Docket #4611 Date Filed: 05/09/2026

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Counsel for Highland Capital Management, L.P. and the Highland Claimant Trust

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

In re:	§	
	§	Chapter 11
HIGHLAND CAPITAL MANAGEMENT, L.P.,[1]	§	
	§	Case No. 19-34054-sgj11
Reorganized Debtor.	§	
	§	

HIGHLAND CAPITAL MANAGEMENT, L.P. AND THE HIGHLAND CLAIMANT TRUST'S AMENDED WITNESS AND EXHIBIT LIST WITH RESPECT TO HEARING TO BE HELD ON MAY 11, 2026

[1] The Reorganized Debtor's last four digits of its taxpayer identification number are (8357). The service address for the Reorganized Debtor is 6333 Mockingbird Ln., Ste 147 #5045, Dallas, Texas 75214.

Highland Capital Management, L.P., the reorganized debtor in the above-captioned chapter 11 case (the "Bankruptcy Case"), and the Highland Claimant Trust (together, "Highland"), by and through its undersigned counsel, submits the following amended witness and exhibit list with respect to the *Motion for Relief from Order and Motion to Vacate* [Docket No. 4513] ("Motion for Relief") filed by The Dugaboy Investment Trust ("Dugaboy") which the Court has set for hearing on May 11, 2026 at 9:00 a.m. (Central Time) (the "Hearing") at the George Mahon Federal Building, 1205 Texas Avenue, Room 314, Lubbock, Texas 79401.

A. Witnesses:

1. James Dondero;
2. James P. Seery, Jr.;
3. Nancy Dondero, as Trustee to The Dugaboy Investment Trust;
4. Mark Patrick;
5. Any witness identified by or called by any other party; and
6. Any witness necessary for rebuttal.

B. Amended Exhibits:[2]

Number	Exhibit	HCMLP Prior W&E Ref.[3]	Offered	Admitted
A.	**Patrick Authority**			
1.	Trust Agreement of Hunter Mountain dated December 17, 2015 [HCMLPHMIT00004103-HCMLPHMIT00004114]	70		

[2] The amendments to the original exhibit list, filed at Docket No. 4608, include the additions in bold font below.

[3] Highland's Witness and Exhibit List for the June 25, 2025 hearing (the "9019 Hearing") on the *Motion for Entry of an Order Pursuant to Bankruptcy Rule 9019 and 11 U.S.C. § 363 Approving Settlement with HMIT Entities and Authorizing Actions Consistent Therewith* [Docket No. 4216] can be found at Docket No. 4255 and as further amended at Docket Nos. 4277 and 4280. Exhibit reference is to the exhibit list (and copies of the exhibits themselves) found at Docket No. 4255 unless otherwise noted.

Number	Exhibit	HCMLP Prior W&E Ref.[3]	Offered	Admitted
2.	HMIT Appointment of Successor Administrator dated 8/12/2022 [HCMLPHMIT00003872]	75		
3.	Amended and Restated Limited Liability Company Agreement of Beacon Mountain LLC dated September 24, 2015 [HCMLPHMIT00004115-HCMLPHMIT00004123]	94		
4.	Second Amended and Restated Limited Liability Company Agreement of Beacon Mountain LLC dated February 12, 2025	95		
5.	Membership Interest Purchase Agreement, dated February 12, 2025, between Rand PE Fund I, L.P. and CLO Holdco, LLC			
6.	Membership Interest Purchase Agreement Rand Advisors dated August 1, 2022 [HCMLPHMIT00004202-HCMLPHMIT00004215]	86		
7.	Limited Liability Company Agreement of Atlas IDF GP, LLC dated October 29, 2015 [HCMLPHMIT00003511-HCMLPHMIT00003517]	73		
8.	Amended and Restated Company Agreement of Atlas IDF GP, LLC dated August 8, 2022 [HCMLPHMIT00004127-HCMLPHMIT00004151]	83		
9.	Member and Manager Consent of Atlas IDF GP, LLC dated October 13, 2022 [HCMLPHMIT00004124-HCMLPHMIT00004126]	82		
10.	Limited Liability Company Agreement of Rand PE Fund Management, LLC dated October 29, 2015 [HCMLPHMIT00003873-HCMLPHMIT00003879]	76		
11.	Amended and Restated Company Agreement of Rand PE Fund Management, LLC dated August 1, 2022 [HCMLPHMIT00004177-HCMLPHMIT00004201]	85		
12.	Member and Manager Consent of Rand PE Fund Management, LLC dated October 13, 2022 [HCMLPHMIT00004219-HCMLPHMIT00004221]	88		
13.	Limited Liability Company Agreement of Rand Advisors, LLC dated August 28, 2013 [HCMLPHMIT00003880-HCMLPHMIT00003886]	77		

Number	Exhibit	HCMLP Prior W&E Ref.[3]	Offered	Admitted
14.	Amended and Restated Company Agreement of Rand Advisors, LLC dated August 1, 2022 [HCMLPHMIT00004152-HCMLPHMIT00004176]	84		
15.	Member and Manager Consent of Rand Advisors, LLC dated October 13, 2022 [HCMLPHMIT00004216-HCMLPHMIT00004218]	87		
16.	3/17/2025 Rand Advisors Form ADV [HCMLPHMIT00003465-HCMLPHMIT00003493]	89		
17.	Agreement of Limited Partnership of Rand PE Fund I, L.P. dated October 29, 2015 [HCMLPHMIT00003887-HCMLPHMIT00003893]	78		
18.	Rand PE Fund I, LP Offering Series 1 Limited Partnership Interests dated November 30, 2015 [HCMLPHMIT00004024-HCMLPHMIT00004095]	81		
19.	Rand PE Fund I, L.P. SEC Form D dated February 24, 2025 [HCMLPHMIT00004096-HCMLPHMIT00004100]	93		
20.	Amended and Restated Limited Partnership Agreement of Atlas IDF, LP dated November 30, 2015 [HCMLPHMIT00003894-HCMLPHMIT00003928]	79		
21.	Atlas IDF, LP Offering of Series 1 Limited Partnership Interests dated November 30, 2015 [HCMLPHMIT00003929-HCMLPHMIT00004023]	80		
22.	Atlas IDF LP SEC Form D dated February 24, 2025 [HCMLPHMIT00003518-HCMLPHMIT00003522]	92		
23.	Atlas IDF, LP Subscription 12/21/2015 (signature pages only)	90		
24.	Atlas IDF, LP Subscription 12/23/2015 (signature page only)	91		
25.	Crown Global Rand Participation Agreement (Executed)	102		
26.	Crown Global DVA Policy 30218 (signed)	98		

Number	Exhibit	HCMLP Prior W&E Ref.[3]	Offered	Admitted
27.	Crown Global DVA Termsheet 30218	99		
28.	Crown Global DVA Policy 30219 (signed)	100		
29.	Crown Global DVA Termsheet 30219	101		
30.	Bylaws of The Okada Family Foundation, Inc. (final version)	96		
31.	Bylaws of Empower Dallas Foundation, Inc.	97		
32.	S&G HMIT Opinion Rep Letter dated January 29, 2016	103		
33.	S&G HMIT Opinion dated January 29, 2016	104		
34.	HOLDCO Responses and Disclosures Related to the Court's Order Requiring Disclosures [Docket No. 2547] HCMLPHMIT00003523-HCMLPHMIT00003828]	74		
35.	Show Cause Hearing Transcript June 8, 2021 [HCMLPHMIT00002716-HCMLPHMIT00003013]	71		
36.	HMIT Hearing Transcript June 8, 2023 [HCMLPHMIT00003014-HCMLPHMIT00003402]	72		
B.	**Validation of Patrick's Authority**			
37.	*Remittance Agreement* between the NexPoint Small Bay and Charitable DAF and Liberty CLO Holdco, Ltd. (as those terms are defined), dated January 10, 2025 [Docket No. 4536-E]	22		
38.	Intercreditor and Participation Agreement with HCLOM dated January 10, 2025 [HCMLPHMIT00003868-HCMLPHMIT00003871]	13		

Number	Exhibit	HCMLP Prior W&E Ref.[3]	Offered	Admitted
39.	*Stipulation Withdrawing Objection of the Dallas Foundation and Crown Global Life Insurance, Ltd. to Motion for Entry of an Order Pursuant to Bankruptcy Rule 9019 and 11 U.S.C. § 363 Approving Settlement With the HMIT Entities and Authorizing Actions Consistent Therewith* dated June 27, 2025 [Docket No. 4291]			
40.	The Rule 11 Agreement filed in the TX Business Court on July 13, 2025 [Docket No. 4356-F]			
41.	*Consent Order in In re Charitable DAF Holdco, Ltd*., entered by the Grand Court of the Cayman Islands Financial Services Division on July 31, 2025 [Docket No. 4556-20]			
42.	*Order* in *The Highland Dallas Foundation, Inc., et al. v. Patrick, et al*., No. 25-BC01B-0027, filed in the Texas Business Court, 1st Division on September 18, 2025 [Docket No. 4534-16]			
43.	An amendment to a loan agreement executed by, among others, certain Dondero-controlled entities and CLO Holdco, Ltd., dated September 30, 2025 [Docket No. 4536-G]			
44.	*Stipulation [Proposed] Order of Dismissal With Prejudice* between Liberty CLO HoldCo, Ltd. and Dugaboy and others aligned with or controlled by Dondero, dated December 3, 2025 [Docket No. 4536-H]			
45.	*Agreed Final Judgment* between Atlas IDF, LP (an HMIT affiliate) and certain Dondero-controlled entities, dated December 8, 2025 [Docket No. 4536-I]			
C.	**Dugaboy's Knowledge of the Principal Allegations Against Patrick**			
46.	Excerpts of Returns of Organizations Exempt from Income Tax filed on IRS Form 990, dated 2024, for the Highland Dallas Foundation Inc., the Highland Kansas City Foundation Inc., and the Highland Santa Barbara Foundation Inc. [Docket No. 4556-21]			
47.	The *Winding Up Petition in In re Charitable DAF Holdco, Ltd*., filed in the Grand Court of the Cayman Islands Financial Services Division on April 16, 2025 [Docket No. 4534-6]			

Number	Exhibit	HCMLP Prior W&E Ref.[3]	Offered	Admitted
48.	The *Affidavit of James David Dondero*, notarized on April 9, 2025 and filed in support of the *Winding Up Petition in In re Charitable DAF Holdco, Ltd*., filed in the Grand Court of the Cayman Islands Financial Services Division on April 16, 2025 [Docket No. 4534-7]	119		
49.	*Petition for Court Supervision of a Voluntary Liquidation in In re Charitable DAF Holdco, Ltd*., filed in the Grand Court of the Cayman Islands Financial Services Division on May 2, 2025 [Docket No. 4534-13]			
50.	*Order Granting Petition for Court Supervision of a Voluntary Liquidation in In re Charitable DAF Holdco, Ltd*., entered in the Grand Court of the Cayman Islands Financial Services Division on May 6, 2025 [Docket No. 4534-14]			
51.	The *Affidavit of Mark Eric Patrick*, notarized on June 4, 2025, in *In re Charitable DAF Holdco, Ltd*. and filed in the Grand Court of the Cayman Islands Financial Services Division on June 4, 2025 [Docket No. 4534-10]			
52.	*Objection of The Dallas Foundation and Crown Global Life Insurance, Ltd to Motion for Entry of an Order Pursuant to Bankruptcy Rule 9019 and 11 U.S.C. § 363 Approving Settlement with the HMIT Entities and Authorizing Actions Consistent Therewith* [Docket No. 4231], filed in the United States Bankruptcy Court for the Northern District of Texas on June 9, 2025 [Docket No. 4534-18]			
53.	*Dugaboy Investment Trust's Discovery Related to Rule 9019 Motion* in the above-captioned bankruptcy case, dated June 10, 2025 [Docket No. 4534-19]			
54.	*Highland Capital Management, L.P., the Highland Claimant Trust, and the Highland Litigation Sub-Trust's Responses and Objections to Dugaboy's Discovery Related to Rule 9019* Motion, dated June 13, 2025 [Docket No. 4534-12]			
55.	Deposition transcript of Shawn Raver dated June 20, 2025			

Number	Exhibit	HCMLP Prior W&E Ref.[3]	Offered	Admitted
56.	Deposition transcript of Julie Diaz dated June 22, 2025	124 (at Dkt. 4277)		
57.	Deposition transcript of Torrey Littleton dated June 22, 2025	125 (at Dkt. 4277)		
58.	Deposition Transcript of Mark Patrick dated June 23, 2025			
59.	The transcript of the June 25, 2025 hearing in the United States Bankruptcy Court for the Northern District of Texas on the *Motion for an Order Further Extending Duration of Trusts* [Docket No. 4213] and *Motion for Entry of an Order Pursuant to Bankruptcy Rule 9019 and 11 U.S.C. § 363 Approving Settlement with the HMIT Entities and Authorizing Actions Consistent Therewith [Docket No. 4216]* [Docket No. 4534-11]			
60.	Highland Rule 9019 Presentation dated June 25, 2025 [Docket No. 4536-L]	L (at Dkt. 4536)[4]		
61.	*Declaration of James David Dondero* filed in the Texas Business Court, Dallas, Texas and dated July 1, 2025 [Case No. 19-34054, [Docket No. 4521-H-6]			
62.	*Plaintiffs' Original Petition, Application for Temporary Restraining Order and Temporary Injunction, and Emergency Request for Appointment of Receiver in The Highland Dallas Foundation, Inc., et al. v. Patrick, et al*., No. 25-BC01B-0027, filed in the Texas Business Court, 1st Division on July 1, 2025 [Docket No. 4534-15]			
63.	*JOL Writ of Summons and Statement of Claim*, filed in the Cayman Proceeding on July 15, 2025 [Docket No. 4536-B]			
64.	*The Dugaboy Investment Trust's Motion to Stay 9019 Order* [Docket No. 4326] and accompanying exhibits, filed in the United States Bankruptcy Court for the Northern District of Texas on July 17, 2025 [Docket No. 4326]			

[4] This demonstrative was used at the 9019 Hearing on June 25, 2025 and admitted into evidence at the request of Mr. Lang, Dugaboy's attorney. *See* June 25, 2025 transcript (Exhibit 62) at 171:15-25.

Number	Exhibit	HCMLP Prior W&E Ref.[3]	Offered	Admitted
65.	*Memorandum Opinion and Order Regarding Stay Requests [Addressing DE ##4326 & 4308]* (Denying Stay) dated July 21, 2025 [Docket No. 4333]			
66.	Charitable DAF Holdco, Ltd. Guidance Notes for Members of the Liquidation Committee (not dated) [Docket No. 4534-9]			
67.	CWR Form No. 15, Liquidator's Certificate (Composition of Liquidation Committee) (O. 9, r. 1) in the Grand Court of the Cayman Islands Financial Services Division, dated July 21, 2025 [Docket No. 4534-17]			
68.	*Verified Petition for (I) Recognition of Foreign Main Proceeding, (II) Recognition of Foreign Representatives, and (III) Related Relief Under Chapter 15 of the Bankruptcy Court, filed in the United States District Court for the District of* Delaware, dated July 21, 2025 [Docket No. 4536-J]			
69.	*Declaration of Margot MacInnis*, sworn to on July 21, 2025, and filed in the United States Bankruptcy Court for the District of Delaware in connection with the Ch. 15 Recognition Petition [Docket 4521-6 (Exhibit G)]			
70.	*Third Affidavit of Margot MacInnis* filed in Grand Court of the Cayman Islands November 2025 (Under Seal)			
D.	**The Cayman Court Rejects the Dondero Foundation's Fraud Claims**			
71.	Letter from Maples and Calder (Cayman) LLP to Karen Hoskins, Personal Assistant to the Hon. Justice Raj Parker of the Grand Court of the Cayman Islands Financial Services Division, dated February 3, 2026 [Docket No. 4556-22]			
72.	*Judgment in In re Charitable DAF Holdco, Ltd.*, filed in the Grand Court of the Cayman Islands Financial Services Division on February 10, 2026 [Docket No. 4534-4]			
E.	**Other**			
73.	Settlement Agreement and General Release dated May 19, 2025 [Docket No. 4217-7]	1		

Number	Exhibit	HCMLP Prior W&E Ref.[3]	Offered	Admitted
74.	*Notice of Appeal of Order Pursuant to Bankruptcy Rule 9019 and 11 U.S.C. § 363 Approving Settlement Between the Highland Entities and the HMIT Entities and Authorizing Actions Consistent Therewith* dated July 15, 2025 [Docket No. 4311]			
75.	Dugaboy's Index (compiled from all documents Dugaboy filed at Docket Nos. 4513 and 4521), a document prepared by professionals employed by my firm at my direction dated April 3, 2026 [Docket No. 4536-A]			
76.	Executed Withdrawal Letters – Dolomiti and Hakusan dated February 6, 2025			
77.	Deposition Transcript of James Dondero dated May 8, 2026			
78.	*Highland Capital Management, L.P.'s Requests for the Production of Documents Directed to the Dugaboy Investment Trust* dated February 2026 [Dkt 4551-8]			
79.	Membership Interest Purchase Agreement, dated August 1, 2022 by and among John Honis, as seller, DAF Holdings Corp., as buyer, and CLO Holdco, Ltd., as guarantor			
80.	Amended and Restated Limited Partnership Agreement of Rand PE Fund, dated as of November 30, 2015			
81.	Investment Management Agreement, dated as of November 30, 2015, by and among Rand Advisors and Atlas IDF			
82.	Investment Management Agreement, dated as of November 30, 2015, by and among Rand Advisors and Rand PE Fund			
83.	Assignment and Assumption of Membership Interest Agreement, dated March 24, 2021, between Grant J. Scott and Mark E. Patrick			
84.	Amended and Restated Limited Liability Company Agreement of DAF GP, dated as of January 1, 2012			
85.	Second Amended and Restated Exempted Limited Partnership Agreement of DAF Fund, dated March 11, 2024			

Number	Exhibit	HCMLP Prior W&E Ref.[3]	Offered	Admitted
86.	Contribution and Assignment Agreement, dated April 27, 2023, by and among DAF Fund, CLO Holdco, Ltd, Liberty CLO Holdco, Ltd., and DAF Holdings Corp.			
87.	Highland Demonstrative Exhibit: Highland's Slide Deck for Hearing on Motion for Relief from Order and Motion to Vacate			
88.	***Summons* filed March 3, 2026 in CICA Civil Appeal No. 3 of 2026 pending in the Cayman Islands Court of Appeal**			
89.	**March 27, 2026 Hearing Transcript from proceedings in CICA Civil Appeal No. 3 of 2026 pending in the Cayman Islands Court of Appeal**			
90.	Any document entered or filed in Highland Capital Management, L.P.'s chapter 11 Bankruptcy Case or any associated contested matter or adversary proceeding, including any exhibits thereto			
91.	All exhibits necessary for impeachment and/or rebuttal purposes			
92.	All exhibits identified by or offered by any other party at the Hearing			

[*Remainder of Page Intentionally Blank*]

Dated: May 9, 2026

PACHULSKI STANG ZIEHL & JONES LLP

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Counsel for Highland Capital Management, L.P. and the Highland Claimant Trust

EXHIBIT 88

IN THE CAYMAN ISLANDS COURT OF APPEAL

ON APPEAL FROM THE GRAND COURT OF THE CAYMAN ISLANDS

CICA CIVIL APPEAL NO. 3 OF 2026

CAUSE NO. FSD 201 OF 2025 (RPJ)

IN THE MATTER OF RULE 24(1) OF THE COURT OF APPEAL RULES (2014 REVISION)

BETWEEN:

CHARITABLE DAF HOLDCO, LTD (IN OFFICIAL LIQUIDATION)

Plaintiff / Appellant

AND

(1) MARK ERIC PATRICK

(2) PAUL MURPHY

(3) CDMCFAD, LLC

(4) DFW CHARITABLE FOUNDATION

(5) CDH GP, LTD. AS GENERAL PARTNER FOR AND ON BEHALF OF CHARITABLE DAF FUND, LP, AND IN ITS CAPACITY AS GENERAL PARTNER

(6) CLO HOLDCO, LTD.

Defendants / Respondents

SUMMONS

FILED by Maples and Calder (Cayman) LLP, attorneys for the Appellant, whose address for service is PO Box 309, Ugland House, Grand Cayman, KY1-1104, Cayman Islands. (Ref: CJM/LRA/TQR/858403.02/86574964)

LET ALL PARTIES CONCERNED attend before the Court of Appeal on the day of 2026 at am / pm upon an application by the Plaintiff pursuant to Rule 24(1)(b) of the Court of Appeal Rules (As Revised) for orders and directions that pending the determination of the appeal of the judgment of the amended summons dated 4 December 2025 filed by the Appellant in Charitable DAF HoldCo, Ltd (in Official Liquidation) v Mark Eric Patrick & Ors (FSD 201 of 2025 (RPJ)) (the "**Appeal**"):

1 The Respondents and the related entities listed in the Schedule hereto (the "**Fund Entities**"), and their respective agents, servants, employees, and representatives, shall:

1.1 not transfer, conceal, withdraw, alienate, redeem, expend, encumber, disperse, or otherwise dispose of any and all funds, assets, receivables, or shares of the Fund Entities outside of the ordinary course of business;

1.2 not take any action to increase the remuneration paid to any employee, manager or director of the Fund Entities;

1.3 not take any action to dissolve, wind-down, liquidate, or otherwise alter the corporate standing of the Fund Entities;

1.4 not take any action to modify or alter the corporate governance of the Fund Entities, including but not limited to any amendment to their respective bylaws or organisational documents;

1.5 not take any action to sell, exchange, or dispossess any asset of one of the Fund Entities unless (i) the sale is to a *bona fide* third party purchaser for reasonably equivalent value, (ii) except in the case of marketable securities, the *bona fide* purchaser is made aware of this undertaking; and (iii) the proceeds from that sale, exchange, or disposition remain owned by the Fund Entities; and

1.6 not alter, conceal, or destroy any business records concerning the Respondents or the Fund Entities, including any transfers of funds, assets, receivables, or shares to or from the Respondents or Fund Entities.

2 Further, and to the extent not addressed by the foregoing, the Respondents and the Fund Entities shall:

2.1 preserve and will not in any way dispose of, deal with, encumber, transfer or diminish the value of (as applicable) their or any interest (of whatsoever nature), whether held directly or indirectly, in Charitable DAF Fund, LP (the "**Fund**"), and/or the Fund Entities and/or any assets of the Fund other than in the ordinary course of business; and

2.2 not do anything to cause, procure, incite, promote or assist a breach by any other party of this undertaking.

3 The Third, Fourth, Fifth and Sixth Respondents (the "**CDM Respondents**") and the Fund Entities shall give seven days' written notice to the Appellant of any payment or transaction of any nature (or series of related payments or transactions) they propose to make at or above US$50,000. Such notice must include full supporting information and documentation as well as an explanation of the rationale for the transaction.

4 If the Appellant has any queries regarding a transaction (or series of related payments or transactions) and whether it is in the ordinary course of the CDM Respondents or the Fund Entities' business, the CDM Respondents and the Fund Entities shall consult with the JOLs and provide clarification. For the avoidance of doubt, nothing in this Order shall prohibit the Respondents and the Fund Entities from making payments to any attorney, lawyer, third party consultant, accountant, or external professional services advisor which is required, either in the ordinary course of business, or in respect of their reasonable legal fees and expenses in connection with these proceedings, the proceedings under FSD 201 of 2025 (RPJ), or the official liquidation of Charitable DAF HoldCo, Ltd (in Official Liquidation) FSD 116 of 2025 (JAJ), or the Chapter 15 proceedings, *In re Charitable DAF Holdco, Ltd (In Official Liquidation)*, United States Bankruptcy Court for the District of Delaware, Case No. 25-11376 (BLS). All

such transactions will be provided for in the monthly transactions report pursuant to paragraph 5 of this Order.

5 The CDM Respondents and the Fund Entities shall disclose to the Appellant, at the end of each calendar month: (i) a full listing of payments or other transactions undertaken by them below US$50,000 in the calendar month just passed; and (ii) copies of all existing and up to date balance sheets and financial statements or records prepared in relation to the Respondents or the Fund Entities for the period 31 December 2025 onwards. Any information of whatever nature relating to any member of the CDM Respondents or the Fund Entities which is provided to the Appellant pursuant to this paragraph 5, shall not be disclosed to or shared with Mr James Dondero, the Supporting Organisations (being Highland Santa Barbara Foundation, Highland Dallas Foundation, and Highland Kansas City Foundation), or any known affiliates or service providers of these individuals / entities, subject to where the Appellant's joint official liquidators are required to disclose any such information in the discharge of their duties to the Court or as otherwise required by law.

DATED this 3rd day of March 2026

Maples and Calder (Cayman) LLP

Maples and Calder (Cayman) LLP
Attorneys for the Appellant

TO: The Registrar of the Court of Appeal

AND TO:
(1) Campbells, Attorneys for the First, Third, Fifth and Sixth Respondents
(2) Kobre & Kim, Attorneys for the Second Respondent
(3) Baker & Partners, Attorneys for the Fourth Respondent

TIME ESTIMATE: The Appellant respectfully submits that the summons is fit to be determined on the papers.

FILED by Maples and Calder (Cayman) LLP, attorneys for the Appellant, whose address for service is PO Box 309, Ugland House, Grand Cayman, KY1-1104, Cayman Islands. (Ref: CJM/LRA/TQR/858403.02/86574964)

Schedule

List of Fund Entities

(i) CDH GP, Ltd. (Cayman Islands)

(ii) CDMCFAD, LLC (Delaware)

(iii) Charitable DAF Fund 2, LP (Cayman Islands)

(iv) Charitable DAF Fund, LP (Cayman Islands)

(v) CLO HoldCo, Ltd. (Cayman Islands)

(vi) Liberty CLO HoldCo, Ltd. (Cayman Islands)

(vii) HCT Holdco 2, Ltd. (Cayman Islands)

(viii) MGM Studios Holdco, Ltd. (Cayman Islands)

(ix) Liberty CLO HoldCo, LLC (Delaware)

(x) Liberty Sub, Ltd. (Delaware)

(xi) Charitable DAF Holdings Corp. (Delaware)

(xii) DST Investco, LLC (Delaware)

(xiii) Allanon Capital Management LLC (Texas)

(xiv) DFW Charitable Foundation (Delaware)

(xv) CLO HoldCo LLC (Delaware)

(xvi) Rand Advisors LLC (Delaware)

(xvii) CDHC Royse City Land LLC (Texas)

(xviii) Royse City Land Company LLC (Texas)

(xix) CDHC Assets LLC (Texas)

(xx) CDHC Fort Worth Land LLC (Texas)

(xxi) CDHC Stewart Creek LLC (Texas)

(xxii) BVP Property LLC (Delaware with CA registration)

(xxiii) Hunter Mountain Investment Trust

(xxiv) Rand PE Fund Management, LLC

(xxv) Atlas IDF GP, LLC

(xxvi) CDHC Apache Trail, LLC

(xxvii) 41915 Leaseco, LLC

FILED by Maples and Calder (Cayman) LLP, attorneys for the Appellant, whose address for service is PO Box 309, Ugland House, Grand Cayman, KY1-1104, Cayman Islands. (Ref: CJM/LRA/TQR/858403.02/86574964)

EXHIBIT 89



CHARITABLE DAF HOLDCO, LTD (IN OFFICIAL LIQUIDATION) v Mark Patrick \& Ors.

Day 1

March 27, 2026

Opus 2 - Official Court Reporters

Phone: 020 4518 8448
Email: transcripts@opus2.com
Website: https://www.opus2.com

Friday, 27 March 2026
(1.00 pm)
PRESIDENT: After you have done your introductions, Ms Moran, perhaps I might say a few words.
MS MORAN: Thank you, my Lords, and thank you very much to your Lordships for convening this special sitting at short notice this morning as well.
My Lords, I appear on behalf of the joint official liquidators of Charitable DAF Holdco. Mr Scott appears for the 1st, 3rd, 5th and 6th respondents, instructed by Campbells. Mr Quest appears for the second respondent, instruct you had by Kobre & Kim. And Ms O'Driscoll, from Baker & Partners, appears for the fourth defendant, DFW.
PRESIDENT: Thank you very much, Ms Moran. May I say a few things.
First, we will finish by —— by —— 6.00 pm UK time, which will be noon Cayman time. There will be a break because, as we know, Melanie is doing the Opus recording.
May I just say this about the question of a special hearing of the substantive appeal —— and there is an appeal by right, as I understand it,

so that would take place in any event —— there are, I am bound to observe, great demands on the court at the moment, which makes a hearing date slightly problematic. I just mention that so that everybody knows. It is not entirely straightforward.
That's the first —— those are the first few matters I wanted to mention. There is something else.
This is, and I think I am right in saying it, Ms Moran, a case in which leave to appeal is not required. That is so, isn't it?
MS MORAN: That's right, my Lord.
PRESIDENT: If it were, I think it would be helpful if we make it plain that we would have granted leave to appeal on the basis that there is, in our view, a seriously arguable case for appeal. So we shall approach the matter on that basis.
Among other things, given that position, we shall want to hear, Ms Moran, from you, as to why any Rule 11 order is insufficient. Obviously it is not the only topic with which you have to deal, but we shall want to know about that, and we shall want to hear from the respondents as to why

the court should not make an order in the terms of Rule 11, which you all know about.
So, with those few words, and emphasising that this is an application for an interim injunction —— this is not the hearing of the substantive appeal —— we have to concentrate on the issues that are presently relevant.
Ms Moran, we leave it to you to start.
Submissions by MS MORAN
MS MORAN: Thank you very much, my Lord, and I am very grateful for those clear indications.
My Lord, I think in light of that guidance I will address your Lordships under the following headings, and I will give just some brief background and context to the proceedings and to this application, and then I think I can skip quite lightly over our serious issue to be tried on appeal, given your Lordship's directions.
PRESIDENT: Correct.
MS MORAN: I will turn then, my Lord, to the meat of this application as to why the balance of convenience favours granting the interim injunction, which will deal with the Rule 11 Agreement and the risk of prejudice to the parties.

So, turning to —— I am sorry, my Lord, before I start, could I just confirm that your Lordships do have access to the electronic bundles? Your Lordship should have received them.
PRESIDENT: We do.
MS MORAN: Very good. Thank you.
JUSTICE BEATSON: Can I just say, we had access to electronic bundles. They are fragmented and in bits. So you will just have to —— speaking for myself, you will have to take care in getting us to the right place. It was a particular problem, I'm afraid, with the Maples bundles.
MS MORAN: Apologies, my Lord.
JUSTICE BEATSON: Let me tell you what I have. I have a companies bundle for this hearing, which is perfect. There is nothing wrong with that. Then I have five bundles, which I think are the papers and exhibits and authorities that were before the judge. And I have an e—mail saying there is some pagination problem in it, which I have not got to the bottom of, because that only arrived last night. That's my —— then I have a bundle of respondents' evidence and authorities, together with the respondents' submissions, but it is a bit fragmented.

MS MORAN: Thank you, my Lord. Apologies for that.
JUSTICE BEATSON: Well, it is your time. Anyway, there we are.
MS MORAN: We will do our best. I think we will be able to make our way through them, my Lord.
My Lords, turning to the background, as your Lordships will have seen from the judgment and the skeleton argument, the company's claim in the Grand Court is that, prior the liquidation, the two directors, Mr Patrick and Mr Murphy, transferred away the company's primary asset, being a valuable limited partnership interest, in breach of fiduciary duty and at a gross undervalue, to entities under their sole control. This was what we refer to, somewhat euphemistically, as "the DAF restructuring".
At the same time as this was going on, the directors were paying themselves excessive remuneration and bonuses, and refusing to give information to the limited partner, the underlying charities, as to the conduct of the business of the partnership. And this is explained in detail in the Grand Court skeleton argument at paragraphs 33 to 56.

As your Lordships will have seen, the company's position is this conduct is all the more egregious because the underlying beneficiaries of the company are four large US charities that support education and community initiatives in under−privileged areas. And as a result of the directors' actions, these charities are being deprived of the funds that they need in order to carry out these charitable commitments.
So, unsurprisingly, in these circumstances, Justice Parker found there was a serious issue to be found in respect of the DAF restructuring, and that is consistent with your Lordship's determination that there is a serious issue to be tried here on appeal.
Surprisingly, and disappointingly, Justice Parker declined to grant an injunction to protect the company's proprietary rights to the limited partnership interest pending trial, notwithstanding that they are under the sole control of the wrongdoers. This risks the company's claim being rendered nugatory by the time we get to trial.
We are currently left without any protection whatsoever in this court over assets to

which the company can demonstrate a proprietary claim.
My Lords, what this means is, pending the trial −− and this is notwithstanding the Rule 11 Agreement −−
PRESIDENT: Could Mr Goodman please turn off his −− I don't know who Mr Goodman is, but somebody called Mr Goodman appears to have just spoken and appeared very briefly.
MR GOODMAN: Apologies, my Lord. I accidentally came off mute.
MS MORAN: Without having any injunctive relief over these assets, it leaves the directors free to continue to pay themselves excessive remuneration, potentially carry out another restructuring, and to transfer away the limited partnership interest out of the structure.
But even leaving aside the question of whether or not the directors would or wouldn't act in bad faith in this manner, allowing them to continue to operate this structure in the ordinary course, on their case means they can make charitable distributions to DFW, currently the sole beneficiary of this structure, and DFW can then make charitable distributions not to our

charities, not to the four charities who are the intended beneficiaries of this structure, but to charities of its choosing.
So there is a clear risk of dissipation of assets in the manner in which the directors consider it is appropriate to conduct the business of (inaudible). There is no question whether the assets are going to be dissipated.
The respondents have declined to offer any undertakings to us pending trial, even over the limited partnership interest, and have expressly refused to give undertakings to this court pending hearing of this application today.
So in our notice of appeal we seek an injunction in substantially similar terms to that refused by Justice Parker, save that we have made a concession in that we are no longer seeking to prevent the respondents from dealing with their salaries, and we have also amended the disclosure orders to take into account some of the information that's already been received and by this application we are seeking an interim injunction on more limited terms, pending the hearing on that appeal, and the terms of the interim injunction are on page 174 of the

company's appeal bundle.

The terms of the interim injunction reflect the consent undertakings that ——

PRESIDENT: Forgive me interrupting, Ms Moran. Was there any reason you did not ask for an order from the judge below?

MS MORAN: Excuse me, my Lord, is there any reason I didn't ask for an order from the judge below?

PRESIDENT: Yes. I think you indicated that you were going to ask, were you not, for some sort of order below, but I'm not sure I have seen anything which indicates —— because this is a point taken against you —— why you didn't.

MS MORAN: Yes, my Lord. I think on the jurisdiction point, my Lord, I think the point taken against me is a bad one. I don't think this is a case where the Grand Court and the Court of Appeal have concurrent jurisdiction in the same way as they would for a leave to appeal application or a stay application. I think this is an application where, under the court rules, there is a right to go directly to the Court of Appeal for an injunction, pending the appeal.

JUSTICE BEATSON: Can I ask ——

PRESIDENT: In any event —— I am so sorry.

JUSTICE BEATSON: Can I ask, let's assume you are right about that. You have a right to come straight here. But the question that was asked was: why didn't you ask the judge? Quite often people ask the first instance judge for relief when they feel they need it at the time. I mean, we have all seen this. So, that was the question I believe that was asked, and I am not sure I understand —— are you saying the judge had no jurisdiction to give you any relief pending appeal?

MS MORAN: Well, my Lord, I think that there —— while there will may have been jurisdiction for the Grand Court judge, I don't think that it is a situation where that jurisdiction precludes this court from exercising jurisdiction.

JUSTICE BEATSON: No, but that's not the question. That's not the question. The question is: why didn't you ask?

MS MORAN: We didn't ask, my Lord, because the judgment was not handed down —— the judgment was not handed down in person, and the judge at the Grand Court had categorically just refused us an injunction on the basis that we didn't have any proprietary interest in the assets.

We had gone back to the judge seeking to clarify the terms of the order —— excuse me —— seeking to clarify the terms of the judgment and asking whether the judge did, in fact, realise that there did not appear to be any reasons in the judgment about why we didn't have a proprietary interest in the partnership interest as opposed to the underlying assets, and ——

PRESIDENT: Forgive me interrupting. I think the answer, which I sense we are coming to, is you didn't think he would grant it, because he was so against you. I think that's what you want to say. I am not sure —— forgive me interrupting. That not an answer to why you didn't ask him —— well, it is an answer to why you didn't ask him; nevertheless you plainly should have asked him. But you did not think he would grant it. That's I think what you are saying or moving to say.

We undoubtedly have the discretion to permit you to ask us, and that's really what you are seeking from us, isn't it?

MS MORAN: As I understand it, my Lord, yes, that's —— perhaps that's right.

I do think it is a strange situation to be in, having been just refused an injunction by

Justice Parker, to then turn around and say "Could you give us an injunction for a shorter period of time until we get to the Court of Appeal?" It wasn't a stay application. It would have been exercising an original jurisdiction to grant the injunction, my Lords. So it did feel more appropriate to come directly to this court in the circumstances.

PRESIDENT: I see.

MS MORAN: My Lords, I think in relation to —— I think I was speaking about the risk of the dissipation of the assets, which is why we sought the injunction in the Grand Court and then why we are seeking the interim injunction today.

I think, just before I turn to the substance of the application, as a preliminary point I do need today address the allegations that are being made that the liquidators are being controlled by Mr Dondero.

The liquidators are court officers and they obtained sanction to bring these proceedings from Justice Asif, the liquidation judge. They also obtained sanction from Justice Asif for the initial tranche of funding from (inaudible) Limited. If there had been any element of control

in that funding agreement, sanction just would not have been granted.

These are very serious allegations to make against court officers. Mr Scott resiled from these allegations under questioning from Justice Parker in the Grand Court, but now we see those allegations being made here again, and I also see that in the MidWave complaint that's been exhibited to Mr Patrick's recent affidavit to this court, he is referring to the liquidators as civil co-conspirators with Mr Dondero.

