall retain exclusive jurisdiction over all matters arising out of, or relating to." And I mean, there is plenty of case law -- those are terms of art that have been interpreted by the courts, and this comes straight out of 1334(b).

THE COURT: Yeah. I'm not going to do anything more than add the language "to the maximum extent provided by law." Because I don't think I can change that. And I don't think -- number one, parties can't agree to it. I have what I have. And as the Supreme Court has taught us, we determine that on a case-by-case basis. So I'll add that, but nothing more.

MR. KINCHELOE: Well, Your Honor, I would ask for one thing. If the Court wants to overrule me, I'll take that and --

THE COURT: Understood.

MR. KINCHELOE: -- advise my client. There was a paragraph that was added last night to the confirmation order, that's Paragraph 258.

THE COURT: Okay. Hold on. Let me get there. Is it -- can you give me the reference to the brand new one, 2847?

MR. KINCHELOE: If the Court gives me a second, I can.

THE COURT: Sure.

MR. KINCHELOE: I had the one last night open. So it's Document 2845. And it looks like it's Page -- well, no, Your Honor. I'm sorry, the -- oh, here it is. It's now Number 256. It's Page 133 of 211.

THE COURT: Okay. I'm sorry, one what? I just couldn't hear you.

MR. KINCHELOE: 133 of 211.

THE COURT: Okay. And it's 250 -- it's what page?

MR. KINCHELOE: It's -- sorry, it's Page 133.

THE COURT: I'm sorry, paragraph.

MR. KINCHELOE: Paragraph 256.

THE COURT: 256.

MR. KINCHELOE: And I heard Chesapeake's counsel on opening argue that they're not subject to FERC's jurisdiction.

I'll get to that in a second. But if they're not --

THE COURT: That's not what they said.

MR. KINCHELOE: Okay. Either way, Your Honor, I'd ask that this paragraph be deleted. I mean, there's just no reason --

THE COURT: We can't be on the same -- because Paragraph 256 is a settlement with Stone Well Service.

MR. KINCHELOE: Okay. I'm looking at Document 2845.

THE COURT: Right.

MR. KINCHELOE: Am I looking at the wrong one, Your Honor?

THE COURT: The current confirmation order is 2847.

MR. KINCHELOE: If the Court will give me a second, I'll try to find it.

THE COURT: Sure. What am I looking for? And I'll do the same --

MR. KINCHELOE: There's -- the subheading is "FERC Jurisdiction."

THE COURT: Ah, okay. I can search for that. It's 255.

MR. KINCHELOE: Whatever my client's jurisdiction is, it is -- it's the Court saying it's retaining jurisdiction to the maximum extent permitted by law. Okay. My client and I can talk about it after the hearing. But a paragraph trying to modify my client's jurisdiction in any way is just -- I can't --

THE COURT: So let me say this. So I've read 255. I don't think that 255 has anything to do with FERC. I would just suggest we delete the header "EEEE, period, provision regarding FERC jurisdiction," because 255 has nothing to do with FERC jurisdiction specifically. It may have tangentially, but it ends by, you know, the "Bankruptcy Court shall not retain jurisdiction beyond the maximum extent allowed by law under the applicable circumstances." I mean, that's all we've said.

I'm not going to do anything less. And I'm certainly not going to do anything more. I do think the header comes out, if that was creating confusion, because I don't think it serves any purpose. And to the extent that it's meant to mean something, it shouldn't.

So we're going to delete "EEEE, period, Provision Regarding FERC Jurisdiction, period." As -- 255 is just going to say what it says.

MR. KINCHELOE: I understand, Your Honor.

THE COURT: Understood. What's next?

MR. KINCHELOE: The next -- it's the 1129(a)(6) issue. Now, the Court has heard me say this before. My client doesn't like Mirant. The Court has also heard me say Your Honor is bound by Mirant. My client is where it is. It may one day ask the Fifth Circuit to overturn Mirant, but for today, the objection was merely to ensure that we're complying with it.

To the extent we're saying the rejections are just breach, okay. My client just wants to make sure that nobody is taking the position that rejection equals more than breach, like maybe rejection means the contracts no longer exist.

THE COURT: So first --

MR. KINCHELOE: So that's --

THE COURT: First of all, I mean, 1129(a)(6) only pertains to the plan. And there is nothing I saw in the plan that comes anywhere close to what you're worried about. If I missed it, please point me to it.

MR. KINCHELOE: The concern is this would be the discussion about the treatment of executory contracts.

THE COURT: I got it.

MR. KINCHELOE: And that that somehow incorporates by reference. And again, if Your Honor's ruling is to overrule that objection, I'll advise my client.

THE COURT: Understood. I'm going to overrule that objection.

MR. KINCHELOE: Thank you. The third objection -- and this got a little more -- this got a little more weight with my client in the last 24 hours. We understand that ETC Tiger and Chesapeake are going to present Your Honor with a settlement at some point. And you know, we're going to have issues with that when it comes up, mainly because we haven't seen it.

THE COURT: Sure.

MR. KINCHELOE: But as I understand the settlement, it's going to result in ETC Tiger and Chesapeake presenting a new proposed rate to FERC. And as we read the injunction, the injunction provision of the plan talks about it enjoins any actions in connection with, or with respect to the discharged claim, which is slightly broader than 524. 524 only enjoins an action to collect or recover a discharged debt.

And so what my client's worried about is that they could arguably be violating the injunction provision in the plan by adjudicating that request to approve a new filed rate.

And I know as I'm saying it, probably odds are nobody is going to make that argument, but I don't want to risk having my client leave today and not having raised the issue with the Court.

THE COURT: You've raised it and I won't -- well, I'll remember you said something. Bring that up at the compromise hearing. I can't imagine that the parties would submit a compromise to me and then say that to the extent that FERC has to approve a rate change, if there is a rate change, that they can't do it. I can't imagine that argument being made. But remind me of today, and remind me at the hearing on that motion to compromise.

