Docket #0227 Date Filed: 01/29/2026

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	Chapter 11
Apple Tree Life Sciences, Inc., *et al.*,[1]	Case No. 25-12177 (LSS)
Debtors.	(Jointly Administered)

LIMITED OBJECTION OF RIGMORA BIOTECH INVESTOR ONE LP AND RIGMORA BIOTECH INVESTOR TWO LP TO DEBTORS' MOTION FOR ENTRY OF AN ORDER (I) APPROVING THE RETENTION AND EMPLOYMENT OF B. RILEY RESTRUCTURING SERVICES, LLC TO PROVIDE THE DEBTORS WITH A CHIEF RESTRUCTURING OFFICER AND ADDITIONAL STAFF EFFECTIVE AS OF THE PETITION DATE; (II) DESIGNATING PERRY M. MANDARINO AS THE CHIEF RESTRUCTURING OFFICER TO THE DEBTORS; AND (III) GRANTING RELATED RELIEF

Parties in interest Rigmora Biotech Investor One LP, by its general partner Unicorn Biotech Ventures One Ltd, and Rigmora Biotech Investor Two LP, by its general partner Unicorn Biotech Ventures Two Ltd (collectively, the "**LPs**"), respectfully submit the following limited objection (the "**Limited Objection**")[2] to the *Debtors' Motion for Entry of an Order (I) Approving the Retention and Employment of B. Riley Restructuring Services, LLC to Provide the Debtors with a Chief Restructuring Officer and Additional Staff Effective as of the Petition Date; (II) Designating Perry M. Mandarino as the Chief Restructuring Officer to the Debtors; and (III) Granting Related*

[1] The Debtors in these chapter 11 cases, along with the last four digits of each Debtor's federal tax identification number include: Apple Tree Life Sciences, Inc. (4506); ATP Life Science Ventures, L.P. (8224); ATP III GP, Ltd. (6091); Apertor Pharmaceuticals, Inc. (3161); Initial Therapeutics, Inc. (2453); Marlinspike Therapeutics, Inc. (4757); Red Queen Therapeutics, Inc. (8563); Evercrisp Biosciences, Inc. (4437); Nine Square Therapeutics, Inc. (4503); and Nereid Therapeutics Incorporated (8493). The location of the Debtors' service address in these chapter 11 cases is 230 Park Avenue, Suite 2800, New York, NY 10169.

[2] Capitalized terms used but not otherwise defined herein shall have the meanings ascribed to them as in the *Limited Objection of Rigmora Biotech Investor One LP and Rigmora Biotech Investor Two LP to Debtors' Application for an Order Authorizing the Retention and Employment of Quinn Emanuel Urquhart & Sullivan, LLP as Co-Counsel for the Debtors Effective as of the Petition Date* filed contemporaneously herewith (the "**Quinn Emanuel Limited Objection**").

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Relief [Docket No. 131] (the "**Retention Application**"), which seeks to retain and employ, for all of the above-captioned debtors and debtors in possession (the "**Debtors**"), Mr. Perry M. Mandarino as Chief Restructuring Officer ("**CRO**") and, as necessary, supporting staff from Mr. Mandarino's firm B. Riley Restructuring Services, LLC ("**B. Riley**") under section 363(b) of the Bankruptcy Code, and state as follows:

PRELIMINARY STATEMENT

1. Like their position with respect to Quinn Emanuel's retention, the LPs do not argue that B. Riley should be barred from *any* role in these chapter 11 cases; rather, the LPs object to B. Riley acting as financial advisor, and Mr. Mandarino purporting to act as CRO, to *all* of the Debtors, with no independent and unconflicted counsel providing advice about how to safeguard the distinct interests of different Debtors' estates, and with no procedural or other safeguards to mitigate the conflicts of interest that are inherent among the filing entities in these chapter 11 cases and their differing stakeholders.

2. The inherent conflicts of interest among certain Debtors in these chapter 11 cases is described in detail in the Quinn Emanuel Limited Objection (and is set forth in the Factual Background herein). The LPs will not repeat a detailed exposition of the relevant conflicts verbatim in this preliminary statement. In summary:

- The GP, the Fund, and the Debtor Portfolio Companies are effectively three different groups of debtors with different economic interests, obligations, and core stakeholders.[3] The situation raises multiple different kinds of conflicts, two of which are of particular concern to the LPs.

- First, in purporting to represent both the solvent GP and the solvent Fund, B. Riley owes duties to two masters: the GP is ultimately owned and directed

[3] As described in the Quinn Emanuel Limited Objection, the LPs have moved to dismiss the chapter 11 case of the GP and the case purportedly filed on behalf of the Fund. If the motion to dismiss is successful, the Court would not need to address the issues raised in this Limited Objection. However, as the application to retain B. Riley will be heard before the LPs' Amended Motion to Dismiss, the LPs must assert this Limited Objection.

by Seth Harrison, whereas the Fund must be managed for the benefit of its investors, of which the LPs are by far the largest, and the GP owes its duties *directly* to the Fund's limited partners. *See Declaration of Mark Phillips KC in Support of Motion of Rigmora Biotech Investor One LP and Rigmora Biotech Investor Two LP for Relief from the Automatic Stay* [Docket No. 126] (the "**Phillips Decl.**") ¶¶ 74–81.

- This conflict is not merely hypothetical: While the GP does owe a fiduciary duty to the LPs that matches the duty that would be owed by any fund professional to its stakeholders in a chapter 11 case, the exercise of that duty is the subject of active litigation. Moreover, statements by Quinn Emanuel have made clear that the GP will seek to displace the LPs from the Fund, notwithstanding that the Fund Assets dramatically exceed any associated liabilities, and the LPs hold far more than a controlling position in the class of interests that will be the fulcrum security for the Fund.

- Second, there is a ripe conflict between the Fund-Level Debtors and the Debtor Portfolio Companies because the GP ought to recognize—and any professionals retained to represent the Fund's interests if it remains in chapter 11 will certainly owe—a duty to maximize the value of the Fund Assets. On the other hand, the Debtor Portfolio Companies are cash-needy and seek immediate funding for research, without vetted prospects of commercial success.

- The Debtors' professionals have glibly asserted that there is an alignment of interests because the equity in the Debtor Portfolio Companies is included in the Fund Assets, so what is good for the Debtor Portfolio Companies must be good for the Fund. In the first place, it is not true that the stakeholders are the same: Each of the Debtor Portfolio Companies has other equity investors and creditor stakeholders besides the Fund.

- Further, it is just not accurate to say that a managed investment fund always has an economic interest in funding portfolio companies that have failed to be profitable: This Court is well aware that portfolio companies of private equity and venture capital funds regularly fail when their sponsor fund does not see an economic basis for further investment, even if the fund itself has available capital and would be able to invest if it believed it should. That is particularly true in early-stage biotech investing, where all acknowledge the failure rate is—and is expected to be—high. In proposing uses of the Fund Assets, the GP *and any professionals retained to represent the GP or the interests of the Fund* have a duty to make a thoughtful investment decision as to whether such a use will in fact benefit the Fund and its investors, the LPs. In doing so, these professionals have a direct conflict of interest with the goals of the Debtor Portfolio Companies, which are depending on the Fund Assets (or borrowing against the Fund Assets) to fund their ongoing operations.

3. In light of these conflicts of interest, absent effective safeguards which do not exist here and in fact have not even been seriously considered, no one professional can maximize value and appropriately consider stakeholders' interests for *all* of the Debtors—the interests of one or another category of Debtors must necessarily take precedence. That type of constraint on effective representation is squarely what section 327(a) of the Bankruptcy Code seeks to prevent.[4] These are not the run-of-the-mill multi-debtor cases where professionals can seek to maximize value of the combined estates for the benefit of all stakeholders without first thoughtfully considering the distinct interests associated with each individual filer and ensuring that each will be appropriately represented.

4. It is primarily incumbent on proposed counsel for the Debtors to give serious thought to potential conflicts of interest and to advise the Debtors with respect to B. Riley (including the proposed CRO, Mr. Mandarino) as to the best way to ensure that any inherent conflicts are addressed and mitigated. Unfortunately, it appears that did not occur: There is no indication that B. Riley or Mr. Mandarino have recognized their obligation to consider investments from the perspective of the Fund, or the fact that the interests of (i) the GP, (ii) the Fund (or, to state the proper position under Cayman law, the LPs for whom the Fund Assets are held on trust and to whom duties are directly owed), and (iii) the Debtor Portfolio Companies are all divergent. Thus, there are no customary corporate governance protections in place at the Debtors whose interests are in conflict, such as independent officers and directors or special committees empowered to decide that a conflict matter has arisen and then seek legal advice from a conflicts

[4] The LPs are well aware that the Retention Application seeks retention under section 363(b) of the Bankruptcy Code. However, as is typical and appropriate for financial advisors seeking retention when one of their professionals is acting in an officer-level capacity with the Debtors, B. Riley has undertaken to make disclosures consistent with the retention standard under section 327(a) of the Bankruptcy Code and has represented that they are a disinterested party under section 101(14). Due to conflicts inherent in the situation, B. Riley does not meet the legal standard for disinterestedness.

counsel or retain its own counsel—the proposed corporate governance architecture for these chapter 11 cases loads all decision-making onto a single CRO who is advised by equally conflicted counsel. The results do not adequately protect the interests of the Fund, the Fund Assets, or the Fund's primary economic stakeholder, the LPs.