So, my Lords, it is not an issue for today. No doubt this is all going to be aired in the removal application that they have listed before the Grand Court at the end of June, and -- but these are serious allegations, and obviously they are denied categorically by the liquidators.

Tactically, I understand, of course, why they are making these allegations, because it is clear that there's considerable animosity between Mr Dondero and Mr Patrick, but that's nothing to do with the liquidators.

My learned friends are well aware that returning the assets to the company doesn't mean that the assets go back into the control -- or go

into the control of Mr Dondero. They will be controlled by the liquidators and to the extent that there is any real evidence that Mr Dondero will siphon off money that should be going to the charities the liquidators will be able to deal with this.

The only way they can get around this inconvenient obstacle to what's a key plank in their defence is to impugn our integrity.

So, my Lords, I will say no more about that and then I'll see if I need to address it any further in reply, but it is telling that Mr Patrick's complaints about Mr Dondero trying to take money away from the charities are only being made by him. There are no such complaints being made by the charities, and, in fact, it is the charities that brought the petition to the Grand Court to appoint the liquidators as a result of mismanagement by Mr Patrick.

Turning, my Lord, to the issue about there being a serious issue to try on appeal --

SIR RICHARD FIELD: I am so sorry. I didn't have my microphone on and I wanted to ask you a question. I am sorry to interrupt your submission.

MS MORAN: Not at all.

SIR RICHARD FIELD: I am right to assume, am I, that it's by reason of the (inaudible) that the original participating shareholders, the four non-profit companies that were acting on behalf of the original four charities, are no longer treated as beneficiaries to receive dividends under the new arrangement?

MS MORAN: That's right, my Lord, yes.

SIR RICHARD FIELD: So, as you have mentioned, the current situation is that the sole recipient of charitable funding is DFW.

MS MORAN: That's right, my Lord. Would it be helpful to see a structure chart?

SIR RICHARD FIELD: No, it wouldn't. I just wanted to make sure that I have got it right --

MS MORAN: Yes.

SIR RICHARD FIELD: -- and give myself a small pat on the back. I at least got that from the documents. Thank you very much.

MS MORAN: That's right, my Lord. DFW is currently the sole beneficiary of the structure and the company and underlying charities have no further --

SIR RICHARD FIELD: That was the situation when

the Rule 11 Agreement was entered into?

MS MORAN: Sorry. That was the situation when what was entered into?

SIR RICHARD FIELD: The Rule 11 Agreement in Texas.

MS MORAN: Correct, my Lord, yes. That was the situation at the start of the liquidation proceedings in 2005.

So, my Lords, given that your Lordships are with me on there being a serious issue to be tried on appeal, I don't propose to go through the grounds in any detail. The only point I do just want to deal with briefly is the nature of the proprietary interest that we have. I think your Lordships are in agreement that we have a serious issue to be tried, that the company has a proprietary interest in the limited partnership interest itself and also either a proprietary interest or at least an interest capable of being protected in the underlying assets.

The nature of the company's proprietary right to the limited partnership interest is important here and it is important for the purposes of this application because it goes to the balance of convenience. When an applicant has

a proprietary right and is entitled to a proprietary injunction, the balance of convenience, as your Lordships know, favours the granting of that injunction, and that gives me a fair wind at my back, as it were.

I think the other point to reiterate here, my Lords, is prior to this DAF restructuring the company was the sole limited partner in the structure. It had all of the particular interests of the partnership. The company was the one initially that contributed the assets into the partnership and the company was the original owner of the $270 million worth of assets. It restructured that into the partnership in 2011 in order to set up the charitable structure. So it is not the case, as seems to be misunderstood by Justice Parker, that the company was effectively a shell and a pass−through vehicle. It actually contributed to the economic value in the first instance and in return got its partnership interest.

In these circumstances if the charities had been able to get to court seeking to appoint −− if the company had come to court on behalf of the charities prior to the DAF

restructuring as the sole limited partner with the economic interest in these circumstances trying to appoint liquidators, this would absolutely have been a situation where, as a limited partner, deference would have been given to their views, to their economic interests, and the liquidators would have been appointed on a just and equitable basis to control the structure. We would be squarely within Aquapoint territory and the line of authorities and directions coming out of the Adamas line of authorities and (inaudible), where the court below and this court is consistently finding that in the context of exempted limited partnerships, where you have a limited partner with the substantial economic interests, deference needs to be given to their views.

My Lords, it is unfortunate that I am in a worse situation now because the directors managed to effect the DAF restructuring before the (inaudible) company had come to court to prevent it. That's really what we are trying to remedy here, my Lords. The company as the sole limited partner having the economic interest in the structure has had its assets taken away from it.

So, my Lords, unless I can answer any more

questions on the merits of the substantive claim or the grounds of appeal, perhaps I will turn directly to the balance of convenience question.

PRESIDENT: Yes, please.

SIR RICHARD FIELD: I am so sorry. Could I ask you one further question? Imagine the situation where DFW before any other restructuring had occurred had been made a participating shareholder. Could that have been objected to by the other four participating shareholders?

MS MORAN: So −−

SIR RICHARD FIELD: There is a fifth charity entering the list.

MS MORAN: Yes.

SIR RICHARD FIELD: What's the answer to my question?

MS MORAN: That is actually what happened, my Lord. DFW was admitted as a fifth charity −−

SIR RICHARD FIELD: Yes.

MS MORAN: −− prior to the liquidation. Yes, my Lord, that is absolutely something that could have been objected to at the time and it is something that has been objected to now on the basis it was done for an improper purpose.

SIR RICHARD FIELD: I see what's said about that,

that it is to give a majority to DFW and so can be in a commanding position as amongst the other participating shareholders, but just continuing my line of questioning, before any of the restructuring we see DFW coming in as a participating shareholder. Would it have been within the −− I will use the word "remit" −− remit of this charitable structure to make donations only to DFW for a period of time in the belief that they needed some catching up?

MS MORAN: My Lord, I think that there are two questions here. DFW was admitted as a shareholder of the company and the company had duties −− the director of the company had duties to the company represented by the interests of the shareholders.

The first question would be was it in their interests to admit DFW, and in relation to the catch−up query and the dividends again I think the question would have been to the directors: is it in the best interests of all the charities to give a catch−up to DFW?

I think, my Lord, that is the analysis that would have had to have been done, but I think it is correct, my Lord, that there is a discretion for the directors to declare distribution other

than simply on a pro rata basis.
SIR RICHARD FIELD: That's what lies behind my question. So before the restructuring it could have been within the directors' discretion to have taken in DFW as a participating shareholder and to have marked time for a period so far as the other participating shareholders are concerned to allow DFW to catch up.
MS MORAN: Yes, my Lord. I think that would possibly have been permitted at least under the articles. At least under the articles I think that would have been permitted, my Lord, but, of course, that's not what happened here, and the result of what has happened is that the company —— the existing charities —— the four charities are no longer entitled to be considered for any distributions at all.
SIR RICHARD FIELD: Yes. I understand that. I understand that. I will come back to this when we start looking at Rule 11. I just wanted to clear up one or two things before we come that. So thank you. Do forgive me for interrupting you.
MS MORAN: Thank you, my Lord.
So, my Lord, turning to the balance of convenience on this application, I think, my

Lords, perhaps we could turn up the Rule 11 Agreement. So this is at page 195 of the company's appeal bundle.
JUSTICE BEATSON: 195 did you say ——
MS MORAN: 195, my Lord, that's right.
JUSTICE BEATSON: —— because the electronic bundles have a slight slippage in the numbering.
MS MORAN: It shouldn't.
JUSTICE BEATSON: You are right. It is the ones from the Grand Court. So this is the letter from Duane Morris?
MS MORAN: That's right. Would it be helpful for me to give a brief explanation as to what proceedings are in Texas in terms of the (inaudible) supporting organisations rather than the liquidators?
PRESIDENT: I think it would be helpful for us to understand exactly what the position is.
MS MORAN: Certainly, my Lord. These proceedings were issued in Texas by three of the shareholders of the company, three of what we call the supporting organisations. The liquidators weren't aware that these proceedings were being brought and they are now a party to them.
The claims being made in Texas are

effectively the same claims that are being made here in this court. The supporting organisations are claiming that they are owed direct fiduciary duties by the directors and that therefore they are entitled to recover the assets themselves.
The court in Texas considered this question and at first instance in Texas decided that this didn't appear to be the case, that these were —— it seemed they were company claims and that the liquidators needed to be a party. They were not direct claims by the supporting organisations, they were derivative, and therefore stayed the proceedings.
The supporting organisations then sought an order of mandamus from the Supreme Court, seeking to overturn this decision, and the Supreme Court has just recently confirmed and upheld the decision of the court at first instance. So those proceedings in Texas are stayed unless the liquidators join as a party —— the company and the liquidators join as a party to advance the claims.
Now, my Lords, I should say that the Respondents who are in the Texas proceedings challenged jurisdiction in Texas initially. They said Texas was not the correct jurisdiction

and that the Cayman Islands were the correct jurisdiction. They consented to jurisdiction here. We didn't have to get permission for leave to serve out. They consented to jurisdiction. So all the parties were agreed Cayman Islands was the correct jurisdictional forum to resolve this dispute.
It is only since the supporting organisations got the favourable decision from Justice Parker that they are now saying we should be —— they are taking advantage of the fact that the Texas proceedings won't continue without our involvement, and they are saying that we should be now required to join into the Texas proceedings to benefit from the Rule 11 Agreement rather than them having to give any further undertakings in this court.
JUSTICE BEATSON: Forgive me. Can I just ask: the parties that submitted to the Cayman jurisdiction were the Texas Claimants did you say?
MS MORAN: The Texas Defendants.
JUSTICE BEATSON: Sorry. I am glad I asked you that.
MS MORAN: So the Defendants in Texas ——
JUSTICE BEATSON: Who are the Respondents here.

MS MORAN: —— who are the Respondents here —— not all of the Respondents but the majority of the Respondents, yes.
JUSTICE BEATSON: I see. Okay.
MS MORAN: So, my Lords, perhaps I'll turn to the terms —— sorry. Just to explain the background to the Rule 11 Agreement, what happened in Texas was the supporting organisations were seeking a temporary restraining order —— their version of an injunction —— pending the hearing of the —— a temporary restraining order pending the hearing of their main application for TRO. Instead of granting a TRO the judge said these parties should enter into this Rule 11 Agreement, which was a more limited form of protection over the assets pending the hearing. So that's the genesis of the Rule 11 Agreement, which was entered into in July of last year.
So turning to the terms of the Rule 11 Agreement, let's look at the parties to it, because, of course, the primary point is the company is not a party to this agreement and cannot enforce it. It is not appropriate for the liquidators to go ahead and join the proceedings in Texas simply to get the perceived benefit of

this agreement in light of all parties agreeing to submit to the jurisdiction here and the liquidators having got sanction to commence the proceedings here.
In order to join proceedings in Texas we would, of course, have to go back to Justice Asif and ask for sanction to do so. It is not a simple thing. We can't simply go to Texas under the Rule 11 Agreement.
Looking then at the Respondent parties to the Rule 11 Agreement —— because I am going to take your Lordships through why the Rule 11 Agreement is more limited than the terms of the interim injunction and why it doesn't give us sufficient protection —— so the first point, my Lords, is that the parties to the Rule 11 Agreement, which your Lordships can see in the first paragraph on page 195, are Mark Patrick, DFW, CDM and CDH GP. That's the general partner of the partnership. So those are the parties to the Texas proceedings. They are the parties to the Rule 11 Agreement, but they also agree that the covered entities, which are the subsidiaries of the Corporate Defendant, will be bound by the terms of this agreement. Now the subsidiaries

aren't actually a party to this agreement, but rather Mark Patrick in his capacity as a manager or director is agreeing to procure they will be bound.
The first point of concern is that the term "covered entities" refers to the subsidiaries of the fund, DFW and CDM. It doesn't refer to subsidiaries and indirect subsidiaries, and the indirect subsidiaries are where the valuable portfolio companies are. So that's the first concern.
The second concern is that Mr Murphy is not a party to this agreement, and Mr Murphy, who is a Respondent in this case, is also a director of some of the subsidiaries of the covered entities. He is wrong in his evidence when he says that the entities to which he is a director are bound by the Rule 11 Agreement, because, as we have just seen, the subsidiaries are not a party. Rather it is a personal obligation on the directors to procure compliance.
So, my Lords, we need Mr Murphy and Mr Patrick to agree to procure that the subsidiaries will comply with the terms of any undertakings. So that is the second point.

The third point is that the Rule 11 Agreement —— if your Lordships go down the page to 196, at paragraph 7(b) the undertaking is:
"Not take any action to increase the compensation paid to any employee of the Covered Entities."
That's a restriction not to increase employee remuneration. It doesn't say anything about remuneration of directors.
JUSTICE BEATSON: That is 7(b), isn't it?
MS MORAN: 7(b).
JUDGE CHARMAN: I heard 7(a). No doubt that's a mishearing by me.
MS MORAN: 7(b). The Rule 11 Agreement does not prevent any increase in the compensation of directors' fees and remuneration, which is, of course, one of the things we are most concerned about in light of the tens of millions of dollars that are being paid out to the directors.
Fourthly, the Rule 11 Agreement is tied to the Texas proceedings and stands or falls depending on what happens in that jurisdiction. We need protection tied to the Cayman Islands, which is on an entirely different timetable.
My Lords, I know that Mr Patrick has

submitted evidence which tries to suggest that there is no risk of the Rule 11 Agreement falling away pending the appeal, but he doesn't deal anywhere in his evidence as to whether they could bring any challenges now to the Rule 11 Agreement in light of the order of the Supreme Court saying that the proceedings in Texas can't go ahead without the liquidators. If that was in this court, you could perhaps see an application for a strike-out for failure to prosecute and to advance the proceedings. They can't advance the proceedings in Texas without us, and Mr Patrick doesn't address that is at all.

Fifthly, the Rule 11 Agreement contains no disclosure orders, so the liquidators can't police the terms of the injunction with the undertakings. In the context of proprietary injunctions disclosure orders are even more important, because they go beyond really policing the injunction and are aimed at identifying the (inaudible) and location of assets owned by a Claimant. That's not covered by the Rule 11 Agreement.

Then as a final point, my Lord, it is also entirely unclear as to if legal fees are being paid in this structure. The Rule 11 Agreement

allows payments to continue to be made in the ordinary course of business. DFW in particular seems to be being paid their legal fees out of this structure. We have asked whether there is any indemnification or contractual rights to be paid these legal fees. As an ultimate shareholder in the structure we would not expect there to be any indemnification rights. The normal rule is where there is a dispute about ownership of a company the disputing shareholders are not allowed to be paid their legal fees out of the assets of that company. That is undoubtedly what is happening in this case. So we need the injunction to prevent that -- the main injunction to prevent that and the interim injunction which will give us oversight over the disclosure orders as to payments that are being made out.

The other point that I have already alluded to, my Lords, is this point about charitable payments can continue to be made to DFW under the Rule 11 Agreement. In the direct view of ordinary course of business that's entirely permissible. It has not been prevented by the Rule 11 Agreement as distributions can still be made to DFW. DFW can still pay them out of the

structure, and without the disclosure orders and our interim injunction we will have no visibility about these payments.

JUSTICE BEATSON: I just didn't hear you. Without the disclosure orders ...?

MS MORAN: Without the disclosure orders that we are seeking in our interim injunction we would have no visibility over those payments.

SIR RICHARD FIELD: So you accept, do you, that 7(a) does not prohibit the making of donations to DFW?

MS MORAN: I think, my Lord, 7(a) permits the use of the asset in the ordinary course of the business and we know that the directors' position is that making distributions to DFW is entirely in the ordinary course of business and that DFW's view of the world is that in the ordinary course of business they are entitled to make charitable donations.

SIR RICHARD FIELD: Right. Sorry. I put the question the wrong way round. Under 7(a) donations could be made to DFW on the basis this was the ordinary course of business?

MS MORAN: That's right, my Lord. This is why we want the main injunction, because we say that's

not the ordinary course of business and it shouldn't be permitted.

SIR RICHARD FIELD: Is there any evidence as to what has been transferred in favour of DFW by way of charitable donation since the restructuring?

MS MORAN: Yes, my Lord. I think there's about 500,000 in donations has been paid out, my Lord. I will pull up the evidence reference for you now. It is in the third MacInnis affidavit I believe.

While we are looking for that reference, DFW has continued to make charitable donations to a variety of different charities since the DAF restructuring.

SIR RICHARD FIELD: Well, I would be interested to know -- you don't need to deal with this right away -- maybe a member of your team can deal with it -- what the last donation to DFW for charitable purposes was and the date that it was last received, a distribution from the directors. Please don't -- that may take some time to find. I am sure one of your team can do that and come back to the court.

JUSTICE BEATSON: Could I just add a footnote to that question: to break down the recipients of these as between the original four charities and

other charitable bodies, ie charitable bodies that were not within the original package.
MS MORAN: Yes, my Lord. The original charities have received no donations from DFW since the restructuring.
JUSTICE BEATSON: Right. None at all?
MS MORAN: None at all. I can confirm that. There is a table in the evidence which has the list of donations and we will find that.
JUSTICE BEATSON: You will be much more familiar with its location than me.
MS MORAN: Thank you, my Lord. Clearly not familiar enough, my Lord, but hopefully somebody sitting beside me will be able to put their hands on it.
JUSTICE BEATSON: Absolutely.
MS MORAN: My Lord, those are my primary submissions on the Rule 11 Agreement as to why that's not sufficient.
In terms of the difference between the Rule 11 Agreement and the interim undertakings that we are seeking the main difference is really the disclosure orders. The terms in respect of how the Respondents are entitled to operate the business mirror the terms of the Rule 11

Agreement. I have just explained to your Lordships why it is important we have those disclosure orders.
Unless your Lordships have any more questions on the Rule 11 Agreement what I might turn to is the risk of prejudice that would be suffered by us without this interim injunction.
SIR RICHARD FIELD: One last question. Sorry. I am looking at the Notice of Appeal and I am looking at paragraph 2.1, and what is sought is that:
"... the Defendants will:
"Preserve and will not in any way dispose of, deal with, encumber, transfer or diminish any assets in their possession or control, whether they are in or outside the Cayman Islands, which were, are or may be received (whether directly or indirectly):
"By way of distribution ..."
And so on.
"... and/or their wholly-owned subsidiaries."
Now, that remains part of the order you seek. Is that right?
MS MORAN: That's the main injunction. That

remains part of the main injunction. The interim injunction is at page 173 of the appeal bundle.
JUSTICE BEATSON: I am sorry to be really boring, but, as I said to you, I don't have -- the paginated thing is not helpful. I will try 173, but ...
MS MORAN: In the appeal bundle if your Lordship is looking at the electronic bundle it is 173 of the pdf.
JUSTICE BEATSON: 173 of the pdf starts "Summons".
MS MORAN: That's right. That's the summons that is before us today for --
JUSTICE BEATSON: That's right.
MS MORAN: Your Lordships will see at paragraph 1 these are the terms which mirror the Rule 11 Agreement in terms of how the Respondents deal with the assets of the fund.
JUSTICE BEATSON: Yes. Is that what you call the main injunction?
MS MORAN: That is the interim injunction, my Lord.
JUSTICE BEATSON: That's the interim injunction. Right.
MS MORAN: That's the interim. We have a surplus of injunctions and yet not one --

JUSTICE BEATSON: At least you don't give them all the same names like the various corporate entities in this case. Yes. Okay. So that is the interim injunction and paragraph 1.1(c) of your Notice of Appeal was the -- you call it the main injunction. Do you mean that was the order that was in place until the judgment?
MS MORAN: No, my Lord. That is the injunction that Justice Parker refused. That's the subject of the appeal.
JUSTICE BEATSON: Oh, I see. So the main injunction -- it is actually the main application -- it is what you wanted.
MS MORAN: It is what I wanted, yes -- what I still want, my Lord.
JUSTICE BEATSON: Well, there we go. Thank you.
MS MORAN: I hope that's a bit clearer. Paragraph 1 of the interim injunction reflects what is in the Rule 11 Agreement in terms of how the Respondent can manage the business, and then paragraph 2 is an additional paragraph which is not contained in the Rule 11 Agreement. That's really simply for the "avoidance of doubt" paragraph that they cannot deal with the limited partnership interest, but I don't think that

changes the substance of the Rule 11 Agreement, which makes that clear in any event.

Then paragraphs 3, 4 and 5 contains the disclosure orders which are not part of the Rule 11 Agreement, but, as I have said, our submission is the disclosure orders are necessary to protect us in light of the payments that can be made and in light of the fact that our interest is proprietary in nature, and it follows that disclosure orders should be made in support.

So, my Lords, just moving on from the Rule 11 Agreement, I think I have two additional points to make —— three additional points to make as to why the balance of convenience favours us on the interim injunction.

The first is that damages are not an adequate remedy for us. If they pay away the assets and we try to be compensated in damages, we will be compensated out of the very structure that we claim to own and that is not a true compensation when your interest is proprietary.

Secondly, my Lord, the Respondents don't appear to have any significant assets other than what's in the DAF structure. So if they improperly deplete or transfer away the assets,

then the company will be left without redress. So damages aren't an adequate remedy for us, particularly if in circumstances where DFW makes multiple charitable donations to different parties, as it has been doing, it is going to be impossible to get that money back.

So in those circumstances where damages aren't an adequate remedy it is entirely appropriate for the court to grant us the injunction on an interim basis for a short period of time pending the appeal.

JUSTICE BEATSON: What happens if there is a long time until the appeal? I mean, when I first read the papers, I thought the special sitting had already been arranged it was presented so presently, but I now understand that you haven't —— you are nowhere near arranging a special hearing.

MS MORAN: We had actually applied for —— we had applied for ——

JUSTICE BEATSON: But that's like applying for an injunction. You sometimes get the injunction you seek and you sometimes don't.

MS MORAN: My Lord, what happened was we applied for a special sitting and we were told that the

court would grant the special sitting. We had asked for this application to be dealt with on the papers, and when the Respondents objected to that, the court agreed to hear this application on an oral basis, which has resulted in us being before your Lordships today, but my understanding is the Court of Appeal has agreed to grant a special sitting for the main appeal. Certainly that was the original position.

PRESIDENT: Just so it is quite clear, the court has in principle decided there will be a special sitting. The question is arranging it, because this is not the only application for a special sitting, I have to say, which the court currently has. We have a number of special sittings which are quite lengthy special sittings already. So that is the reality of the position.

JUSTICE BEATSON: That's why I raised the point.

So I think you need to have your submissions tailored to a situation where you will get your special sitting, but it may not be as soon as you want it or as soon as the court would like to give it in an ideal world.

PRESIDENT: That's fair.

MS MORAN: Thank you, my Lord. If there is going

to be a long gap, then the disclosure orders become even more important, my Lord, because the longer the Respondents are able to operate the structure, the more payments are going to be made. We need to be able to track those, my Lord. We need to be able to track those in real time, because if we start to see significant donations, for example, being paid out of the structure or significant amounts of remuneration being paid to the directors, which, as I said, is not covered by the Rule 11 Agreement, we may need to come back to the court for urgent relief. At the very least we will know where those funds have gone.

My Lords, I now have the reference for the table of donations by DFW. I think it is worth having a look at them, my Lord. This is at the Grand Court bundle B. Apologies to my Lord Beatson for descending into the Grand Court bundles, but hopefully your Lordship can see that there. Grand Court bundle B at page 4728 of the pdf.

JUSTICE BEATSON: Right. Could you please say the number again?

MS MORAN: 4728.

JUSTICE BEATSON: Thank you very much. Of 6894?

MS MORAN: Yes.
JUSTICE BEATSON: Right. Thank you very much. Headed "Santa Barbara Foundation"?
MS MORAN: It is headed "DFW Charitable Foundation".
JUSTICE BEATSON: Well, 728 is headed ——
MS MORAN: Sorry, my Lord. 4728.
JUSTICE BEATSON: Ah! There you go. That's no doubt my hearing again. 4728. Right. I have got that.
MS MORAN: Headed "DFW Charitable Foundation". Your Lordship can see these are US dates. From 11th July 2025 we see various small donations to multiple charities being made out by DFW. This table goes up to 28th August 2025. I don't think we have information going beyond that date, but one can see these are continuing.
So, my Lords, as your Lordships can see from this table, notwithstanding the terms of the Rule 11 Agreement, they are continuing to make these donations, because they consider this to be ordinary course of business. Not one of those donations has gone to our charities. They have gone to multiple different charities at the decision of DFW, and it would be absolutely

impossible to recover those donations.
JUSTICE BEATSON: You mean that one of them has gone to the original —— the original charities? You are the JOLs.
MS MORAN: Sorry. The original charities, my Lord, yes. Your Lordship will probably ——
JUSTICE BEATSON: So everything is appropriated in this way. Okay. Thank you.
MS MORAN: So, my Lords, to your point about there being a risk between this hearing and the date of the special sitting for the appeal, I think this really illustrates why we need the disclosure orders if the fund is going to be entitled to operate in the ordinary course of business.
The other point, my Lord, in respect of sort of the balance of the prejudices, the Respondents are already operating the business under the terms of the Rule 11 Agreement, so there can be no additional prejudice to them in operating the business in accordance with the same terms under the interim undertakings, and rather, you know, what they are saying is that they don't want to give disclosure. They don't want to give the disclosure orders. These orders aren't onerous. They reflect what was agreed by the

Defendants in the consent orders and the orders seek financial information that should be readily available. In circumstances where a company has a proprietary interest, as I said, disclosure orders should follow as a matter of course.
If your Lordships would like to briefly look at the disclosure orders that we are seeking, this is at page 175 of the appeal bundle ——
JUSTICE BEATSON: Right.
MS MORAN: —— paragraph 3. They need to give advance notice of any payment above $50,000. That was a limit agreed to by the Respondents, so clearly they thought that this was workable.
Paragraph 4 gives the liquidators the right to raise any queries about any transactions.
JUSTICE BEATSON: Do you have any observation —— don't answer this now, but in due course. What is said against you is the disclosures caused prejudice because of what is described as collateral use of the Cayman proceedings by entities controlled by Mr Dondero using the interim undertakings. Don't deal with it now. Don't let me take you out of your way, but it is linked with the point you are making.
MS MORAN: Thank you, my Lord.

I am happy to deal with it now, my Lord. I think I have already addressed the point at the outset about the falsity of the allegation the assets are controlled by Dondero, but paragraph 5 contains an express confirmation that the company and the liquidators won't disclose any information provided by the disclosure orders to Mr Dondero or any entities affiliated with him. Your Lordships can see that on page 176.
JUSTICE BEATSON: Right.
MS MORAN: Paragraph 5 also contains the reporting obligations. So the entities each month will need to give us a full listing of any payments undertaking below 50,000 and then the balance sheet and financial statements prepared on a monthly basis.
So this is information that should be easily and readily available if the fund is being operated correctly and, as I said, those are undertakings that they agreed to previously, so clearly are capable of being complied with without too much difficulty.
Finally, my Lords, I would say that no fortification or cross—undertaking should be required for the interim injunction. None was

sought by the Respondents in respect of the consent undertakings, which were in place for over six months, and no new evidence has been put forward as to why it should be required now. Obviously there is no cross-undertaking as to damages in the Rule 11 Agreement.

My Lord, unless I can help your Lordships any further, I think those are my submissions on the interim injunction.

PRESIDENT: Do you have anything to say about the cross-undertaking in relation to damages, Ms Moran?

MS MORAN: Yes. Apologies if perhaps you didn't hear my last submissions.

JUSTICE BEATSON: You went blurry on that.

MS MORAN: It happens after an hour and fifteen minutes on my feet, my Lord.

JUSTICE BEATSON: No, no, I think it is an electronic blurriness.

MS MORAN: My Lord, my submissions in relation to the cross-undertaking, I said one should not be required. When the consent undertakings were put in place last July, no cross-undertaking or fortification was requested in respect of those undertakings. They were in place for over

six months and no request was made. No new evidence has been put forward as to why it should be required now, and obviously there is no cross-undertaking in damages in place in respect of the Rule 11 Agreement either.

PRESIDENT: Yes. Thank you.

MS MORAN: My Lords, if there is nothing further, I will pass it over to the Respondents.

PRESIDENT: Thank you.

Mr Scott, I think.

Submissions by MR SCOTT

MR SCOTT: My Lord, yes.

We oppose this interim relief application on five grounds, any one of which would be sufficient to justify its dismissal.

My Lords, let me summarise each of them and then I will develop each of them in turn, if I may.

The first is the JOLs unjustified and unjustifiable failure to apply to the judge. We respectfully submit that is a complete answer to this application. It is an application --

PRESIDENT: You don't submit that we don't have discretion if we think it in the interests of justice to exercise?

MR SCOTT: Not at all, my Lord. I accept, of course, that the court has discretion. It is for the JOLs to persuade you to exercise it against the backdrop of their unjustified breach of the rules, and my submission to this court is there is simply no basis upon which that discretion can properly be exercised here.

So that is the first objection.

The second is that, even if the court were prepared to grant the JOLs the indulgence, their interim relief application is advanced on the basis that there is a risk of unjustified asset dissipation. But there is no such risk. There is simply no evidence of it, the undisputed facts contradict it, and the historic and contested matters upon which the JOLs rely, relating to the restructuring, do not come close to making it out, and I will develop that.

Our third objection is that even if this court thought there were otherwise a risk of unjustified asset dissipation, it is adequately protected against by the Rule 11 Agreement in Texas, which will remain in place for the foreseeable future, with which my clients continue to comply, as they have confirmed in their sworn

evidence to this court earlier this week.

I will address in that context why the JOLs' requests for parallel undertakings in this jurisdiction are both unnecessary and unjustified, particularly where the prior undertakings that we have given or offered in this jurisdiction have, I'm afraid to say, been misrepresented by the JOLs and, even worse, misused for collateral purposes by their funder, Mr Dondero.

My Lords, fourth, any theoretical risk of asset dissipation in this case is outweighed by the real prejudice to which my clients would be exposed if the interim relief sought were granted.

That's not just the prejudice that any freezing injunction imposes upon entities who are carrying on a business. It is not just the risk of prejudice in the form of further improper manoeuvres by Mr Dondero, but it's also the prejudice cost of continuing to give the unnecessary disclosure that the JOLs seek.

Fifth, even if the court were against me on each of the foregoing points, the absence of a cross-undertaking in damages, let alone a properly fortified one, is of itself a sufficient reason to dismiss the interim relief

application. There is no reason why the JOLs should not pay the usual price for seeking draconian relief of this kind, and indeed there is every reason why they should.

My Lords, can I turn then to the first ground of objection, the JOLs' unjustifiable failure to apply to the judge in the first instance. The JOLs have thereby breached Rule 21(4) of the Court of Appeal rules, assumed to which, and I quote:

"Wherever, under the Act or these Rules, an application may be made either to the court below or to this Court, it shall be made in the first instance to the court below." (As read)

And I don't ask you to turn it up, but you have that rule in our authorities bundle, behind tab 2, page 4.

The Rule is cast in mandatory terms, as the word "shall" makes clear, and there is no doubt that the JOLs could have made their application to the judge.

My learned friend, Ms Moran, in her oral submissions sought to suggest otherwise. With respect to her, she was fundamentally wrong.

JUSTICE BEATSON: She didn't suggest —— she did

not answer the question first.

MR SCOTT: Indeed.

JUSTICE BEATSON: But she did accept from the President that she thought —— having lost on every point, when they were seeking an injunction —— that it was —— she gave a reason for it. You may say that's not a good reason, but she gave a reason.

MR SCOTT: Indeed she did, my Lord. I will deal with that reason. I had understood her submission to be that it would not have been possible to apply to the judge, because he would not have had the jurisdiction to grant the relief that they seek, having dismissed the application. But if I have misunderstood, then I apologise.

What we do say is this. The submission that it would have been impossible or difficult to apply to the judge is flatly contradicted by the JOLs' own correspondence to the judge after the draft judgment was circulated.

If I can ask your Lordships, please, to take up our skeleton argument at this point for today's hearing, and please turn to paragraph 10, we quote there, at paragraph (b), from a letter that my learned friend's firm, Maples, sent to the

judge on 3 February, a few days after his draft judgment had been circulated.

JUSTICE BEATSON: You quote the letter —— I want to clarify something, if I may.

You quote the letter and you give us a reference where we can find the letter, I think it is in one of the exhibits, but what you put in the exhibit is not the letter to the judge, but it is the letter to your opponents, which does refer to the letter to the judge. So this may just be —— this just may be a mistake or something or —— but I could not find it and I —— you refer to something and you say it is exhibited, but it is not. This was not a capital offence, Mr Scott.

MR SCOTT: I am certainly grateful for that my Lord. I apologise if it has not found its way into the bundle.

JUSTICE BEATSON: Perhaps somebody put the wrong letter in. It is the same date.

MR SCOTT: Perhaps while I am on my feet ——

JUSTICE BEATSON: As it were, virtually.

MR SCOTT: Virtually, indeed I have sat down. But perhaps my team might take steps either to give me a correct reference or to remedy it.

As your Lordship sees from the passages

quoted in the skeleton, what the company was saying to the judge on 3 February is that they intended to make their application to him. And it was necessary for us to set out the terms of this letter in our skeleton because the JOLs had failed to tell this court about it at all.

They had also failed to tell this court that when the judge directed us to respond to the Maples' letter, we did so on 5 February, explaining that the application would be opposed.

The JOLs did not thereafter apply to the judge, whether promptly, as had been represented in Maples' 3 February letter, or at all. Nor did the JOLs tell the judge, or us, that they had decided instead to apply to this court, as they eventually did on 3 March. Of course, by that stage, a full month had passed since the intended application was first mentioned in Maples' letter, and where the JOLs had known since the end of January that they had comprehensively lost and that the interim undertakings we had given in July last year would fall away upon the judgment being handed down.

Now, I will address in due course the implications of that delay for the JOLs'

suggestions to this court that there is a real risk of unjustified asset dissipation here. The JOLs' conduct is, we say, one of several examples that contradicts the existence of any such risk.

What I want to focus on at this stage are the implications of the JOLs decision not to proceed with their application before the judge when it comes to evaluating the application that is now before your Lordships. Because the upshot is that the judge who was steeped in the detail of this case, who heard argument over two full days, had considered many hundreds, if not thousands, of pages of evidence and submissions, and who had delivered a 56−page reserve judgment, that judge has been deprived of the opportunity to express his view either on whether the appeal has any merit or whether interim relief in support of it is just and convenient.

We suggest that by requiring applications to be brought first to the lower courts, as Rule 21(4) does, there is a recognition that the lower court will usually be best placed to determine applications such as these, and that this court usually benefits from their determinations if it is called upon to look at the

matter again.

The JOLs have deprived the court of those benefits. No explanation was offered in their skeleton or in Ms MacInnis' affidavit in support of the application to your Lordships. But, with respect, the explanation is obvious. It is a pure and simple example of judge shopping. The JOLs no doubt hope to improve their chances by by−passing the judge steeped in the detail of the case and proceeding to this court, which has had no prior involvement with it.

To make matters worse, they then attempted to persuade this court to decide the matter on the papers, a process that was obviously inappropriate, obviously unfair; and we are very grateful to this court for refusing entertain it.

As I said at the outset, I don't press the submission that the JOLs' breach of the rule deprives this court of jurisdiction to determine the application, but they do need you to indulge them in their breach of the rules. And we respectfully submit that judge shopping is not a good reason for that indulgence.

If you accept that submission, that is the end of this interim relief application.

Can I turn next to say a few words about the merits? I do so mindful of the President's indication at the outset that the court would have been minded to grant leave to appeal, had it been necessary to seek it.

It will not surprise the court, I apprehend, that my clients fundamentally disagree with the vast majority of Ms Moran's presentation of the background to this matter and as to its merits.

Can I make three initial observations in this regard? The first is that the company has no ownership, whether legal or beneficial, in the assets of the fund. It has no pleaded case to ownership of those assets, and there could be no case to ownership of those assets, as the judge correctly found in his judgment.

So, the repeated references in my learned friend's submission to these being assets which are "ours", to use her words, is simply wrong. That's the first point.

The second is that my learned friend was fundamentally wrong to suggest that the company has any economic interest in this structure. Contrary to the submission she falsely made to

your Lordships, the company contributed no capital whatsoever to this structure. It has never received any benefit from it by way of distributions. All of the distributions have gone through the company as a conduit, as it was intended under the partnership agreement and the articles of the company, to the benefit of the four charities that sat above it.

Third, my learned friend was, I'm afraid to say, fundamentally wrong to suggest that distributions to DWF are in the nature of unjustified asset dissipation. The partnership agreement, the ARLPA, to which the judge refers expensively in his judgment, expressly contemplated the possibility of introducing new limited partners and removing existing limited partners. The only constraint upon that was that if a new limited partner was to be introduced, it had to be owned by a qualifying charity. That's exactly what happened when DWF was introduced into the structure.

If I can answer Justice of Appeal Field's question as to whether there could have been any objection to the introduction of DWF as a charitable beneficiary of this structure, the

answer is there could have been no objection whatsoever. That is the deal that all the participating entities in this structure made.

That is among the matters correctly recognised in the judgment, and I don't understand there to be any dispute about upon appeal, that the deal made upon entry to the structure was one whereby the participating shareholders in the company and the charitable entities that sat above it would receive very limited rights indeed. Indeed, a number of charitable entities were offered the possibility of participating in the fund and they declined to do so exactly because of the limited nature of the rights that were available.

If I can also attempt to assist Justice of Appeal Field's question as to the extent to which DFW has benefited, it has benefitted in amounts that are commensurate to the sums paid to the four charities before the restructuring.

JUSTICE BEATSON: Could you say that again. I just lost you.

MR SCOTT: I am so sorry, my Lord.