I would be shocked if that were an issue, but if it is, we'll deal with it. And just as protective as I am of bankruptcy court jurisdiction, and you know what I think of the contract rejection argument, I am equally protective of what I believe to be FERC's legitimate purpose and rights and duties.

MR. KINCHELOE: Thank you, Your Honor. The one last thing -- I've heard Your Honor. My client representative is on the line. He has heard Your Honor. We will talk after the hearing and we will decide what to do. I don't know what we're going to do.

THE COURT: Sure.

MR. KINCHELOE: But I also don't want to be the cause of any delay. So if the Court does overrule the objection today, I would just appreciate, so I can remove the delay, an opportunity to move for a stay pending an appeal orally. And if the Court denies it, just so we can move on with life.

THE COURT: Well, you're going to file a motion, and I'm going to set it for a hearing.

MR. KINCHELOE: Okay. That's fine, Your Honor.

THE COURT: All right. Anything else, Mr. Kincheloe?

MR. KINCHELOE: That's all. Thank you.

THE COURT: And I don't think I've seen you. Happy New Year.

MR. KINCHELOE: Happy New Year, Your Honor.

(Court attends to unrelated matter/caller at 4:58 p.m.)

(Proceedings resume at 5:04 p.m.)

THE COURT: All right. Let me make one more pass. Anyone else wish to make comments that opposes the plan?

All right. Ms. Schwarzman, do you want to respond to some of the issues that you have heard?

MS. SCHWARZMAN: Sure. Well, I was actually going to start by asking Your Honor if there's any sort of issues that were raised that you would like to hear response. And I'm prepared to respond to many things, but you know, Your Honor sat through the trial with us. You have an excellent grasp of the evidence. And so I'll defer to you, if there's anything particular you wanted to hear on.

THE COURT: So -- and I will listen to anything that you want to respond to, but in particular I do want you to address Mr. Pitta's concerns about 6 and 7. I hadn't really focused on the language. I said once before, you know, I made certain assumptions which have turned out not to be true. And I was always worried that I was creating, you know, multiple problems when I was trying to solve what I thought was an easy one at the time.

Let me give you my reaction, and then I'll have you respond however you want. My goal always was -- and Mr. Pitta, and probably rightly so, referenced this as sort of Texas rough justice. And I get that. I appreciate it. I apply it all the time. But I wanted it to be even. And I haven't really thought about whether or not it's currently even.

I don't like the concept of -- that one particular type of creditor can file multiple claims based upon a guarantee or a co-obligor type thing, and another one can't. I think it all needs to be one way or the other.

I don't particularly have a preference. My goal is that, you know, if there isn't -- if there isn't an agreement -- and I'm perfectly happy to give you the evening or a day or -- not too long, but I'm happy to give you an opportunity to try and craft some language that may be reconciliatory in some form or fashion.

But at the end of the day, you know, if you can't reach an accord, then, you know, what I want is I want something -- if people are going to be -- if people are going to feel like they've been unfairly treated, I want everybody to feel that way to an equal degree.

And I'm not making light of that. It's genuinely what I want. I want everybody to be treated exactly the same way. But I don't -- I don't like the thought of approving some language where if you are a green creditor that you can do one thing, but if you're a blue creditor you cannot. I want blue/green to exist the same way, either way, and I don't really care.

That's obviously, you know, Mr. Mitchell has popped in. He's going to weigh in on this. And maybe you don't want to have a discussion.

But I do want to hear your thoughts about that issue. And then obviously I'm happy to hear any other responses that you want to make with respect to any of the arguments that you've heard, and including, obviously, the Committee's and Mr. Stark's.

And let me do this before I do that. It says Henry Knight, but I know it's not Henry Knight, because I know the lawyer.

MR. SPENCE: Yes, Your Honor. Ross Spence of -- I was raising my hand and it told me "hand raised" from my desk, but for some reason you couldn't see it or -- so I moved to my associate's office, and hopefully can hear me.

THE COURT: Very well. And I'm sorry I didn't see you.

MR. SPENCE: No problem. I represent some royalty owners. I have a very practical issue.

THE COURT: I read your objection.

MR. SPENCE: Okay. No, we resolved a lot of things in the plan language. We, and the Committee, and others. But the practical issue I have is that you pointed out during trial third day that an unpaid royalty is a property interest, but a claim -- a claim for a disputed royalty is more of a legal claim.

But the question is -- so once it gets decided, what happens? And in the Extraction bankruptcy case, recently, Judge Sontchi ruled that -- exactly what you did, that royalty payments are not property of (audio interference) but claims for disputed royalties are just that, legal claims. But when they're decided -- once they become decided, then those disputed -- now undisputed royalties are property of the royalty owners, not the estate.

THE COURT: Yeah. So let me be -- and I've read Judge Sontchi's decision. I've actually talked to him about it. And I'm not sure that it came out exactly how he was thinking about it. But again, we're -- that's his decision. I've read it. I understand it.

And let me -- the answer to your question is it's going to depend. And it depends on a lot of things. And you know, for instance, you know, let's assume -- let me make something up. And I want to try to draw the example that won't offend anybody.

Let's say that in 1967 your client was underpaid a royalty of a dollar. And today there is a lawsuit for that royalty and there is no cash in the bank. Well, obviously, you know, any claims that you can make that, you know, based upon tracing or the -- I mean, I know all the theories and I've tried to pick something that wouldn't -- that you couldn't say, well, what about this?

Let's assume that there was zero in the bank account.

Well, at that point, you have a claim. You have an unsecured claim. And it would just get paid, you know, however the plan treatment for general unsecured claims is.

Now, I know that that will never be the case. And so if you're -- I think what I said -- and I'm sure you've looked at the transcript, and I'm sure my memory is bad, is that these things aren't absolute, but --

ELECTRONIC VOICE: Our system will end this conference in five minutes.

THE COURT: Hold on.

ELECTRONIC VOICE: Your conference has been extended for 60 minutes.

THE COURT: I think what I said was in general, claims arising out of the underpayment of royalty are exactly that, legal claims. Because I know all of the -- you know, there are additional damages that go with that. There are fees and costs that go with that.