5. Indeed, it is clear that Quinn Emanuel's advice in its purported role as counsel to the Debtors (which includes Mr. Mandarino as their CRO), has placed the interests of the Debtor Portfolio Companies over the interests of the Fund, apparently at the direction of the GP in breach of its own fiduciary duties. Quinn Emanuel has unashamedly proclaimed that the purpose of these chapter 11 cases is to save the Debtor Portfolio Companies and remove the Fund's LPs—proposed actions that would violate the GP's fiduciary duties to the LPs—and use Fund Assets to loan money to the Debtor Portfolio Companies, without independent analysis to determine whether those amounts will ever be repaid. This clear favoritism, with a lack of attention to duties owed to and by the Fund-Level Debtors' estates, has placed B. Riley and Mr. Mandarino in a conflicted position as well.

6. Mr. Mandarino has testified that one reason not to retain separate professionals for the Fund is a concern for costs. Ex. A, Second Day Hr'g Tr., Jan. 20, 2026, at 121:16–122:10. In making that quick determination on the witness stand (while admitting that he had not previously thought about that issue—presumably because counsel did not advise him about it), Mr. Mandarino had not sought any input from the LPs who will primarily bear the downside risk (and reap the potential benefit) of any expenditures of Fund Assets. This provides further evidence that the current configuration of professionals in these chapter 11 cases neither recognizes nor addresses the conflicts of interest that they face. The Retention Application cannot be approved under these circumstances.

7. If its role were more carefully circumscribed, the LPs believe that B. Riley could be retained to represent all of the Debtors. Specifically, to the extent that B. Riley is engaged to assist with cash flow forecasting, required chapter 11 reporting, or other basic administrative functions associated with the Debtors' chapter 11 cases, such a role would not, as a matter of necessity, implicate the inherent inter-debtor conflicts that concern the LPs, and therefore would not be objectionable.

8. To the extent, however, that Mr. Mandarino has been installed as the purported CRO for all of the Debtors,[5] he, like Quinn Emanuel, is conflicted. As Mr. Mandarino has, in sworn testimony, adopted Quinn Emanuel's position that the purpose of these chapter 11 cases is to benefit the Debtor Portfolio Companies, his retention should be limited to that role, and a separate and independent fiduciary should be appointed to ensure that the GP's duties to manage the Fund are properly carried out.

FACTUAL BACKGROUND

9. The Fund-Level Debtors and Debtor Portfolio Companies are structurally and economically distinct. The Fund-Level Debtors are solvent.[6] The Fund is a Cayman Islands exempted limited partnership that has no legal personality separate and apart from its partners.[7] The Fund is, in effect, a fund-of-one, as the LPs are the Fund's largest limited partner, having

[5] It is not clear that Mr. Mandarino has been or could ever be properly appointed as the CRO of the Fund, which has no officers or directors in accordance with the terms of the LPA.

[6] As recounted in detail in the Amended Motion to Dismiss, the Fund-Level Debtors collectively hold assets in the range of $1 billion to $10 billion with only twelve non-insider, unsecured creditors with claims totaling $204,066. Case No. 25-12178, Docket No. 1, Fund's Form 201, at 4, 9–10; Case No. 25- 12179, Docket No. 1, GP's Form 201, at 4, 9–10; Ex. A, Second Day Hr'g Tr., Jan. 20, 2026, at 142:2–3.

[7] Ex. B, *Kuwait Ports Authority v Williams* [2024] UKPC 32 at [35]; Ex. C, *Re ATP Life Science Ventures LP* [2025] CIGC (FSD) 106 ¶¶ 32–34; Ex. D, Expert Report of Michael Bloch KC, Aug. 15, 2025, ¶ 30; *see generally* Phillips Decl. ¶¶ 24(a), 26–27, 31–56.

contributed approximately 98% of the Fund's overall capital and 100% of the capital for the Debtor Portfolio Companies. Ex. E, Chancery Court Post-Trial Op., Dec. 5, 2025, at 5, 12, 14, 17 n.99; *Declaration of Dr. Seth L. Harrison In Support of Chapter 11 Petitions and First Day Motions* [Docket No. 18] (the "**First Day Decl. of Dr. Seth Harrison**") ¶¶ 10, 27. The GP, a Cayman entity owned and controlled by Dr. Harrison, holds the legal title to the Fund Assets on statutory trust for the benefit of the limited partners (principally, the LPs) and owes fiduciary duties to the Fund's limited partners. Ex. F, *Kuwait Ports Authority v Port Link GP Ltd* [2023] (1) CILR 50 at [54], [56]; *see generally* Phillips Decl. ¶¶ 24(b), 26–27, 57–81; Ex. G, Chancery Court Pre-Trial Order, Sept. 5, 2025, ¶¶ 13–15.

10. The relationship between the two Fund-Level Debtors is complicated, however, because of the fractured relationship between Dr. Harrison and the LPs. As this Court is by now aware, the LPs and Dr. Harrison have been in active litigation for many months. As most relevant here, in the Cayman Court proceedings underway since June 2025, the LPs contend that the GP mismanaged the Fund by, *inter alia* (i) improperly charging expenses to the Fund; (ii) failing to maintain Fund records as required under Cayman law; (iii) suing in the Court of Chancery for a declaration that the LPs owed the Fund hundreds of millions of dollars more than they had committed; and (iv) seeking to impose a default penalty that would allow the GP to seize 50% of the LPs' interests in the Fund and redistribute it to Dr. Harrison and his family trust. *See* Ex. H, Cayman Amended Winding-Up Petition, Nov. 21, 2025, ¶ 4.

11. On the other hand, the Debtor Portfolio Companies are cash-strapped, preclinical start-ups with uncertain scientific and economic promise that burned through millions of dollars of Fund Assets over many years before the petition date. So far in these chapter 11 cases, the Debtor Portfolio Companies have received millions of dollars of additional Fund Assets to

continue their operations, even though certain Debtor Portfolio Companies have exhausted their approved budgets under the LPA. *See Final Order to (I) Make and Accept Secured Loans to Portfolio Companies, (II) Authorize to the Extent Outside the Ordinary Course of Business Payment of Management Company Expenses, and (III) Grant Related Relief* [Docket No. 206] ¶ 2. And although the Fund is the majority investor in the Debtor Portfolio Companies, the GP does *not* owe the Debtor Portfolio Companies fiduciary duties, and thus when managing the Debtor Portfolio Companies, the GP's fiduciary duty remains to "act solely in the interests" of the LPs. Phillips Decl. ¶ 80. Each Debtor Portfolio Company has its own board of directors, but they all share one director in common: the deeply conflicted Dr. Harrison. *See* Ex. I, Seth L. Harrison, M.D., ATP – Team Biography. These boards owe fiduciary duties to their own unique constellation of stakeholders. The Fund owns no more than 90.5% of each of the Debtor Portfolio Companies, *see* First Day Decl. of Dr. Seth Harrison, Ex. A, and each Debtor Portfolio Company has non-Fund creditors, resulting in the recent appointment of the Unsecured Creditors Committee, which includes only creditors of the Debtor Portfolio Companies, not the Fund-Level Debtors, *see Notice of Appointment of Committee of Unsecured Creditors* [Docket No. 194].