DFW has benefitted from charitable distributions in amounts commensurate to the

amount that were previously distributed to the four charities in place prior to the restructuring. I think the last distribution, or certainly the last that is referenced in the evidence, is a distribution of around 100,000 to fix a church roof in Texas.

If I can just show you some of the evidence on this from below, we have it in our bundle, that's the respondents' bundle, at page 549, please.

JUSTICE BEATSON: A paginated bundle, Mr Scott, arrived during the submissions by the applicants. I am not complaining, but I think you ought to know, this is a most amazing -- we all go electronic, because it is also good, but actually it is all much more difficult.

Now, whereabouts? What I have is -- I have not managed -- I decided to listen to the submissions rather than downloading the thing. So I have the first affidavit of Mr Patrick, I have the affidavit of Mr Murphy, and I have the exhibits to the two of them. Is it anywhere there or where would I find it?

MR SCOTT: I believe that is the right document, my Lord.

JUSTICE BEATSON: Which document? I have five documents.

MR SCOTT: I am in the exhibit to Mr Patrick's affidavit, and it is page 549 of the bundle.

JUSTICE BEATSON: The exhibit to Mr Patrick's affidavit only has 347 pages in it. I don't have the bundle yet. I will no doubt have it after the hearing. So can you just --

MR SCOTT: Does your Lordship have a bundle which, on its title page, says "Respondents' bundle for hearing on 27th March 2026"?

JUSTICE BEATSON: Do you know, that's the one that arrived while I was listening to your opponent's submissions.

MR SCOTT: I see.

JUSTICE BEATSON: What I have got is what I cobbled together, which I just told you about. Why don't you just tell me. I have an index to MEP1. Why don't you tell me where that's going to be there.

MR SCOTT: If your Lordship will give me a moment, I will endeavour to --

JUSTICE BEATSON: I really don't want to be difficult. I mean, it is your guys' job to get this stuff to us.

MR SCOTT: I understand. In our defence --

JUSTICE BEATSON: All sorts of things. I am not complaining. Let's find where we are.

MR SCOTT: We have had to do this in a very considerable rush because of the irregular process that the JOLs followed.

JUSTICE BEATSON: Well, not in as much rush as the court, and the court is trying to be very user-friendly to both parties.

So whereabouts in this? I have -- the index to the exhibits has 99 items in it. Which item is it?

MR SCOTT: Does your Lordship have the -- I am sorry, I am having to do this I think --

JUSTICE BEATSON: Is there nobody in your team who can help you?

MR SCOTT: There is no-one with me here, because I am sat in London and my team is in Cayman.

The document I want your Lordship to look at is the third affidavit of Mark Eric Patrick, which should be in the exhibits.

JUSTICE BEATSON: Yes, so I have the third affidavit. It is that affidavit you want which starts at page 122 of the bundle that I have got. This is the bundle, actually, where there is

a dissonance between the —— yes, okay. So, I now have the third affidavit. What paragraph do you want me to go to?
MR SCOTT: It is paragraphs 46 and 47.
JUSTICE BEATSON: 46 and 47, right.
Starting:
"Between 11th July ..."
Is that right?
MR SCOTT: That's the passages.
Can I ask your Lordship, please, to read those passages which were the latest evidence below on the amount of distributions to DWF.
I misspoke earlier when I said the donation to the church was $100,000; it is $157,120.50.
Making distributions on that scale is the ordinary business of this fund. It has been the ordinary business so far as DWF is concerned since the restructuring, and it was the ordinary business of the fund in relation to the four charities prior to the restructuring.
It is fundamentally wrong to suggest to this court, as my learned friend did, that making distributions of this kind is somehow outside the ordinary course of business. It is the absolute

core of this fund's business: the business of making charitable distributions to the needy, such as the entities mentioned in these paragraphs.
JUSTICE BEATSON: So you are really looking at paragraphs 46 to 48, is what you draw to our attention?
MR SCOTT: I am very happy for you to read 48 as well.
JUSTICE BEATSON: Well, I just want to get the end point. Thank you.
Can I ask you, having stopped you, I'm sorry to say, but you said in your earlier submission that it was wrong to say that there was funding from your opponents —— I mean, not the JOLs, but the people behind them. So who did fund? Where did the money come from to make all these lovely charitable donations?
MR SCOTT: It came from a trust, as I understand it, behind which, ultimately, sat Mr Dondero.
JUSTICE BEATSON: That's the 2011 arrangement?
MR SCOTT: As I understand it, yes, my Lord.
JUSTICE BEATSON: Yes. So it came from —— I will call it the Dondero side of things.
MR SCOTT: Yes.
JUSTICE BEATSON: And this is —— like a

consequence of after a hostile takeover?
MR SCOTT: Indeed. It came from the Dondero side of things to benefit charities under a structure which only worked for tax purposes if the benefitted entities were not under his control.
My client's perspective, Mr Patrick's perspective, upon taking over the fund is that, contrary to the very premise on which it was built, the four charities were very much under Mr Dondero's control. And as a consequence, the fund's purpose was compromised, and, what is more, it was exposed to very substantial litigation risk, the litigation risk arising because Mr Dondero is a serial vexatious litigant.
Those are not my words, they are the words of the US bankruptcy judge that has been dealing with litigation involving him for more than a decade.
The litigation risk to which the fund was exposed is illustrated by the claims which UBS brought against CLO Holdco, the sixth Respondent and the principal asset—holding vehicle, seeking to assert more than $1 billion worth of liability against it on the basis that it was the alter ego for Mr Dondero, who owes an unpaid judgment to UBS

in that amount.
The purpose of the restructuring —— and the judge found there were serious arguments here that would need to be tried —— was to protect the fund from the risks that Mr Dondero posed to it.
The judge recognised that the allegations being made on either side in relation to the restructuring were not capable of summary determination. They raised serious issues for trial and they will need to be a tried. But this is not a case, as, for example, some Mareva injunction cases are, in which no defence to the allegations of wrongdoing is put forward, nor is it a case in which the defence put forward is a shadowy one. It is a case in which there is serious arguments on both sides.
I will come back to that point later in my submissions when I address the alleged risk of unjustified asset dissipation, because ultimately what the JOLs' submission amounts to is an assertion that their allegations are correct, but those allegations are hotly disputed and there will need to be a trial to resolve them.
My Lords, before I leave the merits, can I make a number of overarching submissions to

frame the nature of the appeal in this case? That's relevant to your assessment of whether to grant interim injunctive relief, because one of the things that you can properly take account of, and in my submission should take account of, is whether this appeal is likely to succeed.

The fact that leave would have been granted for it, had it been necessary, by no means suggests that this is going to be a successful appeal. That's a relevant consideration when it comes to the balance of hardship.

The first overarching submission I make is the need to be crystal clear about what the judge's decision under appeal was. It was a decision to dismiss the injunction that the JOLs moved for, by which they sought, and only sought, the most wide−ranging proprietary injunction in relation to the fund and all of its underlying assets, and without any exception whereby to permit dealings in the ordinary course.

The judge was not concerned with an application for other relief, because no such application was ever made to him. The JOLs did not apply for a Mareva injunction, no doubt because they recognised that they could not show

the requisite real risk of unjustified asset dissipation, and no doubt because of their determination to obtain interim relief which would instead prevent the fund from continuing its ordinary business, and instead vest the control of their business in them.

Nor did the JOLs apply, even on an alternative basis, for a lesser form of proprietary injunction confined to the three specific assets which were the subject matter of their pleaded proprietary claims. And they are: the limited partner interest that the company formerly held; the participating shares that are now held by DFW; and the membership interest which DFW also holds in CDM, which is an entity which has been inserted into the structure.

Those three assets are the full extent of the JOLs' pleaded proprietary claims in relation to the restructuring. There is no pleaded proprietary claim to the underlying assets of the fund.

One of the submissions which I made to the judge, which he accepted, and which I will be repeating on appeal, if I am instructed, is that the absence of a claim, proprietary claim, to the

underlying assets of the fund is simply fatal to the injunction that the JOLs sought.

If I can ask you, please, to turn up the company's bundle at page 62. I want to show you some passages from the judgment below, where the judge correctly identify the issue that he had to resolve.

To give the court it bearings, by this stage in his judgment the judge had set out the relevant background, the submissions made and the relevant law, as to which there was no dispute, and the judge then sets out his decision.

As your Lordship sees from the heading, the first issue was, quoting from the unbolded italics:

"Is there a serious issue to be tried that the Company has a proprietary interest in the asset(s) over which an injunction is sought to be imposed?"

The judge −−

SIR RICHARD FIELD: I am so sorry, Mr Scott. Can you give me the paragraph of the judgment.

MR SCOTT: I can. It is paragraph 130, and I was quoting from the title.

SIR RICHARD FIELD: That's fine. Thank you very

much.

MR SCOTT: As your Lordships see from paragraph 130 itself, the judge more precisely formulates the issue this way and I quote:

"The Court has carefully considered whether the Company, as a limited partner in the Fund, has a proprietary interest as a limited partner which would entitle it to be protected by way of the injunction sought and/or an indirect beneficial interest in the assets of the Fund."

He answered that question in the negative, because he concluded that the company never had and, if it acquired a limited partnership interest again, never would have beneficial ownership of the assets of the fund.

As you will see in the passages that follow in this section, that was a conclusion which he reached both having regard to general and established principles of Cayman law in relation to exempted limited liability partnerships, and moreover, it was a conclusion that he reached having regard to the very particular and, in my experience, unique features of this fund as a structure which exists to serve charitable purposes.

As your Lordships look through grounds of appeal, we would invite you to ask which of those grounds impugn the judge's core conclusion that the JOLs had no beneficial ownership interest in the assets of the fund; and the vast majority of them do not. Grounds 1, 2, 5, 7 and 6 have no bearing at all upon that core conclusion.

What is more, and this is the second overarching submission I make on the merits, is that even if the JOLs were able, on appeal, to challenge the judge's core conclusion that they had no beneficial interest in the assets of the fund, that would not make for a viable appeal. That is so because the judge would in any event have declined to make the injunction sought, based upon his discretionary assessment of where the balance of convenience lay in the presence case.

If I can ask you, please, to turn ahead in his judgment to page 79 in the bundle. The judge deals with balance of convenience from paragraph 239. He there says this:

"Had the Court been persuaded that there was a serious interest to be tried in relation to the proprietary interest of the Company and there was a legitimate juridical basis to grant

a proprietary injunction, it would not have granted the injunction against any of the Defendants because it is not persuaded that there is a real risk that the assets are in danger."

As your Lordships see, that is a conclusion reached independently from the judge's prior conclusions on serious issue to be tried. It is a conclusion which he reached based on his assessment of the facts and the evidence, which was a matter for him in the exercise of his discretion, and which can only be challenged and appeal if it can be showed he abused that discretion.

Your Lordships see from paragraph 240—242 the factors of which the judge took account on the question whether assets were in danger, and at the heart of it is paragraph 240, where he says this:

"There is no good reason to believe that the relevant assets will be adversely dealt with given the evidence that the Court has considered on this application, and following the undertakings in July 2025 and suggested in November 2025, as well as the Texas Rule 11 Agreement."

As the judge said, he had had regard to

all the evidence relied upon below. In the time available, it is simply not possible for me to take this court through it, but just to give you a flavour of it, the evidence included the vehement and reasoned denials by Mr Patrick and Mr Murphy in their affidavits that they had done anything wrong whatsoever in restructuring the fund, which was something they did on legal and professional advice and because they believed it to be necessary to combat Mr Dondero's predations and the risks that they posed to the fund.

The evidence also included the fact that in the Texas proceedings bought by Mr Dondero's Highland foundations against my client, the Texas judge, having considered the record, was not persuaded there was any risk of asset dissipation following the restructuring.

The judge also took into account —— Justice Parker —— the Rule 11 Agreement that had been entered into in the Texas proceedings, whereby my clients committed not to alter the fund structure or its governance, not to engage in any dealings outside the ordinary course of business, and not to increase the remuneration that is being paid by any of the covered entities as referred to

in that agreement, which includes the fund and all of its subsidiaries and obviously includes my client, Mr Patrick, as one of the directors, and Mr Murphy too.

The judge also took account, as you see, of the fact that my clients offered the interim undertakings in July of last year. It is important to be clear about the circumstances in which they did so. They were bounced into a hearing on the last day of term with around two weeks to prepare for what was, on any view, a very heavy injunction application. They had no choice in those circumstances but to give interim undertakings to cover the period down to an effective hearing of the injunction summons on proper notice. And that is what took place in December last year over two days.

The judge also took account, as you see from paragraph 240, of the undertakings that my clients offered in November 2025 in a pragmatic effort to avoid the need for a contested hearing.

Now, those undertakings were refused by the JOLs, because they contained an exception for continued dealings in the ordinary course of business, and because the JOLs were determined to

press on for the wider restraints that the judge concluded were unjustified.

The evidence also includes the fact that, despite the voluminous disclosure that has been given pursuant to the interim undertakings over that six months or so, which includes information about historic transactions going back prior to the JOLs' appointment, they have been unable to establish a single instance in which assets have been dealt with outside the ordinary course of business.

The judge gave an additional reason on balance of convenience which is also of relevance to your Lordship's assessment of the present application. Those were the reasons given at 243 down to 245 under the heading "Lock Down and Transference of Control to JOLs". The judge said this at paragraph 243:

"The balance of convenience would also come down firmly in favour of the Defendants because the effect of the relief if granted would be to lockdown the charitable activities of the Fund and place it under the control of the JOLs, which the Court regards as unjustified at this interlocutory stage."

So, even if the company had a viable proprietary claim, which is the premise upon which the balance of convenience is being considered here, it was not an interest that would entitle the company to control the fund, and the judge rightly recognised this.

The judge was also entitled, as he did, at paragraph 244, that:

"The Court is not persuaded that the carve outs for specific projects proposed by the JOLs remedy the issue."

They did not remedy the issue, because what those carve—outs would have done would have been to vest control in the JOLs over whether to make expenditures pursuant to those projects.

PRESIDENT: Forgive me interrupting, Mr Scott. It is just that I am conscious, and my Lords may be conscious, of the fact that two hours has just about elapsed. Somebody is having to take a shorthand note and I think it would be convenient to have a ten—minute break, if that's convenient to you.

MR SCOTT: It is convenient to me. I am very happy to take the break at that point.

PRESIDENT: Thank you.

May I just ask you how long —— this is not in any way trying to put pressure on you. How long do you anticipate you are going to be.

MR SCOTT: I would anticipate being another 45 minutes or so.

PRESIDENT: Right. Okay. Thank you very much.

MR SCOTT: If it is any consolation, my Lord, I will be the longest of the respondents making submissions.

PRESIDENT: I think that goes without saying, and we shall make that absolutely clear to those who follow you: we don't want a repetition of your very well put, if I may say so, submissions.

JUSTICE BEATSON: Yes.

You all know when it's going to finish, so you can sort it out yourselves during the break if there is a problem.

PRESIDENT: So, we will resume again, I will say —— so it is —— shall we say 3.20?

JUSTICE BEATSON: Good idea.

(3.03 pm)

(Short break)

(3.21 pm)

PRESIDENT: Mr Scott, I see you are present.

MR SCOTT: I am, my Lord. I see my learned friend

Ms Moran is as well.

PRESIDENT: It seems we are all —— there's a few of us —— ah, the courtroom is still not ——

THE CLERK OF THE COURT: Yes, my Lord.

PRESIDENT: Right. I think we are ready to continue.

MR SCOTT: I am grateful, my Lord.

Returning to the judge's assessment of the balance of convenience ——

PRESIDENT: Yes.

MR SCOTT: —— the third reason he gave was that his conclusion that there are serious issues to be tried as to whether the restructuring was done in breach of directors' duty made no difference to his assessment of where the balance of convenience lay.

He dealt with that from paragraph 246 of his judgment. Perhaps I can ask the court, please, to read from 246 down to 257, so that you have the judge's words rather than my paraphrase of them.

(Pause)

JUSTICE BEATSON: 256 was the bit that you focused on before giving us the whole passage to read?

MR SCOTT: Indeed.

PRESIDENT: I have certainly read it. I think my colleagues have. Thank you.
MR SCOTT: I am very grateful, my Lord.
Our submission here, as before, is that these passages illustrate the very substantial difficulty there will be in the way of the JOLs in successfully appealing this case. They are passages in which the judge was conducting a discretionary assessment on all the evidence before him, but they are also passages which reflect an analysis of the judge steeped in the detail, which is relevant for today's purposes in ascertaining where the balance of convenience lies.
It is of particular relevance when your Lordship Lordships come to evaluate the JOLs' submission that the directors' conduct in connection with the restructuring supports the proposition that there is a real risk of unjustified asset dissipation now.
And, of course, that is a proposition which the judge roundly rejected, as we saw earlier in the passages on assets not being in danger.
The judge's next reason, his fourth

reason, on the balance of convenience was the absence of a cross-undertaking that was secure as a means by which to protect the respondents to the injunction sought against the risk of prejudice that they face. And the judge dealt with that at paragraphs 258 through to 261.
As your Lordships see at 259, the judge said this, and I quote:
"Given the wide nature of the injunction applied for and the significant costs which the Defendants would need to spend to comply with it, the absence of a secure cross undertaking is a good reason to not grant the injunction."
He elaborates on that analysis at paragraph 261 and I quote:
"The Court has concluded that if the injunction were granted, significant loss would be likely to be caused to the Fund and its charitable recipients. There might also be business related and reputational impact on individuals, including most obviously the Directors, which may be hard to quantify."
Much the same points apply in relation to the interim relief that the JOLs ask this court to make.

The judge's final reason, his fifth on the balance of convenience, was his conclusion from paragraph 262, again a discretionary conclusion, as he expressly says, that this was a proper case for fortification.
Again, to avoid my paraphrase, can I ask your Lordships, please, to read what the judge said on fortification from 262 down to 269.
PRESIDENT: Certainly.
(Pause)
Thank you.
JUSTICE BEATSON: Can I ask a question to think about or come back later? I have marked in the judgment paragraph 123, on page 32 of 56, which starts out with your invitation to endorse the court's recognition there is no risk of remedial harm. It then talks about the Rule 11 Agreement, which says that -- was that something that was part of your invitation -- you said the Rule 11 Agreement provides all the protection they need.
MR SCOTT: That was among the submissions that I made to the judge, among the submissions he accepted, as your Lordship -- (overspeaking) --
JUSTICE BEATSON: My question is that the prejudice that's said is to -- I will call them

"your charities" -- I use "your" in big inverted commas -- as opposed to the JOLs' charities, but charities -- this is not a question of entitlement, is it?
MR SCOTT: No.
JUSTICE BEATSON: So it is a balance between two groups who don't necessarily have an entitlement. They can be the object of the trustees' discretion.
MR SCOTT: Indeed.
JUSTICE BEATSON: So, in terms of the -- what you are really saying is to have an injunction which requires policing and disclosure by you is going to cost the respondents a lot of money, and so you effectively say, "So, we can't just hold the ring steady till the substantial hearing."
It is an unusual position, isn't it? Normally speaking, there is something you can do that safeguards people's proper interests, eg by not restricting their entitlement to salaries at the levels they had, etc, etc, and you can hold it till a less ignorant Court of Appeal than this one -- you have all been very kind in the way you've put it, but that's what you are really saying -- gets hold of it.

To say —— to do nothing, you say, well, there is no great risk, because everybody who has had their fingers on this case has come down in favour of no irremediable risk of asset dissipation. So what is it —— what could be given that would partly hold the ring in place? You just say, "We just have to wait until the hearing"?
MR SCOTT: My Lord, I say this, the premise, if I may say, to your Lordship's question is that there is a problem against which protection is needed, and the problem suggested by the JOLs is a risk of unjustified asset dissipation.
We say fundamentally there is simply no such risk.
JUSTICE BEATSON: I understand. The problem on which my premise —— my question was premised is there is a dispute which this court is not in a position to do very much about at the moment. Normally speaking you can lock the gold in a safe and it will be safe and quiet until it is sorted out, and we can't do that here.
MR SCOTT: Indeed. And the judge was not prepared to do that, because the judge concluded that it would be wrong, at this interlocutory stage, to

lock down the charitable activities of the fund.
JUSTICE BEATSON: You know, I am a trustee of various charities. We don't count on anybody giving us things. We rather hope they will.
MR SCOTT: Indeed.
JUSTICE BEATSON: So what —— I mean, it is not as though this is income. A distressed church comes along and makes a case, and they may get money, but they may be told "Actually the stock market is not very good at the moment, we can't spare anything."
MR SCOTT: Possibly, my Lord. This is a fund the current net asset value of which is $300 million.
JUSTICE BEATSON: It is a fund on which vicious litigation is being fought.
MR SCOTT: Indeed. I, of course, accept that.
JUSTICE BEATSON: Okay. I just wondered whether paragraph 123 gave us any basis for some via media, but I think you have told me that it doesn't.
MR SCOTT: If I can just complete the reasons why it doesn't. Your Lordship has my submission that there is no risk of unjustified asset dissipation in this case. We also, in any event, make the further submission that if there were such a risk,

it is adequately protected against by the Rule 11 Agreement. And I will come on to develop that in due course.
But there is a third point here, which goes directly to your Lordship's observation about competing charities, the DWF charities on the one hand, the four prior charities on the other.
The Rule 11 Agreement does not prevent the DAF structure from making distributions to the [DWF] charities, because that's in the ordinary course of its business since the restructuring.
And nor, moreover, would the interim injunction that the JOLs ask the court to make prevent distributions to the DWF charity. Again, because that's in the ordinary course of the structure's business.
So, no—one is suggesting here that the charitable activities of the fund should be locked down on an interim basis.
I say no—one is suggesting it for today's purposes, because, of course, that is the JOLs' case on the appeal. On the appeal they will be saying there should be a proprietary injunction with no exception for ordinary course dealings, as a consequence of which the fund is locked down.

But for today's purposes they are not saying that. As my learned friend put it, what they want to do is mirror the Rule 11 Agreement. And as I will be submitting in due course, there is no need or justification for that. To do so risks prejudice in the form of the collateral use that Mr Patrick mentions in his witness statement, and with which I will deal fully in due course.
JUSTICE BEATSON: I am sorry to track you off.
MR SCOTT: Not at all. It is helpful to answer the court's questions.
JUSTICE BEATSON: You always have to say that don't you? You meant DFW, didn't you?
MR SCOTT: I did. I worried I had put the initials the wrong way round.
JUSTICE BEATSON: They are all such similar acronyms that one gets ...
MR SCOTT: My Lords, that completes what I want to say on the balance of convenience.
If the court stands back, having read this judgment, and puts it alongside the 11 grounds of appeal that are pursued, we respectfully suggest that the only sensible assessment can be that the JOLs have an absolute mountain to climb on this appeal.

Not only do they have to establish the novel proposition that a partner in this fund beneficially owns its assets, but they also have to successfully challenge the judge's discretionary conclusions on balance of convenience, supported by the various reasons I have set out, and they have to challenge the judge's discretionary conclusion on falsification.

While this court may have formed the view -- has formed the view that the appeal raises real prospects of success, that is not the same as concluding the appeal is likely to succeed.

In this case, that is a factor that does weigh in the balance in deciding whether to grant interim relief.

We make the further submission that exactly the same factors which informed the judge's assessment on discretion, on the balance of convenience, all those factors equally apply now. Nothing has changed on the balance of convenience since the two-day hearing in December.

Or, let me slightly caveat that. Nothing has got better for the JOLs on the balance of convenience since December indeed, matters have got worse, because since December we have had the

MidWave issue in the US, where one of Mr Dondero's vehicles has used the undertakings given in this jurisdiction as a basis to purport to treat the structure as a defaulting lender, thereby putting in jeopardy more than $100 million worth of its assets.

That was not a factor that it was possible to address the judge upon, because it is something that Mr Dondero's vehicles did during the course of the hearing. You have the detail of that in Mr Patrick's affidavit, and I will come back to it.

Can I then turn to our second main objection to this application, which concerns the absence of any real risk of unjustified asset dissipation? I have covered much of the ground here, but I want to draw out five points in particular, if I may.

The first is that the JOLs are not seeking Mareva relief, a point which the judge himself emphasised at paragraph 80 of his judgment, which I showed the court earlier.

Because the JOLs are not seeking to do so, there was no need below to get into the well-known authorities which established the need for cogent

evidence to make out the requisite real risk of unjustified asset dissipation, and the inadequacy of mere inference or assertion, authorities with which I have no doubt this court is well familiar.

The second point we make is the findings that the judge made applying the lower threshold of asking whether the assets were in any danger, they of themselves firmly tell against the suggestion that there is a real risk of asset dissipation in the present case.

As your Lordships saw earlier, the judge asked himself whether there was any real risk that the assets of the structure were in danger. He concluded at 239 to 242 of his judgment that they were not.

That is a conclusion that he said he would have reached regardless of whether the company had a seriously arguable proprietary claim. It is a conclusion which aligned with the same observations made by the Texas court and it is a conclusion which, with respect, reflects the reality that the whole purpose of the restructuring was to remove assets from the control and predations of Mr Dondero. That's the reason why it happened.

That having now happened, there is to reason to think that the assets will move any further. That's exactly the language that the Texas judge used. Yes, the Highland foundations were asserting that monies had gone under the restructuring. Yes, they were concerned or they said they were concerned to avoid it moving any further. But the Texas judge saw nothing in the record to indicate an immediate threat to that happening, and nor did Justice Parker. And, we respectfully say, nor should your Lordships. There is simply no evidence to suggest that there will be any unjustified dissipation of the assets within the structure. All the available evidence suggests the structure will simply continue to conduct its ordinary charitable activity.

My Lords, our third point on the lack of any real risk of unjustified asset dissipation is to ask the court to keep firmly in mind my client's conduct since the JOLs took up their office, because it is entirely inconsistent with the asserted risk of unjustified asset dissipation.

If I can just summarise the chronology here, the JOLs took up their appointment on 6 May

last year. Just ten days later the fund and CLO Holdco, who are the asset holding entities, they made an offer to the JOLs to enter into a financial reporting protocol expressly to assuage any concerns that the JOLs might have about dealing with assets outside the ordinary course of the fund's charitable activities.

The making of that proposal was inconsistent with any intention on the part of my clients unjustifiably to dissipate assets. It was a proposal that they repeatedly made in various forms over the months that followed, and it was a proposal that the JOLs have repeatedly rebuffed. They have rebuffed it because what they want to achieve is relief whereby they can lock down the fund and prevent its ordinary course activities and subject them to their control.

When the JOLs were able, I think on 15 July, to obtain a listing of their injunction summons before Justice Parker on the last day of term, which was the 31st, we agreed to give the interim undertakings, again inconsistent with the suggestion that my clients intend to unjustifiably dissipate assets.

In addition to replicating the

restrictions in place under the Rule 11 Agreement, we undertook to provide advance notice of transactions above a certain value. We undertook to consult with the JOLs and provide clarification on any queries they may have about transactions and whether they were in the ordinary course of business, including queries about historic transactions. We also undertook to provide monthly transaction reports and other financial information.

In the six months or so since, the JOLs have not sought, much less obtained, any finding that my clients have failed to comply with those undertakings. Pursuant to them, the JOLs have received, at very considerable cost to my clients, voluminous information.

They do not suggest to this court, whether in their evidence or in their skeleton or in my learned friend's submission, that the disclosure given has revealed a single instance of unjustified asset dissipation, whether before the JOLs' appointment or subsequent to it.

That is so in circumstances where, if there really was a risk of unjustified asset dissipation, one might have expected it to have

eventuated before the JOLs were appointed or before the Rule 11 Agreement was entered, or before the consent order was agreed upon. Yet there is no evidence that that happened. And that is because it did not, because the asserted risk of unjustified asset dissipation is simply illusory, as the judge correctly found.

My Lords, our fourth point is that the JOLs' conduct is inconsistent with the suggestion that there is a real risk of unjustified asset dissipation in this case.

If there had been such a risk, they would no doubt have applied for a Mareva injunction, but no such application has ever been brought. Not only that; there was no application for any injunctive relief in the six weeks that followed the JOLs' appointment.

During that period, what instead happened was that the JOLs chose to fight a sanctions application, by which they sought to have appointed conflicted lawyers. They abandoned that application at the last minute, resulting in an indemnity costs order for more than $1 million. They still have not paid that order to this date.

If there had been a real risk of

unjustified asset dissipation, the JOLs would surely have moved in those early stages for an injunction. They did not.

What instead happened is that Mr Dondero's Highland foundations moved for lockdown relief in Texas. And it is only when that failed, with the Rule 11 Agreement allowing the fund to continue its ordinary business, that Mr Dondero's attentions turned to funding the JOLs to seek lockdown relief in the Cayman Islands by their injunction summons.

Now, had that injunction summons been listed for inter partes hearing on a proper and orderly timetable, we would simply have opposed it, as we did when the matter came on in December.

It was only because of the pressure that was created by the JOLs bouncing us into court on the last day of the summer term that we were compelled to give the interim undertaking, expressly without prejudice to our position that there was no basis for the relief being sought, as the judge later concluded.

I don't ask your Lordships to turn it up, given the time, but Mr Murphy served an affidavit earlier this week that explains the circumstances

in the summer when the interim undertakings were entered into. He was in South Africa at the time with his family dealing with a bereavement. He had no fair opportunity, as he explains in his affidavit, to consider the many thousands of pages' worth of material that was relied upon. The pressure upon him and upon my clients to agree those undertakings was very considerable.

And that also goes to explain why it was not possible to press for a properly fortified cross—undertaking in damages.

We do ask the court to bear very carefully in mine the circumstances in which those interim undertakings were given, because it is simply not fair to suggest, as my learned friend repeatedly did in her submissions, that those undertakings can cause no difficulty, because otherwise we wouldn't have entered into them.

With respect, that entirely ignores the tactical way in which the JOLs procured a listing, no doubt for the object, or in any event with the effect, of putting considerable pressure on us and extracting the interim undertakings as a result.

My Lords, a further example of the JOLs' conduct that is inconsistent with the asserted

risk of unjustified asset dissipation is what happened earlier this year when the judge circulated his draft judgment. The JOLs did not move promptly to obtain interim relief pending appeal from the judge, nor even did they move promptly to move this court for such relief. They instead sat on their hands for more than a month. Again, that cannot be reconciled with a genuine belief on their part that there is a real risk of unjustified asset dissipation in this case.

My Lords, fifthly and finally, we do ask the court to examine with conspicuous care the supposed evidence that is put forward in support of the asserted risk of asset dissipation.

And if I can ask you, please, to take up the JOLs' skeleton argument for today at paragraph 14, your Lordships see in paragraph 14 that the asserted risk is said to be, and I am quoting now from the second sentence:

"... evidenced by the Directors' past and present conduct."

Well, what is the conduct said to provide cogent evidence of a real risk of an unjustified asset dissipation? Just two matters, both of which are hotly contested.

The first is the dealing with the company's partnership interest as part of the restructuring, which the judge concluded raised serious issues to be tried, as I have said.

They are allegations about historic conduct which took place now several years ago. The allegation of wrongdoing is vehemently denied by the directors on the reasoned grounds set out in their sworn evidence, supported by the various legal and other professional advice which they received at the time, all documented in the voluminous materials before the judge below.

The existence of contested allegations such as these does not continue to suggest that there is now a real risk of unjustified asset dissipation, nor does the judge's conclusion that a trial will be necessary to resolve the serious arguments that are made on either side.

The second matter that is relied on is the remuneration that Mr Patrick was paid from the assets of the fund in 2024 and 2025. What the JOLs did not trouble to tell the court in its application, but, as you see very clearly from the judgment, is that Mr Patrick's remuneration was paid following benchmarking work and advice from

Mercer, the global consulting firm. It was done in accordance with legal advice, including the establishment of a remuneration committee.

The JOLs filed below no expert evidence to dispute Mercer's recommendations. They instead confined themselves to the argument that Mr Patrick's remuneration had to be excessive because it was greater than what his predecessor, Mr Scott —— who I should say is not me —— what the other Mr Scott earned.

But the JOLs' argument ignored the fundamentally different nature and scope of Mr Scott's role. His role was essentially passive, whereas Mr Patrick's role has entailed active and intense management of the fund, with the fund's assets having grown very substantially on his watch to now approaching 300 million. And this in the face of multiple litigation and other risks to which Mr Patrick and the fund have been exposed by Mr Dondero.

The JOLs' simplistic comparison with Mr Scott also ignored Mr Scott's connections to Mr Dondero as a long—time business associate, best man at his wedding, and someone described in the US litigation as merely an empty suit.

It was in those circumstances that you see in the judgment, at paragraph 206 and following, the judge's conclusion that there was simply to serious issue to be tried as to whether the remuneration was excessive or in breach of Mr Patrick's duties to the company.

The judge reached the same conclusion in relation to the remuneration of the other director, Mr Murphy. That's at paragraph 216 and following.

My Lords, we do say, against that backdrop, the suggestion that the directors remuneration evidences a real risk of unjustified asset dissipation is simply unarguable.

So, for those five reasons we simply submit there is to basis for the assertion, for that is all it is: that there is a risk of unjustified asset dissipation in this case.

For that reason, if not other, there is no basis for the interim relief TAS sought.

My Lords, even if that were otherwise, the Texas Rule 11 Agreement adequately protects against the risk. That's our third ground for objecting to the interim relief application.

The JOLs accepted in their skeleton at

paragraph 22 that, and I quote:

"The Interim Relief Application simply seeks to reflect the Rule 11 Agreement ..."

My learned friend made the same point this morning. She described it as an attempt to mirror the protections in place under the Rule 11 Agreement, save for the additional provisions in relation to disclosure.

We respectfully submit there is simply no need and no justification to replicate the Rule 11 Agreement with an injunction.

The JOLs put forward five reasons at paragraph 15 of their skeleton to support the submission that the Rule 11 Agreement is not adequate. Respectfully, none of those reasons withstands scrutiny.

What I want to do is give the court our answer to each of those five points and then I will identify the passages in Mr Patrick's recent affidavit which supports them.

Firstly, the JOLs say, correctly, that the Rule 11 Agreement is not enforceable in the Cayman Islands. However, it is enforceable in Texas, where Mr Patrick resides, and is subject to the jurisdiction of the Texas court. There is no

evidence, and it is utterly fanciful to suppose, in my submission, that Mr Patrick is likely to act in contempt of the Texas court.

Fanciful aside, even if he did so, the action would no doubt be met with steps to enforce the Rule 11 Agreement by the Highland foundations, who are in the hands of serial vexatious litigant Mr Dondero.

Second, the JOLs say that the company cannot enforce the Rule 11 Agreement because it is not a party to the Texas proceedings. But, with respect, that ignores the fact that the Highland foundations can ignore it. It also ignores the fact that the individual who stands behind the Highland foundations, Mr Dondero, is the very same individual who is funding the JOLs to pursue these Cayman proceedings, with his Highland foundations being the principal stakeholders in the liquidation.

So the notion that the Rule 11 Agreement would not be enforced in Texas, at the behest of Mr Dondero, if the need to do so arose, is again, with respect, fanciful.

What is more, the company's status as a non-party to the Texas proceedings needs to be

understood in the light of the rulings in Texas that the company should be joined to the proceedings, with the proceedings stayed in the meantime to allow that to happen. So, if the company wishes to participate in Texas, it can do so.

My Lords, third, the JOLs say that the Rule 11 Agreement is not tied to the appeal. That is irrelevant where there is no real prospect that the Rule 11 Agreement will fall away before the appeal is heard, as Mr Patrick has explained in his sworn evidence.

In my learned friend's submissions this morning a new point was taken. She speculated that it might be open to the defendants to apply to strike out the Rule 11 Agreement. She was unable to refer to any evidence to support that speculation because there is no such evidence. And the speculation also makes no sense.

The Rule 11 Agreement is an agreement between the parties to it. Putting aside discharge by frustration or discharge by agreement between the parties, the agreement stands.

My Lords, fourth, the JOLs say that Mr Murphy and CLO Holdco are not parties to the

Texas proceedings, and so they are not bound personally by the Rule 11 Agreement. That is true, but it is also entirely irrelevant. CLO Holdco is the principal asset of the fund. It is wholly owned by the fund. Mr Murphy is one of its directors along with Mr Patrick.

Mr Patrick and the fund are parties to the Texas proceedings, and they are bound by the Rule 11 Agreement. When the Rule 11 Agreement prevents dealings with fund assets otherwise than in the ordinary course of business, it is fanciful to suppose that Mr Patrick or the fund would allow CLO Holdco or any of its subsidiaries to act inconsistently with the Rule 11 Agreement. And it is likewise fanciful to suppose Mr Murphy would do so in his capacity as a fellow director.

Now, in my friend's submissions this morning, a series of newspaper points were taken ——

JUSTICE BEATSON: Can I just stop you a moment with a quick question. You know about some people who like wearing a belt and braces.

MR SCOTT: Yes.

JUSTICE BEATSON: So what you are saying is the existing protections are adequate. So they

provide a belt. The real force of where you're going is to say that winning this relief —— some sort of relief here is not just belt and braces; it is doing positive harm.

MR SCOTT: Indeed.

JUSTICE BEATSON: That's what you say. What would you —— would you say, other than the idea that who wants to spend money on lawyers and just duplicating something, and lawyers want to do that and we can see a lot of spending here.

What would be —— if, in fact, all you were doing was duplicating those in Cayman, for a Cayman LP, with all the Cayman interest in this case, the Cayman JOLs would have to go to court to get permission to intervene in Texas litigation, what's —— why am I just being a pessimist by suggesting that it might be good to have a belt and braces?

MR SCOTT: Can I answer your Lordship's question this way? We say there was to justification in this case for even a belt. There was no risk of unjustified asset dissipation, but nonetheless we entered into the Rule 11 Agreement.

We also say, respectfully, that belt and braces is not the principle that should inform

granting draconian interim injunctive relief such as this. The relevant principle is: is there a real risk of unjustified asset dissipation? If there is, is it just inconvenient to grant the relief that is sought. And it is not whether the Rule 11 Agreement is in place.