And so, again, you know, the answer is we're going to have to get further down the path of where your particular claims are and what they are. And I will tell you I read so much -- and I read your objection. I know what it's about. I don't remember what jurisdiction it is. Obviously, I'm much more comfortable talking about Texas, because I've litigated that issue as a lawyer and I just -- I'm very comfortable with it.

With the lawyer that was making the comments from Pennsylvania, you know, the only time I've ever been to Pennsylvania was to fly into Philadelphia to take the train down to Delaware. I mean, that's -- I mean, that's the sum total of my exposure. So I -- it's going to depend on an awful lot.

MR. SPENCE: Could I say then that the -- I'm aware of -- you know, a SandRidge problem where the money got swept. So, sorry, you're out of luck. But there's language that's now been added to the confirmation order. I had it in my other computer, but it's Page 94 of the redline of the current confirmation order, so the "dash 1" version.

THE COURT: Okay. Hold on. And was this language that Ms. Brown negotiated?

MR. SPENCE: No. It was language that the Perry (sic) royalty owners negotiated, but strictly for themselves.

THE COURT: Okay. Hold on.

MR. SPENCE: Not general --

THE COURT: So hold on. Let me get to the order.

(Pause)

THE COURT: All right. I'm going to look. I'm going to pull up -- if it would stop. I'm going to pull up -- actually, I didn't pull up the redline. Can you give me the number that it's in? And I'm looking at 2845.

MR. SPENCE: It should be 2845-1. It was filed at the same --

THE COURT: No, it was. It's just -- it takes me a moment to get there. I was trying not to do it, but hold on.

MR. SPENCE: (Audio interference)

THE COURT: That's just fine. The computer --

MR. SPENCE: The one I was --

THE COURT: -- gets tired at the end of the day.

MR. SPENCE: What I'm hoping to prevent is that -- it's fine to say okay, do you have a secured claim, do you not? We fight over that later. That's been preserved.

THE COURT: Sure. Can you --

MR. SPENCE: But if we fight over that --

THE COURT: Can you get me to -- I'm sorry, Mr. Spence. Can you get me to the paragraph that we're talking about?

MR. SPENCE: It was Page 94 of the redline, continuing to Page 95. I don't remember the paragraph number.

THE COURT: Okay. So this is the --

MS. SCHWARZMAN: Your Honor, it should be Paragraph 190, I believe.

THE COURT: Okay. Mr. Spence --

MS. SCHWARZMAN: It's included in 2847.

THE COURT: Okay. I have it, Mr. Spence.

MR. SPENCE: And so there they preserved the idea that if you just -- if you have adjudication of your claim and it becomes an allowed secured claim, well, then it will be classified as an other secured claim. To me, that should mean you get paid.

But what I hear you saying and what I'm concerned about, after SandRidge, is that, well, you may be an other secured claim, but unless there's money sitting in the royalty account that you can claim your security interest against, well, then, you're out of luck.

THE COURT: Well, then you're not a secured claim, right? If you have --

MR. SPENCE: Right.

THE COURT: If you have no collateral, you can't be a secured claim.

MR. SPENCE: Right. And so to me, the SandRidge royalty owners did not object at the plan stage. Here, we have obeyed that objection, and we just think that there either -- you can by plan fiat dictate that an other secured claim will get paid regardless of whether the debtor swept the monies so that they can earn some interest.

THE COURT: So you're --

MR. SPENCE: Or --

THE COURT: Are you complaining about the fact that the debtors entered into a settlement with the Pettys?

MR. SPENCE: No, I am not.

THE COURT: Okay.

MR. SPENCE: No.

THE COURT: Then I'm not appreciating the objection.

MR. SPENCE: Okay. Well, to solve the problem that the money may not be there at the time that your claim gets adjudicated --

UNIDENTIFIED: Escrow.

MR. SPENCE: -- then what I was saying is you can have -- you can either, just like -- you can just state that it will be treated as an other secured claim, whether the money is still there due to sweeping or not. Or you can escrow. Going forward, these debtors can escrow all the disputed royalties, and then we won't have a problem.

THE COURT: So your problem is an ongoing problem?

MR. SPENCE: Well, no. Our claim was fixed in time, but we just want to make sure that it will get paid. If it truly is our property or it is a secured claim, we'd like to get paid as such, not -- otherwise, we're going to be in the unsecured pool no matter what.

THE COURT: So here's my -- Mr. Spence, and I don't think that this is a plan issue. I'm surprised that I haven't seen something else filed, if that's where you are. But I don't think it's a plan issue.

Again -- and I said this before. And part of it was because of -- when I read your objection, when I said it to the other -- or I said it to Mr. -- I can't remember who I said it to. But I said plans shouldn't be about -- I did say it to Mr. Pitta, that plans shouldn't be about dictating, you know, who has what. It's -- plans should be about dictating if you have this, then here is your treatment.

Now, granted, 1123 specifically permits the embodiment of settlements within confirmation orders and plans. But just as a general -- as a general statement, I don't believe that the purpose of plans is to dictate who has what. It's to set forth here's how claims will be treated, and then we use the claims adjudication process to figure out what it is you have.

If you believe that your position is changing to the negative, then you should file something and tell me there's a problem and let me deal with it. But I just don't think it's a confirmation issue.

MR. SPENCE: Well, all I can say in that regard is that each day, apparently, they're sweeping those funds, which we don't even think they own. And so, yes, it is an ongoing problem in that sense.

THE COURT: But is the underpayment, if you will -- if your theory of the world is correct, is the underpayment ongoing?

MR. SPENCE: It is in the sense that, yes, until we resolve our issues with them, they are treating our royalty in a certain way, which we disagree with.

THE COURT: Then you need to file something and tell me that, and give me the ability to grant relief.

MR. SPENCE: Okay. The other thing that was done in those Paragraphs 190 and following was they preserved their right to argue about cure amounts under surface cases. And we had asked for that, that we never got that.

THE COURT: So has your lease -- is your lease being assumed under the plan?