12. As separate entities with their own distinct obligations, interests, fiduciaries, and stakeholders, the Debtors have potential claims against each other that are not mere claims that amount to intercompany accounting. Instead of considering these claims from the Fund's perspective, the Debtors' professionals represented to this Court—contrary to the operative stock purchase agreements (the "**SPAs**") and the prior sworn testimony of Dr. Harrison—that the Fund purportedly owes more than $200 million to the Debtor Portfolio Companies in outstanding funding obligations, when these obligations are not, in fact, due and owing. *Compare* First Day Decl. of Dr. Seth Harrison ¶ 47 and First Day Hr'g Tr., Dec. 17, 2025 [Docket No. 81], at 12:17–

22, *with* Ex. J, Harrison Dep. Tr., Oct. 6, 2025, at 273:2–7 (agreeing with the characterization that [redacted]); *see also* Ex. K, Chancery Court Trial Tr., Oct 16-17, 2025, at 195:11–17 (testimony of Debtors' expert, Dr. Mark Robbins, accepting that all early-stage companies had missed investment memorandum milestones). In addition, the Fund has recently received secured notes issued by the Debtor Portfolio Companies on an atypical, emergency basis to operate and continue external research and development on terms that were "exceedingly favorable to the [Debtor] Portfolio Companies." *See Debtors' Motion for Entry of Interim and Final Orders to (I) Make and Accept Secured Loans to Portfolio Companies, (II) Authorize to the Extent Outside the Ordinary Course of Business Payment of Management Company Expenses and (III) Grant Related Relief* [Docket No. 89] (the "**Funding Motion**") ¶¶ 11, 30.

13. Even though the Fund, GP, and Debtor Portfolio Companies have divergent interests and find themselves on opposite sides of transactions and potential claims, B. Riley and Mr. Mandarino request that they be retained to work for *all* the Debtors in these chapter 11 cases under section 363(b) of the Bankruptcy Code. *See* Retention Application ¶¶ 4, 22, 30. No arrangements, however, have been made for the retention of independent directors or independent financial advisors to any of the Debtors with respect to financial issues or business decisions where the Debtors have conflicting interests in these chapter 11 cases. *See* Ex. L, Mandarino Dep. Tr., Jan. 19, 2026, at 42:10–43:19; Ex. A, Second Day Hr'g Tr., Jan. 20, 2026, at 121:10–15. When asked about the lack of safeguards in this case, the only reason that Mr. Mandarino could come up with for their absence, in the moment on the witness stand, is that he has not "thought about it" and it would be a "waste of dough." Ex. A, Second Day Hr'g Tr., Jan. 20, 2026, at 121:16–122:10. Mr. Mandarino, however, said "to come up with the right answer," he would "really have to confer

with counsel"—the same counsel that is wholly conflicted, as recounted in detail in the Quinn Emanuel Limited Objection. *Id.* at 122:5–10.

14. Indeed, perhaps because Quinn Emanuel's own conflicted position has prevented it from properly advising Mr. Mandarino, it does not appear that Mr. Mandarino has assessed the propriety of advising opposite sides of loan transactions or even the possibility that the terms of those loans might benefit the borrowers more than the lender. When asked whether he is advising both the lender and borrowers with respect to the proposed loans between the Fund and Debtor Portfolio Companies, Mr. Mandarino responded, [redacted] but when asked whether he is on both sides of that transaction, he replied, [redacted] As to the question of whether an interest rate [redacted] Mr. Mandarino responded, [redacted] Even when asked whether it would be in the Fund's best interest to provide a [redacted] loan at [redacted] percent interest to a portfolio company, Mr. Mandarino answered, [redacted]

15. Furthermore, Mr. Mandarino appears to have concluded that all the Debtors' interests are aligned in funding the Debtor Portfolio Companies, without undertaking the analysis that would be needed to support such a conclusion. Mr. Mandarino testified that the Debtors' interests are aligned by virtue of the "waterfall" by which value is distributed, but neither he nor anyone else at B. Riley has analyzed the mechanics of the waterfall.[8] As a result, Mr. Mandarino

[8] *Compare, e.g.*, Ex. L, Mandarino Dep. Tr., Jan. 19, 2026, at 58:17–23 [redacted] and *id.* at 43:12–19 [redacted] *with id.* at 60:4–7 [redacted]

has concluded that "what is most important . . . is that [the portfolio] companies continue to receive funding to continue their mandates" because "[i]f that happens and it works then everything else falls into place." Ex. A, Second Day Hr'g Tr., Jan. 20, 2026, at 117:10–15. But, at the same time, Mr. Mandarino has already acknowledged a potential complication to his analysis: In his view, the Debtor Portfolio Companies are "not supposed to make money." *Id.* at 109:24.

16. Accordingly, what Mr. Mandarino has really done is make clear whose interests he believes he is representing in these chapter 11 cases. Echoing Quinn Emanuel's position, Mr. Mandarino has told this Court that "the most important thing . . . is to continue the funding of the [Portfolio Companies] to continue their missions." Ex. A, Second Day Hr'g Tr., Jan. 20, 2026, at 122:11–22; *see* Ex. L, Mandarino Dep. Tr., Jan. 19, 2026, at 48:2–25 [redacted]; Ex. M, Excerpt of Quinn Emanuel Second Day Hr'g PowerPoint, at 15 ("The primary purpose of these Chapter 11 cases is to save, preserve and maximize the value of the Portfolio Companies."). Accordingly, when Mr. Mandarino advised both the Fund (the lender) and the Debtor Portfolio Companies (the borrowers) with respect to the secured notes mentioned above, Mr. Mandarino *never* analyzed whether the Fund would receive a return on its investment—or even if the notes would be repaid at all—but did have the Fund provide the funding on "good terms" for the Debtor Portfolio Companies. Ex. L, Mandarino Dep. Tr., Jan. 19, 2026, at 43:21–44:1, 46:9–15, 53:13–20, 82:4–14; Ex. A, Second Day Hr'g Tr., Jan. 20, 2026, at 116:13–25, 118:3–22. When designing a budget to fund the Debtors, Mr. Mandarino disclaimed doing so [redacted] because he must [redacted] Ex. L, Mandarino Dep. Tr., Jan. 19, 2026, at 55:3–16, 56:23–57:1. And

[redacted]

Mr. Mandarino, similar to Quinn Emanuel and Dr. Harrison, stated that "Chapter 11 may permit the Debtors to bring in new investors to replace the . . . LPs, investors who are willing and able to fund the Portfolio Companies' development, so that the Portfolio Companies can continue to pursue their life-saving drug programs," when it is unclear how such a position comports with the Fund's interests or the GP's fiduciary duties. *Declaration of Perry M. Mandarino, Chief Restructuring Officer of the Debtors, in Support of Chapter 11 Petitions and First Day Motions* [Docket No. 25] ¶ 11.

ARGUMENT

17. The Debtors have requested that they be permitted to retain and employ Mr. Mandarino as CRO and his firm B. Riley for additional support, as necessary, for all the Debtors under section 363(b) of the Bankruptcy Code. Presumably, the Debtors seek this relief pursuant to the Jay Alix Protocol (the "**J. Alix Protocol**"), under which the U.S. Trustee allows Debtors to retain CROs and their firms under section 363(b). *See* Ex. N, U.S. Trustee Program Manual and Policies: Vol. 3 Chapter 11 Case Administration, at § 3-7.1.1. It is important to note, however, that the J. Alix Protocol does *not* have the force of law. *In re Nine West Holdings, Inc.*, 588 B.R. 678, 687–88 (Bankr. S.D.N.Y. 2018). It thus cannot alter that section 327(a) of the Bankruptcy Code applies to all "professional persons," which includes CROs as individuals that provide "services intimately involve[d] [in] the administration of the bankruptcy estate." *See In re Lowry Graphics, Inc.*, 86 B.R. 74, 78 (Bankr. S.D. Tex. 1988); *see also In re First Merchants Acceptance Corp.*, 1997 WL 873551, at *3 (D. Del. Dec. 15, 1997) (listing factors used to assess whether an employee is a "professional" under section 327); *In re Blue Stone Real Estate, Constr. & Dev. Corp.*, 392 B.R. 897, 906 (Bankr. M.D. Fla. 2008) (finding that a CRO is a "'professional' within the meaning of section 327(a)"). Nor can Mr. Mandarino and B. Riley be permitted to evade the requirements of section 327(a) by seeking retention under a section of the Bankruptcy

Code with different, less stringent requirements. *See F/S Airlease II, Inc. v. Simon*, 844 F.2d 99, 108–09 (3d Cir. 1988) (prohibiting a professional from "circumventing section 327(a)," whose requirements he could not meet, by seeking compensation under a different section of the Bankruptcy Code). Accordingly, even the terms of the J. Alix Protocol itself do *not* permit the retention of a CRO and its firm if they have an actual conflict of interest under section 327(a). *See* Ex. O, The Future of the USTP's CRO "Protocol," U.S. Dep't of Justice (Sept. 1, 2018), https://www.justice.gov/archives/ust/blog/future-ustps-cro-protocol; *see also In re Marvel Ent. Grp., Inc.*, 140 F.3d 463, 476 (3d Cir. 1998) (holding that professionals with an "actual conflict of interest" are *per se* disqualified under section 327(a)).