But we go further. We do say that granting an injunction or giving equivalent undertakings would be prejudice. Indeed, it would be seriously prejudicial. The evidence of that is the MidWave issue. The MidWave issue occurred during the hearing before Justice Parker.

Perhaps I can deal with it at this point. You have the detail, as I have said, in Mr Patrick's affidavit.

Now, MidWave is an entity under the control of Mr Dondero. It has borrowed substantial sums from CLO Holdco and those sums, the debt that is owed, are among the principal assets of the fund.

During the hearing before Justice Parker, MidWave took the position that, by virtue of giving the undertakings, CLO Holdco had become a defaulting lender, and, on the basis it was a defaulting lender, a series of amendments were

purportedly made to the facility agreement under which the debt arose ——

JUSTICE BEATSON: To think they'd have had to have consented otherwise, and the changes were made without their consent.

MR SCOTT: Indeed. Indeed, they're issues that are being ventilated in New York.

JUSTICE BEATSON: Yes.

MR SCOTT: But the position that MidWave has adopted is that by virtue of giving the undertaking, it is able to defer the maturity dates under the facility agreement, remove or defer the substantial finance fees which are payable, and put in jeopardy more than $100 million worth of assets.

That's what happens when we give undertakings in Cayman. That's what Mr Dondero and his vehicles have done.

Your Lordship is entirely right, we dispute entirely the validity of that exercise. We have had to bring proceedings in New York to vindicate our position, but all of that has stemmed from the giving of interim undertakings.

Among other concerns is if we give those undertakings again to this court, or if the court

grants an injunction simply because it regards it as belt and braces, there will be exactly the same weaponisation of the development by Mr Dondero as occurred with the undertakings that we gave last year.

So we do very much say this is a case where the giving of undertakings or the making of an injunction will do harm.

There is, of course, the harm of the continued substantial cost of having to give disclosure, disclosure which we say is entirely unnecessary in support of a purported proprietary claim that doesn't exist. There is, of course, that prejudice. There is, of course, also the prejudice inherent in any freezing injunction, because, as anyone who has represented a respondent to a freezing injunction will know, as soon as one is made, banks and other counterparties, they won't deal with you, notwithstanding the ordinary course exception, if there is any risk that the applicant will take the position that the proposed dealing is outwith the ordinary course of dealing.

You can see the willingness of the JOLs to take that position from the submission my friend

made this morning that it is not the ordinary course of the structure's business to continue making charitable distribution to an entity which has benefitted from them for several years.

Freezing injunctions are a draconian remedy. They are among the nuclear weapons in the law's arsenal. They require caution before granting them because of the impacts that they have on the responds' ordinary business, regardless of the exception.

So, there are those forms of prejudice that would arise on any case in which a freezing injunction is sought, but the Dondero factor in this case just makes it so much worse.

I hope that gives your Lordship our —— (overspeaking) ——

JUSTICE BEATSON: Yes.

MR SCOTT: These are dangerous braces that the court is being asked to apply, without, in our submission, any justification to do so.

SIR RICHARD FIELD: Mr Scott, could I ask you a question, please? I am looking at the summons for interim relief which you are seeking. I beg your pardon, you are —— (overspeaking) ——

MR SCOTT: I'm resisting.

SIR RICHARD FIELD: —— not seeking.

Paragraph 1 more or less tracks the Rule 11 Agreement, using the expression "outside the ordinary course of business".

Now, I understood counsel for the JOLs to be accepting that it was within the ordinary course of business to make donations to the DFW charity or charities.

MR SCOTT: I didn't understand counsel for the JOLs to accept that. I understood her position to be that the JOLs do not accept that distributions to DFW are within the ordinary business of the structure.

SIR RICHARD FIELD: Well, the expression is in the Rule 11 Agreement, and it is in the summons. Perhaps we can hear in reply what is finally being said.

Is the company —— I ask this of counsel to deal with in reply —— maintaining that the Rule 11 Agreement is an agreement that prevents any distributions to DFW, because that would not be in the ordinary course of business?

JUSTICE BEATSON: I think this is where the exchange about our charities came in.

SIR RICHARD FIELD: Yes.

MR SCOTT: It is, of course, for my learned friend to clarify her position. My understanding is that the company's position is indeed that the Rule 11 Agreement prohibits distribution to DFW, as would the interim injunction sought, because the JOLs maintain that distributions to DFW are not in the ordinary course of business, because they are distributions to our charities rather than theirs, to use my learned friend's phrase.

SIR RICHARD FIELD: Yes.

Is there any evidence as to whether there have been any distributions to DFW since the Rule 11 Agreement?

MR SCOTT: Yes. It is the evidence I showed the court earlier. It deals with the position from I think July, by which stage the Rule 11 Agreement had been entered into, down to December when the affidavit was ——

SIR RICHARD FIELD: Was there any ——

JUSTICE BEATSON: There was no payment to any of the original four in those?

MR SCOTT: No, because across the restructuring, the original four are no longer the objects of the charitable structure.

JUSTICE BEATSON: Yes.

SIR RICHARD FIELD: But Mr Dondero's corporations, Highland Dallas and Highland Kansas and so on, they haven't asserted that the Rule 11 Agreement has been breached by reason of those three donations, I will call them, distributions, that you have shown us in the evidence.
MR SCOTT: I don't know the answer to that question, my Lord. If an answer can be found, it will be fed to me by my team. I don't know if Mr Dondero has taken that decision.
SIR RICHARD FIELD: Okay.
MR SCOTT: I can certainly say our position is plainly there is no breach at all.
SIR RICHARD FIELD: I understand that. I apologise. Thank you. I am sorry to interrupt. That's very helpful there, thanks.
MR SCOTT: Not at all, my Lord.
I was going to deal at this stage with a series of news points on the Rule 11 Agreement which emerged from my friend's submissions this morning. If I can just briefly deal with these. Respectfully, we say they are all wrong.
The first was the suggestion that the Rule 11 Agreement is inadequate because it only applies to direct subsidiaries of the funds.

I don't see in the language of the Rule 11 Agreement any basis for that submission. As the court saw earlier, it applies to any subsidiaries, but in any event the critical subsidiary of relevance is CLO Holdco, because it is the asset. It is the asset holding company. And plainly it is a subsidiary of the fund, because it is wholly owned by the fund.
The second new point that was taken was the suggestion that the Rule 11 Agreement would not prevent increasing the fees payable to directors. Respectfully, I didn't understand that point. It flies in the face of sub-paragraph 7(b), which provides that there can be no increase to the remuneration of employees of the covered entities.
Prior to my learned friend's submissions this morning, I had not understood it to be suggested by anyone that the Rule 11 Agreement left open the possibility of increasing directors' remuneration.
Third is the point I have already addressed on DFW distributions. The court has my submission that paragraph 7(a) of the Rule 11 Agreement permits this because it would be

a distribution in the ordinary course of business.
As I say, I had understood Ms Moran to dispute that. We will find that what the true position is when she gets on her feet for reply.
I then turn to the suggested fifth inadequacy of the Rule 11 Agreement, according to the JOLs, which is the fact it makes no provision for disclosure.
Now, that is true, but, in my submission, it is not an inadequacy. It is an acknowledgement that there is no need or justification for disclosure, particularly where, as the judge found, the costs of providing it pursuant to the interim undertakings have been prejudicial to the defendant, that being among the reasons why, on the balance of convenience, he would not have made the injunction even if the underlying claims were arguable.
SIR RICHARD FIELD: Well, tracing orders backed by discovery usually come after the trial.
MR SCOTT: Indeed. As we stand at the moment, there will be no trial of any tracing claim, because, as the judge held, in our submission correctly, there is no seriously arguable tracing claim to be brought here.

Your Lordship is, with respect, entirely right. Even if there were viable tracing claims, and even if they do succeed at trial, that will be the point at which the court can grant the relief necessary to make that tracing exercise effective.
The only reason to pre-empt it now would be if the court had been satisfied that there were a risk of unjustified asset dissipation in the meantime. And the court has my submission, there is no such risk here.
I said I was going to show the court some of Mr Patrick's evidence on these issues. Can I make good on that now?
If we can go, please, to the respondents' bundle. And I do so with some trepidation given the difficulties we had earlier identifying the relevant pages.
The page I want to go to is in his first affidavit to this court, served last week, which at page 290 of the bundle. It is from paragraph 28. I hope that gives some help to help the court find it.
JUSTICE BEATSON: The first affidavit?
MR SCOTT: Yes.
JUSTICE BEATSON: So that will be in the exhibited

bundle.
MR SCOTT: No, because it has been renumbered.
JUSTICE BEATSON: Well, there you go. It is really good, this.
MR SCOTT: As I understand it ——
JUSTICE BEATSON: I read that this morning, the e—mail about that. Right.
MR SCOTT: It is the first affidavit he has sworn in relation to these Court of Appeal proceedings.
JUSTICE BEATSON: No. That's not a problem, no. It is the lower ones. Right.
So, there we are.
MR SCOTT: I want to go, please, to paragraph 28 to start.
JUSTICE BEATSON: I am sorry to be —— not tetchy, but I am keen not to slow you down. 28.
MR SCOTT: Paragraph 28.
JUSTICE BEATSON: Starting:
"In addition ..."
MR SCOTT: Exactly so.
JUSTICE BEATSON: I am there.
MR SCOTT: Having referred to Justice Parker's findings in relation to the Rule 11 Agreement, the court will see that Mr Patrick says this in the second sentence:

"I and the CDM respondents confirm to this court that the Rule 11 Agreement continues to be complied with. That agreement, which for the avoidance of doubt is a voluntary commercial standstill among solvent entities, not an insolvency receivership or analogous proceeding, ensures that assets will only be dealt with in the ordinary course of business, that there will be no increase in current levels of remuneration and that the holding structure will not be changed."
Now, my Lord, the need for Mr Patrick to spell out the obvious fact that the Rule 11 Agreement has nothing to do with insolvency, that's a consequence of Mr Dondero's manoeuvres with MidWave. And I will show you the evidence on that in a moment.
But the key point I want you to take from paragraph 28 is that Mr Patrick is confirming to this court on his behalf, and on behalf of the other respondents, that the Rule 11 Agreement will be complied with.
Mr Patrick then deals at paragraph 25 with the JOLs' arguments that the Rule 11 Agreement was not adequate, and he says that these arguments

miss the point for the reasons that I have been submitting to the court, namely that the Rule 11 Agreement is enforceable where he is resident and it is inconceivable that Mr Dondero would not cause it to be enforced if the need to do so were ever to arise.
Can I please ask the court to read paragraph 29?
(Pause)
PRESIDENT: For myself, I have read it, Mr Scott. I think my colleagues may have done.
JUSTICE BEATSON: Yes, I have read it.
SIR RICHARD FIELD: Yes.
MR SCOTT: I am very grateful.
Paragraph 30 then explains why there appears to us to be no real prospect of the Rule 11 Agreement falling away before the appeal to this court is determined.
Again, perhaps to avoid paraphrasing, can I ask the court, please, to read paragraph 30.
(Pause)
JUSTICE BEATSON: The reference to the August date, that —— so this affidavit is very, very recent, isn't it, so there's no change since this affidavit?

MR SCOTT: This affidavit was, I think, Tuesday afternoon. Obviously Mr Patrick doesn't know and I don't know when the special sitting will be convened to hear the JOLs' appeal, but what you can see is that nothing is going to happen in the near term in Texas that will cause the Rule 11 Agreement to fall away.
(Pause)
PRESIDENT: Yes, Mr Scott.
MR SCOTT: I'm grateful.
Then, at paragraph 31 down to 33, Mr Patrick exchanges his reluctance to give an undertaking to this court. As your Lordship sees in the second sentence of 31, he says this:
"I am also reluctant to provide one because of the history of the undertakings previously offered or given in these proceedings being misrepresented by the appellants [that's the JOLs] and Mr Dondero and his affiliates and misused by the latter for improper purposes."
(As read)
Now, so far as concerned the misrepresentations by the JOLs —— and this is dealt with at paragraph 32 —— at the hearing before Justice Parker, at which I appeared, on

a number of occasions the JOLs' leading counsel portrayed the undertakings that my clients had offered as an acceptance that interim relief was appropriate in this case, and it was unfortunately necessary for me on several occasions to rise to correct the record.

The true position, as Mr Patrick explains here, is that the undertakings were offered expressly without ——

PRESIDENT: We have covered this ground, Mr Scott. I think we understand perfectly well what you are saying about that.

MR SCOTT: And I won't also belabour the point on MidWave, which I have already addressed.

PRESIDENT: Yes, and which is referred to as well, isn't it?

MR SCOTT: Indeed, at paragraph 33. I also won't go over again the points on prejudice, but you have the evidential impacts in terms of the prejudice caused by disclosure at paragraph 35 of Mr Patrick's affidavit. He addresses the points I have made on the circumstances in which the undertakings were given at 36. And he addresses the point on prejudice, given the absence of any undertaking, at 37.

Given the time, I can't take the court through all the detail on collateral use, but you will no doubt have read what Mr Patrick has said about MidWave and the other issues in section E of his affidavit.

So, for all those reasons, we do say it would be unnecessary to add belt to braces or braces to belt, and indeed to do so would be seriously prejudicial, and that is another reason why this interim relief application should be refused.

The fourth ground for our objection I have already covered: the various forms of prejudice that the interim relief sought, in granted, would cause to us or risk causing to us.

I have already addressed why it is unfair and wrong for the JOLs to submit that there can't be any prejudice here, otherwise we would not have agreed the interim undertakings.

Can I finally deal with our fifth and final objection to the interim relief application? I will going to take this briefly, not because the point is unimportant, but because it is really straightforward and it is a short and complete answer to this application.

The JOLs offer no cross—undertaking in damages, nor even do they offer a cross—undertaking from their funder, Mr Dondero's vehicle Crossvine. Still less do they offer any fortification. There is simply no protection on offer for what they ask your Lordship Lordships to make, which is, in substance, a freezing injunction.

We respectfully suggest that there is no remote justification for granting interim relief of that kind without the usual protections that courts in this jurisdiction require by way of a secure cross—undertaking, which is essential so as to enable the court to do full justice in due course, if it turns out that the injunction was wrongly made, by making orders for compensation for loss caused that will be satisfied.

The JOLs are unwilling or unable to put forward any such protection. The only reason given for it, so far as I could discern in my learned friend's submissions this morning, was that because no cross—undertaking was given on the interim undertakings in July, there is no need for one to be provided now. But the court has my submissions and that simply ignores the context in

which the July undertakings were given.

It also ignores the fact that the litigation has now very substantially moved on. The JOLs have had two days in which to persuade a Grand Court judge that their injunction was justified. They failed to do so. Comprehensively.

They have an appeal as of right and they appear to wish to pursue that appeal. That is a matter for them. But what is not just and what is not fair is to seek interim freezing relief such as this without paying the usual price of a cross—undertaking in damages that is properly fortified so that the court can do justice in due course if the need to do so arises.

Unless I can assist the court any further, those are the submissions I wanted to make.

PRESIDENT: Thank you very much indeed, Mr Scott. I don't know if any of my colleagues has anything they would like to ask you.

SIR RICHARD FIELD: No. Thank you very much for your submissions, Mr Scott.

MR SCOTT: In which case it falls to Mr Quest to take up the baton for Mr Murphy.

PRESIDENT: Yes.

Submissions by MR QUEST
PRESIDENT: Mr Quest.
MR QUEST: Yes, my Lord.
MR JUSTICE MARCUS SMITH: I hope you are going to be much briefer, because obviously quite a lot of the submissions cover ground that you would wish to cover in any event, that has been dealt with, so you are dealing specifically with the position of the second respondent, aren't you?
MR QUEST: That's right. I will be limiting my submissions to those aspects of the application that will are particular to Mr Murphy as the second respondent.
PRESIDENT: Thank you very much.
MR QUEST: Sir, I should say, we, of course, adopt and support Mr Scott's arguments as they apply to the defendants generally, but we do also say that Mr Murphy's position is, in some respects, materially different from the other defendants, such that there is no basis in any event for the grant of any relief against him personally.
Mr Murphy's position can perhaps be conveniently taken from the judgment.
If I can ask your Lordships to turn to Mr Justice Parker's judgment at page 79 of the

bundle, the appeal bundle.
SIR RICHARD FIELD: Could you give me the paragraph, please?
MR QUEST: It begins at paragraph 216.
SIR RICHARD FIELD: Thank you very much.
MR QUEST: It is under the heading "The injunction against Mr Murphy". As your Lordship will see, the judge rightly considered separately the application as it applied specifically to Mr Murphy.
As you can see, he said, at paragraph 216:
"Mr Ayres", who then appeared for the liquidators, "made clear that as Mr Murphy still plays a role in the Fund and the Company, the JOLs apply to injunct him in respect of all the Fund entities.
"217. However, it is undisputed, on the evidence before the court, that Mr Murphy does not hold any interest in the Fund or in its limited or general partner and has no shareholding or any other interest in any of the companies connected with the Fund."
At 218:
"The Company's proprietary claim", as against Mr Murphy, "concerns only money that

was paid to him as remuneration under his director's service agreements.
"219. The Court takes the view that the damages and compensation claimed based on his participation in the restructuring are not proprietary claims in nature."
Just to elaborate slightly what the judge is saying there about Mr Murphy's position, the role that Mr Murphy plays or currently plays in the fund is as director of some, but not all, of the companies in the fund structure, including the third, fifth and sixth defendants.
However, as the judge noted, and was then and is now undisputed, Mr Murphy does not himself hold any disputed property other than the money that was paid to him by way of remuneration, and his total remuneration over the five years that he acted was about $1.2 million, so a relatively modest amount, and certainly not the tens of millions that Ms Moran referred to.
So he holds none of the disputed fund property himself.
Now, in relation to those companies in the fund structure of which he is a director, it is, of course, right that Mr Murphy would, in the

usual way, be bound not to frustrate any proprietary injunction that the court might grant against the companies in respect of their property. That follows from the making of an injunction against the company.
But it is important that the mere fact that Mr Murphy is a director of some of these companies does not in itself justify granting proprietary injunctive relief against him personally.
So, whether or not the court thinks it is appropriate to grant relief against those entities that hold the assets, there is, in my submission, no justification for extending that relief to Mr Murphy personally.
This, if I may say, is not merely a formality. Mr Murphy has a particular concern about the way in which the relief is framed and in his being brought in as a Respondent to it.
If I can just to explain the difficulty, if I can ask your Lordships to look at the summons, which you will find at page 176 of the bundle -- so this is a summons for the relief that's sought by the liquidators today. Your Lordships have already seen paragraph 1, which is

negative in form, if I can put it that way, but Mr Murphy's particular concern is over paragraph 2 on the next page, which provides that:

"The respondents [which includes Mr Murphy and the Fund entities] shall preserve and will not in any way dispose of ... their or any interest of whatsoever nature whether held directly or indirectly in the Fund, the Fund Entities, or any assets of the Fund, other than in the ordinary course of business." (As read)

So, on the face of it this is —— and I should say, sorry, the Fund Entities —— the capital F, capital E, Fund Entities —— are defined two pages on, on page 180. You should see there is a list of 27 companies in various jurisdictions which are defined as being the "Fund Entities".

So, just going back to paragraph 2, the positive obligation to preserve assets applies not only to assets that are not assets that are held by Mr Murphy himself, but applies to the assets of a very large number of companies, the 27 that are set out in the schedule, of which Mr Murphy is only a director of five of them. So the vast majority of the fund entities that are scheduled to the order are companies with which Mr Murphy

has no direct involvement.

In those circumstances, it is, in my submission, for the liquidators to justify not just why the court should grant injunctive proprietary relief against corporate entities in the structure, but, in addition, why they should extend —— why the court should extend that relief to Mr Murphy personally. Neither in writing nor orally have the liquidators offered any explanation or any principle basis on which they say the court should grant relief of a proprietary nature against Mr Murphy in respect of fund property that he does not hold.

The position, we say, a fortiori, where the property is not openly not held by Mr Murphy; it is held by companies of which he is not even a director.

So, we say that there is simply no basis, and certainly no basis has been articulated, to join Mr Murphy as a personal Respondent to these applications for proprietary relief in respect of the fund assets.

As I say, to the extent that he is a director of particular companies, he would, as any director would, be bound against that company,

but that's not a justification for making an order against him.

So, that was what I wanted to say about the orders sought against him —— the proprietary orders sought against him in relation to the fund assets.

As to the claim that's also made in respect of the receipt by him of remuneration, it was and is somewhat unclear to us, even from listening to the oral submissions from the liquidators today, whether the liquidators are still seeking any order which seeks to restrain in any way Mr Murphy's use of his personal assets. If they are, then just a couple of points I would like to make about that.

Your Lordships will have seen from the judgment, that was certainly the primary basis on which the case was pursued against Mr Murphy below, the judge held in terms that Mr Murphy's remuneration was not excessive, and indeed he held there was no serious issue to be tried that Mr Murphy had been paid or had received ——

MS MORAN: Apologies for interrupting, my Lords, my learned friend, just to clarify, on the interim injunction we are not seeking any restriction on

(inaudible) Mr Murphy's remuneration (inaudible).

MR QUEST: All right. That's a helpful clarification.

So, as I understand the position, no relief is now being sought —— let me make sure I have it right —— no relief is now being sought which would have the effect of applying any restraint to Mr Murphy in relation to his dealings in his own personal assets.

MS MORAN: That's correct.

MR QUEST: Thank you.

In that case, I need only, I think, just add just two points in general as to why relief against Mr Murphy is further unjustified.

One is that it is, of course, for the plaintiff seeking this interim relief pending appeal to identify some risk of prejudice that liquidators might suffer as between now and the appeal. And obviously Mr Scott has already dealt with the position in relation to the companies and his clients, but certainly as regards Mr Murphy there is no allegation as against him and no evidence that there is any risk of him doing anything between now and the hearing of the appeal that might undermine the efficacy of the appeal

process. So there is simply no case as regards Mr Murphy that he is going to do something that requires the court to restrain him so as to maintain the efficacy of the appeal. Without that, there is no simply no basis for the court to intervene as against him.

Any suggestion that there might be some risk of prejudice arising from Mr Murphy's conduct is, of course, belied by the fact, as Mr Scott has already explained to you, that, even though the undertakings —— the undertaking that Mr Murphy gave formally expired on 10 February, when judgment was handed down, the liquidators waited until 3 March before the present application, with no reason for that delay given.

It is said as regards Mr Murphy, on behalf of the liquidators, that the orders sought against him would cause him little hardship, including, they say, because he was previously prepared to give a voluntary undertaking. As to that we say, first of all, absence of hardship to a Respondent is clearly not a justification in itself for making an injunctive order. It is only a relevant consideration if the court is satisfied that there is otherwise some basis for the court to make

an order against Mr Murphy.

As for the undertaking, as Mr Scott has already explained, that was offered by Mr Murphy, as it was by the other defendants, in very particular circumstances.

PRESIDENT: I think we understand that, Mr Quest. Mr Murphy sets out quite a lot of detail, as I recall, in his affidavit which we have received, I think, this morning.

MR QUEST: Thank you. Then I needn't say anything more about that. Your Lordships have the point.

I think the only other point I just need to emphasise —— again, it is a point Mr Scott made —— about the lack of a cross—undertaking, not just the lack of a fortified cross—undertaking, the lack of a cross—undertaking at all. Mr Murphy in particular is justifiably concerned about this. Else a Cayman Islands attorney, resident and practising as a professional in the Cayman Islands. There is obviously a risk that injunctive relief against him may be seen, rightly or wrongly, by those he deals with on the island as reflecting badly on his reputation. If it does, he would expect to be compensated for that. And it is only fair, in those circumstances, that

the liquidators should pay the usual price, as it were, for obtaining relief of this sort, which is that they agree to compensate Mr Murphy for any loss that may be caused by it.

There has been no real explanation about why a cross—undertaking hasn't been volunteered in the normal way. The most that seems to be said by the liquidators is that there are no assets in the company available to financially support such an undertaking. That may be, but there are clearly persons behind the company who have an interest in the outcome of the liquidation, not least because they are presumably funding the liquidators to bring this application, and they, in our submission, can be fairly expected to provide financial support for a cross—undertaking as a price, as a condition, in the usual way of bringing this application.

My Lords, those are the points that apply specifically to Mr Murphy. Unless there are any points I can help your Lordships on, those are my submissions.

PRESIDENT: Not from me, thank you very much, Mr Quest. Again, I don't know if either of my colleagues would like your help on anything.

SIR RICHARD FIELD: No, thank you.

JUSTICE BEATSON: Not from me, thank you.

PRESIDENT: Thank you very much indeed, Mr Quest.

MS MORAN: My Lords, I am conscious of the time. I think the respondents have had more than their fair share at this stage, but I understand that Ms O'Driscoll is going to be very brief.

PRESIDENT: They are entitled to make their submissions, Ms Moran.

JUSTICE BEATSON: You should have all agreed a time.

PRESIDENT: They think it is necessary. This litigation is being conducted, if I may say so, with enough antagonism —— wholly unproductive, as far as the court is concerned, antagonism, as far as it is —— and I think some of the correspondence was unattractive to read, to put it mildly. But there we are.

Submissions by MS O'DRISCOLL

MS O'DRISCOLL: I intend to be exceptionally brief on behalf of the fourth defendant, DFW.

I had originally planned to address the court on the proportionate proprietary claims against DFW as distinct from CDM, but in light of the President's comments at the outset of the

hearing in respect of (inaudible) of the application, the President's comments just before the break in respect of repetition, and the nature and scope of Mr Scott's submissions, I respectfully intend to do no more than gratefully rely on Mr Scott's submissions on behalf of DFW.

PRESIDENT: Thank you very much indeed. That's very helpful.

JUSTICE BEATSON: Thank you very much.

Reply by MS MORAN

MS MORAN: My Lords, I do apologise to the court and to Ms O'Driscoll. I misunderstood the time difference with England and I thought we were due to finish in ten minutes' time. So I apologise for that.

PRESIDENT: Don't worry, Ms Moran.

Now, obviously in your response you will simply deal with the matters that have specifically been raised and there are a number. I am not going to go through them, but I will leave you to it, but obviously you will do it succinctly.

MS MORAN: Thank you, my Lord. I am grateful.

I think the key point I need to address

your Lordships on in reply is this idea about whether it is in the ordinary course of business to make the donations to DFW and the idea that has been propounded by the respondents, and that seems to be taking root, that this is a charitable structure that was entirely discretionary where the four original charities had no real interest.

My Lord, this really goes to the heart of the case. We say it absolutely is —— it was not in the ordinary course of business, it was improper in the manner in which it was conducted to admit DFW into the structure and that now it is not in the ordinary course of business to make those payments to DFW.

The Respondents say they were absolutely entitled to do what they did, that this was a structured set—up for charitable purposes at large and that they were entitled to disenfranchise "my charities", to adopt the terminology, because it was not a disenfranchisement, we weren't really entitled to anything and we had no expectation to receive anything, and that they could therefore give it all to DFW in their sole discretion, or to anybody else that they might choose.

I think that also illustrates the problem that we have with the Rule 11 Agreement. They say it is —— the Rule 11 Agreement permits ordinary course of business transactions. They will be making contributions to DFW. And my learned friend Mr Scott said that that would be the case.

As I say, we can't go to Texas to have that debate over ordinary course of business, whether it is or not ordinary course of business. It is also not appropriate on this interim injunction to have that fight, because, as I said, it goes to the heart of the case.

So, therefore, what we are looking for from this court is a way to hold the ring, to adopt your Lordship's phrase, about the charities can continue —— excuse me, DFW can continue to make those donations, but we get (inaudible) apportion protocol which shows us just how much is being made and to whom and in which ——

PRESIDENT: I am being a bit slow here. I am not quite understanding what exactly you are saying.

You are saying that you would be content for payments to be made to charities —— is that correct? —— provided you knew what the payments were, knew something about them. Is that what you

are saying? Albeit that because, fundamentally, you say, what took place shouldn't have taken place, it is not the ordinary course of business anyway. Do I correctly understand what you are saying?

MS MORAN: That's right. That is the —— the way the application is framed today is that it permits an ordinary course of business exception. Now, we do not think that an ordinary course of business exception should permit payments to DFW but the other side do and that is the dispute at the heart of the case.

PRESIDENT: But you are prepared for that to happen, are you?

MS MORAN: My Lord, I think —— if I am pushing at an open door, I would ideally like to have that shut down. And if your Lordships are prepared to make that order today, that would go a long way towards protecting the interests of the estate.

However, if your Lordships are not prepared to make that order, at the very least I should be given the reporting protocols that I ask for in my ——

PRESIDENT: I understand that you are saying.

MS MORAN: Thank you, my Lord.

JUSTICE BEATSON: The reporting protocols that you ask for, just for my note, can you just remind me where they are?
MS MORAN: Yes, my Lord.
JUSTICE BEATSON: Are they the ones in the summons?
MS MORAN: Yes, that's right, my Lord.
JUSTICE BEATSON: So, paragraphs 3 ——
MS MORAN: 3, 4 and 5.
JUSTICE BEATSON: 3, 4 and 5. Thank you very much.
MS MORAN: Now, my Lord, if I could just spend a little bit of time dealing with this point about what is the company's interest in the structure and this idea of general charitable purposes or whether the structure was set up to benefit specific charities.
Fist of all, my Lords, if you could turn up, please, the terms of the limited partnership agreement. I think it is worth going to the agreement itself. This is at Grand Court Bundle E.
JUSTICE BEATSON: Right.
MS MORAN: If your Lordships turn to page 495 of the pdf —— do your Lordships have that? The title

is "Article III Capital Accounts and Division of Profits and Losses".
JUSTICE BEATSON: This is Article III of the agreement?
MS MORAN: In the limited partnership agreement, my Lords, yes.
JUSTICE BEATSON: Okay.
MS MORAN: This is the agreement that governed the partnership at the time when the company was the sole limited partner. Your Lordship will see at paragraph 3.1(a), it says:
"Each Partner has made the capital contributions to the Partnership in the amount set forth ..."
And it says:
"The Limited Partner [that's the company] has contributed to the Partnership all of the ... equity interests of CLO HoldCo."
So, that's a recognition that when the structure was being set up, the company contributed the assets into the structure, the assets which now form the underlying assets of the partnership controlled by the Respondents.
I think it is common ground, my Lord, that those assets came originally from Highland

entities or Mr Dondero entities and were put into the company. So it is simply not correct, as my learned friend Mr Scott suggested, that the company did not make any capital contribution to the partnership. It absolutely did. It made the sole contribution which is now being used to benefit his clients.
My Lords, if you could then turn, please, to page 489 of this pdf, and to clause 1.6 down at the end of the page.
1.6(a), and your Lordships will see this is a very typical type of clause that you see in a partnership agreement, which gives powers to the general partner exclusively to manage the business of the partnership.
But if your Lordships continue down the clause over the page, your Lordship will see at the end of this it says, in the second to last line, after the semicolon:
"... provided, however that the Partnership's assets and investments shall be for the benefit of the Limited Partners and not for the economic benefit of the General Partner."
If your Lordships could then turn to page 495 of the agreement, and at clause 3.2(c) ——

JUSTICE BEATSON: Forgive me. I lost the page number you gave me. What was it?
MS MORAN: 495.
JUSTICE BEATSON: Thank you very much.
MS MORAN: It is 3.2(c). Here it says that:
"... the General Partner's capital account and contributions shall be the minimum required by [law], all income, deductions, gains, losses and credits ... shall be for the benefit of the Limited Partner ..."
So, again, general partner, no economic interest. All the economic interest is with the limited partner.
Finally, my Lords, and this is a really critical point which goes to the economic interests of my client —— excuse me —— of the company, at 4.2(a), which is on page 496. So the first part of the clause is the part which says distributions are made at the discretion of the general partner, based on the need of the indirect charitable ownership.
I should say, it is in a manner and in the aggregate amounts determined by the general partner taking into consideration the cash and the needs of the indirect charitable owners(?).

This (inaudible) is the part of the clause that my learned friends are making much of, and which Justice Parker relied on in the Grand Court. However, my learned friends conveniently ignore the second part of this clause, and this simply was not considered at all by Justice Parker, which is, starting at the fourth line up from the bottom, that:

"Notwithstanding the foregoing, distributions made in connection with a sale of all ... [of the] assets or a liquidation ... [are] made in accordance with the ... account balances of the Partners ..."

As we just saw, my Lord, the account balance of the general partners is nil, or at a minimum, and the account balance of the limited partner is going to be the majority of the account balances.

So, on a sale or on a liquidation of the partnership, the limited partner, the company, gets all of the assets.

So, it is simply not correct to say that the company had no economic interest in the partnership. It absolutely did. It then was required to pass on any distributions or assets

received from the partnership to the underlying charities, but that does not take away from the nature of the relationship between the company as a limited partner and the partnership itself, and the obligations that the general partner had to it.

The next point, my Lord, is that this structure was set up to benefit the specific charities. It wasn't a discretionary trust, as I think my Lord, Lord Justice Beatson, was drawing a parallel. This was a corporate structure where the charities were actually given shares, and did have participating shares in the company.

Why was it set up that way? Well, we have seen in the statement of claim that this is partially for tax reasons. But what the structure was trying to do it is to mirror what's known as a donor–advised fund in the US. That's where we get the word "DAF" in the companies name: Charitable DAF Fund.

If your Lordships could quickly turn up bundle B in the Grand Court bundles, and this is at page 1008.

JUSTICE BEATSON: Can I put away Bundle E or are we going back to that?

MS MORAN: You can put away Bundle E. Thank you, my Lord.

JUSTICE BEATSON: Bundle B. Which page do you want in bundle B?

MS MORAN: 1008.

JUSTICE BEATSON: 008.

MS MORAN: Do your Lordships have it?

JUSTICE BEATSON: I have a page 8. What is this document? This is the articles?

MS MORAN: 1008.

JUSTICE BEATSON: I'm sorry, I keep on proving I ought to do something about my hearing. 1008.

Ah, that looks more like it. Yes.

MS MORAN: This is a letter from Haynes and Boone, lawyers, to Mark Patrick in July 2021. At paragraph 1 of this letter, Haynes and Boone explain what a DAF is, a donor–advised fund is. You will see here –– perhaps my Lords can read it to yourselves, but the point I wanted to highlight is that the donor retains advisory privilege over the DAF funds or account, specifically with respect to charities that should receive donations.

My Lords, what we see here is if this had been set up through a DAF structure in the US, the

donor, which is the company, or, indirectly, the Highland entities of Mr Dondero, would have retained advisory privileges over the DAF –– over the charitable funds, and could have directed which charities got the distributions.

Now, as we have explained in the statement of claim, for tax reasons they didn't set it up in quite that manner, and indeed they tried to mirror it through the corporate structure that we now have here, using the Cayman Islands (inaudible) and the company.

So, my Lords, this is the intention. And, importantly, this was also understood by Mr Patrick. If I can ask your Lordships to turn up the appeal bundle at page 212.

JUSTICE BEATSON: The company's appeal bundle?

MS MORAN: The company's appeal bundle, yes.

JUSTICE BEATSON: 212.

MS MORAN: 212.

Now, this is a letter –– it starts on page 211. This is a letter from April 2022 that Mr Patrick wrote to the Securities and Exchange Commission. In it –– I think the purpose of this letter was to complaining about Mr Dondero's activities, but the point I want to draw to your

attention is what Mr Patrick said to the SEC about the Charitable DAF Fund, the company and its mission.

This starts at paragraph 1 down the bottom of page 211.

JUSTICE BEATSON: Uh-huh. On to 212.

MS MORAN: It is 212 that I want to really highlight. Here he makes the point -- at the top of page 212 -- that the DAF's charitable supporting organisations are the indirect equity owners of the limited partner, Charitable DAF Holdco, the company. This is the reference to the original four charities.

It is the next paragraph that's particularly relevant. He says:

"Since its inception ... DAF has had a significant impact on the communities ..."

And that the charitable organisations "donate tens of millions of dollars" to different charitable causes.

This sentence here, my Lord, starting with "More specifically", he says:

"... since 2012, [the] supporting organisations have committed over $42 million to nonprofit organisations ..."

So they have committed 42 million, and they:

"... have funded $32 million ... with the remaining commitments scheduled for further installments. These commitments include donations to [the various organisations], with average annual grant payments of approximately $3.7 million."

So what this shows us here is that the charities did expect to receive dividends, that they made commitments to their various charitable endeavours in reliance on those charitable commitments. So they've committed 42 million and they've only received 32 million, and Mr Patrick is acknowledging that the balance of the 10 million is going to be funded by way of future distributions.

So, it's simply wrong to suggest that the charities, that the four original charities, had no real entitlement or expectation from this structure whatsoever, and it's simply wrong to suggest that the company had no economic -- (overspeaking) --

SIR RICHARD FIELD: Isn't the question as to the entitlement of these participating entities,

shareholders, resolved solely by construing the constitutional documents? This is somebody's letter who is not referring to those documents in any detail at all.

MS MORAN: Well, I think, my Lords --

SIR RICHARD FIELD: That must be so, mustn't it?

MS MORAN: So, let me -- perhaps I'll take it in stages, my Lords.

We are talking about an exempted limited partnership in the first instance, and I have shown you the provisions of the Limited Partnership Act, which explain that the company does have an economic interest in the partnership agreement. And the partnership agreement itself also recognises the interests of the underlying owners of the company.

The recent authority from the Privy Council in Aquapoint makes clear that in the context of exempted limited partnerships, sometimes it is acceptable to look outside the terms of the agreements.

Now, we say, and this will be a matter for trial, that actually the terms of the agreements themselves do support our analysis, and that this is not purely a situation of looking outside at

external evidence. But the second point is that, in an exempted limited partnership context, it is permissible to look beyond the four corners of the documents in appropriate circumstances.

SIR RICHARD FIELD: Whoever said that? Can you refer me to some authority?

MS MORAN: Yes, my Lord.

SIR RICHARD FIELD: Just let me finish. You depart from the constitutional documents by referring to some external evidence, some letter writing or whatever, in order to decide what, in fact, the enforceable actionable entitlements are of the limited partnership.