MR. SPENCE: We have -- yes, we have surface leases that they're assuming at zero. And we tried to get them to agree, let's put off that fight over the cure amount, to another day, and just preserve that.

THE COURT: So do you have a good faith basis, as we stand here today, for disputing the amount of the cure?

MR. SPENCE: My clients feel that it's not zero, but I don't have any -- I don't have the facts in front of me to tell Your Honor here's why.

THE COURT: And again, I just don't remember. What was the process for asserting an objection to the cure amount?

MR. SPENCE: I do not recall it, Your Honor.

THE COURT: Ms. Schwarzman, could you remind me?

MS. SCHWARZMAN: Yes, Your Honor. Objections to cure were due at the same time as objections to confirmation generally.

THE COURT: Right. And how long did folks have to do

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that?

MS. SCHWARZMAN: Objections were due on December 10th, I believe, and the DS was approved on October 30th.

THE COURT: And so here we are, what, three months later, Mr. Spence, and you still don't know?

MR. SPENCE: I don't know the cure amounts. I did -- I did discuss this whole surface contract issue, and just that the issue should be preserved for future.

THE COURT: I got it. That objection is going to be overruled. What else?

MR. SPENCE: We had asked to preserve all lease rights. There is sort of general language preserving the lease as unimpaired -- the mineral leases.

THE COURT: So I don't understand what that means. If you're -- if the lease is being assumed --

MR. SPENCE: No, no. I mean the mineral lease.

THE COURT: Oh, the mineral -- I'm sorry. Sorry, sorry, sorry. Okay. And so what is it that you're looking for?

MR. SPENCE: (Audio interference) so we've asked for specific reservation of audit rights, consent rights, and lease termination rights, as part of the bundle of rights that's being preserved. We just were unable to get that language included.

THE COURT: And what does the confirmation order say?

MR. SPENCE: Generally that -- in Paragraph T -- well, I'm thinking of the plan --

THE COURT: Okay.

MR. SPENCE: -- but that the leases will be unimpaired --

THE COURT: Yeah. I think the bundle of rights -- I'm not going to go through, because I'm worried that if I say anything -- because no two leases are ever the same. Whatever the lease rights are, they are. And I think that a statement is that those will continue unimpaired is exactly the right statement to make, because then I don't have to look at, you know, 27,000 leases in 15 different states, only one of which I'm probably marginally qualified to look at.

MR. SPENCE: Okay. Thank you. And Your Honor asked what state, and it's all Texas that I'm talking about.

THE COURT: Okay. Well, then -- well, I'm at least more comfortable.

MR. SPENCE: And that really -- that's it, Your Honor.

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

So, Mr. Mitchell, before I come back to you, I want to hear what Ms. Schwarzman has to say. I would think that you would, as well.

All right. Ms. Schwarzman.

MS. SCHWARZMAN: Thank you, Your Honor.

THE COURT: And my apologies for interrupting with the gentleman from J.C. Penney.

MS. SCHWARZMAN: No problem.

THE COURT: I hope --

MS. SCHWARZMAN: He was very lovely to us.

THE COURT: I hope he hasn't been waiting since nine o'clock. That would be a long day.

Go ahead, please. I'm sorry.

MS. SCHWARZMAN: So --

MR. SPENCE: (Indiscernible.)

THE COURT: Mr. Spence, could you mute me, please?

Go ahead, please.

MS. SCHWARZMAN: Thank you, Your Honor. So I believe, you know, Your Honor, was saying that you want the treatment to be fair, and you want it to be fair for everyone. And you know, green creditors don't get different treatment than blue creditors. And I believe that what we've done, although people say it's complicated -- I believe that it's fair. Everybody gets (indiscernible) recovery and not misconstruing what the plan says.

But we heard Your Honor loud and clear. Your assumptions, when you gave us that hint, was correct, and that unsecureds are "out of the money." And you know, we think zero times 30 results in the same as zero times one or times two. And so we do think it's fair. And so I do think we would -- we would ask the plan be confirmed as is.

THE COURT: So let me ask you this. Because the way, at least my memory, of 30 minutes ago, was that it was only one claim as to a lease -- or, I'm sorry, as to a noteholder. But another by just a general unsecured could perhaps do that. Is that -- that's just not correct?

MS. SCHWARZMAN: No. Whatever Your Honor's expression was, "one riot, one ranger." It's the same for everybody.

THE COURT: Got it. And can you -- and I have now 2845 up on my screen. Can you walk me through where that is? Oh, it's actually going to be --

MS. SCHWARZMAN: I'm looking at 2847. It's actually in the plan, which would be 2833.

THE COURT: Got it.

MS. SCHWARZMAN: And I'm looking at 2833-1, looking at the redline.

THE COURT: 33-1. Okay.

MS. SCHWARZMAN: So the first page I would go to, Your Honor, is Page 15 of 64. And it's the pro rata language.

THE COURT: Hold on just one second. I'm lagging behind you.

MS. SCHWARZMAN: Sure. Okay.

THE COURT: All right. I now have the plan. You said 15 of 64?

MS. SCHWARZMAN: Yes, Your Honor.

THE COURT: Okay.

MS. SCHWARZMAN: So the pro rata language should describe how we get to numerator and the denominator, and most importantly it says about halfway through that redline language, "Each allowed unsecured notes claim and each allowed general unsecured claim shall be counted ounce, notwithstanding the number of debtors against which such claim may be asserted."

THE COURT: I misread that. You're right.

MS. SCHWARZMAN: And then we did clean up the section -- I believe it was VI-J on Page 48, to clarify the confusion there, as well. Just to say that holders in allowed claims other than an allowed unsecured notes claim or allowed general unsecured claim cannot recover against more than debtor just once.

And I believe somebody -- Mr. Silverberg from the Committee asked me earlier to clarify if that applies to the convenience claims, too. And the answer is yes, that's the intention: one claim, one recovery.

THE COURT: Okay. So -- got it. Okay. So you treat everybody the same. Got it. Okay.