18. The Third Circuit has been clear that "a conflict is actual when the specific facts before the bankruptcy court suggest that 'it is likely that a professional will be placed in a position permitting it to favor one interest over an impermissibly conflicting interest.'" *In re Boy Scouts of Am.*, 35 F.4th 149, 158 (3d Cir. 2022) (citing *In re Pillowtex, Inc.*, 304 F.3d 246, 254 (3d Cir. 2022)). In line with that precedent, this Court has observed that an actual conflict of interest exists if a professional's "ability to advocate on behalf of the debtors is impaired or constrained." *See* Tr. of Bench Ruling Hr'g at 11:17–19, *In re Franchise Grp., Inc., et al.*, Case No. 24-12480 (LSS) (Bankr. D. Del. Feb. 12, 2025) (the "**Franchise Group Bench Ruling**"). The assessment of whether an actual conflict of interest exists is a fact-specific inquiry. *See In re BH&P, Inc.*, 949 F.2d 1300, 1315 (3d Cir. 1991); Franchise Group Bench Ruling at 11:19–22.

19. Here, Mr. Mandarino and B. Riley have an actual conflict of interest that resembles the conflicts tainting Quinn Emanuel's attempt to represent all the Debtors in this Court. First, there is a conflict between the Fund and the GP resulting from the active litigation between the LPs and Dr. Harrison over the past year. By echoing Quinn Emanuel's stated goal of ousting the

LPs in these cases, Mr. Mandarino has taken a position that aligns with the interests of Dr. Harrison but that is in conflict with the GP's contractual and fiduciary duties to the LPs or any position that an unconflicted professional advising the Fund should take. Like Quinn Emanuel, then, Mr. Mandarino finds himself tangled in a conflict between serving the interests of the individual who speaks for the GP, or making decisions with respect to the Fund Assets that will advance the interests of the Fund and its investors, despite the mismanagement of the GP.

20. Second, there is an unreconciled conflict between the Fund-Level Debtors and the Debtor Portfolio Companies as to the proper use of Fund Assets and the economic goal of these chapter 11 cases. The GP, in managing the Fund, owes its fiduciary duties exclusively to the LPs including to maximize the value of their investments in the Fund. The Fund-Level Debtors, however, do *not* have parallel fiduciary duties to the Debtor Portfolio Companies and thus cannot myopically focus on bailing out the Debtor Portfolio Companies to the detriment of the Fund's limited partners. On the other hand, the Debtor Portfolio Companies have their own interest in continuing cash-intensive scientific research, rather than maximizing economic value in the near-term, to serve their unique constellations of stakeholders. Ex. L, Mandarino Dep. Tr., Jan. 19, 2026, at 50:12–18 (describing [redacted]. The Fund-Level Debtors and Debtor Portfolio Companies therefore have different objectives: The Fund-Level Debtors are (or should be, if properly focused on their fiduciary duties) focused on return on investment, while the Debtor Portfolio Companies are determined to pursue an ill-defined goal of scientific progress regardless of the cost or likely economic return.

21. The result has been that Mr. Mandarino and B. Riley have needed to pick whether to prioritize the interests of the Fund-Level Debtors or the Debtor Portfolio Companies. That is

best exemplified by Mr. Mandarino advising the Fund, as lenders, and the Debtor Portfolio Companies, as borrowers, with respect to the same secured notes. *See id.* at 43:21–44:1. In that situation, Mr. Mandarino advised the Fund to provide loans on "good terms" to the Debtor Portfolio Debtors, without ever assessing the likelihood of the Fund being repaid or getting a return on its investment. *Id.* at 46:9–15, 53:13–20, 56:8–57:1, 82:4–12; Ex. A, Second Day Hr'g Tr., Jan. 20, 2026, at 116:13–25, 118:3–22.[9] And Mr. Mandarino proceeded to give this advice without ever viewing the transaction as potentially conflicted and thus giving no "thought" as to whether either the Fund or the Debtor Portfolio Companies needed an independent professional to advise them. Ex. A, Second Day Hr'g Tr., Jan. 20, 2026, at 121:16–122:22; Ex. L, Mandarino Dep. Tr., Jan. 19, 2026, at 43:21–44:4, 48:2–25. To be clear, the LPs' issue is with process, rather than necessarily with the outcome. It very well may be that an independent professional would recommend further investment in the Debtor Portfolio Companies, but such a professional would have certainly approached the issue objectively, based on independent economic analyses and the Fund's best interests, rather than wholesale adopting Dr. Harrison's view that what is good for the Debtor Portfolio Companies is good for the Fund, as Mr. Mandarino did. *See* First Day Decl. of Dr. Seth Harrison ¶¶ 12–13.

22. Mr. Mandarino's approach to the secured notes recently at issue is all the more troubling because this type of situation is likely to recur in this case. The interim funding that the Debtors recently obtained will only last through February 13, 2026. *See* Ex. A, Second Day Hr'g

[9] There is also no evidence that a market check was undertaken to assess the desirability of further funding. If, indeed, it was in the best interests of the Fund to invest further Fund Assets into the Debtor Portfolio Companies, Mr. Mandarino and the Debtors' other professionals should have been able to source DIP financing for the Debtor Portfolio Companies. The absence of any indication that outside investors were interested in funding the Debtor Portfolio Companies suggests that the market does not view further investment in the Debtor Portfolio Companies as economically sound. Accordingly, this is a further indication that the secured loans were *not* in the Fund's best interests.

Tr., Jan. 20, 2026, at 101:22–102:9. It is therefore probable that, in the near future, the Debtor Portfolio Companies will again seek to utilize Fund Assets to propel their expensive research operations forward. In addition, although the Debtors' professionals have claimed that the Fund owes more than $200 million to the Debtor Portfolio Companies in outstanding funding obligations, *see* First Day Decl. of Dr. Seth Harrison ¶ 47; *see also* First Day Hr'g Tr., Dec. 17, 2025 [Docket No. 81], at 12:17–22, unconflicted counsel for the Fund would readily contest the validity of such obligations, for the reasons detailed herein and in the Quinn Emanuel Limited Objection. Accordingly, if the Fund-Level Debtors' cases are not dismissed and independent counsel is appointed for the Fund-Level Debtors (as it should be), the likelihood of inter-debtor claims, where Mr. Mandarino and B. Riley would be valuing one Debtor's claims against another, is essentially inevitable.

23. But just as Quinn Emanuel implemented no safeguards to avoid enmeshing itself in conflicts between the Debtors, no proactive steps have been taken to obtain independent decisionmakers to address these obvious conflicts, as would be typical and appropriate (and, just as one example, was recently done in Saks' chapter 11 cases filed weeks ago).[10] Instead, all of the decision-making has been fully loaded onto Mr. Mandarino and B. Riley, forcing them to forge ahead by prioritizing the interests of the Debtor Portfolio Companies over the Fund-Level Debtors. Mr. Mandarino has told this Court that "the most important thing . . . is to continue the funding of the [Portfolio Companies] to continue their missions[.]" Ex. A, Second Day Hr'g Tr., Jan. 20,

[10] One of the two debtor groups in Saks appointed an independent director and retained a separate chief restructuring officer, financial advisor, and independent general bankruptcy counsel to represent different silos of debtors, because of the presence of inter-debtor claims and divergent interests between the two debtor groups. *In re Saks Global Enterprises LLC, et al.*, No. 26-90103 (ARP) (Bankr. S.D. Tex. 2026), Docket No. 37, *Declaration of Andrew D.J. Hede in Support of SO5 Digital Debtors' Chapter 11 Petitions and First Day Pleadings* ¶¶ 22–26.

2026, at 122:16–22; *see* Ex. L, Mandarino Dep. Tr., Jan. 19, 2026, at 48:2–25 [redacted]. And his actions thus far in this case (*e.g.*, the budget and the secured loans between the Fund and the Debtor Portfolio Companies) align with that viewpoint, just as Quinn Emanuel's actions have.

24. Because Mr. Mandarino has already chosen the Debtor Portfolio Companies over the Fund-Level Debtors, Mr. Mandarino should only be retained as the CRO of the Debtor Portfolio Companies. If Mr. Mandarino's role, in which he is required to exercise business judgment, were to be limited, then the LPs would have no objection to all the Debtors retaining B. Riley for ministerial financial work, such as cash flow forecasting, required chapter 11 reporting, or other basic administrative functions associated with the Debtors' chapter 11 cases.

CONCLUSION

WHEREFORE, the LPs request that the Retention Application be approved only to the extent that Mr. Mandarino be retained as the CRO of the Debtor Portfolio Companies and B. Riley be retained to provide administrative services to all the Debtors. The Fund-Level Debtors should retain and employ separate CROs in these chapter 11 cases.