MS MORAN: That was the Privy Council decision in Aquapoint.

JUSTICE BEATSON: Isn't there just a dicta to that. I mean, you know --

PRESIDENT: Forgive me interrupting. Where are we going here? I just wanted to follow where are we going, so far, Ms Moran, as your submissions in response are concerned. What point are you seeking to deal with here?

MS MORAN: I am seeking to address -- the question was asked about whether we believe it is in the ordinary course of business to make payments to

DFW. The submission was also made by my learned friends that, in considering whether to grant this injunction, your Lordships needed to consider the strength of my (inaudible) when assessing the balance of convenience. And he majored(?) very significantly on this point that the company had no proprietary interest, that it was entirely in the ordinary course of business to do what they did, and that I would not be able to succeed on my claims ——

PRESIDENT: You are seeking to submit to us that there's a sufficiently strong case to found your application?

MS MORAN: A sufficiently strong case to found the application, my Lords, yes.

PRESIDENT: I think we follow that. I am not sure —— perhaps my Lords would like some further submissions, but I am not sure.

I think we understand what your case is, and I don't know that we want to spend a lot of time, but perhaps, my Lords, if either of my colleagues has any questions.

SIR RICHARD FIELD: No, I don't have any further follow—up questions. Thank you.

JUSTICE BEATSON: I just have a question. You

referred, when answering Justice of Appeal Field, you said you would refer us to the statute on this. Probably because my note is inadequate, but I can't find it. Can you just remind me which statute you referred to on this point?

SIR RICHARD FIELD: I think it is the exempted partnership.

JUSTICE BEATSON: I know, but it has a lot of sections. I just wondered which one was referred to.

MS MORAN: I think I might have misspoken. I think I was referring to the limited partnership —— to the EL —— to the limited partnership agreement.

JUSTICE BEATSON: Well, that's fine. I have lots of references to that.

MS MORAN: Thank you. Thank you, my Lord.

My Lords, I think the next point I wanted to address is this idea about no real risk of dissipation. I can take this shortly and I can take the balance of my submissions very shortly, my Lords, as well.

My learned friend submitted that the charitable donations that were made —— that had been made since the DAF restructuring are at the

same level as had been made previously. That is not the case. Only approximately 500,000 has been given to DFW, and we saw that in the table that I took your Lordships to earlier on, which is at Grand Court bundle B, at page 4728. And I have just shown you the letter from the SEC —— the letter to the SEC where we saw that millions of dollars in grants were being paid to the charities. They were saying annual grants of 3.5 million per year, whereas DFW has received only 500,000 in about a year and a half.

Prior to —— at the same time as the millions of dollars of donations were being made to my charities, the salaries and remuneration of the directors were being paid at $60,000 per annum, whereas now what we have seen is that since the structure has moved under the control of Mr Patrick, with DFW as the sole beneficiary, the directors have been paid more than $15 million.

JUSTICE BEATSON: You don't respond to the point that's made on paper —— I don't know that Mr Scott made it orally —— but actually one the reasons for that was that the former person was doing a passive management, where there is a lot more management, and a lot of stuff was outsourced.

And if you add the outsourcing income —— outsourcing of fees, that's quite a lot. You haven't responded to that at all.

MS MORAN: My Lord, on this point —— I can respond to this. So, the investment activities were outsourced to an entity called Skyview prior to the restructuring, but, my Lord, the fees that were paid to Skyview are still —— were still, in fact, less than what is being paid to Mark Patrick.

JUSTICE BEATSON: Where do I see that on the papers?

MS MORAN: This is in the second affidavit of Mr Patrick. Apologies, I am just trying to find the reference.

(Pause)

Let me ask my colleagues to check the reference.

JUSTICE BEATSON: Do that.

MS MORAN: But effectively I think Skyview was paid —— it works out that Mr Patrick is basically being paid double what Skyview is being paid.

JUSTICE BEATSON: But you didn't make a comparison with the total. You just compared it with the 60,000.

MS MORAN: Sorry —— excuse me, my Lord?
JUSTICE BEATSON: It is good to have that figure, but I note that in both the written and oral submissions, until this moment the comparison was just with the 60,000 a year paid to the former advisor, the former director.
MS MORAN: That's right, my Lord. I think that ——
JUSTICE BEATSON: You find that a reasonable thing to do?
MS MORAN: A reasonable thing for me ——
JUSTICE BEATSON: I mean, are we comparing chickens and rabbits? Was it a fair comparison to compare ——
MS MORAN: (inaudible) perhaps, my Lord, it wasn't the full picture just to compare it to the 60,000. However, my Lord, I think it was fair because of the comparison that was being drawn is that the former director who was receiving the 60,000 was a —— had had no investment management experience, and similarly Mr Patrick has no investment management experience. He is a tax attorney. He is not an investment advisor. So, I think that was the point that was being made in relation to the 60,000.
JUSTICE BEATSON: Right. Thank you.

MS MORAN: My Lord, the next point that was taken against me is there is no jurisdiction to grant me a proprietary injunction over the underlying assets. I think your Lordships have the point that, you know, we have the argument that, as a matter of partnership law, there is a proprietary interest capable of being protected, and that also, where you have a proprietary interest in a share or a limited partnership interest, then it is appropriate to grant ancillary relief over the underlying assets to protect the value of that interest, and that's the Koza case, my Lords. I don't think we need to turn it up, but for the purposes of your Lordship's notes, paragraph 62 of that case clearly shows that there are two sources of jurisdiction to grant relief over underlying assets to protect the value of, in that case, a share. The first is an original jurisdiction to grant a direct injunction and the second is an ancillary jurisdiction to protect the primary injunction or undertaking over the share in question. At paragraph 98 of that decision we see that the judge in Koza exercised the ancillary jurisdiction ——

JUSTICE BEATSON: This is Koza, is it?
MS MORAN: That's right, my Lord, yes.
JUSTICE BEATSON: Thank you. I didn't hear it first time.
MS MORAN: My Lords, two final points, which I can take shortly. The point that's been taken against us on MidWave, the MidWave litigation, I think the point my learned friend made was that the fact of giving the undertakings in this court are what caused MidWave to declare the fund as a defaulting lender and to refuse to pay.

To be clear, Mr MidWave is controlled by Mr Dondero, as I understand it, and Mr Dondero no doubt does not want to put any more money into this structure for so long as it is under the control of Mr Patrick. So, I think it is very clear that it is not any undertakings given in this court that are going to be the reasons for Mr Dondero refusing to put any more money into the structure. It is a more fundamental issue than that. So I think that's a bad point, my Lord.

Then, finally, my Lord, on the cross—undertaking, one factor that the court did not take into account in the Grand Court, and which is equally applicable here, is that the

court is entitled to take into account the inability to give a cross—undertaking (inaudible) has been caused by the actions of the respondents. That's all the more so when we are talking about a liquidator, a neutral party, trying to get to the bottom of this control dispute and return the assets to those who are rightfully entitled to them.

So, my Lord, let me just check if I have that reference for you. My Lord, the reference is at bundle A in the Grand Court bundles and it is page 303, paragraph 137 of Mr Patrick's second affidavit.
JUSTICE BEATSON: Thank you very much.
MS MORAN: That sets out the fees that I referenced earlier.

My Lords, unless I can assist your Lordships any further, I think those are the points I wanted to address in reply.
PRESIDENT: Do you want to say anything about Mr Murphy particularly, Ms Moran?
MS MORAN: My Lords, I think I made my submissions on Mr Murphy in opening. We are seeking —— as I clarified to my learned friend Mr Quest, we are not seeking at this time in respect of the interim

injunction anything preventing him from dealing with his personal assets. The injunction that we seek against him is in his capacity as a director of the underlying subsidiaries so that he can procure their compliance with the interim injunction.
PRESIDENT: I understand. Is there anything else you want to say, Ms Moran?
MS MORAN: No, my Lords, unless I can assist the court any further.
PRESIDENT: Thank you very much.
I don't know again if my Lords would have any questions of Ms Moran.
SIR RICHARD FIELD: No. Thank you very much for your submissions, Ms Moran.
JUSTICE BEATSON: Thank you from me too.
PRESIDENT: We will adjourn briefly to talk among ourselves and then —— so if everyone would wait, I hope —— well, we shall be back no later than 5.35 UK time, which I think will be 11.35 Cayman time.
MS MORAN: Thank you, my Lords. I am grateful.
(5.24 pm)
(Short break)
(5.43 pm)

PRESIDENT: As you will see, Justice of Appeal Field is not with us. He is, in fact —— his connection has gone down, so he's actually on my phone and he can hear what I'm saying. I hope you take my word for it, but that is the case. I am on speaker.
SIR RICHARD FIELD: I confirm what the President is saying. Do accept my Apologies.
PRESIDENT: So you know.
Can I tell you what we have decided? We have decided we are not going to immediately give our decision; in other words, not today. We hopefully will do so —— and we will give you an exact date —— by Wednesday, 31st March (sic), probably on that date. It may be without reasons. So we will adjourn. The whole court will probably not be sitting, because a number of us have commitments which make it extremely difficult, but you will see I confidently say a decision before Easter.
MS MORAN: Thank you, my Lord. I am grateful.
PRESIDENT: Thank you all very much indeed and I wish you the best for Easter anyway. Thank you.
(5.46 pm GMT)
(Hearing concluded)

I N D E X

Submissions by MS MORAN 3
Submissions by MR SCOTT 46
Submissions by MR QUEST 121
Submissions by MS O'DRISCOLL 132
Reply by MS MORAN 133

A

abandoned (1) 91:21
able (11) 5:6 14:5 17:23 33:14 40:3,5,6 69:10 89:18 104:11 149:9
above (4) 43:11 56:8 57:9 90:3
absence (7) 48:22 66:25 78:2,12 86:15 117:24 129:21
absolute (2) 61:25 84:24
absolutely (9) 18:3 19:21 33:16 41:25 75:11 134:9,15 139:5 141:24
abused (1) 70:12
accept (8) 31:9 47:1 50:3 54:24 82:16 107:10,11 158:8
acceptable (1) 147:20
acceptance (1) 117:3
accepted (3) 66:23 79:23 97:25
accepting (1) 107:6
access (2) 4:3,7
accidentally (1) 7:10
accordance (3) 42:20 96:2 141:12
according (1) 111:6
account (15) 8:20 65:4,5 70:15 71:18 72:5,18 140:6 141:12,14,16,17 143:21 155:24 156:1
accounts (1) 138:1
achieve (1) 89:15
acknowledgement (1) 111:10
acknowledging (1) 146:15
acquired (1) 68:13
acronyms (1) 84:17
across (1) 108:22
acted (1) 123:18
acting (1) 15:5
action (2) 28:4 99:5
actionable (1) 148:12
actions (2) 6:7 156:3
active (1) 96:15
activities (7) 73:22 82:1 83:18 89:7,16 144:25 152:5
activity (1) 88:16
actually (12) 17:18 19:17 27:1 36:12 38:19 58:15 60:25 82:9 142:12 147:23 151:22 158:3
adamas (1) 18:11
add (4) 32:23 118:7 128:13 152:1
addition (3) 89:25 113:19 126:6
additional (6) 36:21 37:12,13 42:19 73:12 98:7
address (13) 3:13 12:17 14:11 29:13 48:2 52:24 64:18 86:8 132:22 133:25 148:23 150:19 156:19
addressed (4) 44:2 110:23 117:14 118:16
addresses (2) 117:21,23
adequate (6) 37:17 38:2,8 98:15 101:25 114:25
adequately (3) 47:21 83:1 97:22
adjourn (2) 157:17 158:16
admit (2) 20:17 134:12
admitted (2) 19:18 20:12
adopt (3) 121:15 134:19 135:15
adopted (1) 104:10
advance (5) 23:21 29:11,11 43:11 90:2
advanced (1) 47:11
advantage (1) 24:11
adversely (1) 70:19
advice (4) 71:9 95:10,25 96:2
advisor (2) 153:6,22
advisory (2) 143:20 144:3
affidavit (28) 13:9 32:9 54:4 58:20,21 59:4,6 60:20,23,23 61:2 86:11 92:24 93:5 98:20 103:15 108:18 112:19,23 113:8 115:23,25 116:1 117:21 118:5 130:8 152:13 156:13
affidavits (1) 71:6
affiliated (1) 44:8
affiliates (1) 116:19
afraid (3) 4:12 48:7 56:9
africa (1) 93:2
after (8) 1:3 45:16 50:19 51:1 59:7 63:1 111:20 139:19
afternoon (1) 116:2
again (21) 13:7 20:18 40:23 41:9 54:1 57:21 68:14 75:18 79:3,6 83:14 89:22 94:8 99:22 104:25 115:19 117:18 130:13 131:24 140:11 157:12
against (42) 9:13,16 11:12 13:4 43:18 47:3,22 48:21 63:21,24 70:2 71:14 78:4 81:11 83:1 87:8 97:11,23 121:21 122:7,25 124:3,5,9,12 126:5,12,25 127:2,4,5,18 128:14,22 129:6,17 130:1,21 132:24 154:2 155:6 157:3
aggregate (1) 140:23
ago (1) 95:6
agree (4) 26:22 27:23 93:7 131:3
agreed (10) 24:5 39:4,7 42:25 43:12 44:20 89:21 91:3 118:19 132:10
agreeing (2) 26:1 27:3
agreement (122) 3:24 7:5 13:1 16:1,4,15 22:2 24:15 25:7,14,17,20,22 26:1,9,11,13,17,22,25 27:1,13,18 28:2,14,20 29:2,5,14,22,25 30:21,24 33:18,21 34:1,5 35:16 36:19,22 37:1,5,12 40:11 41:20 42:18 45:6 46:5 47:22 56:6,13 70:24 71:19 72:1 79:17,20 83:2,8 84:3 90:1 91:2 92:7 97:22 98:3,7,11,14,22 99:6,10,20 100:8,10,16,20,20,22,23 101:2,9,9,14 102:23 103:6 104:1,12 107:3,15,20,20 108:4,13,16 109:3,19,24 110:2,10,19,25 111:6 113:23 114:2,3,14,21,24 115:3,17 116:7 135:2,3 137:20,21 138:4,5,8 139:13,25 147:14,14 150:14
agreements (3) 123:2 147:21,23
ah (3) 41:8 76:3 143:13
ahead (3) 25:24 29:7 69:18
aimed (1) 29:20
aired (1) 13:13
albeit (1) 136:1
aligned (1) 87:19
allegation (3) 44:3 95:7 128:22
allegations (12) 12:17 13:3,5,7,16,19 64:6,13,21,22 95:5,13
alleged (1) 64:18
allow (3) 21:7 100:4 101:12
allowed (1) 30:11
allowing (2) 7:20 92:7
allows (1) 30:1
alluded (1) 30:19
alone (1) 48:23
along (2) 82:8 101:6
alongside (1) 84:21
already (14) 8:21 30:18 38:15 39:16 42:17 44:2 110:22 117:14 118:13,16 124:25 128:19 129:10 130:3
also (45) 8:19 12:23 13:8 16:18 26:22 27:14 29:23 44:11 48:18 52:7 57:16 58:15 66:15 71:12,18 72:5,18 73:3,13,19 74:7 77:10 78:19 82:24 85:3 90:8 93:9 96:22 99:13 100:19 101:3 102:24 105:14 116:15 117:13,17 120:2 121:17 127:7 135:1,10 144:13 147:15 149:1 154:8
alter (2) 63:24 71:21
alternative (1) 66:8
always (1) 84:12
amazing (1) 58:14
amended (1) 8:19
amendments (1) 103:25
among (10) 2:20 57:4 79:21,22 103:19 104:24 106:6 111:15 114:5 157:17
amongst (1) 20:2
amount (5) 58:1 61:12 64:1 123:19 138:13
amounts (5) 40:9 57:18,25 64:20 140:23
analogous (1) 114:6
analysis (4) 20:22 77:11 78:14 147:24
ancillary (3) 154:11,21,24
andor (2) 34:21 68:9
animosity (1) 13:20
annual (2) 146:7 151:9
annum (1) 151:16
another (3) 7:15 75:4 118:9
answer (16) 11:10,14,15 18:25 19:15 43:17 46:21 50:1 56:22 57:1 84:10 98:18 102:19 109:7,8 118:25
answered (1) 68:11
answering (1) 150:1
antagonism (2) 132:14,15
anticipate (2) 75:3,4
anybody (2) 82:3 134:24
anyone (2) 105:16 110:19
anything (14) 9:11 28:8 45:10 71:7 82:11 120:19 128:24 130:10 131:25 134:22,23 156:20 157:1,7
anyway (3) 5:3 136:4 158:23
anywhere (2) 29:4 58:22
apologies (8) 4:13 5:1 7:10 40:17 45:13 127:23 152:14 158:8
apologise (5) 50:15 51:16 109:15 133:12,15
appeal (74) 1:24,25 2:11,16,18 3:6,18 6:15 8:14,24 9:1,18,19,23,23 10:11 12:3 14:21 16:11 19:2 22:3 29:3 34:9 35:2,7 36:5,10 38:11,13 39:7,8 42:11 43:8 49:9 53:16 55:4 56:22 57:6,17 65:1,6,10,14 66:24 69:2,10,13 70:12 80:22 83:22,22 84:22,25 85:10,12 94:5 100:8,11 113:9 115:17 116:4 120:8,9 122:1 128:17,19,24,25 129:4 144:15,16,17 150:1 158:1
appealing (1) 77:7
appear (5) 1:9 11:5 23:8 37:23 120:9
appeared (3) 7:9 116:25 122:12
appears (5) 1:11,13,15 7:8 115:16
appellants (1) 116:18
applicable (1) 155:25
applicant (2) 16:25 105:21
applicants (1) 58:12
application (60) 3:4,16,21 8:13,22 9:20,20,21 12:4,16 13:14 16:24 21:25 25:12 29:9 36:13 39:2,4,13 46:13,22,22 47:11 49:1,12,21 50:14 52:3,10,18 53:7,8 54:5,20,25 65:22,23 70:21 72:12 73:15 86:14 91:14,15,20,22 95:23 97:24 98:2 118:10,21,25 121:11 122:9 129:14 131:14,18 133:2 136:7 149:13,15
applications (3) 53:19,23 126:21
applied (6) 38:19,20,24 78:10 91:13 122:9
applies (4) 109:25 110:3 125:18,20
apply (15) 46:20 49:7 50:12,18 52:11,15 65:24 66:7 78:23 85:19 100:15 106:19 121:16 122:15 131:19
applying (3) 38:21 87:6 128:7
appoint (3) 14:18 17:24 18:3
appointed (3) 18:7 91:1,21
appointment (4) 73:8 88:25 90:22 91:17
apportion (1) 135:18
apprehend (1) 55:7
approach (1) 2:18
approaching (1) 96:17
appropriate (9) 8:6 12:7 25:23 38:9 117:4 124:12 135:10 148:4 154:10
appropriated (1) 42:7
approximately (2) 146:7 151:2
april (1) 144:21
aquapoint (3) 18:9 147:18 148:15
areas (1) 6:6
arent (5) 27:1 38:2,8 42:24 121:9
arguable (4) 2:17 87:18 111:18,24
argument (8) 5:9,24 50:22 53:11 94:16 96:6,11 154:5
arguments (6) 64:3,16 95:18 114:24,25 121:16
arise (2) 106:12 115:6
arises (1) 120:15
arising (2) 63:13 129:8
arlpa (1) 56:13
arose (2) 99:22 104:2
around (4) 12:1 14:7 58:5 72:10
arranged (1) 38:15
arrangement (2) 15:8 62:20
arranging (2) 38:17 39:12
arrived (3) 4:22 58:12 59:13
arsenal (1) 106:7
article (2) 138:1,3
articles (4) 21:11,11 56:7 143:9
articulated (1) 126:19
ascertaining (1) 77:13
aside (3) 7:18 99:4 100:21
asif (3) 12:22,23 26:6
ask (46) 9:5,8,10,24 10:1,4,5,19,20 11:14,15,20 14:23 19:5 24:18 26:7 49:15 50:21 61:10 62:11 67:3 69:2,18 75:1 76:18 78:24 79:6,12 83:13 88:19 92:23 93:12 94:11,15 106:21 107:18 115:7,20 119:6 120:20 121:24 124:21 136:23 137:2 144:14 152:17
asked (9) 10:3,8 11:16 24:22 30:4 39:2 87:12 106:19 148:24
asking (2) 11:4 87:7
aspects (1) 121:11
assert (1) 63:23
asserted (6) 88:22 91:5 93:25 94:14,18 109:3
asserting (1) 88:5
assertion (3) 64:21 87:3 97:16
assessing (1) 149:4
assessment (9) 65:2 69:16 70:9 73:14 76:8,15 77:9 84:23 85:18
asset (39) 5:12 31:13 47:12,21 48:11 53:2 56:12 64:19 66:1 71:16 77:20 81:4,13 82:13,23 86:15 87:2,9 88:18,22 89:2 90:21,24 91:6,10 92:1 94:1,10,14,24 95:15 97:14,18 101:4 102:22 103:3 110:5,6 112:8
assetholding (1) 63:22
assets (82) 6:25 7:13 8:5,8 10:25 11:8 12:12 13:24,25 16:20 17:11,13 18:24 23:5 25:15 29:21 30:12 34:15 35:17 37:18,23,25 44:4 55:14,15,16,19 65:19 66:10,17,20 67:1,18 68:10,15 69:5,12 70:4,16,19 73:9 77:23 85:3 86:6 87:7,13,23 88:2,13 89:6,10,24 95:21 96:16 101:10 103:20 104:15 114:7 124:13 125:9,18,19,19,20 126:22 127:6,13 128:9 131:8 138:21,22,22,25 139:21 141:11,21,25 154:4,11,18 156:7 157:2
assist (4) 57:16 120:16 156:17 157:9
associate (1) 96:23
assuage (1) 89:5
assume (2) 10:1 15:2
assumed (1) 49:9
attempt (2) 57:16 98:5
attempted (1) 54:12
attention (2) 62:6 145:1
attentions (1) 92:9
attorney (2) 130:18 153:22
august (2) 41:15 115:22
authorities (7) 4:18,23 18:10,11 49:16 86:25 87:3
authority (2) 147:17 148:6
available (6) 43:3 44:18 57:15 71:2 88:14 131:9
average (1) 146:6
avoid (4) 72:21 79:6 88:7 115:19
avoidance (2) 36:23 114:4
aware (2) 13:23 22:23
away (15) 5:12 7:16 14:14 18:24 29:3 32:16 37:17,25 52:22 100:10 115:17 116:7 142:2,24 143:1
ayres (1) 122:12

B

b (7) 40:17,20 50:24 142:22 143:3,4 151:5
back (17) 11:1 13:25 15:19 17:5 21:19 26:6 32:22 38:6 40:11 64:17 73:7 79:13 84:20 86:11 125:17 142:25 157:19
backdrop (2) 47:4 97:12
backed (1) 111:19
background (5) 3:15 5:7 25:6 55:9 67:10
bad (3) 7:20 9:16 155:21
badly (1) 130:23
baker (1) 1:15
balance (32) 3:21 16:25 17:2 19:3 21:24 37:14 42:16 44:14 65:11 69:17,20 73:13,19 74:3 76:9,15 77:13 78:1 79:2 80:6 84:19 85:5,14,18,20,23 111:16 141:15,16 146:15 149:5 150:21
balances (2) 141:12,18
bankruptcy (1) 63:16
banks (1) 105:18
barbara (1) 41:3
based (4) 69:15 70:8 123:4 140:20
basically (1) 152:21
basis (30) 2:16,19 10:24 18:8 19:23 21:1 31:22 38:10 39:5 44:16 47:6,12 63:24 66:8 69:25 82:18 83:19 86:3 92:21 97:16,20 103:24 110:2 121:20 126:10,18,19 127:17 129:5,25
baton (1) 120:24
bear (1) 93:12
bearing (1) 69:7
bearings (1) 67:8
beatson (136) 4:7,14 5:3 9:24 10:1,17 22:4,6,9 24:18,22,25 25:4 28:10 31:4 32:23 33:6,10,16 35:3,10,13,18,22 36:1,11,16 38:12,21 39:18 40:18,22,25 41:2,6,8 42:2,7 43:9,16 44:10 45:15,18 49:25 50:3 51:3,18,21 57:21 58:11 59:1,5,12,16,23 60:2,7,15,22 61:5 62:4,9,20,22,25 75:14,20 76:23 79:12,24 80:6,11 81:16 82:2,6,14,17 84:9,12,16 101:20,24 102:6 104:3,8 106:17 107:23 108:20,25 112:23,25 113:3,6,10,15,18,21 115:12,22 132:2,10 133:10 137:1,5,8,10,23 138:3,7 140:1,4 142:10,24 143:3,6,8,11 144:16,18 145:6 148:16 149:25 150:8,15 151:20 152:11,19,23 153:2,8,11,25 155:1,3 156:14 157:16
become (2) 40:2 103:23
before (34) 4:2,19 12:15 13:15 18:19 19:7 20:4 21:3,21 35:12 39:6 53:7,9 57:20 64:24 76:24 77:4,10 89:20 90:21 91:1,2,3 95:12 100:10 103:12,21 106:7 115:17 116:25 122:18 129:14 133:2 158:19
beg (1) 106:23
begins (1) 122:4
behalf (8) 1:9 15:5 17:25 114:20,20 129:16 132:21 133:7
behest (1) 99:21
behind (6) 21:2 49:16 62:15,19 99:14 131:11
being (59) 5:13 6:7,22 12:18,18 13:7 14:14,15,21 16:10,19 22:23,25 23:1 28:19 29:24 30:3,17 39:5 40:8,9 41:14 42:10 44:18,21 52:22 55:19 64:7 71:24 74:3 75:4 77:23 82:15 92:21 99:18 102:16 104:7 106:19 107:16 111:15 116:18 124:19 125:16 128:5,6 132:13 135:19,20 138:20 139:6 151:8,13,15 152:9,22,22 153:17,23 154:7
belabour (1) 117:13
belied (1) 129:9
belief (2) 20:9 94:9
believe (5) 10:8 32:9 58:24 70:18 148:24
believed (1) 71:9
below (15) 9:6,8,11 18:12 44:14 49:13,14 58:8 61:12 67:5 71:1 86:24 95:12 96:4 127:19
belt (9) 101:22 102:1,3,17,21,24 105:2 118:7,8
benchmarking (1) 95:25
beneficial (5) 55:13 68:10,14 69:4,12
beneficially (1) 85:3
beneficiaries (3) 6:3 8:2 15:7
beneficiary (4) 7:24 15:22 56:25 151:18
benefit (11) 24:15 25:25 56:3,7 63:3 137:16 139:7,22,23 140:9 142:8
benefited (1) 57:18
benefits (2) 53:24 54:3
benefitted (4) 57:18,24 63:5 106:4
bereavement (1) 93:3
beside (1) 33:14
best (5) 5:5 20:20 53:22 96:24 158:23
better (1) 85:23
between (12) 13:20 32:25 33:20 42:10 61:1,7 80:6 100:21,23 128:18,24 142:3
beyond (3) 29:19 41:16 148:3
big (1) 80:1
billion (1) 63:23
bit (5) 4:25 36:17 76:23 135:20 137:13
bits (1) 4:9
blurriness (1) 45:19
blurry (1) 45:15
bodies (2) 33:1,1
bonuses (1) 5:20
boone (2) 143:14,16
boring (1) 35:3
borrowed (1) 103:17
both (6) 48:4 60:9 64:16 68:18 94:24 153:3
bottom (4) 4:21 141:8 145:4 156:6
bought (1) 71:13
bounced (1) 72:9
bouncing (1) 92:17
bound (8) 2:2 26:24 27:4,18 101:1,8 124:1 126:25
braces (8) 101:22 102:3,18,25 105:2 106:18 118:7,8
breach (7) 5:14 47:4 54:18,21 76:14 97:5 109:13
breached (2) 49:8 109:4
break (8) 1:21 32:24 74:21,24 75:16,22 133:3 157:24
brief (4) 3:14 22:13 132:7,20
briefer (1) 121:5
briefly (6) 7:9 16:13 43:6 109:21 118:22 157:17
bring (4) 12:21 29:5 104:21 131:14
bringing (1) 131:18
brought (7) 14:17 22:23 53:20 63:21 91:14 111:25 124:19
built (1) 63:9
bundle (40) 4:15,23 9:1 22:3 35:2,7,8 40:17,20 43:8 49:16 51:17 58:9,9,11 59:4,7,9,10 60:24,25 67:4 69:19 112:15,20 113:1 122:1,1 124:23 137:22

142:22,24 143:1,3,4 144:15,16,17 151:5 156:11
bundles (8) 4:4,8,12,17 22:7 40:19 142:22 156:11
business (56) 5:22 8:6 30:2,22 31:14,16,18,23 32:1 33:25 36:20 41:22 42:14,17,20 48:16 61:17,18,20,25 62:1,1 66:5,6 71:23 72:25 73:11 78:19 83:11,16 90:7 92:8 96:23 101:11 106:2,9 107:4,7,12,22 108:7 111:1 114:8 125:10 134:2,10,13 135:4,8,9 136:3,8,9 139:15 148:25 149:8
bypassing (1) 54:8

C

call (6) 22:21 35:18 36:5 62:23 79:25 109:5
called (3) 7:8 53:25 152:6
came (7) 7:11 62:18,22 63:2 92:15 107:24 138:25
campbells (1) 1:12
cannot (4) 25:23 36:24 94:8 99:10
cant (11) 26:8 29:7,11,15 80:15 81:22 82:10 118:1,17 135:7 150:4
capable (4) 16:19 44:21 64:8 154:7
capacity (3) 27:2 101:16 157:3
capital (8) 51:14 56:1 125:13,13 138:1,12 139:4 140:6
care (2) 4:10 94:12
carefully (2) 68:5 93:12
carry (2) 6:9 7:15
carrying (1) 48:16
carve (1) 74:9
carveouts (1) 74:13
cases (1) 64:12
cash (1) 140:24
cast (1) 49:18
catch (1) 21:8
catching (1) 20:10
catchup (2) 20:18,21
categorically (2) 10:23 13:17
cause (5) 93:17 115:5 116:6 118:15 129:18
caused (7) 43:18 78:18 117:20 119:17 131:4 155:10 156:3
causes (1) 145:20
causing (1) 118:15
caution (1) 106:7
caveat (1) 85:22
cayman (21) 1:20 24:1,5,19 28:23 34:16 43:20 60:18 68:19 92:10 98:22 99:17 102:12,13,13,14 104:17 130:18,19 144:10 157:21
cdh (1) 26:19
cdm (5) 26:19 27:7 66:15 114:1 132:24
certain (1) 90:3
challenge (3) 69:11 85:4,7
challenged (2) 23:24 70:11
challenges (1) 29:5
chances (1) 54:8
change (1) 115:24
changed (2) 85:20 114:11
changes (2) 37:1 104:4
charitable (47) 1:10 6:9 7:23,25 15:12 17:15 20:8 30:20 31:18 32:5,11,17 33:1,1 38:4 41:4,11 56:25 57:9,11,24 62:2,17 68:24 73:22 78:18 82:1 83:18 88:16 89:7 106:3 108:24 134:5,17 137:15 140:21,25 142:20 144:4 145:2,9,11,18,20 146:11,12 150:24
charities (58) 5:22 6:4,7 8:1,1,3 14:5,14,16,17 15:6,23 17:22,25 20:20 21:15,15 32:12,25 33:3 41:14,23,24 42:3,5 56:8 57:20 58:2 61:21 63:3,9 80:1,2,3 82:3 83:6,6,7,10 107:8,24 108:8 134:7,19 135:15,23 137:17 142:2,9,12 143:22 144:5 145:13 146:10,19,19 151:9,14
charity (5) 19:12,18 56:19 83:14 107:8
charman (1) 28:12
chart (1) 15:14
check (2) 152:17 156:9
chickens (1) 153:12
choice (1) 72:13
choose (1) 134:25
choosing (1) 8:3
chose (1) 91:19
chronology (1) 88:24
church (3) 58:6 61:14 82:7
circulated (3) 50:20 51:2 94:3
circumstances (18) 6:11 12:8 17:22 18:2 38:3,7 43:3 72:8,13 90:23 92:25 93:13 97:1 117:22 126:2 130:5,25 148:4
civil (1) 13:11
claimant (1) 29:21
claimants (1) 24:20
claimed (1) 123:4
claiming (1) 23:3
claims (13) 22:25 23:1,9,11,21 63:20 66:11,18 111:17 112:2 123:6 132:23 149:10
clarification (2) 90:4 128:3
clarified (1) 156:24
clarify (5) 11:2,3 51:4 108:2 127:24
clause (7) 139:9,12,17,25 140:18 141:1,5
clear (14) 3:11 8:4 13:20 21:21 37:2 39:10 49:19 65:13 72:8 75:11 122:13 147:18 155:12,17
clearer (1) 36:17
clearly (7) 33:12 43:13 44:21 95:23 129:22 131:11 154:16
clerk (1) 76:4
client (3) 71:14 72:3 140:16
clients (16) 47:24 48:12 55:7 63:6 71:21 72:6,20 88:20 89:10,23 90:13,15 93:7 117:2 128:21 139:7
climb (1) 84:24
clo (9) 63:21 89:2 100:25 101:4,13 103:18,23 110:5 138:18
close (1) 47:17
cobbled (1) 59:17
coconspirators (1) 13:11
cogent (2) 86:25 94:23
collateral (4) 43:20 48:8 84:6 118:2
colleagues (6) 77:2 115:11 120:19 131:25 149:22 152:17
combat (1) 71:10
come (18) 10:2 12:7 17:24 18:20 21:19,21 32:21 40:11 47:17 62:16 64:17 73:20 77:16 79:13 81:3 83:2 86:11 111:20
comes (3) 53:8 65:11 82:7
coming (3) 11:10 18:10 20:5
commanding (1) 20:2
commas (1) 80:2
commence (1) 26:3
commensurate (2) 57:19,25
comments (2) 132:25 133:2
commercial (1) 114:4
commission (1) 144:23
commitments (6) 6:9 146:4,5,11,13 158:18
committed (4) 71:21 145:24 146:1,13
committee (1) 96:3
common (1) 138:24
communities (1) 145:17
community (1) 6:5
companies (15) 4:15 15:5 27:10 122:21 123:11,23 124:3,8 125:15,21,25 126:16,24 128:20 142:19
company (70) 6:4 7:1 13:24 15:23 16:16 17:8,10,12,17,24 18:20,22 20:13,13,14,14 21:14 22:21 23:9,20 25:22 30:10,12 38:1 43:3 44:5 52:1 55:12,23 56:1,5,7 57:9 66:12 67:17 68:6,12 69:24 74:1,5 87:17 97:6 99:9 100:2,5 107:18 110:6 122:14 124:5 126:25 131:9,11 138:9,16,20 139:2,4 140:17 141:20,23 142:3,13 144:1,11 145:2,12 146:22 147:12,16 149:6
companys (16) 5:9,12 6:2,18,22 9:1 16:21 22:3 67:4 95:2 99:24 108:3 122:24 137:14 144:16,17
compare (2) 153:13,15
compared (1) 152:24
comparing (1) 153:11
comparison (5) 96:21 152:23 153:4,12,17
compelled (1) 92:19
compensate (1) 131:3
compensated (3) 37:18,19 130:24
compensation (5) 28:5,15 37:21 119:16 123:4
competing (1) 83:6
complaining (3) 58:13 60:3 144:24
complaint (1) 13:8
complaints (2) 14:13,15
complete (3) 46:21 82:21 118:24
completes (1) 84:18
compliance (2) 27:21 157:5
complied (3) 44:21 114:3,22
comply (4) 27:24 47:25 78:11 90:13
comprehensively (2) 52:20 120:7
compromised (1) 63:11
concentrate (1) 3:6
concern (5) 27:5,11,12 124:17 125:2
concerned (10) 21:7 28:17 61:18 65:21 88:6,7 116:22 130:17 132:15 148:21
concerns (4) 86:14 89:5 104:24 122:25
concession (1) 8:17
concluded (8) 68:12 73:2 78:16 81:24 87:14 92:22 95:3 158:25
concluding (1) 85:12
conclusion (17) 68:17,21 69:3,7,11 70:6,8 76:12 79:2,3 85:8 87:16,19,21 95:16 97:3,7
conclusions (2) 70:7 85:5
concurrent (1) 9:18
condition (1) 131:17
conduct (13) 5:22 6:2 8:6 53:3 77:17 88:16,20 91:9 93:25 94:21,22 95:6 129:8
conducted (2) 132:13 134:11
conducting (1) 77:8
conduit (1) 56:5
confidently (1) 158:19
confined (2) 66:9 96:6
confirm (4) 4:2 33:7 114:1 158:7
confirmation (1) 44:5
confirmed (2) 23:17 47:25
confirming (1) 114:19
conflicted (1) 91:21
connected (1) 122:21
connection (3) 77:18 141:10 158:3
connections (1) 96:22
conscious (3) 74:17,18 132:4
consent (6) 9:3 43:1 45:2,22 91:3 104:5
consented (3) 24:2,4 104:4
consequence (4) 63:1,10 83:25 114:15
consider (4) 8:6 41:21 93:5 149:3
considerable (5) 13:20 60:5 90:15 93:8,22
consideration (3) 65:10 129:24 140:24
considered (9) 21:16 23:6 53:12 68:5 70:20 71:15 74:3 122:8 141:6
considering (1) 149:2
consistent (1) 6:13
consistently (1) 18:12
consolation (1) 75:7
conspicuous (1) 94:12
constitutional (2) 147:2 148:9
constraint (1) 56:17
construing (1) 147:1
consult (1) 90:4
consulting (1) 96:1
contained (2) 36:22 72:23
contains (4) 29:14 37:3 44:5,11
contemplated (1) 56:15
contempt (1) 99:3
content (1) 135:22
contested (4) 47:15 72:21 94:25 95:13
context (7) 3:15 18:13 29:17 48:2 119:25 147:19 148:2
continue (14) 7:14,21 24:12 30:1,20 47:24 76:6 88:15 92:7 95:14 106:2 135:16,16 139:16
continued (3) 32:11 72:24 105:10
continues (1) 114:2
continuing (5) 20:3 41:17,20 48:19 66:4
contractual (1) 30:5
contradict (1) 47:15
contradicted (1) 50:18
contradicts (1) 53:4
contrary (2) 55:25 63:8
contributed (5) 17:11,19 56:1 138:17,21
contribution (2) 139:4,6
contributions (3) 135:5 138:13 140:7
control (20) 5:15 6:21 12:25 13:25 14:1 18:8 34:15 63:5,10 66:5 73:17,23 74:5,14 87:24 89:17 103:17 151:17 155:16 156:6
controlled (6) 12:19 14:2 43:21 44:4 138:23 155:12
convened (1) 116:4
convenience (23) 3:22 16:25 17:3 19:3 21:25 37:14 69:17,20 73:13,19 74:3 76:9,15 77:13 78:1 79:2 84:19 85:6,19,21,24 111:16 149:5
convenient (4) 53:18 74:21,22,23
conveniently (2) 121:23 141:4
convening (1) 1:7
core (4) 62:1 69:3,7,11
corners (1) 148:3
corporate (5) 26:24 36:2 126:5 142:11 144:9
corporations (1) 109:1
correct (13) 3:19 16:6 20:24 23:25 24:1,6 51:24 64:21 117:6 128:10 135:24 139:2 141:22
correctly (8) 44:19 55:17 57:4 67:6 91:7 98:21 111:24 136:4
correspondence (2) 50:19 132:16
cost (4) 48:19 80:14 90:15 105:10
costs (3) 78:10 91:23 111:13
council (2) 147:18 148:14
counsel (4) 107:5,9,18 117:1
count (1) 82:3
counterparties (1) 105:19
couple (1) 127:14
course (70) 7:22 13:18 21:13 25:21 26:6 28:17 30:2,22 31:13,16,17,23 32:1 41:22 42:14 43:5,17 47:2 52:16,24 61:25 65:20 71:23 72:24 73:10 77:21 82:16 83:3,11,15,21,24 84:4,8 86:9 89:7,16 90:6 101:11 105:9,13,14,20,23 106:2 107:4,7,22 108:1,7 111:1 114:8 119:15 120:15 121:15 123:25 125:10 128:15 129:9 134:2,10,13 135:4,8,9 136:3,8,9 148:25 149:8
courtroom (1) 76:3
courts (4) 53:20 79:16 84:11 119:12
cover (3) 72:14 121:6,7
covered (11) 26:23 27:6,15 28:5 29:22 40:10 71:25 86:16 110:16 117:10 118:13
created (1) 92:17
credits (1) 140:9
critical (2) 110:4 140:15
cross (1) 78:12
crossundertaking (21) 44:24 45:5,11,21,23 46:4 48:23 78:2 93:11 119:1,3,13,22 120:13 130:14,15,16 131:6,16 155:23 156:2
crossvine (1) 119:4
crystal (1) 65:13
current (3) 15:11 82:13 114:9
currently (5) 6:24 7:23 15:22 39:14 123:9