MS. SCHWARZMAN: And then with respect to rebuttal of the other things we've heard. I'd just quickly -- on Mr. Kincheloe's objection. No issue changing the heading of that FERC section. You're right. It is a misnomer. But if we could change it to just "Retention of Jurisdiction."

THE COURT: That's fine.

MS. SCHWARZMAN: Otherwise, it looks like it stays in that ETC section. So that would be the request there.

And you know, Your Honor, Mr. Stark said a lot. I'm very happy to go through and explain why I disagree with the numbers that he put up in a slide when he was trying to put in what he thought the value of unencumbered collateral is.

If Your Honor is not persuaded by theory, I don't feel the need to take the time to respond to either the theory or the numbers. But I'll take direction from Your Honor.

THE COURT: Yeah. First, let's deal with Mr. Kincheloe.

Mr. Kincheloe, any issue if we just -- as opposed to the language that dealt with FERC, we just give it a title? Because I agree. It means -- that it looks like it's in another section. If we just call it "Retention of Jurisdiction"?

MR. KINCHELOE: There is a problem, Your Honor. Section I has the same subheading. It's Paragraph 112 on Page 52.

THE COURT: So hold on. Hold on. Hold on. So one at a time.

So, with respect to the question that I asked you, any issue in just changing that to "Retention of Jurisdiction"?

MR. KINCHELOE: Well, yes, Your Honor, because there is already the exact same subheading elsewhere, and I think it's confusing to have that in two separate places.

THE COURT: Okay. So then why can't we just move the paragraph?

MR. KINCHELOE: We can, Your Honor.

THE COURT: Okay. Can you do that, Ms. Schwarzman?

MS. SCHWARZMAN: Yeah. Your Honor, I think we can actually just delete the second time it shows up. I'll have to double-check, but I think (indiscernible). We can definitely make that change.

THE COURT: Could you just confirm to Mr. Kincheloe, once you have a chance to catch your breath, that you're either going to put them both together or you're going to delete one?

MS. SCHWARZMAN: Yes. Absolutely, we will.

THE COURT: Thank you.

MR. KINCHELOE: Thank you, Your Honor.

THE COURT: Thank you, Mr. Kincheloe.

Ms. Schwarzman, I want to hear whatever comments that you want to make. I told you I would give you rebuttal. I don't want to dictate what you say, what you don't say. I'll leave it at that.

MS. SCHWARZMAN: Your Honor, I don't really feel like I need to respond. You know, at a high level, I don't think the numbers that Mr. Stark gave you were consistent with the evidence or at a minimum had misconstrued the evidence. But Your Honor, at this time, unless there's any questions troubling you, I would reiterate our request to confirm the plan.

THE COURT: All right. Thank you.

Anyone else that I promised rebuttal to want to take me up on that? Mr. Zensky.

MR. ZENSKY: Can you hear me, Your Honor?

THE COURT: Yes, sir.

MR. ZENSKY: Okay. Thank you. I'll be very brief. I just wanted to respond to a few of my friend, Mr. Stark's, comments.

On 546(e) and the questions of a qualifying financial institution, Mr. Stark discussed at length the argument about MUFG's relationship to the lenders and the 2L trustee. He did not respond at all to Franklin's independent status as a financial institution. And as Your Honor knows, from argument and from the papers, that's not all dependent on whether Your Honor agrees with the second and more encompassing argument that is based on the Commune case. So you've heard nothing to suggest that our argument is wrong as to the Franklin funds themselves.

With respect to the "in connection with" requirement, which I spent some time on, Mr. Stark showed you a chart which he called a "schematic," and used it to try to argue that the FILO loans and the debt tender for the WildHorse notes really have nothing to do with each other, or certainly shouldn't be considered as related.

He did that have very pretty arrow going across the page from one side to the other, which belies the point. But he's really twisting himself into a knot trying to avoid the "in connection with" argument, because the whole theory of the Committee's fraudulent conveyance case is that you have to collapse the FILO loans with the debt tender offer, and that's what makes it a constructive fraudulent conveyance.

In other words, the lenders did give Chesapeake $1.5 billion, and the argument that it becomes constructively fraudulent is if you collapse it with the next step of the transaction, because the money goes out the door to buy the bonds.

So you can't have it both ways. You can't argue that the loan and the lien are not in connection with the debt tender offer, but at the same time argue that the debt tender offer makes it constructively fraudulent.

There's a similar problem that comes up with the Committee's intentional fraudulent transfer argument. And Mr. Stark tried to argue that there's a badge of fraud here that the debtors retained the property at the same time it was dispossessed from the Legacy Chesapeake entities. And again, that's intentioned with the argument that what makes it fraudulent is that the money was borrowed by the Legacy Chesapeake entities and sent out the door to pay off the BVL bondholders. So that doesn't work.

Mr. Stark cited the Sentinel case to you, and I would say that Sentinel on the standard of intent has never been followed by any court, and has been criticized, in fact, in particular in the Lyondell case at 554 B.R. 635. If the Sentinel formulation of intent -- sufficient to trigger intent -- intentional fraudulent transfer was right, every constructive case would become an intentional case, because the natural consequences of engaging in a transaction without alleged reasonably equivalent value when you're insolvent is that creditors will be harmed.

So the Sentinel formulation is not remotely approximate to what 548(a)(1)(A) requires. And that's all I wanted to say, Your Honor, unless you have any questions.

THE COURT: No, I do not. Thank you.

And Mr. Schaible, I think I gave you the opportunity as well.

MR. SCHAIBLE: Thank you, Your Honor. Thank you, Your Honor. Can you hear me?

THE COURT: Yes, sir.

MR. SCHAIBLE: Your Honor, I'll try to be even briefer than Mr. Zensky. Suffice it to say, Your Honor, we disagree with Mr. Stark's first set of arguments about the FILOs being more than (indiscernible). I could walk you through the math, but I don't think I need to.

He overstates -- understates the claims by ignoring postpetition interest (indiscernible) and he overstates the recovery by using the backstop economic (indiscernible) as if it's part of the recovery on a claim, which of course it's not.