Dated: January 29, 2026
Wilmington, Delaware

Respectfully Submitted,

DEBEVOISE & PLIMPTON LLP

/s/ M. Natasha Labovitz

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EXHIBIT A

UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

IN RE:	.	Chapter 11
	.	Case No. 25-12177 (LSS)
APPLE TREE LIFE SCIENCES, INC., *et al.*,	.	(Jointly Administered)
	.	Courtroom No. 2
	.	824 Market Street
Debtors.	.	Wilmington, Delaware 19801
	.	Tuesday, January 20, 2026
. . . . .	.	2:35 p.m.

TRANSCRIPT OF HEARING
BEFORE THE HONORABLE LAURIE SELBER SILVERSTEIN
UNITED STATES BANKRUPTCY JUDGE

APPEARANCES:

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INDEX

WITNESSES CALLED BY THE DEBTORS:	PAGE
DR. SETH L. HARRISON	
Direct examination by Mr. Berdon	16
Cross-examination by Ms. Selden	79
Redirect examination by Mr. Berdon	93
PERRY M. MANDARINO	
Direct examination by Ms. Tomasco	96
Cross-examination by Mr. Taft	111
Redirect examination by Ms. Tomasco	131
Recross-examination by Mr. Taft	135

EXHIBITS

DEBTORS' EXHIBITS:	PAGE
38 - Secured promissory note	105
39 - Secured promissory note	105
40 - Secured promissory note	105
41 - Secured promissory note	105
42 - Secured promissory note	105
43 - Secured promissory note	105
50 - 26-week cash flow projection	99
57 - Amendment 8 to the LPA	74
77 - Series A Preferred Stock Purchase Agreement	108
78 - Series A Preferred Stock Purchase Agreement	108
79 - Series A Preferred Stock Purchase Agreement	108
80 - Series A Preferred Stock Purchase Agreement	108
81 - Series A Preferred Stock Purchase Agreement	108
82 - Series A Preferred Stock Purchase Agreement	108
83 - Series A Preferred Stock Purchase Agreement	108
84 - Series A Preferred Stock Purchase Agreement	108
85 - Series A Preferred Stock Purchase Agreement	108
86 - Client statement from Morgan Stanley	70
87 - SEC Form 4, 12/25	72
88 - Document JX-0126	75
89 - Set of audited financials	77
Transcriptionists' Certificate	167

INDEX

MOTIONS: PAGE

Agenda Item 1: Debtors' Motion for an Order (I) Directing Joint Administration of Additional Chapter 11 Cases and (II) Extending Certain Relief Granted to the Original Debtors [Docket No. 118 - filed January 6, 2026]

Court's Ruling:

Agenda Item 2: Debtors' Motion for Entry of an Order (I) Extending Time to File Schedules of Assets and Liabilities, Schedules of Current Income and Expenditures, Schedules of Executory Contracts and Unexpired Leases, Statements of Financial Affairs, and Rule 2015.3 Financial Reports and (II) Granting Related Relief [Docket No. 119 - filed January 6, 2026]

Court's Ruling:

Agenda Item 3: Debtors' Motion for Entry of an Order (I) Establishing Procedures for Interim Compensation and Reimbursement of Expenses for Retained Professionals and (II) Granting Related Relief [Docket No. 120 - filed January 6, 2026]

Court's Ruling:

Agenda Item 4: Debtors' Motion for Entry of Interim and Final Orders to (I) Continue Employee Benefits Programs and (II) Granting Related Relief [Docket No. 23 - filed December 15, 2025]

Court's Ruling:

INDEX

MOTIONS: PAGE

Agenda Item 5: Debtors' Motion Seeking Entry of Interim and Final Orders (I) Authorizing the Debtor to (A) Continue to Operate Their Cash Management System, (B) Honor Certain Pre-Petition Obligations Related Thereto, and (C) Continue to Perform Intercompany Transactions, (II) Granting Administrative Expense Status to Post-Petition Intercompany Balances, and (III) Granting Related Relief
[Docket No. 24 - filed December 15, 2025]

Court's Ruling:

Agenda Item 6: [SEALED/Unsealed] Debtors' Motion for an Order (I) Enforcing the Automatic Stay and (II) Imposing Sanctions Against Rigmora
[Docket No. 83/Docket No. 140 - filed December 23, 2025/January 9, 2026]

Court's Ruling:

Agenda Item 7: Debtors' Motion for Entry of Interim and Final Orders to (I) Make and Accept Secured Loans to Portfolio Companies, (II) Authorize to the Extent Outside the Ordinary Course of Business Payment of Management Company Expenses and (III) Grant Related Relief
[Docket No. 89 - filed December 23, 2025]

Court's Ruling:

Agenda Item 8: Debtors' Motion for Entry of an Order (I) Authorizing the Debtors to (A) Pay Their Obligations Under Prepetition Insurance Policies, (B) Continue to Pay Certain Brokerage Fees, (C) Renew, Supplement, Modify, or Purchase Insurance Coverage, and (II) Granting Related Relief
[Docket No. 106 - filed December 30, 2025]

Court's Ruling:

INDEX

MOTIONS: PAGE

Agenda Item 9: Debtors' Motion for Entry of an Order (I) Authorizing Debtors to Employ Professionals Utilized in the Ordinary Course of Business, (II) Waiving Certain Information Requirements of Local Rule 2016-1, and (III) Granting Related Relief
[Docket No. 121 - filed January 6, 2026]

Court's Ruling:

Agenda Item 10: Debtors' Motion Seeking Entry of an Order (I) Approving the Debtors' Proposed Adequate Assurance of Payment for Future Utility Services, (II) Prohibiting Utility Providers from Altering, Refusing, or Discontinuing Services, (III) Approving the Debtors' Proposed Procedures for Resolving Adequate Assurance Requests, and (IV) Granting Related Relief
[Docket No. 123 - filed January 6, 2026]

Court's Ruling:

Agenda Item 11: Motion of Rigmora Biotech Investor One LP and Rigmora Biotech Investor Two LP to File Under Seal Exhibit B Attached to the Limited Objection
[Docket No. 156 - filed January 15, 2026]

Court's Ruling:

(Proceedings commenced at 2:35 p.m.)

THE COURT: Please be seated.

Ms. Good.

MS. GOOD: Good afternoon, Your Honor. Katie Good of Potter, Anderson & Corroon on behalf of Apple Tree Life Sciences, Incorporated and its affiliated debtors.

We're here today for an omnibus hearing in these cases.

I note, prior to this hearing, Your Honor had entered orders on Items 1 through 5 and 8 through 10, which really just -- or I think I may have had that numbering off -- yeah, which really leaves us with three items going forward today:

Our motion to enforce the automatic stay;

Our funding motion;

And Rigmora's motion to seal their limited objection.

We thought it made sense to start with the funding motion, since that is more critical relief. And I think, in the context of that, the sealing request can be addressed. I understand the U.S. Trustee has some comments or an objection to that.

THE COURT: Okay.

MS. GOOD: So, if that's acceptable to Your Honor, I would turn the podium over to Ms. Tomasco, and we can

proceed with the funding motion.

THE COURT: Yes. Excuse me.

MS. TOMASCO: Your Honor, we have a PowerPoint presentation. I don't know if you want to hear from Rigmora yet. And there's a -- and we're not going to put it up on the screen because it -- you know, some of this is commercial. I didn't want to like look at who's on the Zoom. So if I could hand it up to the Court?

THE COURT: You can.

MS. TOMASCO: Thank you.

(Participants confer)

MS. TOMASCO: Thank you.

THE COURT: Thank you.

(Participants confer)

THE COURT: Here's another one. I just need one.

MS. TOMASCO: Sorry, Your Honor. Thank you. Fortunately, I brought enough for the whole class.

Your Honor, Patty Tomasco, proposed counsel on behalf of the debtors.

I'm not going to go through a lengthy presentation, I think the papers have covered everything. Mostly, the PowerPoint presentation is meant to orient the Court to the structure of the debtors, the history, and the argument.

If you'd like, we can get started. But

essentially, some of this is repetitive of what we put on the first-day presentation, the format --

THE COURT: Am I --

MS. TOMASCO: -- and everything --

THE COURT: -- going to get evidence?

MS. TOMASCO: Oh, yes. And if you would like to start with evidence, we can do that, too.

THE COURT: That's where I'd like to start.

MS. TOMASCO: Okay. Your Honor, I'll turn the podium over to Mr. Andrew Berdon, who's going to put on the first witness.

THE COURT: Okay. Thank you.

MS. TOMASCO: Oh, if I could, Your Honor, maybe we could go through some exhibits and see if those can be admitted.

THE COURT: Excuse me.

(Participants confer)

THE COURT: I had a list and now I've lost it.

MS. TOMASCO: We can have another...

(Pause in proceedings)

MS. TOMASCO: May I approach, Your Honor?