D

d (1) 159:1
daf (19) 1:10 5:17 6:12 17:7,25 18:19 32:12 37:24 83:9 142:19,20 143:17,21,25 144:3 145:2,11,16 150:25
dafs (1) 145:9
dallas (1) 109:2
damages (12) 37:16,18 38:2,7 45:6,11 46:4 48:23 93:11 119:2 120:13 123:4
danger (5) 70:4,16 77:24 87:7,13
dangerous (1) 106:18
date (9) 2:3 32:18 41:16 42:10 51:19 91:24 115:23 158:14,15
dates (2) 41:12 104:12
day (3) 72:10 89:20 92:18
days (5) 51:1 53:11 72:17 89:1 120:4
deal (24) 2:24 3:23 14:5 16:13 29:3 32:15,16 34:14 35:16 36:24 43:22 44:1 50:9 57:2,7 84:8 103:13 105:19 107:19 109:18,21 118:20 133:19 148:22
dealing (10) 8:18 63:16 89:6 93:3 95:1 105:22,23 121:8 137:13 157:1
dealings (6) 65:20 71:23 72:24 83:24 101:10 128:8
deals (4) 69:20 108:15 114:23 130:22
dealt (9) 39:2 70:19 73:10 76:17 78:5 114:7 116:24 121:7 128:19
debate (1) 135:8
debt (2) 103:19 104:2
decade (1) 63:18
december (6) 72:17 85:21,24,25 92:15 108:17
decide (2) 54:13 148:11
decided (6) 23:7 39:11 52:15 58:18 158:10,11
deciding (1) 85:14
decision (13) 23:16,18 24:9 41:25 53:6 65:14,15 67:12 109:10 148:14 154:23 158:12,19
declare (2) 20:25 155:10
declined (4) 6:17 8:9 57:13 69:15
deductions (1) 140:8
defaulting (4) 86:4 103:24,25 155:10
defendant (4) 1:16 26:24 111:15 132:21
defendants (12) 24:21,24 34:12 43:1 70:3 73:20 78:11 100:15 121:17,19 123:12 130:4
defer (2) 104:11,13
deference (2) 18:5,15
defined (2) 125:13,16
delay (2) 52:25 129:15
delivered (1) 53:14
demands (1) 2:2
demonstrate (1) 7:1
denials (1) 71:5
denied (2) 13:17 95:7
depart (1) 148:9
depending (1) 28:22
deplete (1) 37:25
deprived (3) 6:8 53:15 54:2
deprives (1) 54:19
derivative (1) 23:12
descending (1) 40:18
described (3) 43:19 96:24 98:5
despite (1) 73:4
detail (10) 5:23 16:12 53:10 54:9 77:12 86:10 103:14 118:2 130:7 147:4
determination (3) 6:14 64:9 66:3
determinations (1) 53:25
determine (2) 53:23 54:19
determined (3) 72:25 115:18 140:23
develop (3) 46:17 47:18 83:2
development (1) 105:3
dfw (60) 1:16 7:23,24 15:12,21 19:7,18 20:1,5,9,12,17,21 21:5,8 26:19 27:7 30:2,20,25,25 31:11,15,22 32:4,11,17 33:4 38:3 40:15 41:4,11,14,25 57:18,24 66:14,15 84:13 107:7,12,21 108:4,6,12 110:23 132:21,24 133:7 134:3,12,14,24 135:5,16 136:10 149:1 151:3,10,18
dfws (1) 31:16
dicta (1) 148:16
didnt (22) 9:8,13 10:4,19,20,24 11:6,11,14,15 14:22 23:8 24:3 31:4 45:13 49:25 84:13 107:9 110:12 144:7 152:23 155:3
difference (4) 33:20,22 76:14 133:14
different (7) 28:24 32:12 38:4 41:24 96:12 121:19 145:19
difficult (4) 50:17 58:16 59:24 158:18
difficulties (1) 112:16
difficulty (4) 44:22 77:6 93:17 124:20
diminish (1) 34:14
direct (6) 23:3,11 30:21 109:25 126:1 154:20
directed (2) 52:8 144:4
directions (2) 3:18 18:10
directly (6) 9:22 12:7 19:3 34:17 83:5 125:7
director (16) 20:14 27:3,14,17 97:9 101:16 123:10,24 124:7 125:23 126:17,24,25 153:6,18 157:3
directors (31) 5:11,19 6:7 7:13,19 8:5 18:18 20:19,25 21:4 23:4 27:21 28:9,16,19 31:14 32:19 40:10 72:3 76:14 77:17 78:21 94:20 95:8 97:12 101:6 110:12,20 123:2 151:15,19
disagree (1) 55:8
disappointingly (1) 6:16
discern (1) 119:20
discharge (2) 100:22,22
disclose (1) 44:6
disclosure (29) 8:19 29:15,18 30:16 31:1,5,6 33:23 34:3 37:4,6,10 40:1 42:12,23,24 43:4,7 44:7 48:20 73:4 80:13 90:19 98:8 105:11,11 111:8,12 117:20
disclosures (1) 43:18
discovery (1) 111:20
discretion (12) 11:19 20:24 21:4 46:24 47:2,6 70:11,13 80:9 85:18 134:24 140:19
discretionary (7) 69:16 77:9 79:3 85:5,8 134:6 142:9
disenfranchise (1) 134:19
disenfranchisement (1) 134:21
dismiss (2) 48:25 65:15
dismissal (1) 46:15
dismissed (1) 50:14
dispose (2) 34:13 125:6
dispute (10) 24:7 30:9 57:6 67:11 81:18 96:5 104:20 111:3 136:11 156:6
disputed (3) 64:22 123:15,21
disputing (1) 30:10
dissipate (2) 89:10,24
dissipated (1) 8:8
dissipation (36) 8:4 12:12 47:13,21 48:11 53:2 56:12 64:19 66:2 71:16 77:20 81:5,13 82:23 86:16 87:2,10 88:13,18,23 90:21,25 91:6,11 92:1 94:1,10,14,24 95:16 97:14,18 102:22 103:3 112:8 150:20
dissonance (1) 61:1
distinct (1) 132:24
distressed (1) 82:7
distributed (1) 58:1
distribution (8) 20:25 32:19 34:19 58:3,5 106:3 108:4 111:1
distributions (27) 7:23,25 21:17 30:24 31:15 56:4,4,11 57:25 61:12,16,24 62:2 83:9,14 107:11,21 108:6,8,12 109:5 110:23 140:19

141:10,25 144:5 146:17
dividends (3) 15:7 20:18 146:10
division (1) 138:1
document (4) 58:24 59:1 60:19 143:9
documented (1) 95:11
documents (6) 15:20 59:2 147:2,3 148:4,9
does (18) 28:14 31:10 51:9 53:21 59:9 60:13 83:8 85:13 95:14,16 122:18 123:14 124:8 126:13 130:24 142:2 147:13 155:14
doesnt (10) 13:24 26:14 27:7 28:8 29:3,13 82:20,22 105:13 116:2
doing (6) 1:22 38:5 102:4,12 128:23 151:23
dollars (4) 28:18 145:19 151:8,13
donate (1) 145:19
donation (3) 32:5,17 61:14
donations (24) 20:8 31:10,19,22 32:7,11 33:4,9 38:4 40:7,15 41:13,21,23 42:1 62:17 107:7 109:5 134:3 135:17 143:23 146:5 150:24 151:13
dondero (35) 12:19 13:11,21 14:1,3,13 43:21 44:4,7 48:9,18 62:19,23 63:2,14,25 64:5 87:24 96:20,23 99:8,15,22 103:17 104:17 105:3 106:13 109:10 115:4 116:19 139:1 144:2 155:13,13,19
donderos (11) 63:10 71:10,13 86:1,9 92:4,8 109:1 114:15 119:4 144:24
done (9) 1:3 19:24 20:23 71:6 74:13 76:13 96:1 104:18 115:11
donor (2) 143:20 144:1
donoradvised (2) 142:18 143:17
dont (44) 7:7 9:16 10:14 16:11 32:15,20 35:4 36:1,25 37:22 38:23 41:15 42:22,23 43:17,22,23 46:23,23 49:15 54:17 57:5 59:6,18,19,23 75:12 80:7 82:3 84:13 92:23 109:7,9 110:1 116:3 120:19 131:24 133:17 149:20,23 151:20,21 154:13 157:12
door (1) 136:16
double (1) 152:22
doubt (16) 13:13 28:12 36:23 41:9 49:20 54:8 59:7 65:24 66:2 87:4 91:13 93:21 99:5 114:4 118:3 155:14
down (26) 10:21,22 28:2 32:24 51:22 52:23 72:14 73:16,16,20 76:19 79:8 81:3 82:1 83:19,25 89:15 108:17 113:16 116:11 129:13 136:17 139:9,16 145:4 158:3
downloading (1) 58:19
draconian (3) 49:3 103:1 106:5
draft (3) 50:20 51:1 94:3
draw (3) 62:5 86:17 144:25
drawing (1) 142:10
drawn (1) 153:17
duane (1) 22:11
due (8) 43:17 52:24 83:3 84:4,8 119:14 120:14 133:14
duplicating (2) 102:9,12
during (6) 58:12 75:16 86:9 91:18 103:12,21
duties (4) 20:13,14 23:4 97:6
duty (2) 5:14 76:14
dwf (8) 56:11,20,24 61:12,18 83:6,10,14

E

e (6) 118:4 125:13 137:22 142:24 143:1 159:1
earlier (13) 48:1 61:13 62:12 77:23 86:22 87:11 92:25 94:2 108:15 110:3 112:16 151:4 156:16
early (1) 92:2
earned (1) 96:10
easily (1) 44:18
easter (2) 158:20,23
economic (13) 17:19 18:2,6,15,23 55:24 139:23 140:11,12,15 141:23 146:22 147:13
education (1) 6:5
effect (4) 18:19 73:21 93:22 128:7
effective (2) 72:15 112:5
effectively (4) 17:17 23:1 80:15 152:20
efficacy (2) 128:25 129:4
effort (1) 72:21
eg (1) 80:19
ego (1) 63:24
egregious (1) 6:3
either (9) 16:18 46:5 49:12 51:23 53:16 64:7 95:18 131:24 149:21
el (1) 150:13
elaborate (1) 123:7
elaborates (1) 78:14
elapsed (1) 74:19
electronic (6) 4:3,8 22:6 35:8 45:19 58:15
element (1) 12:25
else (4) 2:9 130:18 134:25 157:7
email (2) 4:19 113:7
emerged (1) 109:20
emphasise (1) 130:13
emphasised (1) 86:21
emphasising (1) 3:3
employee (2) 28:5,8
employees (1) 110:15
empty (1) 96:25
enable (1) 119:14
encumber (1) 34:14
end (6) 13:15 52:19 54:25 62:9 139:10,18
endeavour (1) 59:22
endeavours (1) 146:12
endorse (1) 79:15
enforce (3) 25:23 99:5,10
enforceable (4) 98:22,23 115:3 148:12
enforced (2) 99:21 115:5
engage (1) 71:22
england (1) 133:14
enough (2) 33:13 132:14
ensures (1) 114:7
entailed (1) 96:14
enter (2) 25:14 89:3
entered (9) 16:1,3 25:17 71:20 91:2 93:2,18 102:23 108:17
entering (1) 19:13
entertain (1) 54:16
entirely (15) 2:5 28:24 29:24 30:22 31:15 38:8 88:21 93:19 101:3 104:19,20 105:11 112:1 134:6 149:7
entities (33) 5:15 26:23 27:6,16,17 28:6 36:2 43:21 44:8,12 48:15 57:3,9,11 62:3 63:5 71:25 89:2 110:16 114:5 122:16 124:12 125:5,8,12,13,16,24 126:5 139:1,1 144:2 146:25
entitle (2) 68:8 74:4
entitled (13) 17:1 21:16 23:5 31:18 33:24 42:13 74:7 132:8 134:16,18,21 156:1,7
entitlement (5) 80:4,8,20 146:20,25
entitlements (1) 148:12
entity (4) 66:15 103:16 106:3 152:6
entry (1) 57:7
equally (2) 85:19 155:25
equitable (1) 18:7
equity (2) 138:18 145:10
equivalent (1) 103:8
eric (1) 60:20
essential (1) 119:13
essentially (1) 96:13
establish (2) 73:9 85:1
established (2) 68:19 86:25
establishment (1) 96:3
estate (1) 136:19
etc (2) 80:21,21
euphemistically (1) 5:17
evaluate (1) 77:16
evaluating (1) 53:8
even (22) 7:18 8:10 29:18 40:2 47:9,19 48:8,21 66:7 69:10 74:1 94:5 97:21 99:4 102:21 111:17 112:2,3 119:2 126:16 127:9 129:10
event (9) 2:1 9:25 37:2 69:14 82:24 93:21 110:4 121:7,20
eventually (1) 52:16
eventuated (1) 91:1
ever (3) 65:23 91:14 115:6
every (2) 49:4 50:4
everybody (2) 2:5 81:2
everyone (1) 157:18
everything (1) 42:7
evidence (46) 4:23 14:3 27:16 29:1,4 32:3,8 33:8 45:3 46:2 47:14 48:1 53:13 58:5,8 61:11 70:9,20 71:1,4,12 73:3 77:9 87:1 88:12,14 90:18 91:4 94:13,23 95:9 96:4 99:1 100:12,17,18 103:10 108:11,14 109:6 112:12 114:16 122:18 128:23 148:1,10
evidenced (1) 94:20
evidences (1) 97:13
evidential (1) 117:19
exact (1) 158:14
exactly (8) 22:18 56:20 57:13 85:17 88:3 105:2 113:20 135:21
examine (1) 94:12
example (4) 40:8 54:7 64:11 93:24
examples (1) 53:3
exception (7) 65:19 72:23 83:24 105:20 106:10 136:8,10
exceptionally (1) 132:20
excessive (5) 5:19 7:14 96:7 97:5 127:20
exchange (2) 107:24 144:22
exchanges (1) 116:12
exclusively (1) 139:14
excuse (5) 9:7 11:2 135:16 140:16 153:1
exempted (6) 18:13 68:20 147:9,19 148:2 150:6
exercise (5) 46:25 47:3 70:10 104:20 112:5
exercised (2) 47:7 154:24
exercising (2) 10:16 12:5
exhibit (3) 51:8 59:3,5
exhibited (3) 13:9 51:13 112:25
exhibits (5) 4:18 51:7 58:22 60:11,21
exist (1) 105:13
existence (2) 53:4 95:13
existing (3) 21:15 56:16 101:25
exists (1) 68:24
expect (3) 30:7 130:24 146:10
expectation (2) 134:22 146:20
expected (2) 90:25 131:15
expenditures (1) 74:15
expensively (1) 56:14
experience (3) 68:23 153:20,21
expert (1) 96:4
expired (1) 129:12
explain (5) 25:6 93:9 124:20 143:17 147:12
explained (6) 5:23 34:1 100:11 129:10 130:3 144:6
explaining (1) 52:10
explains (4) 92:25 93:4 115:15 117:7
explanation (5) 22:13 54:3,6 126:10 131:5
exposed (4) 48:13 63:12,20 96:20
express (2) 44:5 53:15
expression (2) 107:3,14
expressly (6) 8:11 56:14 79:4 89:4 92:20 117:9
extend (2) 126:7,7
extending (1) 124:14
extent (4) 14:2 57:17 66:17 126:23
external (2) 148:1,10
extracting (1) 93:23
extremely (1) 158:18

F

f (1) 125:13
face (4) 78:5 96:18 110:13 125:11
facility (2) 104:1,12
factor (4) 85:13 86:7 106:13 155:23
factors (3) 70:15 85:17,19
failed (5) 52:5,7 90:13 92:6 120:6
failure (3) 29:10 46:20 49:7
fair (9) 17:5 39:24 93:4,15 120:11 130:25 132:6 153:12,16
fairly (1) 131:15
faith (1) 7:20
fall (3) 52:22 100:10 116:7
falling (2) 29:2 115:17
falls (2) 28:21 120:23
falsely (1) 55:25
falsification (1) 85:8
falsity (1) 44:3
familiar (3) 33:10,13 87:4
family (1) 93:3
fanciful (5) 99:1,4,23 101:11,15
far (7) 21:6 61:18 116:22 119:20 132:15,15 148:20
fatal (1) 67:1
favour (3) 32:4 73:20 81:4
favourable (1) 24:9
favours (3) 3:22 17:3 37:14
features (1) 68:23
february (5) 51:1 52:2,9,13 129:12
fed (1) 109:9
feel (2) 10:6 12:6
fees (10) 28:16 29:24 30:3,6,11 104:13 110:11 152:2,7 156:15
feet (3) 45:17 51:20 111:4
fellow (1) 101:16
few (7) 1:4,18 2:8 3:3 51:1 55:1 76:2
fiduciary (2) 5:14 23:3
field (46) 14:22 15:2,10,15,18,25 16:4 19:5,12,15,19,25 21:2,18 31:9,20 32:3,14 34:8 67:21,25 106:21 107:1,14,25 108:10,19 109:1,11,14 111:19 115:13 120:21 122:2,5 132:1 146:24 147:6 148:5,8 149:23 150:1,6 157:14 158:2,7
fields (2) 56:22 57:17
fifteen (1) 45:17
fifth (7) 19:12,18 48:21 79:1 111:5 118:20 123:12
fifthly (2) 29:14 94:11
fight (2) 91:19 135:11
figure (1) 153:2
filed (1) 96:4
final (4) 29:23 79:1 118:21 155:5
finally (6) 44:23 94:11 107:16 118:20 140:14 155:22
finance (1) 104:13
financial (5) 43:2 44:15 89:4 90:9 131:16
financially (1) 131:9
find (12) 32:20 33:9 51:6,12 58:23 60:3 111:3 112:22 124:22 150:4 152:14 153:8
finding (2) 18:13 90:12
findings (2) 87:5 113:23
fine (2) 67:25 150:15
fingers (1) 81:3
finish (4) 1:19 75:15 133:15 148:8
firm (2) 50:25 96:1
firmly (3) 73:20 87:8 88:19
first (38) 1:19 2:7,7 10:5 17:19 20:16 23:7,18 26:15,18 27:5,10 37:16 38:13 46:19 47:8 49:5,7,14 50:1 52:18 53:20 55:12,21 58:20 65:12 67:14 86:19 95:1 109:23 112:18,23 113:8 129:21 140:18 147:10 154:19 155:4
firstly (1) 98:21
fist (1) 137:18
five (9) 4:17 46:14 59:1 86:17 97:15 98:12,18 123:17 125:23
fix (1) 58:6
flatly (1) 50:18
flavour (1) 71:4
flies (1) 110:13
focus (1) 53:5
focused (1) 76:23
follow (5) 43:5 68:17 75:12 148:19 149:16
followed (3) 60:6 89:12 91:16
following (6) 3:13 70:21 71:17 95:25 97:2,10
follows (2) 37:9 124:4
followup (1) 149:24
footnote (1) 32:23
force (1) 102:1
foregoing (2) 48:22 141:9
foreseeable (1) 47:24
forgive (8) 9:4 11:9,13 21:22 24:18 74:16 140:1 148:18
form (6) 25:15 48:17 66:8 84:6 125:1 138:22
formality (1) 124:17
formally (1) 129:12
formed (2) 85:9,10
former (4) 151:23 153:5,6,18
formerly (1) 66:13
forms (3) 89:12 106:11 118:13
formulates (1) 68:4
forth (1) 138:14
fortification (5) 44:24 45:24 79:5,8 119:5
fortified (4) 48:24 93:10 120:14 130:15
fortiori (1) 126:14
forum (1) 24:6
forward (7) 45:4 46:2 64:13,14 94:13 98:12 119:19
fought (1) 82:15
found (10) 6:11,12 51:16 55:17 64:3 91:7 109:8 111:13 149:12,14
foundation (3) 41:3,5,11
foundations (7) 71:14 88:4 92:5 99:6,13,15,17
four (19) 6:4 8:1 15:4,6 19:10 21:15 32:25 56:8 57:19 58:2 61:20 63:9 83:7 108:21,23 134:7 145:13 146:19 148:3
fourth (8) 1:16 48:10 77:25 91:8 100:24 118:12 132:21 141:7
fourthly (1) 28:20
fragmented (2) 4:8,25
frame (1) 65:1
framed (2) 124:18 136:7
free (1) 7:13
freezing (7) 48:15 105:15,17 106:5,12 119:8 120:11
friday (1) 1:1
friends (13) 13:23 50:25 55:19 90:19 100:13 101:17 108:9 109:20 110:17 119:21 141:2,4 149:2
frustrate (1) 124:1
frustration (1) 100:22
full (6) 44:13 52:17 53:11 66:17 119:14 153:15
fully (1) 84:8
fund (73) 27:7 35:17 42:13 44:18 55:14 57:13 61:17,20 62:16 63:7,19 64:5 65:18 66:4,21 67:1 68:7,10,15,23 69:5,13 71:8,11,21 72:1 73:23 74:5 78:18 82:1,12,14 83:18,25 85:2 89:1,16 92:7 95:21 96:15,19 101:4,5,7,10,12 103:20 110:7,8 122:14,15,19,22 123:10,11,21,24 125:5,8,8,9,12,13,16,24 126:12,22 127:5 142:18,20 143:17 145:2 155:10
fundamental (1) 155:20
fundamentally (8) 49:24 55:7,23 56:10 61:22 81:14 96:12 136:1
funded (2) 146:3,16
funder (2) 48:9 119:3
funding (7) 12:24 13:1 15:12 62:14 92:9 99:16 131:13
funds (9) 6:8 40:13 62:1 63:11 89:7 96:16 109:25 143:21 144:4
further (20) 14:12 15:24 19:6 24:16 45:8 46:7 48:17 82:25 85:16 88:3,8 93:24 103:7 120:16 128:14 146:4 149:17,23 156:18 157:10
future (2) 47:24 146:16

G

gains (1) 140:8
gap (1) 40:1
gave (8) 50:6,7 73:12 76:11 82:18 105:4 129:12 140:2
general (13) 26:19 68:18 122:20 128:13 137:15 139:14,23 140:6,11,20,23 141:15 142:5
generally (1) 121:17
genesis (1) 25:16
genuine (1) 94:8
get (17) 6:23 12:3 14:7 17:23 24:3 25:25 38:6,22 39:21 59:24 62:9 82:8 86:24 102:15 135:17 142:19 156:5
gets (4) 80:25 84:17 111:4 141:21
getting (1) 4:10
give (39) 3:14 5:20 8:12 10:10 12:2 15:18 20:1,21 22:13 24:16 26:14 30:16 36:1 39:23 42:23,23 43:10 44:13 48:19 51:5,23 59:21 67:8,22 71:3 72:13 89:21 92:19 98:17 104:16,24 105:10 116:12 122:2 129:20 134:23 156:2 158:11,13
given (29) 2:20 3:18 16:9 18:5,16 48:6 52:21 70:20 73:5,15 78:9 81:5 86:2 90:20 92:24 93:14 112:15 116:17 117:23,24 118:1 119:20,22 120:1 129:15 136:22 142:12 151:3 155:17
gives (5) 17:4 43:14 106:15 112:21 139:13
giving (8) 76:24 82:4 103:8,23 104:10,23 105:7 155:9
glad (1) 24:22
global (1) 96:1
gmt (1) 158:24
goes (8) 16:24 41:15 75:10 83:5 93:9 134:8 135:12 140:15
going (35) 5:18 8:8 9:10 13:13 14:4 26:11 38:5 39:25 40:4 41:16 42:13 59:19 65:9 73:7 75:3,15 80:13 102:2 109:18 112:11 116:5 118:22 121:4 125:17 129:2 132:7 133:21 137:20 141:17 142:25 146:16 148:19,20 155:18 158:11
gold (1) 81:20
gone (8) 11:1 40:13 41:23,24 42:3 56:4 88:5 158:3
good (12) 4:6 50:7 54:23 58:15 70:18 75:20 78:13 82:10 102:17 112:13 113:4 153:2
goodman (4) 7:6,7,8,10
governance (1) 71:22
governed (1) 138:8
gp (1) 26:19
grand (20) 5:10,24 9:17 10:14,23 12:13 13:6,15 14:18 22:10 40:17,18,20 120:5 137:21 141:3 142:22 151:5 155:24 156:11
grant (27) 6:17 11:11,17 12:5 38:9 39:1,7 47:10 50:13 55:4 65:3 69:25 78:13 85:14 103:4 112:4 121:21 124:3,12 126:4,11 146:7 149:2 154:2,10,17,20
granted (8) 2:16 13:2 48:13 65:8 70:2 73:21 78:17 118:14
granting (8) 3:22 17:4 25:13 103:1,8 106:8 119:10 124:8
grants (3) 105:1 151:8,9
grateful (10) 3:11 51:15 54:16 76:7 77:3 115:14 116:10 133:24 157:22 158:21
gratefully (1) 133:6
great (2) 2:2 81:2
greater (1) 96:8
gross (1) 5:14
ground (7) 49:6 86:16 97:23 117:10 118:12 121:6 138:24
grounds (8) 16:12 19:2 46:14 69:1,3,6 84:21 95:8
groups (1) 80:7
grown (1) 96:16

guidance (1) 3:12
guys (1) 59:24

H

half (1) 151:11
hand (1) 83:7
handed (4) 10:21,22 52:23 129:13
hands (3) 33:14 94:7 99:7
happen (3) 100:4 116:5 136:14
happened (12) 19:17 21:13,14 25:7 38:24 56:20 87:25 88:1 91:4,18 92:4 94:2
happening (2) 30:13 88:10
happens (4) 28:22 38:12 45:16 104:16
happy (3) 44:1 62:7 74:24
hard (1) 78:21
hardship (3) 65:11 129:18,21
harm (4) 79:17 102:4 105:8,9
hasnt (1) 131:6
havent (3) 38:17 109:3 152:3
having (19) 7:12 11:25 18:23 24:16 26:3 40:16 50:4,14 60:14 62:11 68:18,22 71:15 74:19 84:20 88:1 96:16 105:10 113:22
haynes (2) 143:14,16
headed (4) 41:3,4,6,11
heading (3) 67:13 73:16 122:6
headings (1) 3:14
hear (9) 2:21,25 31:4 39:4 45:14 107:16 116:4 155:3 158:4
heard (3) 28:12 53:11 100:11
hearing (30) 1:24 2:3 3:5 4:15 8:13,24 25:10,11,16 38:18 41:9 42:10 50:23 59:8,11 72:10,15,21 80:16 81:8 85:21 86:10 92:13 103:12,21 116:24 128:24 133:1 143:12 158:25
heart (4) 70:17 134:8 135:12 136:11
heavy (1) 72:12
held (9) 66:13,14 111:23 125:7,19 126:15,16 127:19,20
help (6) 45:7 60:16 112:21,21 131:21,25
helpful (9) 2:15 15:14 22:12,17 35:5 84:10 109:16 128:2 133:9
here (42) 6:15 10:3 13:7 16:23 17:6 18:22 20:12 21:13 23:2 24:3,25 25:1 26:2,4 47:7 53:2 60:17 64:3 74:4 77:4 81:22 83:4,17 86:17 88:25 102:3,10 111:25 112:10 117:8 118:18 135:20 140:5 143:18,24 144:10 145:8,21 146:9 148:19,22 155:25
hes (1) 158:3
highland (11) 71:14 88:4 92:5 99:6,12,15,17 109:2,2 138:25 144:2
highlight (2) 143:19 145:8
himself (5) 86:20 87:12 123:14,22 125:20
historic (4) 47:15 73:7 90:7 95:5
history (1) 116:16
hold (9) 80:15,21,25 81:6 122:19 123:15 124:13 126:13 135:14
holdco (11) 1:10 63:21 89:2 100:25 101:4,13 103:18,23 110:5 138:18 145:12
holding (3) 89:2 110:6 114:10
holds (2) 66:15 123:21
hope (8) 36:17 54:8 82:4 106:15 112:21 121:4 157:19 158:4
hopefully (3) 33:13 40:19 158:13
hostile (1) 63:1
hotly (2) 64:22 94:25
hour (1) 45:16
hours (1) 74:18
however (7) 98:23 122:17 123:13 136:20 139:20 141:4 153:16
hundreds (1) 53:12

I

idea (6) 75:20 102:7 134:1,3 137:15 150:19
ideal (1) 39:23
ideally (1) 136:16
identify (3) 67:6 98:19 128:17
identifying (2) 29:20 112:16
ie (1) 33:1
ignorant (1) 80:22
ignore (2) 99:13 141:4
ignored (2) 96:11,22
ignores (5) 93:19 99:12,13 119:25 120:2
iii (2) 138:1,3
ill (3) 14:11 25:5 147:7
illusory (1) 91:7
illustrate (1) 77:5
illustrated (1) 63:20
illustrates (2) 42:12 135:1
im (9) 4:12 9:11 48:7 56:9 62:11 106:25 116:10 143:11 158:4
imagine (1) 19:6
immediate (1) 88:9
immediately (1) 158:11
impact (2) 78:20 145:17
impacts (2) 106:8 117:19
implications (2) 52:25 53:6
important (7) 16:23,23 29:18 34:2 40:2 72:8 124:6
importantly (1) 144:13
imposed (1) 67:19
imposes (1) 48:15
impossible (3) 38:6 42:1 50:17
improper (4) 19:24 48:17 116:20 134:11
improperly (1) 37:25
improve (1) 54:8
impugn (2) 14:9 69:3
inability (1) 156:2
inadequacy (3) 87:2 111:6,10
inadequate (2) 109:24 150:3
inappropriate (1) 54:15
inaudible (16) 8:7 12:24 15:3 18:11,20 22:15 29:20 128:1,1 133:1 135:17 141:1 144:10 149:4 153:14 156:2
inception (1) 145:16
include (1) 146:5
included (2) 71:4,12
includes (5) 72:1,2 73:3,6 125:4
including (5) 78:20 90:7 96:2 123:11 129:18
income (3) 82:7 140:8 152:1
inconceivable (1) 115:4
inconsistent (5) 88:21 89:9,22 91:9 93:25
inconsistently (1) 101:14
inconvenient (2) 14:8 103:4
increase (6) 28:4,7,15 71:24 110:15 114:9
increasing (2) 110:11,20
indemnification (2) 30:5,8
indemnity (1) 91:23
independently (1) 70:6
index (2) 59:18 60:11
indicate (1) 88:9
indicated (1) 9:9
indicates (1) 9:12
indication (1) 55:3
indications (1) 3:11
indirect (6) 27:8,9 68:9 140:20,25 145:10
indirectly (3) 34:18 125:8 144:1
individual (2) 99:14,16
individuals (1) 78:20
indulge (1) 54:20
indulgence (2) 47:10 54:23
inference (1) 87:3
inform (1) 102:25
information (9) 5:21 8:21 41:16 43:2 44:6,17 73:6 90:10,16
informed (1) 85:17
inherent (1) 105:15
initial (2) 12:24 55:11
initially (2) 17:11 23:24
initials (1) 84:14
initiatives (1) 6:5
injunct (1) 122:15
injunction (95) 3:5,23 6:17 8:15,23,25 9:2,23 10:24 11:25 12:2,6,13,14 17:2,4 25:10 26:14 29:16,19 30:14,14,15 31:2,7,25 34:7,25 35:1,2,19,20,22 36:4,5,8,12,18 37:15 38:10,22,22 44:25 45:9 48:15 50:5 64:12 65:15,17,24 66:9 67:2,18 68:9 69:15 70:1,2 72:12,15 78:4,9,13,17 80:12 83:13,23 89:19 91:13 92:3,11,12 98:11 103:8 105:1,8,15,17 106:13 108:5 111:17 119:8,15 120:5 122:6 124:2,5 127:25 135:11 149:3 154:3,20,22 157:1,2,6
injunctions (3) 29:17 35:25 106:5
injunctive (8) 7:12 65:3 91:16 103:1 124:9 126:4 129:23 130:21
inserted (1) 66:16
insolvency (2) 114:6,14
installments (1) 146:5
instance (9) 10:5 17:20 23:7,18 49:8,14 73:9 90:20 147:10
instead (8) 25:12 52:15 66:4,5 91:18 92:4 94:7 96:5
instruct (1) 1:14
instructed (2) 1:12 66:24
insufficient (1) 2:22
integrity (1) 14:9
intend (3) 89:23 132:20 133:5
intended (4) 8:2 52:3,17 56:6
intense (1) 96:15
intention (2) 89:9 144:12
inter (1) 92:13
interest (49) 5:13 6:19 7:16 8:11 10:25 11:7,7 16:14,17,18,19,19,22 17:21 18:2,23 36:25 37:8,21 43:4 55:24 66:12,14 67:17 68:7,10,13 69:4,12,23,24 74:4 95:2 102:13 122:19,21 125:6 131:12 134:7 137:14 140:12,12 141:23 147:13 149:7 154:7,9,10,12
interested (1) 32:14
interests (12) 17:9 18:6,15 20:15,17,20 46:24 80:19 136:19 138:18 140:16 147:15
interim (67) 3:4,22 8:22,25 9:2 12:14 26:14 30:15 31:2,7 33:21 34:7 35:1,20,22,24 36:3,18 37:15 38:10 42:21 43:22 44:25 45:9 46:13 47:11 48:13,25 52:21 53:17 54:25 65:3 66:3 72:6,13 73:5 78:24 83:12,19 85:15 89:22 92:19 93:1,13,23 94:4 97:20,24 98:2 103:1 104:23 106:23 108:5 111:14 117:3 118:10,14,19,21 119:10,23 120:11 127:24 128:16 135:10 156:25 157:5
interlocutory (2) 73:25 81:25
interrupt (2) 14:24 109:15
interrupting (7) 9:4 11:9,13 21:22 74:16 127:23 148:18
intervene (2) 102:15 129:6
into (32) 8:20 13:25 14:1 16:1,3 17:11,14 24:14 25:14,17 40:18 51:17 56:20 66:16 71:18,20 72:9 86:24 89:3 92:17 93:2,18 102:23 108:17 134:12 138:21 139:1 140:24 155:14,19,24 156:1
introduced (2) 56:18,20
introducing (1) 56:15
introduction (1) 56:24
introductions (1) 1:4
inverted (1) 80:1
investment (4) 152:5 153:19,21,22
investments (1) 139:21
invitation (2) 79:15,19
invite (1) 69:2
involvement (3) 24:13 54:11 126:1
involving (1) 63:17
irregular (1) 60:5
irrelevant (2) 100:9 101:3
irremediable (1) 81:4
island (1) 130:22
islands (9) 24:1,5 28:23 34:16 92:10 98:23 130:18,20 144:10
isnt (8) 2:12 11:21 28:10 80:17 115:24 117:16 146:24 148:16
issued (1) 22:20
issues (7) 3:7 64:9 76:12 95:4 104:6 112:12 118:4
italics (1) 67:15
item (1) 60:12
items (1) 60:11
its (30) 8:3 15:3 17:20 18:24 33:11 46:15 48:18 51:16 55:10 59:10 65:18 66:4 71:22 72:2 75:15 78:18 83:11 85:3 86:5 88:16 89:16 92:8 95:22 101:6,13 122:19 145:2,16 146:18,21
itself (8) 16:18 48:24 68:3 124:8 129:22 137:21 142:4 147:14