And Your Honor, we agree with the debtors with respect to -- significantly overstating over -- unencumbered value (indiscernible) numbers for the oil and gas leases and leave a bunch of other (indiscernible) including taking value that is encumbered by the RBL under all circumstances and counting it as unencumbered.

Lastly, Your Honor, again, (indiscernible) Mr. Zensky sort of left it, we do believe very strongly that MUFG is a financial institution, and we could walk you through how the merit case works. But I would just leave it at that for the record. Thank you, Your Honor.

THE COURT: All right. Thank you. Anyone else?

All right. Then we'll -- Mr. Mitchell, I'm sorry. I did tell you that you could comment. I'm assuming --

MR. MITCHELL: Your Honor --

THE COURT: I just assumed you had none, given what Ms. Schwarzman said.

MR. MITCHELL: That's correct, Your Honor. Can you hear me?

THE COURT: I can.

MR. MITCHELL: I'm sorry. I was just going to join in what Ms. Schwarzman said, and ask the Court to please confirm the plan, and Energy Transfer would urge confirmation as proposed. Thank you.

THE COURT: All right. Thank you.

MR. KINGMAN: Your Honor?

THE COURT: Yes, sir.

MR. KINGMAN: This is Bill Kingman. I represent three entities, and I'm not opposing a plan. I just want to make one comment before we go offline here.

THE COURT: Yes, sir.

MR. KINGMAN: I did originally file objection to the plan, similar to Mr. McCune's client, but we have reached a resolution on all of those. Unfortunately, we have not papered the -- or finalized the settlement of one of the claims. There is currently in Docket Number 2847-1 -- it addresses the settlement between two of my clients, which is Tornado Venture Quattro, LLC and Tornado Venture Seis, LLC [sic]. We are a surface use agreement counterparty. We've reached a resolution. I'm looking for the provision in 2847-1 if I can't get my hands on it quickly, but the terms of that settlement's address, and as a result of that settlement, we'll be withdrawing our objection to the claim -- excuse me, to the plan.

The third entity is a royalty interest holder, Tornado Venture Seis, LP. We have reached the terms of an agreement similar to the stipulations that have been previously approved by the Court. They could be part of the plan confirmation pursuant to Section 1123, but I believe the debtors would prefer to have a separate stipulation or a Rule 9019 motion. It contemplates the payment of my client of $575,000 for (indiscernible) prepetition claim and the withdrawal of our assertion that the underlying lease was terminated on a prepetition basis. There was pending state court litigation. That will be resolved as to the prepetition portion of the claim. But again, as a result of the settlement that we have reached, and assuming it's ultimately approved by the Court, and in fact, we'll be withdrawing our objection to the plan. However, (indiscernible) that if it's not -- if it does not get approved by the Court, then, in fact, we will then have our rights under the plan, assuming the plan is confirming, asserting that the lease was, in fact, terminated, that we have a secured claim, have the ability to liquidate the claim. But again, I do anticipate getting the ultimate settlement approved by the Court.

So if Ms. Schwarzman wants to confirm that, I appreciate your time today and your patience with everybody, and I hope you have a good evening.

THE COURT: So, Mr. Kingman, always good to hear from you. Happy New Year. I haven't seen you yet this year. I don't know how --

MR. KINGMAN: No, I --

THE COURT: I don't know how I'm going to put you back to trial if I can't get you to get a camera.

MR. KINGMAN: I've got a camera. I apologize for not turning it on.

THE COURT: I am just having fun with you.

Ms. Schwarzman, can you give Mr. Kingman some comfort there.

MS. SCHWARZMAN: Yes, Your Honor. I can confirm. My apologies, Mr. Kingman. I did tell him I'd put that on the record, and it just got lost in the shuffle. But that's all true, and we'll be filing that as shortly as possible. (Indiscernible) other non-debtor parties to it, and that's why we're doing separate stipulations, but that is all correct.

THE COURT: I got it.

And, Mr. Kingman, if you want to do a stipulation and agreed order with a memorandum of lease status and have me approve it so you've got something you can put on record at the county courthouse, I'm happy to do it.

MR. KINGMAN: I sure appreciate that, Your Honor. I will -- Ms. Schwarzman and I and her colleagues will work on a settlement agreement. I appreciate that very much.

THE COURT: All right. Thank you, Mr. Kingman.
Anyone else?
MR. KINGMAN: Have a great day.
THE COURT: You, too.
All right. Then, with that, I'll consider the arguments closed. Let me first start and echo the comments.
In 32 years, I don't think that I've ever seen, participated in, or adjudicated over a confirmation hearing that has been handled the way that this one has been handled. It was just -- it was just immaculately done. The lawyering was great. The preparation was great. Obviously, I didn't agree with every assumption, but I think that's my prerogative, and what I look to the professionals to do, what I look to the parties to do is to make me better and hopefully make a better decision, and that's what I've tried to do.
With respect to the valuation, I've listened to everything. I've reread all of the arguments in favor of different valuations. I've looked back at the testimony. I am not so arrogant to say that the value is $5,129,000. What I am willing to do, and I believe that I've done all the work that anyone could ask, is my opinion that a fair representation of value is $5,129,000, and that is my finding for purposes of confirmation.
Let me -- I want to deal with both the Committee's motion for standing, as well as the settlement that was

embodied within the plan. I want to deal with those kind of together. We spent a lot of time talking about the claims and the defenses, and while I appreciate all that argument, it's not really all of that -- it's not really all that persuasive to me at all. Colorability is a really low standard. It doesn't take a lot to get over the colorability standard. And I do find that the claims asserted by the Committee meet that. I mean, there is -- you know, there are plenty of lawyers who would put their name pursuant to Rule 11 on a complaint that sets forth those claims, and if that's not exactly the colorability argument or standard, it's awfully close. And so I just don't think it takes a lot to get over that hurdle, and I think that given the diligence and the effort and the thought that went into that complaint, it meets that standard.