THE COURT: You may. Thank you.

MS. TOMASCO: Your Honor, I believe that some of these are going to be repetitive. They are largely derived from the pleadings that were filed with those exhibits.

But I would propose that Exhibits 1 --

THE COURT: That's Chancellor McCormick's opinion?

MS. TOMASCO: -- 1 through 9 be admitted.

Exhibit -- and for purposes of the funding motion, Exhibit 50.

THE COURT: 50? Okay.

MS. TOMASCO: In addition, we have the pre-petition secured promissory notes at Exhibits 38 through 43, and the stock purchase agreements at 77 through 85.

And if there is any doubt, we want the LPA and all of its amendments. I believe that it's on the exhibit list several times.

I don't believe there should be any objections to those, those are all operative documents.

THE COURT: Okay. I am going to want to know what's important in each of those documents and why they're coming in.

And let me ask this: Is there no a conformed copy of the limited partnership agreement as it stands today with its amendments?

MR. BERDON: Your Honor, Anthony Berdon for the debtors. And the answer to that is no, the agreement is essentially interpreted and enforced as the amended and restated agreement plus its 22 amendments.

THE COURT: Well, somebody might consider doing

that and having and having an agreed document that is current, and where we don't have to go and try to look at each amendment and figure out what goes -- I started crossing things out, but it -- I'm surprised that no other judge has asked for this. So, if the parties can take some time at some point to do that, one would think that could be agreed to.

MS. TOMASCO: Noted, Your Honor.

THE COURT: Okay.

MS. TOMASCO: So we propose to admit those exhibits at the outset, subject to the testimony that will refer to them.

THE COURT: Is there any objection? Ms. McCollum.

MS. MCCOLLUM: Good afternoon, Your Honor. Hannah McCollum for the U.S. Trustee.

I don't have an objection, but I do note that the exhibit list noted that some of these exhibits were sealed. And so, to the extent that the exhibits are marked "sealed" on the exhibit list -- and here, I would say that the --

THE COURT: Oh --

MS. MCCOLLUM: -- Debtors' Exhibits 5, 6, and 7 -- which I don't think anybody intends to be sealed, but I -- if they are to be sealed, I object to that, I believe.

And then Rigmora has filed its objection, a couple of things in it are sealed, and then it has designed two

exhibits as to be sealed. And I object to the sealing of those exhibits. I don't know whether anybody is going to refer to them or attempt to admit them or discuss them, so I am reserving my objection to that time. But I wanted to let Your Honor -- I wanted to flag the issue for Your Honor.

THE COURT: Okay

MS. MCCOLLUM: Thank you.

THE COURT: Thank you.

Let's start with 5, 6, and 7. Why are they sealed?

MS. TOMASCO: 5, 6, and 7. The LPA does not need to be sealed.

MR. TAFT: We agree, Your Honor.

Will Taft for the Rigmora LPs.

THE COURT: Thank you.

Okay. So -- and as well as the amendments, the two amendments.

MS. TOMASCO: As well as the amendments.

THE COURT: Okay. Thank you.

MS. TOMASCO: I would say that the Series A preferred stock purchase agreements, those are going to have very precise milestones that are going to be confidential and proprietary. And while we could redact them, I would propose, for purposes of this hearing, that we just simply keep them sealed. And to the extent that those details of

the underlying science could provide a competitive advantage to a competitor.

THE COURT: Thank you.

I think it's a question of just how do we work around that.

MS. TOMASCO: Your Honor, I believe that we can submit exhibits under seal, and that happens all the time.

The testimony about those exhibits will not concern, at least as far as I know, at least not on direct, the actual scientific milestones that contain the confidential and proprietary data.

What I would suggest is, to the extent that there is any testimony elicited on the portions that would be sensitive to the debtors' ongoing competitive advantage, that we address it if it comes up.

THE COURT: Ms. McCollum.

MS. MCCOLLUM: Your Honor, if they're not going to talk about the terms that are proposed to be sealed, then I don't think that we need to seal them.

THE COURT: Well, they should be redacted then.

MS. MCCOLLUM: Correct.

THE COURT: Yeah.

MS. TOMASCO: I think those particular -- very precisely, those particular things that are confidential commercial information -- which I haven't seen, by the way,

should be redacted.

And if the witness -- what I have seen in the past is the witness discusses whatever in the agreement is not the confidential part of the agreement, and the rest of it is unsealed.

THE COURT: Thank you.

Ms. Labovitz.

MS. LABOVITZ: Your Honor, Natasha Labovitz for the LPs.

We actually haven't really seen these exhibits either, we were not given an opportunity to go through the exhibit list with the debtors before it was filed, so we're not sure what they're planning to refer to or how they're planning to use these documents today, so it's a little hard for us to --

THE COURT: Okay.

MS. LABOVITZ: -- respond.

THE COURT: So let's see how it plays out. Let's see how it -- let's see how it plays out. I don't hear, really, any objection to the limited partnership agreement, I can't imagine, or any of the amendments.

The stock purchase agreements is maybe where I hear they don't have -- don't know what they're being used for.

I'll reserve. You can move them into evidence

with the witnesses. We'll see how it plays out.

MS. TOMASCO: Thank you, Your Honor.

I'm going to turn the podium over to Mr. Berdon, who is going to call our first witness.

(Pause in proceedings)

MR. BERDON: Good afternoon, Your Honor. Andrew Berdon for the debtors.

The debtors call Dr. Seth Harrison to the stand.

THE COURT: Mr. Harrison, please take the stand.

THE ECRO: Please raise your right hand.

Please state your full name and spell your last name for the court record, please.

THE WITNESS: Seth Harrison, H-a-r-r-i-s-o-n.

SETH L. HARRISON, WITNESS FOR THE DEBTORS, AFFIRMED

THE ECRO: You may be seated.

Your Honor.

THE COURT: Thank you.

Mr. Berdon.

MR. BERDON: If I may begin?

THE COURT: Yes.

DIRECT EXAMINATION

BY MR. BERDON:

Q Dr. Harrison, good afternoon.

Can you please briefly describe your educational background?

A Yeah. I have an undergraduate degree from Princeton, an M.D. from Columbia, and M.B.A. from Columbia, some surgery training beyond that at Columbia Presbyterian.
Q And are you currently engaged in venture capital activities?
A I am.
Q And how many years of experience do you have in the venture capital area?
A I believe 36. I started in 1991.
Q And have your venture capital activities focused on any particular industry?
A Life sciences.
Q And are you familiar with the Debtor ATP Life Science Ventures, L.P.?
A Yes.
Q And what is it?
A ATPLSV is a venture fund that invests in life sciences companies.
Q And do you have a role at ATPLSV?
A I do.
Q And what is that?
A Managing general partner.
Q Are you familiar with the Debtor ATP III GP, Limited?
A I am.
Q And what is that?

A That is the general partner of ATPLSV.
Q And do you have a role at ATP III GP, Limited?
A I am the director of the general partner.
Q And do you also own the general partner?
A Yes.
Q Are you familiar with Debtor Apple Tree Life Sciences, Inc.?
A Yes.
Q And what is that entity?
A One of two management companies that oversees the investments in the fund.
Q And does ATP -- I'm sorry.
Do you colloquially call that "ATLS" in your business?
A ATLS, yes.
Q Okay. Does ATLS have any employees?
A Yes.
Q And can you -- generally speaking, what are the roles that ATLS plays in the administration of the fund?
A ATLS employs everybody at the fund who is responsible for founding, managing, overseeing the portfolio companies. ATLS holds all the leases that might be involved in running the fund, any contracts, obligations, benefit plans. It's essentially the operating entity.
Q Okay. You mentioned that there are two managing entities. After ATLS, what's the other one?

A Apple Tree Venture Management, LLC.
Q And what is the role of Apple Tree Venture Management, LLC?
A ATVM, that is my management company, and it -- through it, I manage the funds.
Q And is it the vehicle through which you are paid?
A Yes, I am.
Q Do you receive any remuneration from ATLS?
A I receive a de minimis salary that is designed to enable me to have healthcare benefits. Because of the way healthcare benefits work, you need to have a large enough payroll, so ATLS has that payroll.
Q Are you familiar with the debtors' day-to-day operations?
A Yes.
Q And are you familiar with the debtors' business and financial affairs, generally?
A Yes.
Q And are you generally familiar with the debtors' books and records?
A Yes.
Q You mentioned earlier that the debtor is engaged -- debtors are generally engaged in investments in life science companies. Are those investments in the form of portfolio companies?