J

january (1) 52:20
jeopardy (2) 86:5 104:14
job (1) 59:24
join (6) 23:20,21 24:14 25:24 26:5 126:20
joined (1) 100:2
joint (1) 1:9
jols (100) 42:4 46:19 47:3,10,16 48:3,7,20 49:1,6,8,20 50:19 52:5,11,14,19,25 53:3,6 54:2,7,18 60:6 62:15 64:20 65:15,23 66:7,18 67:2 69:4,10 72:23,25 73:8,17,23 74:10,14 77:6,16 78:24 80:2 81:12 83:13,21 84:24 85:23 86:19,23 88:20,25 89:3,5,13,18 90:4,11,14,22 91:1,9,17,19 92:1,9,17 93:20,24 94:3,16 95:22 96:4,11,21 97:25 98:12,21 99:9,16 100:7,24 102:14 105:24 107:5,10,11 108:5 111:7 114:24 116:4,19,23 117:1 118:17 119:1,18 120:4 122:14
judge (87) 4:19 9:6,8 10:4,5,9,14,22 11:1,4 12:22 25:13 28:12 46:20 49:7,21 50:12,18,19 51:1,8,10 52:2,8,12,14 53:7,10,14 54:7,9,22 55:16 56:13 63:16 64:3,6 65:21 66:23 67:6,9,12,20 68:3 69:14,19 70:15,25 71:15,18 72:5,18 73:1,12,17 74:5,7 77:8,11,22 78:5,7 79:7,22 81:23,24 86:8,20 87:6,11 88:4,8 91:7 92:22 94:2,5 95:3,12 97:7 111:12,23 120:5 122:8 123:7,13 127:19 154:24
judges (13) 65:14 69:3,11 70:7 76:8,20 77:25 79:1 85:4,8,18 95:16 97:3
judgment (30) 5:8 10:21,21 11:3,6 36:7 50:20 51:2 52:22 53:14 55:17 56:14 57:5 63:25 67:5,9,22 69:19 76:18 79:14 84:21 86:21 87:14 94:3 95:24 97:2 121:23,25 127:17 129:13
july (12) 25:17 41:13 45:23 52:21 61:7 70:22 72:7 89:19 108:16 119:23 120:1 143:15
june (1) 13:15
juridical (1) 69:25
jurisdiction (27) 9:15,18 10:10,13,15,16 12:5 23:24,25 24:2,2,4,19 26:2 28:22 48:4,6 50:13 54:19 86:3 98:25 119:12 154:2,17,19,21,25
jurisdictional (1) 24:6
jurisdictions (1) 125:15
justifiably (1) 130:17
justification (9) 84:5 98:10 102:20 106:20 111:11 119:10 124:14 127:1 129:22
justified (1) 120:6
justify (3) 46:15 124:8 126:3

K

kansas (1) 109:2
keen (1) 113:16
keep (2) 88:19 143:11
key (3) 14:8 114:18 133:25
kim (1) 1:14
kind (4) 49:3 61:24 80:23 119:11
knew (2) 135:24,25
know (29) 1:21 2:24 3:2 7:7 17:3 28:25 31:14 32:15 40:13 42:22 58:14 59:12 75:15 82:2 101:21 105:17 109:7,9 116:2,3 120:19 131:24 148:17 149:20 150:8 151:21 154:5 157:12 158:9
known (2) 52:19 142:17
knows (1) 2:5
kobre (1) 1:14
koza (3) 154:13,24 155:1

L

lack (4) 88:17 130:14,15,16
language (2) 88:3 110:1
large (3) 6:4 125:21 134:18
last (20) 4:22 25:18 32:17,18 34:8 45:14,23 52:22 58:3,4 72:7,10,17 89:1,20 91:22 92:18 105:4 112:19 139:18
later (5) 64:17 79:13 89:1 92:22 157:19
latest (1) 61:11
latter (1) 116:20
lawyers (4) 91:21 102:8,9 143:15
lay (2) 69:17 76:16
leading (1) 117:1
learned (26) 13:23 49:22 50:25 55:18,22 56:9 61:23 75:25 84:2 90:19 93:15 98:4 100:13 108:1,9 110:17 119:21 127:24 135:5 139:3 141:2,4 149:1 150:23 155:8 156:24
least (8) 15:19 16:19 21:10,11 36:1 40:12 131:13 136:21
leave (9) 2:11,16 3:8 9:19 24:3 55:4 64:24 65:7 133:22
leaves (1) 7:13
leaving (1) 7:18
left (3) 6:24 38:1 110:20
legal (8) 29:24 30:3,6,11 55:13 71:8 95:10 96:2
legitimate (1) 69:25
lender (4) 86:4 103:24,25 155:11
lengthy (1) 39:16
less (5) 80:22 90:12 107:2 119:4 152:9
lesser (1) 66:8
let (10) 4:14 43:23 46:16 48:23 85:22 128:5 147:7 148:8 152:17 156:9
lets (3) 10:1 25:20 60:3
letter (22) 22:10 50:24 51:3,5,6,8,9,10,19 52:5,9,13,18 143:14,16 144:20,21,24 147:3 148:10 151:6,7
level (1) 151:1
levels (2) 80:21 114:9
liability (2) 63:23 68:20
lies (2) 21:2 77:14
light (8) 3:12 26:1 28:18 29:6 37:7,8 100:1 132:24
lightly (1) 3:17
like (12) 36:2 38:21 39:23 43:6 62:25 101:22 120:20 127:15 131:25 136:16 143:13 149:17
likely (4) 65:6 78:18 85:12 99:2
likewise (1) 101:15
limit (1) 43:12
limited (48) 5:13,21 6:19 7:16 8:11,23 12:25 16:17,22 17:8 18:1,4,13,14,22 25:15 26:13 36:24 56:16,16,18 57:10,14 66:12 68:6,7,13,20 122:19 137:19 138:5,10,16 139:22 140:10,13 141:16,20 142:4 145:11 147:9,11,19 148:2,13 150:12,13 154:9
limiting (1) 121:10
line (5) 18:9,11 20:4 139:19 141:7
linked (1) 43:24
liquidation (8) 5:10 12:22 16:7 19:20 99:19 131:12 141:11,19
liquidator (1) 156:5
liquidators (34) 1:10 12:18,20 13:10,17,22 14:2,5,18 18:3,6 22:16,22 23:10,20,21 25:24 26:3 29:8,15 43:14 44:6 122:13 124:24 126:3,9 127:11,11 128:18 129:13,17 131:1,8,14
list (3) 19:13 33:9 125:15
listed (2) 13:14 92:13
listen (1) 58:18
listening (2) 59:13 127:10
listing (3) 44:13 89:19 93:20
litigant (2) 63:14 99:7
litigation (11) 63:12,13,17,19 82:15 96:18,25 102:15 120:3 132:13 155:7
little (2) 129:18 137:13
location (2) 29:21 33:11
lock (4) 73:16 81:20 82:1 89:15
lockdown (3) 73:22 92:5,10
locked (2) 83:18,25
london (1) 60:18
long (6) 38:12 40:1 75:1,3 136:18 155:15
longer (5) 8:17 15:6 21:16 40:3 108:23
longest (1) 75:8
longtime (1) 96:23
look (9) 25:20 40:16 43:7 53:25 60:19 69:1 124:21 147:20 148:3
looking (10) 21:20 26:10 32:10 34:9,10 35:8 62:4 106:22 135:13 147:25
looks (1) 143:13
lords (65) 1:6,9 5:7 7:3 12:6,10 13:12 14:10 16:9 17:7 18:17,22,25 22:1 23:22 25:5 26:16 27:22 28:25 30:19 37:11 40:14 41:18 42:9 44:23 46:7,16 48:10 49:5 64:24 74:17 84:18 88:17 91:8 93:24 94:11 97:11,21 100:7,24 127:23 131:19 132:4 133:12 137:18 138:6 139:8 140:14 143:18,24 144:12 147:5,8 149:15,17,21 150:18,22 154:13 155:5 156:17,22 157:9,12,22
lordship (23) 4:4 35:7 40:19 41:12 42:6 51:25 59:9,21 60:13,19 61:10 67:13 77:16 79:23 82:22 104:19 106:15 112:1 116:13 119:7 122:7 138:10 139:17
lordships (64) 1:7 3:13,18 4:3 5:8 6:1,14 16:9,15 17:3 26:12,17 28:2 34:2,4 35:14 39:6 41:18 43:6 44:8 45:7 50:21 53:9 54:5 56:1 68:2 69:1 70:5,14 73:14 77:16 78:7 79:7 81:10 83:5 87:11 88:11 92:23 94:17 102:19 119:7 121:24 124:21,25 127:16 130:11 131:21 134:1 135:15 136:17,20 137:24,25 139:11,16,24 142:21 143:7 144:14 149:3 151:4 154:4,15 156:18
loss (3) 78:17 119:17 131:4
losses (2) 138:2 140:8
lost (4) 50:4 52:20 57:22 140:1
lot (9) 80:14 102:10 121:5 130:7 149:20 150:8 151:24,25 152:2
lots (1) 150:15
lovely (1) 62:17
lower (4) 53:20,22 87:6 113:11
lp (1) 102:13

M

macinnis (2) 32:9 54:4
main (12) 25:12 30:14 31:25 33:22 34:25 35:1,19 36:5,11,12 39:8 86:13
maintain (2) 108:6 129:4

maintaining (1) 107:19
majored (1) 149:5
majority (6) 20:1 25:2 55:8 69:5 125:24 141:17
makes (10) 2:3 37:2 38:3 49:19 82:8 100:19 106:14 111:7 145:8 147:18
making (19) 13:19 31:10,15 43:24 47:17 61:16,23 62:2 75:8 83:9 89:8 105:7 106:3 119:16 124:4 127:1 129:23 135:5 141:2
man (1) 96:24
manage (2) 36:20 139:14
managed (2) 18:19 58:18
management (5) 96:15 151:24,25 153:19,21
manager (1) 27:2
mandamus (1) 23:15
mandatory (1) 49:18
manner (5) 7:20 8:5 134:11 140:22 144:8
manoeuvres (2) 48:18 114:15
many (2) 53:12 93:5
maples (5) 4:12 50:25 52:9,13,18
march (5) 1:1 52:16 59:11 129:14 158:14
marcus (1) 121:4
mareva (4) 64:11 65:24 86:20 91:13
mark (5) 26:18 27:2 60:20 143:15 152:10
marked (2) 21:6 79:13
market (1) 82:9
material (1) 93:6
materially (1) 121:19
materials (1) 95:12
matter (12) 2:18 43:5 54:1,13 55:9 66:10 70:10 92:15 95:19 120:10 147:22 154:6
matters (7) 2:8 47:16 54:12 57:4 85:24 94:24 133:19
maturity (1) 104:11
maybe (1) 32:16
mean (10) 10:6 13:24 36:6 38:13 42:2 59:24 62:14 82:6 148:17 153:11
means (4) 7:3,22 65:8 78:3
meant (1) 84:13
meantime (2) 100:4 112:9
meat (1) 3:20
media (1) 82:19
melanie (1) 1:21
member (1) 32:16
membership (1) 66:14
mention (2) 2:4,8
mentioned (3) 15:10 52:18 62:3
mentions (1) 84:7
mep1 (1) 59:19
mercer (1) 96:1
mercers (1) 96:5
mere (2) 87:3 124:6
merely (2) 96:25 124:16
merit (1) 53:17
merits (5) 19:1 55:2,10 64:24 69:9
met (1) 99:5
microphone (1) 14:23
midwave (14) 13:8 86:1 103:11,11,16,22 104:9 114:16 117:14 118:4 155:7,7,10,12
might (14) 1:4 34:5 51:23 78:19 89:5 90:25 100:15 102:17 124:2 128:18,25 129:7 134:25 150:11
mildly (1) 132:17
million (16) 17:13 82:13 86:5 91:23 96:17 104:15 123:18 145:24 146:1,3,8,13,14,16 151:10,19
millions (5) 28:18 123:20 145:19 151:7,13
mind (1) 88:19
minded (1) 55:4
mindful (1) 55:2
mine (1) 93:13
minimum (2) 140:7 141:16
minute (1) 91:22
minutes (3) 45:17 75:5 133:15
mirror (6) 33:25 35:15 84:3 98:5 142:17 144:8
mishearing (1) 28:13
mismanagement (1) 14:19
misrepresentations (1) 116:23
misrepresented (2) 48:7 116:18
miss (1) 115:1
mission (1) 145:3
misspoke (1) 61:13
misspoken (1) 150:11
mistake (1) 51:11
misunderstood (3) 17:16 50:15 133:13
misused (2) 48:8 116:20
modest (1) 123:19
moment (8) 2:3 59:21 81:19 82:10 101:20 111:21 114:17 153:4
money (11) 14:4,14 38:6 62:16 80:14 82:8 102:8 122:25 123:15 155:14,19
monies (1) 88:5
month (3) 44:12 52:17 94:7
monthly (2) 44:16 90:9
months (5) 45:3 46:1 73:6 89:12 90:11
moran (143) 1:4,6,17 2:11,13,21 3:8,9,10,20 4:6,13 5:1,5 7:12 9:4,7,14 10:12,20 11:22 12:10 15:1,9,13,17,21 16:2,6 19:11,14,17,20 20:11 21:9,23 22:5,8,12,19 24:21,24 25:1,5 28:11,14 31:6,12,24 32:6 33:3,7,12,17 34:25 35:7,11,14,20,24 36:8,14,17 38:19,24 39:25 40:24 41:1,4,7,11 42:5,9 43:10,25 44:11 45:12,13,16,20 46:7 49:22 76:1 111:2 123:20 127:23 128:10 132:4,9 133:11,12,17,24 136:6,15,25 137:4,7,9,12,24 138:5,8 140:3,5 143:1,5,7,10,14 144:17,19 145:7 147:5,7 148:7,14,20,23 149:14 150:11,17 152:4,13,20 153:1,7,10,14 154:1 155:2,5 156:15,21,22 157:8,9,13,15,22 158:21 159:2,4
morans (1) 55:8
more (35) 6:2 8:23 12:6 14:10 18:25 25:15 26:13 29:18 33:10 34:4 40:2,4 58:16 63:11,17,23 68:3 69:8 86:5 91:23 94:7 99:24 104:14 107:2 130:11 132:5 133:5 143:13 145:22 151:19,24 155:14,19,20 156:4
moreover (2) 68:21 83:12
morning (10) 1:8 98:5 100:14 101:18 106:1 109:21 110:18 113:6 119:21 130:9
morris (1) 22:11
most (5) 28:17 58:14 65:17 78:21 131:7
mountain (1) 84:24
move (4) 88:2 94:4,5,6
moved (5) 65:16 92:2,5 120:3 151:17
moving (3) 11:18 37:11 88:7
ms (151) 1:4,6,15,17 2:11,13,21 3:8,9,10,20 4:6,13 5:1,5 7:12 9:4,7,14 10:12,20 11:22 12:10 15:1,9,13,17,21 16:2,6 19:11,14,17,20 20:11 21:9,23 22:5,8,12,19 24:21,24 25:1,5 28:11,14 31:6,12,24 32:6 33:3,7,12,17 34:25 35:7,11,14,20,24 36:8,14,17 38:19,24 39:25 40:24 41:1,4,7,11 42:5,9 43:10,25 44:11 45:12,13,16,20 46:7 49:22 54:4 55:8 76:1 111:2 123:20 127:23 128:10 132:4,7,9,19,20 133:11,12,13,17,24 136:6,15,25 137:4,7,9,12,24 138:5,8 140:3,5 143:1,5,7,10,14 144:17,19 145:7 147:5,7 148:7,14,20,23 149:14 150:11,17 152:4,13,20 153:1,7,10,14 154:1 155:2,5 156:15,21,22 157:8,9,13,15,22 158:21 159:2,3,4
much (36) 1:7,17 3:10 15:20 33:10 40:25 41:2 44:22 58:16 60:7 63:9 68:1 75:6 78:23 81:19 86:16 90:12 105:6 106:14 120:18,21 121:5,14 122:5 131:23 132:3 133:8,10 135:18 137:11 140:4 141:2 156:14 157:11,14 158:22
multiple (4) 38:4 41:14,24 96:18
murphy (49) 5:11 27:12,13,22 58:21 71:6 72:4 92:24 97:9 100:25 101:5,15 120:24 121:12 122:7,10,13,18,25 123:9,14,25 124:7,15,17 125:4,20,22,25 126:8,12,15,20 127:18,22 128:8,14,21 129:2,11,16 130:1,3,7,16 131:3,20 156:21,23
murphys (8) 121:18,22 123:8 125:2 127:13,19 128:1 129:8
must (1) 147:6
mustnt (1) 147:6
mute (1) 7:11
myself (3) 4:10 15:18 115:10

N

n (1) 159:1
name (1) 142:19
namely (1) 115:2
names (1) 36:2
nature (13) 16:13,21 37:9 56:11 57:14 65:1 78:9 96:12 123:6 125:7 126:12 133:3 142:3
near (2) 38:17 116:6
necessarily (1) 80:7
necessary (9) 37:6 52:4 55:5 65:8 71:10 95:17 112:5 117:5 132:12
need (38) 6:8 10:6 12:17 14:11 27:22 28:23 30:13 32:15 39:19 40:5,6,11 42:12 43:10 44:12 54:20 64:4,10,23 65:13 72:21 78:11 79:20 84:4 86:24,25 98:10 99:22 111:11 114:12 115:5 119:23 120:15 128:12 130:12 133:25 140:20 154:13
needed (4) 20:10 23:10 81:12 149:3
neednt (1) 130:10
needs (3) 18:16 99:25 140:25
needy (1) 62:2
negative (2) 68:11 125:1
neither (1) 126:8
net (1) 82:13
neutral (1) 156:5
never (3) 56:2 68:12,14
nevertheless (1) 11:16
news (1) 109:19
newspaper (1) 101:18
next (7) 55:1 77:25 125:3 142:7 145:14 150:18 154:1
night (1) 4:22
nil (1) 141:15
nobody (1) 60:15
none (5) 33:6,7 44:25 98:15 123:21
nonetheless (1) 102:22
nonparty (1) 99:25
nonprofit (2) 15:5 145:25
noon (1) 1:20
noone (3) 60:17 83:17,20
nor (10) 52:13 64:13 66:7 83:12 88:10,11 94:5 95:16 119:2 126:8
normal (2) 30:8 131:7
normally (2) 80:18 81:20
note (4) 74:20 137:2 150:3 153:3
noted (1) 123:13
notes (1) 154:15
nothing (9) 4:16 13:21 46:7 81:1 85:20,22 88:8 114:14 116:5
notice (7) 1:8 8:14 34:9 36:4 43:11 72:16 90:2
notion (1) 99:20
notwithstanding (5) 6:20 7:4 41:19 105:20 141:9
novel (1) 85:2
november (2) 70:23 72:20
nowhere (1) 38:17
nuclear (1) 106:6
nugatory (1) 6:22
number (9) 39:15 40:23 57:11 64:25 117:1 125:21 133:20 140:2 158:17
numbering (1) 22:7

O

object (2) 80:8 93:21
objected (4) 19:9,22,23 39:3
objecting (1) 97:24
objection (8) 47:8,19 49:6 56:24 57:1 86:14 118:12,21
objects (1) 108:23
obligation (2) 27:20 125:18
obligations (2) 44:12 142:5
observation (2) 43:16 83:5
observations (2) 55:11 87:20
observe (1) 2:2
obstacle (1) 14:8
obtain (3) 66:3 89:19 94:4
obtained (3) 12:21,23 90:12
obtaining (1) 131:2
obvious (2) 54:6 114:13
obviously (14) 2:22 13:16 45:5 46:3 54:14,15 72:2 78:21 116:2 121:5 128:19 130:20 133:18,22
occasions (2) 117:1,5
occurred (3) 19:8 103:11 105:4
odriscoll (6) 1:15 132:7,19,20 133:13 159:3
offence (1) 51:14
offer (6) 8:9 89:3 119:1,2,5,6
offered (10) 48:6 54:3 57:12 72:6,20 116:17 117:3,8 126:9 130:3
office (1) 88:21
officers (2) 12:20 13:4
official (1) 1:10
often (1) 10:4
oh (1) 36:11
okay (8) 25:4 36:3 42:8 61:1 75:6 82:17 109:11 138:7
onerous (1) 42:25
ones (3) 22:9 113:11 137:5
open (3) 100:15 110:20 136:16
opening (1) 156:23
openly (1) 126:15
operate (4) 7:21 33:24 40:3 42:14
operated (1) 44:19
operating (2) 42:17,20
opponents (3) 51:9 59:13 62:14
opportunity (2) 53:15 93:4
oppose (1) 46:13
opposed (4) 11:7 52:10 80:2 92:14
opus (1) 1:22
oral (4) 39:5 49:22 127:10 153:3
orally (2) 126:9 151:22
order (26) 2:22 3:1 6:8 9:5,8,11 11:2 17:15 23:15 25:9,11 26:5 29:6 34:23 36:6 91:3,23,24 125:25 127:1,12 129:23 130:1 136:18,21 148:11
orderly (1) 92:14
orders (26) 8:20 29:15,18 30:16 31:1,5,6 33:23 34:3 37:4,6,10 40:1 42:13,24,24 43:1,1,5,7 44:7 111:19 119:16 127:4,5 129:17
ordinary (51) 7:21 30:2,22 31:13,16,17,23 32:1 41:22 42:14 61:17,18,19,25 65:20 66:5 71:23 72:24 73:10 83:10,15,24 88:16 89:6,16 90:6 92:8 101:11 105:20,23 106:1,9 107:4,6,12,22 108:7 111:1 114:8 125:9 134:2,10,13 135:3,8,9 136:3,8,9 148:25 149:8
organisations (12) 22:15,22 23:2,12,14 24:9 25:8 145:10,18,24,25 146:6
original (17) 12:5 15:4,6 17:12 32:25 33:2,3 39:9 42:3,3,5 108:21,23 134:7 145:13 146:19 154:19
originally (2) 132:22 138:25
otherwise (8) 47:20 49:23 93:17 97:21 101:10 104:4 118:18 129:25
ought (2) 58:13 143:12
ours (1) 55:20
ourselves (1) 157:18
outcome (1) 131:12
outs (1) 74:10
outset (4) 44:3 54:17 55:3 132:25
outside (8) 34:16 61:24 71:23 73:10 89:6 107:3 147:20,25
outsourced (2) 151:25 152:6
outsourcing (2) 152:1,2
outweighed (1) 48:11
outwith (1) 105:22
over (30) 3:17 6:25 7:13 8:10 25:15 30:16 31:8 45:2,25 46:8 53:11 63:7 67:18 72:17 73:5 74:14 89:12 117:18 123:17 125:2 135:8 139:17 143:20 144:3,3 145:24 154:3,11,17,22
overarching (3) 64:25 65:12 69:9
oversight (1) 30:16
overspeaking (4) 79:23 106:16,24 146:23
overturn (1) 23:16
owed (2) 23:3 103:19
owes (1) 63:25
own (3) 37:20 50:19 128:9
owned (4) 29:21 56:19 101:5 110:8
owner (1) 17:12
owners (3) 140:25 145:11 147:16
ownership (7) 30:9 55:13,15,16 68:14 69:4 140:21
owns (1) 85:3

P

package (1) 33:2
pages (5) 53:13 59:6 93:6 112:17 125:14
paginated (2) 35:5 58:11
pagination (1) 4:20
paid (26) 28:5,19 29:25 30:3,6,11 32:7 40:8,9 57:19 71:25 91:24 95:20,25 123:1,16 127:22 151:8,15,19 152:8,9,21,22,22 153:5
paper (1) 151:21
papers (5) 4:18 38:14 39:3 54:14 152:12
paragraph (64) 26:18 28:3 34:10 35:14 36:4,18,21,21,24 43:10,14 44:4,11 50:23,24 61:2 67:22,23 68:3 69:21 70:14,17 72:19 73:18 74:8 76:17 78:15 79:3,14 82:18 86:21 94:17,17 97:2,9 98:1,13 107:2 110:24 112:21 113:13,17 114:19,23 115:8,15,20 116:11,24 117:17,20 122:3,4,11 124:25 125:2,17 138:11 143:16 145:4,14 154:15,23 156:12
paragraphs (7) 5:25 37:3 61:4 62:3,5 78:6 137:8
parallel (2) 48:3 142:11
paraphrase (2) 76:20 79:6
paraphrasing (1) 115:19
pardon (1) 106:24
parker (16) 6:11,17 8:16 12:1 13:6 17:17 24:10 36:9 71:19 88:10 89:20 103:12,21 116:25 141:3,6
parkers (2) 113:22 121:25
part (11) 34:23 35:1 37:4 79:19 89:9 94:9 95:2 140:18,18 141:1,5
partes (1) 92:13
partially (1) 142:16
participate (1) 100:5
participating (13) 15:4 19:8,10 20:3,6 21:5,7 57:3,8,12 66:13 142:13 146:25
participation (1) 123:5
particular (12) 4:11 17:9 30:2 68:22 77:15 86:18 121:12 124:17 125:2 126:24 130:5,17
particularly (5) 38:3 48:5 111:12 145:15 156:21
parties (16) 3:25 24:5,19 25:13,20 26:1,10,16,20,21 38:5 60:9 100:21,23,25 101:7
partly (1) 81:6
partner (28) 5:21 17:8 18:1,4,14,23 26:19 56:18 66:12 68:6,8 85:2 122:20 138:10,12,16 139:14,23 140:10,11,13,20,24 141:17,20 142:4,5 145:11
partners (7) 1:15 56:16,17 139:22 140:6 141:13,15
partnership (42) 5:13,23 6:19 7:16 8:11 11:7 16:17,22 17:10,12,14,20 26:20 36:25 56:6,12 68:13 95:2 137:19 138:5,9,13,17,23 139:5,13,15 141:20,24 142:1,4 147:10,12,13,14 148:2,13 150:7,13,14 154:6,9
partnerships (4) 18:14 68:20 139:21 147:19
party (10) 22:24 23:10,20,21 25:22 27:1,13,19 99:11 156:5
pass (2) 46:8 141:25
passage (1) 76:24
passages (10) 51:25 61:9,11 67:5 68:16 77:5,8,10,23 98:19
passed (1) 52:17
passive (2) 96:14 151:24
passthrough (1) 17:18
past (1) 94:20
pat (1) 15:18
patrick (40) 5:11 13:21 14:19 26:18 27:2,23 28:25 29:12 58:20 60:20 71:5 72:3 84:6 95:20 96:19 98:24 99:2 100:11 101:6,7,12 113:24 114:12,19,23 116:2,12 117:7 118:3 143:15 144:14,22 145:1 146:14 151:18 152:10,14,21 153:20 155:16
patricks (15) 13:9 14:13 59:3,5 63:6 86:11 95:24 96:7,14 97:6 98:19 103:15 112:12 117:21 156:12
pause (6) 76:22 79:10 115:9,21 116:8 152:16
pay (6) 7:14 30:25 37:17 49:2 131:1 155:11
payable (2) 104:14 110:11
paying (2) 5:19 120:12
payment (2) 43:11 108:20
payments (14) 30:1,17,20 31:3,8 37:7 40:4 44:13 134:14 135:23,24 136:10 146:7 148:25
pdf (5) 35:9,10 40:21 137:25 139:9
pending (14) 6:19 7:3 8:10,12,23 9:23 10:10 25:10,11,16 29:3 38:11 94:4 128:16
people (3) 10:5 62:15 101:21
peoples (1) 80:19
per (2) 151:10,15
perceived (1) 25:25
perfect (1) 4:16
perfectly (1) 117:11
perhaps (20) 1:4 11:23 19:2 22:1 25:5 29:9 45:13 51:18,20,23 76:18 103:13 107:16 115:19 121:22 143:18 147:7 149:17,21 153:14
period (6) 12:2 20:9 21:6 38:10 72:14 91:18
permissible (2) 30:23 148:3
permission (2) 24:3 102:15
permit (3) 11:20 65:20 136:10
permits (4) 31:12 110:25 135:3 136:7
permitted (3) 21:10,12 32:2
person (2) 10:22 151:23
personal (5) 27:20 126:20 127:13 128:9 157:2
personally (5) 101:2 121:21 124:10,15 126:8
persons (1) 131:11
perspective (2) 63:6,7
persuade (3) 47:3 54:13

120:4
persuaded (4) 69:22 70:3 71:16 74:9
pessimist (1) 102:16
petition (1) 14:17
phone (1) 158:4
phrase (2) 108:9 135:15
picture (1) 153:15
place (18) 2:1 4:11 36:6 45:2,23,25 46:4 47:23 58:2 72:16 73:23 81:6 90:1 95:6 98:6 103:6 136:2,3
placed (1) 53:22
plain (1) 2:15
plainly (3) 11:16 109:13 110:6
plaintiff (1) 128:16
plank (1) 14:8
planned (1) 132:22
plays (3) 122:14 123:9,9
pleaded (4) 55:14 66:11,18,19
please (21) 7:6 19:4 32:20 40:22 50:21,23 58:10 61:10 67:3 69:18 76:19 79:7 94:15 106:22 112:14 113:13 115:7,20 122:3 137:19 139:8
pm (7) 1:2,20 75:21,23 157:23,25 158:24
points (16) 37:13,13 48:22 78:23 86:17 98:18 101:18 109:19 117:18,21 127:14 128:13 131:19,21 155:5 156:19
police (1) 29:15
policing (2) 29:19 80:13
portfolio (1) 27:10
portrayed (1) 117:2
posed (2) 64:5 71:11
position (29) 2:20 6:2 20:2 22:18 31:14 39:9,17 80:17 81:19 92:20 103:22 104:9,22 105:22,25 107:10 108:2,3,15 109:12 111:4 117:7 121:8,18,22 123:8 126:14 128:4,20
positive (2) 102:4 125:18
possession (1) 34:15
possibility (3) 56:15 57:12 110:20
possible (4) 50:11 71:2 86:7 93:10
possibly (2) 21:10 82:12
potentially (1) 7:15
powers (1) 139:13
practising (1) 130:19
pragmatic (1) 72:20
precisely (1) 68:3
precludes (1) 10:15
predations (2) 71:10 87:24
predecessor (1) 96:8
preempt (1) 112:6
prejudice (23) 3:24 34:6 42:19 43:19 48:12,14,17,19 78:4 79:25 84:5 92:20 103:9 105:14,15 106:11 117:18,20,24 118:13,18 128:17 129:8
prejudices (1) 42:16
prejudicial (3) 103:10 111:14 118:9
preliminary (1) 12:16
premise (4) 63:8 74:2 81:9,17
premised (1) 81:17
prepare (1) 72:11
prepared (7) 44:15 47:10 81:23 129:19 136:13,17,21
presence (1) 69:17
present (5) 73:14 75:24 87:10 94:21 129:14
presentation (1) 55:9
presented (1) 38:15
presently (2) 3:7 38:16
preserve (3) 34:13 125:5,18
president (60) 1:3,17 2:14 3:19 4:5 7:6 9:4,9,25 11:9 12:9 19:4 22:17 39:10,24 45:10 46:6,9,23 50:4 74:16,25 75:6,10,18,24 76:2,5,10 77:1 79:9 115:10 116:9 117:10,15 120:18,25 121:2,14 130:6 131:23 132:3,8,12 133:8,17 135:20 136:13,24 148:18 149:11,16 156:20 157:7,11,17 158:1,7,9,22
presidents (3) 55:2 132:25 133:2
press (3) 54:17 73:1 93:10
pressure (4) 75:2 92:16 93:7,22
presumably (1) 131:13
prevent (10) 8:18 18:20 28:15 30:14,15 66:4 83:8,14 89:16 110:11
prevented (1) 30:23
preventing (1) 157:1
prevents (2) 101:10 107:20
previously (5) 44:20 58:1 116:17 129:19 151:1
price (4) 49:2 120:12 131:1,17
primary (5) 5:12 25:21 33:17 127:17 154:21
principal (4) 63:22 99:18 101:4 103:19
principle (4) 39:11 102:25 103:2 126:10
principles (1) 68:19
prior (14) 5:10 17:7,25 19:20 48:5 54:10 58:2 61:21 70:7 73:7 83:7 110:17 151:12 152:6
privilege (1) 143:20
privileges (1) 144:3
privy (2) 147:17 148:14
pro (1) 21:1
probably (4) 42:6 150:3 158:15,16
problem (8) 4:11,20 75:17 81:11,12,16 113:10 135:1
problematic (1) 2:4
proceed (1) 53:7
proceeding (2) 54:10 114:7
proceedings (32) 3:15 12:21 16:8 22:14,19,23 23:13,19,23 24:12,14 25:24 26:4,5,21 28:21 29:7,11,12 43:20 71:13,20 99:11,17,25 100:3,3 101:1,8 104:21 113:9 116:17
process (3) 54:14 60:5 129:1
procure (4) 27:3,21,23 157:5
procured (1) 93:20
professional (3) 71:9 95:10 130:19
profits (1) 138:2
prohibit (1) 31:10
prohibits (1) 108:4
projects (2) 74:10,15
promptly (3) 52:12 94:4,6
proper (4) 72:16 79:4 80:19 92:13
properly (5) 47:7 48:24 65:4 93:10 120:13
property (5) 123:15,22 124:4 126:13,15
proportionate (1) 132:23
proposal (3) 89:8,11,13
propose (1) 16:11
proposed (2) 74:10 105:22
proposition (3) 77:19,21 85:2
propounded (1) 134:4
proprietary (41) 6:18 7:1 10:25 11:6 16:14,17,18,21 17:1,2 29:17 37:9,21 43:4 65:17 66:9,11,18,20,25 67:17 68:7 69:24 70:1 74:2 83:23 87:18 105:12 122:24 123:6 124:2,9 126:5,11,21 127:4 132:23 149:7 154:3,7,8
prosecute (1) 29:10
prospect (2) 100:9 115:16
prospects (1) 85:11
protect (7) 6:18 37:7 64:4 78:3 154:12,18,21
protected (5) 16:20 47:22 68:8 83:1 154:7
protecting (1) 136:19
protection (8) 6:25 25:15 26:15 28:23 79:20 81:11 119:6,19
protections (3) 98:6 101:25 119:11
protects (1) 97:22
protocol (2) 89:4 135:18
protocols (2) 136:22 137:1
provide (7) 90:2,4,8 94:22 102:1 116:15 131:16
provided (4) 44:7 119:24 135:24 139:20
provides (3) 79:20 110:14 125:3
providing (1) 111:13
proving (1) 143:11
provision (1) 111:7
provisions (2) 98:7 147:11
pull (1) 32:8
pure (1) 54:6
purely (1) 147:25
purport (1) 86:3
purported (1) 105:12
purportedly (1) 104:1
purpose (5) 19:24 63:11 64:2 87:22 144:23
purposes (12) 16:24 32:18 48:8 63:4 68:25 77:12 83:21 84:1 116:20 134:17 137:15 154:14
pursuant (4) 73:5 74:15 90:14 111:13
pursue (2) 99:16 120:9
pursued (2) 84:22 127:18
pushing (1) 136:15
puts (1) 84:21
putting (3) 86:4 93:22 100:21

Q

qualifying (1) 56:19
quantify (1) 78:22
queries (3) 43:15 90:5,7
query (1) 20:18
quest (17) 1:13 120:23 121:1,2,3,10,15 122:4,6 128:2,11 130:6,10 131:24 132:3 156:24 159:3
question (38) 1:23 7:18 8:7 10:3,7,17,18,18 14:24 19:3,6,16 20:16,19 21:3 23:7 31:21 32:24 34:8 39:12 50:1 56:23 57:17 68:11 70:16 79:12,24 80:3 81:10,17 101:21 102:19 106:22 109:8 146:24 148:23 149:25 154:23
questioning (2) 13:5 20:4
questions (7) 19:1 20:12 34:5 84:11 149:22,24 157:13
quick (1) 101:21
quickly (1) 142:21
quiet (1) 81:21
quite (9) 3:17 10:4 39:10,16 121:5 130:7 135:21 144:8 152:2
quote (8) 49:10 50:24 51:3,5 68:4 78:8,15 98:1
quoted (1) 52:1
quoting (3) 67:14,24 94:19