The second portion of the Louisiana World standard or evaluation or analysis, however you want to phrase it, is whether or not there's been an unjustified refusal or inability to bring the identified claims. And that brings into play the compromise. I just outright reject all of the hyperbole and all of the assertions that people just threw caution to the wind and didn't care, weren't thoughtful, violated their fiduciary duties. It really bothers me, if it wasn't obvious, when those terms get thrown around when there is simply zero in the record to support those comments.

I think that debtors' management was faced with an incredibly difficult problem in an unprecedented time. It went -- not only did they have to deal with problem A, they had to deal with problem B and then problem C, and then problem A got worse. I can't imagine sitting on a board or being management through the events that have taken place over the past three years in the energy industry. Just I don't know how those folks get it right, but they do.

And I'm not suggesting that every decision that they made was the right one, but that's not what the governing precedence tells me that I'm supposed to do, and I'm specifically referencing Foster Mortgage, which is 68 F.3d 914, Jackson Brewing, which 624 F.2d 599, In re Aweco, 725 F.2d 293, Cajun Electric, 119 F.3d 349, all governing precedent in this circuit, all which derive out of the Supreme Court's decision in TNT Trailer (ph), 390 U.S. 414.

Management made a decision that it thought was right under the circumstances, and to suggest that the analysis wasn't thoughtful, that it wasn't designed to achieve a good outcome is to ignore the record. Again, I'm not suggesting that everything that management did was right, but it absolutely was thoughtful. It was designed with the interest of the company put first, and that is all that you can ask of management or a director, though I do find that the debtors prudently exercised their business judgment under the most difficult of circumstances. And not only should they not be criticized and not only should they not be accused of violating their fiduciary duty, and they should be complimenting [sic] for staying the course and not running and trying to deal with problems that they were faced that no one has ever seen, at least in my 32 years of dealing with these issues.

With respect to the compromise that is contained with the plan, I do find that it represents the prudent exercise of business judgment. It is in the best interest of the estate, and I will approve that compromise.

I also want to deal with the rights offering. And I get the complaints. You know, I would always make better decisions with the benefit of hindsight. But there is a bankruptcy process which demands finality. People make decisions based upon the orders that I enter, and they need to be able to rely on their orders. And there's been no showing that there was any bad behavior. There's been no concrete evidence of any fraud on the court. I hear terms like "slight of hand" and all those types of things, which again are offensive to me. You either are transparent with me or you're not. There is no middle ground, and I don't -- again, I might have made a different decision if I had the benefit of hindsight, and maybe I should have delayed ruling, but the fact of the matter is I didn't. I was told there was a need. I believed it. That's what the record said. I evaluated the applicable law, and I made the decision that I thought was right under the circumstances, and that order stands. Turns out that the folks who agreed to backstop it made a great business decision, but that happens every single day.

With respect to the plan itself, I am required to ensure that the plan satisfies the mandatory requirements of Section 1123(a) of the Code, and I make that finding. I have considered all of the arguments that have been made, that the plan violates other provisions of the Bankruptcy Code, that it lacks fundamental fairness. All of those arguments, I reject them all. I think the plan -- I will find that the plan does not violate any of the permissive requirements of 1123(b) or any other section of the Bankruptcy Code.

With respect to Section 1129, I am required to conduct an independent analysis of each of the requirements of 1129(a). And based upon the record that I have before me, I will find that the plan satisfies the requirements of 1129(a)(1), (a)(2), (a)(3), (a)(4), (a)(5), (a)(6). I will stop and pause at (a)(6) to specifically note that I have overruled FERC's objection with respect to the challenge to 1129(a)(6).

With respect to 1129(a)(7), I will find that the plan satisfies the requirements of 1129(a)(7) with the changes that have been made and again recognizing where value flows, the unique circumstances of the case. Everybody in 6 and 7 are equally unhappy, and that's just he way it should be.

I will further find that the requirements of 1129(a)(9), (a)(10), (a)(11), (a)(12), and (a)(13) have been satisfied. I will find that the requirements of 1129(a)(14), (a)(15), and (a)(16) are not applicable to this case.

Having found that the plan satisfies all of the requirements of 1129(a) or those provisions identified are not applicable other than 1129(a)(8), I will move to 1129(b) and I will find that the plan does not discriminate unfairly and is fair and equitable with respect to each class of claims or interest that is impaired under and has not accepted the plan.

There's only one plan before me for confirmation. I will find that the requirements of 1129(c) are not implicated and have been satisfied and I'll further find that the primary purpose of the plan is not the avoidance of taxes or the avoidance of the application of Section 5 of the 1933 Securities Act.

I'll find that Section -- that the requirements of 1129(e) are not applicable to this case.

With those findings and with the changes that have been announced, I will confirm the debtors' fifth amended plan. That is the plan that is filed at Docket Number 2833.

Having made those findings and conclusions and confirmed the plan, I'd like Mr. Lawler to appear on the video if that's possible, please.

MS. SCHWARZMAN: Your Honor, we're just confirming that Mr. Lawler has the video capabilities right now.

THE COURT: Understood.

MS. SCHWARZMAN: (Indiscernible).

THE COURT: While we're waiting for Mr. Lawler, let me confirm for those who are listening who are individual retail investors and/or stockholders, I got a large number of correspondence. Consistent with my practice, I read every single one of them. I know how bad this hurts. I wish I had the ability to do more. I wish I had a magic wand and I could generate value. I simply don't, but I have considered your comments. I have spent a lot of time, a lot of sleepless nights thinking about this.

UNIDENTIFIED: (Indiscernible).

THE COURT: I just wanted all those folks to know that I appreciate the time that you took to write me. I did read it, every -- I read every single scrap of paper, and I thought about everything in trying to work my way through the problem.

Do we have Mr. Lawler now?

MS. SCHWARZMAN: We're back (indiscernible). I know video's a process. The video isn't working. I know he's on by phone.

THE COURT: Got it.

Mr. Lawler -- ah, here we go.

There's Mr. Dell'Osso.

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MR. LAWLER: Sorry, Your Honor. It's Doug. I'm -- my camera (indiscernible) work so I came to Nick's office.