A Yes.
Q And how many portfolio companies are being managed today by the GP?
A Fifteen.
MS. LABOVITZ: (Not identified) Objection to form. Objection, lack of foundation.
THE COURT: Overruled.
BY MR. BERDON:
Q And is it fair to say that A-T-S --
A ATLS?
Q -- ATLS -- A-T -- I'm sorry -- Apple Tree Life Science Ventures, L.P. is the owner of those portfolio companies' capital, stock, as it pertains to ATP's ownership?
A Yes.
Q Okay. And for some of those portfolio companies, are there owners of shares outside of the ATP fund family?
A Well, shares in a company tend to be divided up into types. So, if ATP is the sole investor, then ATP would be, typically, the sole preferred stock owner, but founders and management and sometimes other entities have common stock.
Q And in general terms, what are the businesses of these portfolio companies?
A So, for the most part, they're biotech companies. There's a pharmaceutical company and there is one MedTech company.

Q And by "MedTech," you mean what?
A Medical device that has a therapeutic effect.
Q Okay. And in your mind, is there a difference between a biotechnology company and a pharmaceutical company?
A Yes. In the common parlance, a biotechnology company uses a piece of biology inside the body to eventually develop a therapeutic, which may be a therapeutic that is similar to that, which would have been originally developed by a pharmaceutical company. A pharmaceutical company comes out of the organic chemicals industry, which is much older than the biotech industry. They come together, usually, at later stages in commercialization.
Q Okay. Do you know how many of the portfolio companies are currently debtors in this case?
A Seven.

MR. BERDON: Okay. Your Honor, I don't know how familiar you are with the FDA clinical development process. I'm going to ask the witness some questions and, if it's stuff that's well tread with you, I'll move on very quickly.

THE COURT: Thank you.

BY MR. BERDON:
Q Dr. Harrison, when it comes to the development of therapeutics designed for human use, does the FDA require clinical study of a drug before it can be introduced into commerce?

A Yes.
Q And are they generally divided into different stages?
A Yes.
Q And can you explain to the Court how those stages are designated; are they numbered?
A Phase 1, Phase 2, Phase 3, simply put.
Q Okay. And what's the purpose of a Phase 1 clinical trial, generally?
A Typically, it's to determine whether a drug is safe in humans, although there's add-ons called a "Phase 1b," for example, where you can determine proof of the drug's mechanisms and also early efficacy.
Q And generally speaking, what is done in a Phase 2 clinical trial?
A A Phase 2 clinical trial, you're seeking out the specific populations for whom a drug may work. You're determining the correct dose in those people, those populations. And you're basically sizing and determining the structure of what will be your Phase 3 trial, which will be done for approval of the product.
Q And is the Phase 3 trial sometimes called the "pivotal trial"?
A Yes.
Q Okay. So what has to be done before you can start Phase 1 testing?

A Well, you have to go through a lot of what are called "preclinical" tests and experiments and specific pieces of work related to a project that are dictated by the FDA.

Q And generally speaking, when you are doing the preclinical work, is some of that done basically in test tubes, in vitro?

A Yes. The -- that tends to be an earlier piece of work, where you discover how a drug is working, what we say, "mechanistically," which receptors it might touch in the body or which biomolecules or things like that. And once you've determined that you have that sort of proof in vitro, then you move to in vivo systems and different animal models.

But ultimately, in order to do a clinical trial, you need to do very specific regulatory toxicology studies in specific species of animals for specific durations and do specific tests on those animals, et cetera.

Q Now once you've performed that work, is there a specific filing that goes to the FDA before a Phase 1 clinical trial can begin?

A Yes.

Q And what's that filing called?

A An "IND," investigational new drug application.

Q Thank you.

Among the portfolio here, are there some that are in active clinical development of therapeutics?

A Yes.
Q And which one are they -- which ones are those?
A Which ones.
Q Pardon me.
A Replicate, Aulos, Ascidian, and Marengo.
Q And we're here today asking the Court to approve some funding for which one of those four?
A I believe today is Aulos.
Q Okay. Are there companies in the portfolio that are in the preclinical stage of development?
A Yes.
Q And of those 15 portfolio companies that you mentioned, how many are preclinical?
A I believe the number is nine.
Q And are all the preclinical companies that filed for chapter -- withdrawn.

All the portfolio companies that have filed for Chapter 11 so far, are they in the preclinical phase?
A Yes.
Q Okay. Now does the partnership have an interest in any commercial stage companies?
A Yes, two.
Q And "commercial stage companies" are those that actually have a marketed product. Is that right?
A Yes.

Q And what are the two commercial stage companies in the portfolio?
A One is called Braeburn and the other is called Galvanize.
Q And briefly, what is the -- is Braeburn's business?
A Braeburn markets a drug that is used to combat opioid addiction.
And Galvanize markets a medical device that is used to treat cancer.
Q And does ATP have valuations done of Braeburn from time to time?
A Yes.
Q And do you have a recollection of the most recent valuation of Braeburn?
A I do.
Q What's that?
A All in, it's approximately 2.9 billion, although some 750 million of that, valued on the date of distribution, was distributed.
Q Dr. Harrison, why did the debtor portfolio companies here file for Chapter 11 protection?
A Because they did not have the resources to carry out their -- their research plans, essentially.
Q And was there a particular event that interrupted their access to resources?

A Yes, Rigmora defaulted on the limited partnership agreement and repudiated their obligations under it.

Q And what did the general partner and the fund do in response to that event?

A We filed a suit in Chancery Court.

Q And after litigating that suit through, was there an opinion rendered?

A Yes.

MR. BERDON: Okay. And as Your Honor noted earlier, the Court's opinion does appear on the exhibit list. I'm not going to walk the witness through it, but that's Exhibit 1.

BY MR. BERDON:

Q Dr. Harrison, prior to the default, did the partnership and the GP keep track of the financial performance of the fund, in comparison with some of the other participants in the industry?

A Yes.

Q And would it help your testimony if I were to provide you with a chart that I believe appeared earlier in one of the first-day submissions, in a PowerPoint presentation?

A Sure.

May I ask, can you hear me if I don't lean forward? Is -- if I just sit back, can you hear me okay?

THE COURT: I can.

THE WITNESS: Yeah? Okay.

(Participants confer)

MS. LABOVITZ: (Not identified) Your Honor, while we wait to find the right spot for the next question, we are resisting objecting to all of this. It's very unclear to me why the questions being asked right now are relevant to the funding motion, and we're just not sure where we're going here.

We've been asking for information about the funding motion and what is supposed to be funded for quite some time, we look forward to hearing it. But it seems to me that doing it in this format and in this way is a bit counterproductive. And if Dr. Harrison would like to explain to us what the funding is for, we'd love to do that perhaps back at Richards Layton's offices. I'm just not sure what we're doing here right now.

UNIDENTIFIED SPEAKER: Your Honor, I --

MR. BERDON: Your Honor, I can't respond to that in any way, other than to say we're here to put on evidence of the -- why are we here and --

THE COURT: Well, why are we here is not necessarily for today.

MR. BERDON: And --

THE COURT: That's for another day.

MR. BERDON: And then what are we asking to be

able to spend and for what use will it be made.

THE COURT: Okay. So I'll consider this background for that, but --

MR. BERDON: That's exactly what it is.

THE COURT: But let's get to that.

MR. BERDON: Understood, Your Honor. Then I will not go to this exhibit.

(Participants confer)

MR. BERDON: Okay. May I approach the witness, Your Honor?

THE COURT: You may. Is that this PowerPoint?

MR. BERDON: It is.

I'm just going to ask the witness to look at the slides titled "Debtors Overview."

BY MR. BERDON:

Q Dr. Harrison, can you turn to Page 7?

A I'm there, yeah.

Q Okay. I'm just going to use this for a little -- just so we have an order to talk about things. But I'd like to start our conversation with Aulos.

Are you familiar with the amount being sought to fund Aulos in the funding motion?

A Yes.

Q And how much is that?

A It's shifted. It -- I understand what Aulos needs as

an -- as an enterprise --

Q Is it --

A -- to achieve its next valuation step, which is approximate 7 million.

Q Okay.

A But I haven't exactly tracked what goes into these different segments.

Q Understood.

So if you would please turn to page 16 of the presentation and the slides that followed, and I would direct your attention to numbered page 20.

Are you with me on page 20?

A I am.

Q Does it refresh your recollection as to the amount that is being sought --

A Yes.

Q -- as a requested final amount here?

A Yes.

Q And how much is that?

A $3.7 million.

Q Okay. Can you explain to the Court the reason why we -- the Debtors are seeking $3.7 million to fund Aulos in the near term?

A Well, Aulos is in the middle of the phase, four Phase 2 oncology clinical trials to malignant melanoma and to non-

small cell lung cancer both, in patients who are otherwise untreatable using standard of care and the company has approximately three weeks of cash left.