R

rabbits (1) 153:12
raise (1) 43:15
raised (4) 39:18 64:9 95:3 133:20
raises (1) 85:10
rata (1) 21:1
rather (9) 22:15 24:15 27:2,20 42:21 58:19 76:20 82:4 108:8
reached (6) 68:18,21 70:6,8 87:17 97:7
read (19) 38:13 49:14 61:10 62:7 76:19,24 77:1 79:7 84:20 113:6 115:7,10,12,20 116:21 118:3 125:10 132:17 143:18
readily (2) 43:2 44:18
ready (1) 76:5
real (27) 14:3 40:6 48:12 53:1 66:1 70:4 77:19 85:11 86:15 87:1,9,12 88:18 91:10,25 94:9,23 95:15 97:13 100:9 102:1 103:3 115:16 131:5 134:7 146:20 150:19
realise (1) 11:4
reality (2) 39:17 87:22
really (18) 11:20 18:21 29:19 33:22 35:3 36:23 42:12 59:23 62:4 80:12,24 90:24 113:4 118:23 134:8,21 140:14 145:7
reason (26) 9:5,7 15:3 48:25 49:1,4 50:6,7,8,10 54:23 70:18 73:12 76:11 77:25 78:1,13 79:1 87:25 88:2 97:19 109:4 112:6 118:9 119:19 129:15
reasonable (2) 153:8,10
reasoned (2) 71:5 95:8
reasons (15) 11:5 73:15 82:21 85:6 97:15 98:12,15 111:15 115:1 118:6 142:16 144:7 151:22 155:18 158:15
rebuffed (2) 89:13,14
recall (1) 130:8
receipt (1) 127:8
receive (5) 15:7 57:10 134:22 143:22 146:10
received (13) 4:4 8:21 32:19 33:4 34:17 56:3 90:15 95:11 127:22 130:8 142:1 146:14 151:10
receivership (1) 114:6
receiving (1) 153:18
recent (4) 13:9 98:20 115:24 147:17
recently (1) 23:17
recipient (1) 15:11
recipients (2) 32:24 78:19
recognised (4) 57:5 64:6 65:25 74:6
recognises (1) 147:15
recognition (3) 53:21 79:16 138:19
recommendations (1) 96:5
reconciled (1) 94:8
record (3) 71:15 88:9 117:6
recording (1) 1:22
recover (2) 23:5 42:1
redress (1) 38:1
refer (7) 5:16 27:7 51:9,12 100:17 148:6 150:2
reference (11) 32:8,10 40:14 51:6,24 115:22 145:12 152:15,18 156:10,10
referenced (2) 58:4 156:16
references (2) 55:18 150:16
referred (7) 71:25 113:22 117:15 123:20 150:1,5,9
referring (4) 13:10 147:3 148:10 150:12
refers (2) 27:6 56:13
reflect (4) 9:3 42:25 77:11 98:3
reflecting (1) 130:23
reflects (2) 36:18 87:21
refuse (1) 155:11
refused (7) 8:12,16 10:23 11:25 36:9 72:22 118:11
refusing (3) 5:20 54:16 155:19
regard (4) 55:12 68:18,22 70:25
regardless (2) 87:17 106:10
regards (5) 73:24 105:1 128:21 129:1,16
reiterate (1) 17:6
rejected (1) 77:22
related (1) 78:19
relating (1) 47:16
relation (20) 12:10 20:17 45:11,20 61:20 64:7 65:18 66:18 68:19 69:23 78:23 97:8 98:8 113:9,23 123:23 127:5 128:8,20 153:24
relationship (1) 142:3
relatively (1) 123:18
relevance (3) 73:13 77:15 110:5
relevant (11) 3:7 65:2,10 67:10,11 70:19 77:12 103:2 112:17 129:23 145:15
reliance (1) 146:12
relied (4) 71:1 93:6 95:19 141:3
relief (59) 7:12 10:5,10 40:12 46:13 47:11 48:13,25 49:3 50:13 53:17 54:25 65:3,22 66:3 73:21 78:24 85:15 86:20 89:15 91:16 92:5,10,21 94:4,6 97:20,24 98:2 102:2,3 103:1,5 106:23 112:4 117:3 118:10,14,21 119:10 120:11 121:21 124:9,12,14,18,23 126:5,7,11,21 128:5,6,13,16 130:21 131:2 154:11,17
reluctance (1) 116:12
reluctant (1) 116:15
rely (2) 47:16 133:6
remain (1) 47:23
remaining (1) 146:4
remains (2) 34:23 35:1
remedial (1) 79:16
remedy (8) 18:21 37:17 38:2,8 51:24 74:11,12 106:6
remind (2) 137:2 150:4
remit (2) 20:7,7
remote (1) 119:10
removal (1) 13:14
remove (2) 87:23 104:12
removing (1) 56:16
remuneration (24) 5:20 7:14 28:8,9,16 40:9 71:24 95:20,24 96:3,7 97:5,8,13 110:15,21 114:10 123:1,16,17 127:8,20 128:1 151:14
rendered (1) 6:22
renumbered (1) 113:2
repeated (1) 55:18
repeatedly (3) 89:11,13 93:15
repeating (1) 66:24
repetition (2) 75:12 133:3
replicate (1) 98:10
replicating (1) 89:25
reply (8) 14:12 107:16,19 111:4 133:11 134:1 156:19 159:4
reporting (4) 44:11 89:4 136:22 137:1
reports (1) 90:9
represented (3) 20:15 52:12 105:16
reputation (1) 130:23
reputational (1) 78:20
request (1) 46:1
requested (1) 45:24
requests (1) 48:3
require (2) 106:7 119:12
required (8) 2:12 24:14 44:25 45:4,22 46:3 140:7 141:25
requires (2) 80:13 129:3
requiring (1) 53:19
requisite (2) 66:1 87:1
reserve (1) 53:14
resident (2) 115:3 130:18
resides (1) 98:24
resiled (1) 13:4
resisting (1) 106:25
resolve (4) 24:6 64:23 67:7 95:17
resolved (1) 147:1
respect (22) 6:12 33:23 42:15 45:1,24 46:4 49:24 54:6 87:21 93:19 99:12,23 112:1 122:15 124:3 126:12,21 127:8 133:1,3 143:22 156:25
respectfully (11) 46:21 54:22 84:22 88:11 98:9,15 102:24 109:22 110:12 119:9 133:5
respects (1) 121:18
respond (3) 52:8 151:20 152:4
responded (1) 152:3
respondent (11) 1:13 26:10 27:14 36:20 63:21 105:17 121:9,13 124:19 126:20 129:21
respondents (34) 1:12 2:25 4:23,24 8:9,18 23:23 24:25 25:1,2,3 33:24 35:16 37:22 39:3 40:3 42:17 43:12 45:1 46:8 58:9 59:10 75:8 78:3 80:14 112:14 114:1,21 125:4 132:5 134:4,15 138:23 156:3
responds (1) 106:9
response (2) 133:18 148:21
restrain (2) 127:12 129:3
restraining (2) 25:9,11
restraint (1) 128:8
restraints (1) 73:1
restricting (1) 80:20
restriction (2) 28:7 127:25
restrictions (1) 90:1
restructured (1) 17:14
restructuring (32) 5:17 6:13 7:15 17:7 18:1,19 19:7 20:5 21:3 32:5,13 33:5 47:17 57:20 58:3 61:19,21 64:2,8 66:19 71:7,17 76:13 77:18 83:11 87:23 88:6 95:3 108:22 123:5 150:25 152:7
result (4) 6:6 14:18 21:14 93:23
resulted (1) 39:5
resulting (1) 91:22
resume (1) 75:18
retained (1) 144:3
retains (1) 143:20
return (2) 17:20 156:6
returning (2) 13:24 76:8
revealed (1) 90:20
richard (44) 14:22 15:2,10,15,18,25 16:4 19:5,12,15,19,25 21:2,18 31:9,20 32:3,14 34:8 67:21,25 106:21 107:1,14,25 108:10,19 109:1,11,14 111:19 115:13 120:21 122:2,5 132:1 146:24 147:6 148:5,8 149:23 150:6 157:14 158:7
rightfully (1) 156:7
rightly (3) 74:6 122:8 130:21
rights (5) 6:18 30:5,8 57:10,14
ring (3) 80:15 81:6 135:14
rise (1) 117:5
risk (60) 3:24 8:4 12:11 29:2 34:6 42:10 47:12,13,20 48:10,16 53:2,4 63:13,13,19 64:18 66:1 70:4 71:16 77:19 78:4 79:16 81:2,4,13,15 82:23,25 86:15 87:1,9,12 88:18,22 90:24 91:5,10,12,25 94:1,9,14,18,23 95:15 97:13,17,23 102:21 103:3 105:21 112:8,10 118:15 128:17,23 129:8 130:20 150:19
risks (5) 6:21 64:5 71:11 84:5 96:19
role (5) 96:13,13,14 122:14 123:9
roof (1) 58:6
root (1) 134:5
round (2) 31:21 84:15
roundly (1) 77:22
rules (5) 9:21 47:5 49:9,11 54:21
rulings (1) 100:1
rush (2) 60:5,7

S

safe (2) 81:20,21
safeguards (1) 80:19
salaries (3) 8:19 80:20 151:14
sale (2) 141:10,19
same (16) 5:18 9:18 23:1 36:2 42:20 51:19 78:23 85:11,17 87:19 97:7 98:4 99:15 105:2 151:1,12
sanction (5) 12:21,23 13:1 26:3,7
sanctions (1) 91:19
santa (1) 41:3
sat (6) 51:22 56:8 57:9 60:18 62:19 94:7
satisfied (3) 112:7 119:17 129:24
save (2) 8:16 98:7
saw (7) 77:22 87:11 88:8 110:3 141:14 151:3,7
saying (25) 2:10 4:19 10:9 11:18 24:10,13 29:6 42:22 52:2 75:10 80:12,25 83:23 84:1 101:24 117:12 123:8 135:21,22 136:1,5,24 151:9 158:4,8
scale (1) 61:16
schedule (1) 125:22
scheduled (2) 125:24 146:4
scope (2) 96:12 133:4
scott (101) 1:11 13:4 46:10,11,12 47:1 50:2,9 51:14,15,20,22 57:23 58:11,24 59:3,9,15,21 60:1,4,13,17 61:4,9 62:7,18,21,24 63:2 67:21,23 68:2 74:16,23 75:4,7,24,25 76:7,11,25 77:3 79:21 80:5,10 81:9,23 82:5,12,16,21 84:10,14,18 96:9,10,22 101:23 102:5,19 104:6,9 106:18,21,25 107:9 108:1,14,22 109:7,12,17 111:21 112:24 113:2,5,8,13,17,20,22 115:10,14 116:1,9,10 117:10,13,17 120:18,22,23 128:19 129:9 130:2,13 135:6 139:3 151:21 159:2
scotts (5) 96:13,22 121:16 133:4,6
scrutiny (1) 98:16

sec (3) 145:1 151:6,7
second (22) 1:13 27:12,25 47:9 55:22 69:8 86:13 87:5 94:19 95:19 99:9 110:9 113:25 116:14 121:9,13 139:18 141:5 148:1 152:13 154:20 156:12
secondly (1) 37:22
section (2) 68:17 118:4
sections (1) 150:9
secure (3) 78:2,12 119:13
securities (1) 144:22
see (50) 12:9 13:6,8 14:11 15:14 19:25 20:5 25:4 26:17 29:9 35:14 36:11 40:7,19 41:12,13,17,18 44:9 59:15 68:2,16 70:5,14 72:5,18 75:24,25 78:7 94:17 95:23 97:1 102:10 105:24 110:1 113:24 116:5 122:7,11 125:14 138:10 139:11,12,17 143:18,24 152:11 154:23 158:1,19
seek (10) 8:14 34:24 38:23 43:2 48:20 50:14 55:5 92:9 120:11 157:3
seeking (27) 8:17,22 11:1,3,21 12:14 17:23 23:16 25:8 31:7 33:22 43:7 49:2 50:5 63:22 86:19,23 106:23 107:1 127:12,25 128:16 148:22,23 149:11 156:23,25
seeks (2) 98:3 127:12
seemed (1) 23:9
seems (5) 17:16 30:3 76:2 131:7 134:4
seen (10) 5:8 6:1 9:11 10:7 27:19 124:25 127:16 130:21 142:15 151:16
sees (3) 51:25 67:13 116:14
semicolon (1) 139:19
sense (2) 11:10 100:19
sensible (1) 84:23
sent (1) 50:25
sentence (4) 94:19 113:25 116:14 145:21
separately (1) 122:8
serial (2) 63:14 99:7
series (3) 101:18 103:25 109:19
serious (19) 3:17 6:12,15 13:3,16 14:21 16:10,15 64:3,9,16 67:16 69:23 70:7 76:12 95:4,17 97:4 127:21
seriously (5) 2:17 87:18 103:10 111:24 118:9
serve (2) 24:4 68:24
served (2) 92:24 112:19
service (1) 123:2
set (13) 17:15 52:4 67:9 85:7 95:8 125:22 137:16 138:13,20 142:8,14 143:25 144:7
sets (3) 67:12 130:7 156:15
setup (1) 134:17
several (4) 53:3 95:6 106:4 117:5
shadowy (1) 64:15
shall (13) 2:18,21,24,25 49:13,19 75:11,19 125:5 139:21 140:7,9 157:19
share (4) 132:6 154:9,19,22
shareholder (5) 19:9 20:6,12 21:5 30:6
shareholders (9) 15:4 19:10 20:3,15 21:7 22:20 30:10 57:8 147:1
shareholding (1) 122:20
shares (3) 66:13 142:12,13
sheet (1) 44:15
shell (1) 17:18
shopping (2) 54:7,22
short (5) 1:8 38:10 75:22 118:24 157:24
shorter (1) 12:2
shorthand (1) 74:20
shortly (3) 150:20,21 155:6
should (40) 3:1 4:4 11:16 14:4 23:22 24:10,13 25:13 37:10 43:2,5 44:17,24 45:4,21 46:2 49:2,4 60:21 65:5 83:18,23 88:11 96:9 100:2 102:25 118:10 121:15 125:12,14 126:4,6,7,11 131:1 132:10 136:10,22 140:22 143:22
shouldnt (3) 22:8 32:2 136:2
show (5) 58:7 65:25 67:4 112:11 114:16
showed (3) 70:12 86:22 108:14
shown (3) 109:6 147:11 151:6
shows (3) 135:18 146:9 154:16
shut (1) 136:17
sic (1) 158:14
side (5) 62:23 63:2 64:7 95:18 136:11
sides (1) 64:16
significant (6) 37:23 40:7,9 78:10,17 145:17
significantly (1) 149:6
similar (2) 8:15 84:16
similarly (1) 153:20
simple (2) 26:7 54:7
simplistic (1) 96:21
since (19) 24:8 32:5,12 33:4 52:17,19 61:18 83:11 85:21,24,25 88:20 90:11 108:12 115:24 145:16,23 150:25 151:16
single (2) 73:9 90:20
siphon (1) 14:4
sir (45) 14:22 15:2,10,15,18,25 16:4 19:5,12,15,19,25 21:2,18 31:9,20 32:3,14 34:8 67:21,25 106:21 107:1,14,25 108:10,19 109:1,11,14 111:19 115:13 120:21 121:15 122:2,5 132:1 146:24 147:6 148:5,8 149:23 150:6 157:14 158:7
sitting (12) 1:8 33:14 38:14,25 39:1,8,12,14,21 42:11 116:3 158:17
sittings (2) 39:15,16
situation (11) 10:15 11:24 15:11,25 16:2,7 18:4,18 19:6 39:20 147:25
six (5) 45:3 46:1 73:6 90:11 91:16
sixth (2) 63:21 123:12
skeleton (10) 5:9,24 50:22 52:1,5 54:4 90:18 94:16 97:25 98:13
skip (1) 3:16
skyview (4) 152:6,8,20,22
slight (1) 22:7
slightly (3) 2:4 85:22 123:7
slippage (1) 22:7
slow (2) 113:16 135:20
small (2) 15:18 41:13
smith (1) 121:4
sole (12) 5:15 6:20 7:24 15:11,22 17:8 18:1,22 134:24 138:10 139:6 151:18
solely (1) 147:1
solvent (1) 114:5
somebody (4) 7:8 33:13 51:18 74:19
somebodys (1) 147:2
somehow (1) 61:24
someone (1) 96:24
something (14) 2:9 19:21,22 51:4,11,13 71:8 79:18 80:18 86:8 102:9 129:2 135:25 143:12
sometimes (3) 38:22,23 147:20
somewhat (2) 5:16 127:9
soon (3) 39:22,22 105:18
sort (5) 9:10 42:16 75:16 102:3 131:2
sorted (1) 81:21
sorts (1) 60:2
sought (27) 12:12 23:14 34:10 45:1 48:13 49:23 65:16,16 67:2,18 68:9 69:15 78:4 90:12 91:20 92:21 97:20 103:5 106:13 108:5 118:14 124:24 127:4,5 128:5,6 129:17
sources (1) 154:16
south (1) 93:2
spare (1) 82:10
speaker (1) 158:6
speaking (4) 4:9 12:11 80:18 81:20
special (14) 1:7,24 38:14,18,25 39:1,8,11,13,15,16,21 42:11 116:3
specific (4) 66:10 74:10 137:17 142:8
specifically (6) 121:8 122:9 131:20 133:20 143:21 145:22
speculated (1) 100:14
speculation (2) 100:18,19
spell (1) 114:13
spend (4) 78:11 102:8 137:12 149:20
spending (1) 102:10
spoken (1) 7:9
squarely (1) 18:9
stage (8) 52:17 53:5 67:9 73:25 81:25 108:16 109:18 132:6
stages (2) 92:2 147:8
stakeholders (1) 99:18
stand (1) 111:21
stands (4) 28:21 84:20 99:14 100:23
standstill (1) 114:5
start (6) 3:8 4:2 16:7 21:20 40:7 113:14
starting (4) 61:6 113:18 141:7 145:21
starts (5) 35:10 60:24 79:15 144:20 145:4
statement (3) 84:7 142:15 144:6
statements (1) 44:15
status (1) 99:24
statute (2) 150:2,5
stay (2) 9:20 12:4
stayed (3) 23:13,19 100:3
steady (1) 80:16
steeped (3) 53:10 54:9 77:11
stemmed (1) 104:23
steps (2) 51:23 99:5
still (10) 30:24,25 36:15 76:3 91:24 119:4 122:13 127:12 152:8,8
stock (1) 82:9
stop (1) 101:20
stopped (1) 62:11
straight (1) 10:3
straightforward (2) 2:6 118:24
strange (1) 11:24
strength (1) 149:4
strike (1) 100:16
strikeout (1) 29:10
strong (2) 149:12,14
structure (55) 7:17,21,24 8:2 15:14,22 17:9,15 18:8,24 20:8 29:25 30:4,7 31:1 37:19,24 40:4,8 55:24 56:2,21,25 57:3,7 63:3 66:16 68:24 71:22 83:9 86:4 87:13 88:14,15 107:13 108:24 114:10 123:11,24 126:6 134:6,12 137:14,16 138:20,21 142:8,11,16 143:25 144:9 146:21 151:17 155:15,20
structured (1) 134:17
structures (2) 83:16 106:2
stuff (2) 59:25 151:25
subject (4) 36:9 66:10 89:17 98:24
submit (8) 26:2 46:21,23 54:22 97:16 98:9 118:17 149:11
submitted (3) 24:19 29:1 150:23
submitting (2) 84:4 115:2
subparagraph (1) 110:14
subsequent (1) 90:22
subsidiaries (15) 26:23,25 27:6,8,8,9,15,19,24 34:22 72:2 101:13 109:25 110:3 157:4
subsidiary (2) 110:4,7
substance (3) 12:16 37:1 119:8
substantial (7) 18:15 63:12 77:5 80:16 103:18 104:13 105:10
substantially (3) 8:15 96:16 120:3
substantive (3) 1:24 3:6 19:1
succeed (4) 65:6 85:12 112:3 149:9
success (1) 85:11
successful (1) 65:9
successfully (2) 77:7 85:4
succinctly (1) 133:23
suffer (1) 128:18
suffered (1) 34:7
sufficient (4) 26:15 33:19 46:15 48:25
sufficiently (2) 149:12,14
suggest (15) 29:1 49:23,25 53:19 55:23 56:10 61:22 84:22 88:12 90:17 93:15 95:14 119:9 146:18,22
suggested (5) 70:22 81:12 110:19 111:5 139:3
suggesting (3) 83:17,20 102:17
suggestion (7) 87:9 89:23 91:9 97:12 109:23 110:10 129:7
suggestions (1) 53:1
suggests (2) 65:9 88:15
suit (1) 96:25
summarise (2) 46:16 88:24
summary (1) 64:8
summer (2) 92:18 93:1
summons (11) 35:10,11 72:15 89:20 92:11,12 106:22 107:15 124:22,23 137:6
sums (3) 57:19 103:18,18
support (12) 6:5 37:10 53:17 54:4 94:13 98:13 100:17 105:12 121:16 131:9,16 147:24
supported (2) 85:6 95:9
supporting (9) 22:15,22 23:2,11,14 24:8 25:8 145:10,23
supports (2) 77:18 98:20
suppose (3) 99:1 101:12,15
supposed (1) 94:13
supreme (3) 23:15,16 29:6
sure (8) 9:11 10:8 11:13 15:16 32:21 128:5 149:17,18
surely (1) 92:2
surplus (1) 35:24
surprise (1) 55:6
surprisingly (1) 6:16
sworn (4) 47:25 95:9 100:12 113:8

T

tab (1) 49:17
table (5) 33:8 40:15 41:15,19 151:3
tactical (1) 93:20
tactically (1) 13:18
tailored (1) 39:20
taken (12) 9:12,16 18:24 21:5 100:14 101:19 109:10 110:9 121:23 136:2 154:1 155:6
takeover (1) 63:1
takes (1) 123:3
taking (4) 24:11 63:7 134:5 140:24
talk (1) 157:17
talking (2) 147:9 156:4
talks (1) 79:17
tas (1) 97:20
tax (4) 63:4 142:16 144:7 153:21
team (6) 32:16,21 51:23 60:15,18 109:9
telling (1) 14:12
temporary (2) 25:9,11
ten (2) 89:1 133:15
tenminute (1) 74:21
tens (3) 28:18 123:19 145:19
term (5) 27:6 72:10 89:21 92:18 116:6
terminology (1) 134:20
terms (31) 3:1 8:15,23,24 9:2 11:2,3 22:14 25:6,19 26:13,25 27:24 29:16 33:20,23,25 35:15,16 36:19 41:19 42:18,21 49:18 52:4 80:11 117:19 127:19 137:19 147:21,23
territory (1) 18:9
tetchy (1) 113:15
texas (47) 16:5 22:14,20,25 23:6,7,19,23,24,25 24:12,14,20,21,24 25:7,25 26:5,8,21 28:21 29:7,12 47:23 58:6 70:23 71:13,14,20 87:20 88:4,8 92:6 97:22 98:23,25 99:3,11,21,25 100:1,5 101:1,8 102:15 116:6 135:7
thank (55) 1:6,6,17 3:10 4:6 5:1 15:20 21:22,23 33:12 36:16 39:25 40:25 41:2 42:8 43:25 46:6,9 62:10 67:25 74:25 75:6 77:2 79:11 109:15 120:18,21 121:14 122:5 128:11 130:10 131:23 132:1,2,3 133:8,10,24 136:25 137:10 140:4 143:1 149:24 150:17,17 153:25 155:3 156:14 157:11,14,16,22 158:21,22,23
thanks (1) 109:16
thats (94) 2:7,13 4:22 8:21 10:17,18 11:12,17,20,23,23 13:8,21 15:9,13,21 18:21 21:2,13 22:5,12 25:16 26:19 27:10 28:7,12 29:21 30:22 31:24,25 33:19 34:25 35:11,11,13,22,24 36:9,17,22 38:21 39:18,24 41:8 48:14 50:7 55:21 56:19 58:9 59:12,19 61:9 62:20 65:2,10 67:25 74:21 79:25 80:24 83:10,15 87:24 88:3 97:9,23 102:6 104:16,17 109:16 113:10 114:15 116:18 121:10 124:24 127:1,7 128:2,10 133:8 136:6 137:7 138:16,19 142:18 145:14 150:15 151:21 152:2 153:7 154:12 155:2,6,21 156:4
theirs (1) 108:8
themselves (6) 5:19 7:14 23:5 87:8 96:6 147:24
theoretical (1) 48:10
thereafter (1) 52:11
thereby (2) 49:8 86:4
therefore (4) 23:4,12 134:23 135:13
theres (5) 13:20 32:6 76:2 115:24 149:12
theyd (1) 104:3
theyre (1) 104:6
theyve (2) 146:13,14
thing (5) 26:8 35:5 58:19 153:8,10
thinks (1) 124:11
third (14) 28:1 32:9 47:19 56:9 60:20,22 61:2 76:11 83:4 88:17 97:23 100:7 110:22 123:12
though (2) 82:7 129:10
thought (5) 38:14 43:13 47:20 50:4 133:14
thousands (2) 53:12 93:5
threat (1) 88:9
three (7) 22:20,21 37:13 55:11 66:9,17 109:4
threshold (1) 87:6
through (11) 5:6 16:11 26:12 56:5 69:1 71:3 78:6 118:2 133:21 143:25 144:9
tied (3) 28:20,23 100:8
till (2) 80:16,22
time (31) 1:20,20 5:3,18 6:23 10:6 12:3 19:22 20:9 21:6 32:20 38:11,13 40:6 71:1 92:24 93:2 95:11 118:1 132:4,11 133:13,15 137:13 138:9 149:21 151:12 155:4 156:25 157:20,21
timetable (2) 28:24 92:14
title (3) 59:10 67:24 137:25
today (12) 8:13 12:14,17 13:13 35:12 39:6 94:16 124:24 127:11 136:7,18 158:12
todays (4) 50:23 77:12 83:20 84:1
together (2) 4:24 59:17
told (4) 38:25 59:17 82:9,19
too (3) 44:22 72:4 157:16
took (11) 70:15 71:18 72:5,16,18 88:20,25 95:6 103:22 136:2 151:4
topic (1) 2:23
total (2) 123:17 152:24
towards (1) 136:19
tracing (5) 111:19,22,24 112:2,5
track (3) 40:5,6 84:9
tracks (1) 107:2
tranche (1) 12:24
transaction (1) 90:9
transactions (6) 43:15 73:7 90:3,5,8 135:4
transfer (3) 7:16 34:14 37:25
transference (1) 73:17
transferred (2) 5:12 32:4
treat (1) 86:3
treated (1) 15:6
trepidation (1) 112:15
trial (11) 6:19,23 7:4 8:10 64:10,23 95:17 111:20,22 112:3 147:23
tried (14) 3:17 6:15 16:11,16 64:4,10 67:16 69:23 70:8 76:13 95:4 97:4 127:21 144:8
tries (1) 29:1
tro (2) 25:12,13
trouble (1) 95:22
true (5) 37:20 101:3 111:3,9 117:7
trust (2) 62:18 142:9
trustee (1) 82:2
trustees (1) 80:9
try (3) 14:21 35:5 37:18
trying (8) 14:13 18:2,21 60:8 75:2 142:17 152:14 156:5
tuesday (1) 116:1
turn (26) 3:20 7:6 12:1,15 19:2 22:1 25:5 34:6 46:17 49:5,15 50:23 55:1 67:3 69:18 86:13 92:23 111:5 121:24 137:18,24 139:8,24 142:21 144:14 154:14
turned (1) 92:9
turning (5) 4:1 5:7 14:20 21:24 25:19
turns (1) 119:15
twoday (1) 85:21
type (1) 139:12
typical (1) 139:12

U

ubs (2) 63:20,25
uhhuh (1) 145:6
uk (2) 1:20 157:20
ultimate (1) 30:6
ultimately (2) 62:19 64:19
unable (3) 73:8 100:17 119:18
unarguable (1) 97:14
unattractive (1) 132:17
unbolded (1) 67:14
unclear (2) 29:24 127:9
underlying (16) 5:21 6:3 11:8 15:23 16:20 65:18 66:20 67:1 111:17 138:22 142:1 147:15 154:3,11,17 157:4
undermine (1) 128:25
underprivileged (1) 6:6
understand (26) 1:25 10:9 11:22 13:18 21:18,19 22:18 38:16 57:5 60:1 62:18,21 81:16 107:9 109:14 110:12 113:5 117:11 128:4 130:6 132:6 136:4,24 149:19 155:13 157:7
understanding (3) 39:6 108:2 135:21
understood (7) 50:10 100:1 107:5,10 110:18 111:2 144:13
undertaking (12) 28:3 44:14 78:12 92:19 104:11 116:13 117:25 129:11,20 130:2 131:10 154:22
undertakings (48) 8:10,12 9:3 24:16 27:25 29:16 33:21 42:21 43:22 44:20 45:2,22,25 48:3,5 52:21 70:22 72:7,14,19,22 73:5 86:2 89:22 90:14 93:1,8,14,16,23 103:9,23 104:17,23,25 105:4,7 111:14 116:16 117:2,8,23 118:19 119:23 120:1 129:11 155:9,17
undertook (3) 90:2,3,8
undervalue (1) 5:15
undisputed (3) 47:14 122:17 123:14
undoubtedly (2) 11:19 30:12
unfair (2) 54:15 118:16
unfortunate (1) 18:17
unfortunately (1) 117:4
unimportant (1) 118:23
unique (1) 68:23
unjustifiable (2) 46:20 49:6
unjustifiably (2) 89:10,23
unjustified (34) 46:19 47:4,12,21 48:4 53:2 56:12 64:19 66:1 73:2,24 77:20 81:13 82:23 86:15 87:2 88:13,18,22 90:21,24 91:6,10 92:1 94:1,10,23 95:15 97:13,18 102:22 103:3 112:8 128:14
unless (8) 18:25 23:19 34:4 45:7 120:16 131:20 156:17 157:9

unnecessary (4) 48:4,20 105:12 118:7
unpaid (1) 63:25
unproductive (1) 132:14
unsurprisingly (1) 6:10
until (7) 12:3 36:7 38:13 81:7,21 129:14 153:4
unusual (1) 80:17
unwilling (1) 119:18
upheld (1) 23:17
upon (18) 47:6,16 48:15 52:22 53:25 56:17 57:6,7 63:7 69:7,16 71:1 74:2 86:8 91:3 93:6,7,7
upshot (1) 53:9
urgent (1) 40:12
used (3) 86:2 88:4 139:6
userfriendly (1) 60:9
using (3) 43:21 107:3 144:10
usual (6) 49:2 119:11 120:12 124:1 131:1,17
usually (3) 53:22,24 111:20
utterly (1) 99:1

V

validity (1) 104:20
valuable (2) 5:13 27:9
value (5) 17:19 82:13 90:3 154:12,18
variety (1) 32:12
various (10) 36:2 41:13 82:3 85:6 89:11 95:9 118:13 125:15 146:6,11
vast (3) 55:8 69:5 125:23
vehement (1) 71:5
vehemently (1) 95:7
vehicle (3) 17:18 63:22 119:4
vehicles (3) 86:2,9 104:18
ventilated (1) 104:7
version (1) 25:9
vest (2) 66:5 74:14
vexatious (2) 63:14 99:7
via (1) 82:18
viable (3) 69:13 74:1 112:2
vicious (1) 82:14
views (2) 18:5,16
vindicate (1) 104:22
virtually (2) 51:21,22
virtue (2) 103:22 104:10
visibility (2) 31:2,8
voluminous (3) 73:4 90:16 95:12
voluntary (2) 114:4 129:20
volunteered (1) 131:6

W

wait (2) 81:7 157:18
waited (1) 129:13
wants (1) 102:8
wasnt (3) 12:4 142:9 153:14
watch (1) 96:17
way (33) 5:6 9:19 14:7 31:21 32:4 34:13,19 42:8 43:23 51:16 56:3 68:4,9 75:2 77:6 80:23 84:15 93:20 102:20 119:12 123:16 124:1,18 125:1,6 127:13 131:7,17 135:14 136:6,18 142:14 146:16
weaponisation (1) 105:3
weapons (1) 106:6
wearing (1) 101:22
wedding (1) 96:24
wednesday (1) 158:14
week (3) 48:1 92:25 112:19
weeks (2) 72:11 91:16
weigh (1) 85:14
wellknown (1) 86:24
went (1) 45:15
werent (2) 22:22 134:21
whatever (1) 148:11
whats (6) 14:8 19:15,25 37:24 102:16 142:17
whatsoever (6) 6:25 56:2 57:2 71:7 125:7 146:21
whereabouts (2) 58:17 60:10
whereas (3) 96:14 151:10,16
whereby (4) 57:8 65:19 71:21 89:15
wherever (1) 49:11
whoever (1) 148:5
whole (3) 76:24 87:22 158:16
wholly (3) 101:5 110:7 132:14
whollyowned (1) 34:21
whom (1) 135:19
wide (1) 78:9
wider (1) 73:1
wideranging (1) 65:17
willingness (1) 105:24
wind (1) 17:5
winning (1) 102:2
wish (3) 120:9 121:6 158:23
wishes (1) 100:5
withstands (1) 98:16
witness (1) 84:7
wondered (2) 82:17 150:9
wont (5) 24:12 44:6 105:19 117:13,17
work (1) 95:25
workable (1) 43:13
worked (1) 63:4
works (1) 152:21
world (2) 31:17 39:23
worried (1) 84:14
worry (1) 133:17
worse (5) 18:18 48:8 54:12 85:25 106:14
worth (7) 17:13 40:15 63:23 86:5 93:6 104:15 137:20
wouldnt (3) 7:19 15:15 93:18
writing (2) 126:8 148:11
written (1) 153:3
wrong (17) 4:16 27:16 31:21 49:24 51:18 55:20,23 56:10 61:22 62:13 71:7 81:25 84:15 109:22 118:17 146:18,21
wrongdoers (1) 6:21
wrongdoing (2) 64:13 95:7
wrongly (2) 119:16 130:22
wrote (1) 144:22

X

x (1) 159:1

Y

year (10) 25:18 52:22 72:7,17 89:1 94:2 105:5 151:10,11 153:5
years (3) 95:6 106:4 123:17
yet (3) 35:25 59:7 91:3
york (2) 104:7,21
youre (1) 102:1
yourselves (2) 75:16 143:19
youve (1) 80:24

0

008 (1) 143:6

1

1 (9) 35:14 36:18 63:23 69:6 91:23 107:2 124:25 143:16 145:4
10 (3) 50:23 129:12 146:16
100 (3) 1:2 86:5 104:15
100000 (2) 58:5 61:14
1008 (4) 142:23 143:5,10,12
11 (99) 2:22 3:2,23 7:4 16:1,4 21:20 22:1 24:15 25:7,14,17,19 26:9,11,12,16,22 27:18 28:1,14,20 29:2,5,14,22,25 30:21,24 33:18,21,25 34:5 35:15 36:19,22 37:1,5,12 40:11 41:20 42:18 45:6 46:5 47:22 70:23 71:19 79:17,19 83:1,8 84:3,21 90:1 91:2 92:7 97:22 98:3,6,10,14,22 99:6,10,20 100:8,10,16,20 101:2,9,9,14 102:23 103:6 107:3,15,19 108:3,13,16 109:3,19,24 110:1,10,19,24 111:6 113:23 114:2,13,21,24 115:2,17 116:6 135:2,3
1135 (1) 157:20
11c (1) 36:4
11th (2) 41:13 61:7
12 (1) 123:18
121 (1) 159:3
122 (1) 60:24
123 (2) 79:14 82:18
130 (2) 67:23 68:3
132 (1) 159:3
133 (1) 159:4
137 (1) 156:12
14 (2) 94:17,17
15 (3) 89:19 98:13 151:19
15712050 (1) 61:15
16 (1) 139:9
16a (1) 139:11
173 (4) 35:2,5,8,10
174 (1) 8:25
175 (1) 43:8
176 (2) 44:9 124:22
180 (1) 125:14
195 (4) 22:2,4,5 26:18
196 (1) 28:3
1st (1) 1:11

2

2 (5) 36:21 49:17 69:6 125:2,17
2005 (1) 16:8
2011 (2) 17:14 62:20
2012 (1) 145:23
2021 (1) 143:15
2022 (1) 144:21
2024 (1) 95:21
2025 (6) 41:13,15 70:22,23 72:20 95:21
2026 (2) 1:1 59:11
206 (1) 97:2
21 (1) 34:10
211 (2) 144:21 145:5
212 (6) 144:15,18,19 145:6,7,9
214 (2) 49:9 53:21
216 (3) 97:9 122:4,11
217 (1) 122:17
218 (1) 122:23
219 (1) 123:3
22 (1) 98:1
239 (2) 69:21 87:14
240 (2) 70:17 72:19
240242 (1) 70:14
242 (1) 87:14
243 (2) 73:15,18
244 (1) 74:8
245 (1) 73:16
246 (2) 76:17,19
25 (1) 114:23
256 (1) 76:23
257 (1) 76:19
258 (1) 78:6
259 (1) 78:7
261 (2) 78:6,15
262 (2) 79:3,8
269 (1) 79:8
27 (3) 1:1 125:15,21
270 (1) 17:13
27th (1) 59:11
28 (5) 112:21 113:13,16,17 114:19
28th (1) 41:15
29 (1) 115:8
290 (1) 112:20

3

3 (11) 37:3 43:10 51:1 52:2,13,16 129:14 137:8,9,10 159:2
30 (2) 115:15,20
300 (2) 82:13 96:17
303 (2) 75:21 156:12
31 (2) 116:11,14
31a (1) 138:11
31st (2) 89:21 158:14
32 (4) 79:14 116:24 146:3,14
320 (1) 75:19
321 (1) 75:23
32c (2) 139:25 140:5
33 (3) 5:25 116:11 117:17
347 (1) 59:6
35 (2) 117:20 151:10
36 (1) 117:23
37 (2) 117:25 146:8
3rd (1) 1:11

4

4 (5) 37:3 43:14 49:17 137:9,10
42 (3) 145:24 146:1,13
42a (1) 140:17
45 (1) 75:5
46 (4) 61:4,5 62:5 159:2
47 (2) 61:4,5
4728 (5) 40:20,24 41:7,9 151:5
48 (2) 62:5,7
489 (1) 139:9
495 (3) 137:24 139:25 140:3
496 (1) 140:17

5

5 (7) 37:3 44:4,11 52:9 69:6 137:9,10
50000 (2) 43:11 44:14
500000 (3) 32:7 151:2,11
524 (1) 157:23
535 (1) 157:20
543 (1) 157:25
546 (1) 158:24
549 (2) 58:10 59:4
56 (2) 5:25 79:14
56page (1) 53:14
5th (1) 1:11

6

6 (2) 69:6 88:25
600 (1) 1:20
60000 (6) 151:15 152:25 153:5,15,18,24
62 (2) 67:4 154:15
6894 (1) 40:25
6th (1) 1:12

7

7 (1) 69:6
728 (1) 41:6
79 (2) 69:19 121:25
7a (5) 28:12 31:10,12,21 110:24
7b (5) 28:3,10,11,14 110:14

8

8 (1) 143:8
80 (1) 86:21

9

98 (1) 154:23
99 (1) 60:11