THE COURT: No, got it. I now --

MR. LAWLER: Sorry for the delay.

THE COURT: -- I now see your picture. I appreciate you getting online. There are a couple things, after thinking about it, that I really just wanted to convey to you, and I want to be very measured in what I say.

The history of Chesapeake, let's just be candid, is not that great. It has treated a lot of people very poorly. I am hoping that, going forward, we can change that policy. And let's be honest and I want to focus for a second on the royalty holders. The majority of those folks are underequipped to deal with an entity like Chesapeake, and that gives you an incredible amount of power. And with power comes responsibility, and I want you to instill in your corporate culture that -- I want you to consider every royalty holder to be like your parent. They may not like the answer, but you treat them with respect, you treat them with honesty, and you treat them with transparency. Can I ask you to do that?

MR. LAWLER: Yes, sir, without question. It is my full commitment to you, to the court, to the royalty interest holders of the company, and all the stakeholders of the company and is a culture that, Your Honor, it's very easily for me to say that I agree with. It is something that I personally work

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very hard on, and I'm fully committed to further improve.

THE COURT: Good. So in a couple minutes -- right now, I have all the power in the world. I control the destiny of Chesapeake Energy. In a couple moments, I'm going to transfer that power to you. And I want you to remember -- Chesapeake is a really big and important company. It's an important company to our country's infrastructure. It makes -- it helps make everything work. And that's not lost on me.

But we live right now in a very, very difficult time, and you have the ability to be a leader and to make a difference, to remember we only have one planet and we are all one race. That's the human race. So I ask you as a good corporate citizen and to remember that a lot of people have suffered a lot of pain for Chesapeake to have a second chance, and I ask that you not forget that going forward and remember there is decision-making and then there is responsible decision-making. Decision-making is the cold, analytical running the numbers, "Can I?" Responsible decision-making is after you run that analysis, you ask yourself the question, "Now that I've concluded I can, should I?"

And I have -- there's nothing under the Code that gives me this authority, but I simply ask, as one human to another, that you not forget that.

MR. LAWLER: Yes, sir. I will not forget that. And I will very earnestly commit to you and demonstrate the leadership, the culture, and commitment such that in a way when you follow up on this company in one year's time or five years' time that you'll see a track record of dedication and commitment to what you just described, Your Honor.

THE COURT: Then, that serves honor to the process, and that's all I could ask. So thank you for getting on. I know you weren't expecting that, but thank you for popping on the camera.

Let met take your other outstanding objections that I didn't specifically address. To the extent that there isn't language that has been added or agreements that have been made, those objections are overruled.

Ms. Schwarzman, do you need to do a final run-through, make sure you've got all the tweaks, run -- just sort of make sure you've got a perfect form of order, or you think that's being uploaded as we talk?

MS. SCHWARZMAN: The only change is the deletion of the duplicative retention of jurisdiction paragraph, so if Your Honor wanted to pull it up -- and I think you have it -- we could just delete it in realtime or we can get one loaded up. I don't know if it's --

THE COURT: (Indiscernible) --

MS. SCHWARZMAN: -- currently already happened.

THE COURT: My guess is -- so there were a couple of other things. Mr. Stark raised some issues about termination

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of the Committee. I agree, termination of the Committee should be the effective date, not the confirmation date. The request for a 14-day stay -- I'm sorry, the request for -- to overrule the request that it go -- or that there be a -- that the 14-day stay not be waived, that request is denied. I think there's more than adequate basis. This needs to be done yesterday.

And, Mr. Stark, there was a third thing that was in your miscellaneous category, and I've just forgotten what the third one was.

MR. STARK: Your Honor, can you hear me?

THE COURT: Yes, sir.

MR. STARK: I believe it was with respect to the indenture trustee fees.

THE COURT: So I didn't --

MR. STARK: Let me research.

THE COURT: So I didn't understand that, Ms. Schwarzman. Do you have a reaction to that? I wrote myself a note. I just forgot to ask you.

MS. SCHWARZMAN: Your Honor, I believe there were -- you know, usually when we end up and agree with a settlement with the Committee, one of the things we do is we agree to pay the Committee members' fees, and that way, they don't have to assert their charging liens. Obviously, we never got to an agreement here, and so there's currently no agreement to pay Committee members' fees.

THE COURT: So why don't you --

MS. SCHWARZMAN: (Indiscernible).

THE COURT: Why don't we do this? Why don't you take the rest of the evening and -- until, let's say, noon tomorrow to talk to Mr. Pitta, anyone else, see if there are any other tweaks that you want to make to the proposed order, and then just let Mr. Alonzo know around noon that the final form of order has been uploaded. I will take a look at it then, and then I will sign it. Fair enough?

MS. SCHWARZMAN: Yes, Your Honor. We'll do that.

THE COURT: All right. Again, thank you, everyone. I know it's been late. My view, the process has worked the way it's supposed to. I always appreciate good advocates, and this is why you don't try things by declaration. This is why you get to look in people's eyes and you get to test the models and you get to hear not only what people say but how they say it. I think it just makes the process better.

Anyway, go home, be safe, and we'll be adjourned. Thank you.

MS. SCHWARZMAN: Thank you, Your Honor.

UNIDENTIFIED: Thanks, Your Honor.

(Proceedings concluded at 5:59 p.m.)

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

We, Alicia Jarrett, Ilene Watson, and Lisa Luciano, court-approved transcribers, hereby certify that the foregoing is a correct transcript from the official electronic sound recording of the proceedings in the above-entitled matter, and to the best of our ability.

Alicia J. Jarrett

____

ALICIA JARRETT, AAERT NO. 428 DATE: January 14, 2021

ACCESS TRANSCRIPTS, LLC

Ilene Watson

____

ILENE WATSON, AAERT NO. 447 DATE: January 14, 2021

ACCESS TRANSCRIPTS, LLC

Lisa Luciano

____

LISA LUCIANO, AAERT NO. 327 DATE: January 14, 2021

ACCESS TRANSCRIPTS, LLC