Q And just so the Court understands, in order to conduct these four Phase 2 clinical trials, what expenses are associated with maintaining those trials?

A Well, apart from the basic payroll at the company, which is very efficient -- there are only seven people there -- most of the work at a company like this would be outsourced to a contract research organization set up to perform the clinical trial.

Q And contract research organizations are typically referred to as "CROs"?

A Yes.

Q And is Aulos going to be required to make payments to its CRO over the next five to six weeks?

A Yeah, typically, the contracts for CRO have progress payments and I believe that Aulos has a $2.5 million progress payment due by the end of January.

Q In addition to payments to the contract research organizations, are there amounts that get paid for laboratory work?

A Yes.

Q And how is laboratory work relevant to the clinical trials?

A Well, these days, clinical trials involve making sure that a drug works in the way that it's supposed to work biologically, and that means that you know from all the work you've done preclinically, what the mechanism of action is of the drug. And there's a lot of fairly complicated and technical tests that you do of samples of the patients in a clinical trial: blood samples, tissue samples, various types that are sent to specialized labs and those are typically specialized tests that may often have been developed specifically for the company's drug, and those need to be carried out as a part of the clinical trial, as part -- in order to have a valid result for the FDA.

Q And is part of running the clinical trial, is there a requirement to actually supply an active drug --

A Yes.

Q -- for use in the trial?

A Yes, the company must ensure drug supply for the clinical trial; in fact, it's part of the Institutional Review Board's requirements for each university medical center where the clinical trial may be undertaken, that there's an assurance of blood supply -- of drug supply for the patients.

Q Does Aulos currently have on hand enough drug to finish its current clinical trials?

A I am not certain of that, but I know that they will

need to continue to fund the manufacture and supply organization to continue to make drug supply.

Q Taking a look at the column under "Reason," are the investigator interactions and Aulos' presence at clinical trial sites things that are necessary to fund in order for a clinical trial to be maintained?

A In my experience, crucial. You can't just outsource to a contract research organization; you have to have your own people on-site developing relationships with principal investigators and actually being, at times, involved in patient selection, answering any questions about nuances is of a drug administration. If you don't do that, things can go awry very quickly.

Q Dr. Harrison, if you read Rigmora's papers, you know, none of this is so sensitive that it couldn't wait a couple of months.

What's your reaction to that?

A It's nonsense.

Q Is there any fat in this funding request, anything that is going for things that are not necessary to keep the clinical trial program up and running?

A These portfolio companies have been starved for approximately one year, so there's absolutely no fat. The funding request is, after an intensive period by a professional team, of triage and only the essential assets

are being funded in the absolute, bare-minimum amounts.

Q If one was to try to run Aulos in the ordinary course as a generally typical biotech company at clinical stage, would it have a different amount of cash needs than $3.7 million for the next several weeks?

A Well, first of all, I've never seen a company at this stage in its life cycle as a biotech company, have no balance sheet. It -- and would never have embarked upon a clinical trial of this nature without a balance sheet.

Typically, companies monitor and evaluate the data stream that's coming from the clinical trials or from their work, in general, and they adjust their research plans and program expenditures based upon those results. Aulos, actually, has been unable to do that. The best it can do is hope to continue its clinical trials. I believe it's trimmed them from the number of patients originally sought after to an absolute minimum number, based upon the lack of funding.

So what Aulos could do and what Aulos is doing; there's quite a distance.

Q And without going into too much detail, you mentioned that this is -- these are trials in melanoma and lung cancer.

Just as a category, what type of drug is Aulos developing?

A It's a kind of a drug that's called an immuno-oncology drug and, specifically, a cytokine agent. And what it does

is it harnesses part of the immune system that can be used by the body to fight cancers and it aims it, essentially, at those cancers better and intensifies its action better without having very many side effects.

Q If you were to be running this company in the ordinary course, would you be asking for more than $3.7 million right now?

A Absolutely.

Q What will happen if Aulos does not receive the funding that you've asked for in this interim order?

A Well, Aulos will go out of business. The critical trial, if I were continued, it would only be some patients who might be succeeding on the trial. I believe the numbers are 30 to 40 percent at the moment, which is a very good number for those indications.

They might continue on sort of a momentum and compassionate-use basis. The minute the drug supply is up, they'll go off; there'll be no new patients recruited; there'll be no monitoring of those patients, so the data will kind of go sideways, which is absolutely critical for any kind of FDA file. That'll be ruined. There'll be no -- we talked about all the testing that needs to go on in the background; that's not going to happen. It would be unmanaged; it would sort of go off the road.

Q And what would happen to the patients who are currently

enrolled in that trial?

A As I said, some of them might be lucky, who have access to drug supply and a compassionate care team might stay on for some period of time, but, ultimately, they would fall off. And that's problematic because I don't know if you people quite realize what happens in the drug industry is something called an "extension arm" of the clinical trial that's working and it's your obligation as a company to continue to supply drug to investigators who request it for patients who are staying on drug where their disease is controlled. So, sometimes, a clinical trial may end and patients in the extension arm might be on for years surviving, doing well, and that certainly would not happen.

Q So Dr. Harrison --

A And -- sorry -- there are already patients on the extension arm here from the Phase 1 trial that Aulos did.

Q Dr. Harrison, in terms of the characteristics and admission criteria for a patient to be in one of Aulos' clinical trials, are they a particularly robust population?

A Well, no. Aulos, specifically, is recruiting patients who have failed all other agents known in the Pharmacopeia that could potentially treat them. They've tried them; they failed.

In fact, before we embarked on this clinical trial, we mandated that Aulos holds an advisory board of the leading

melanoma scientists in the country to ensure that the clinical trial would only recruit patients who stringently failed prior, any possible medicine that could help them.

Because we wanted -- because we knew under the default that we had so little money that every patient had to count, we couldn't have anyone look at the data and say, Oh, this could have been a patient where the momentum of their prior therapy is somehow is latent response, so we eliminated that by having patients have absolute failure on any -- on whatever they could have been on and that was legislated in to the clinical trial plan.

Q Dr. Harrison, how much money has been invested into Aulos to date?

A I think the total number is about $69 and a half million.

Q And who provided those funds?

A ATP provided 60. The CEO of Aulos provided 7 and a half and the regional source of the preclinical compound that we took forward, which is an Israeli company that designs antibodies *in silico* named "Biologic" provided 2 and a half, and then there was an individual on the board who used to be the chief medical officer of Pfizer Oncology, who invested a hundred thousand dollars.

Q We've heard about budgets with a capital B, in this case, in the context of the limited partnership agreement.

At this time, does Aulos have any remaining, approved budget that Rigmora has approved?

A It does not.

Q Have you asked Rigmora to approve budgets for Aulos?

A Yes.

Q And what, generally, has been Rigmora's response?

A Initially, the response was "no." Then, they said, after many, many discussions where the response was "no" or things were put off, they indicated that they would only consider funding Aulos, for example, if we were to shut down the preclinical portfolio.

Q So, was that an issue that was litigated down in the Chancery Court?

A Yes.

Q Is it usual for a company's CEO to contribute or invest their own money in an early-stage biotechnology company like this?

A It's quite unusual under these circumstances. Sometimes it happens where a CEO will ask to co-invest, but usually it's under a million dollars and it's something that's allowed. But at this scale of investing and there's no doubt that biotechnology is a capital-intensive endeavor, typically, it's institutional investors and I've never seen it before where a CEO steps in to the breach where an institutional investor defaults.

Q Do you know how long that's -- the last of that $69 million is likely to last for Aulos?
A Early February, I believe.
Q So the cashout date for Aulos --
A Less than a month.
Q -- with those contributions is still in February of 2026?
A Yeah, the guy's put together that $9 and a half million, I think it was June or July and they're running a Phase 2 clinical trial or trials, so that ten million bucks lasted as long as it has; it's incredibly efficient.
Q And I'm going to wrap up Aulos, but if Aulos were to be able to proceed, essentially, as close to ordinary course as it can, what are the events that you are using as your thoughts about business planning and generation of value over the next 12 months?
A The company would complete the enrollment of its Phase 2 clinical trials and all of the associated testing. The company would analyze the data, measuring response rates, adverse events, and most importantly, durability of response. That's why you have to let these things run for a long time, particularly in immuno-oncology, because the durability is very important. The data would be presented at major oncology conferences, which tend to occur in May and June. There would be something called an "end of Phase 2" meeting

with the FDA, which will probably occur midyear and that would set the company up for an approval path through a Phase 3 clinical trial.

And based upon meetings with the FDA, that could go in several different directions; most aggressively, if we were super optimistic, you would get an accelerated approval path with a very limited, phase, what's called a "Phase 2(b)," you know, a very small trial, and get an approval in '27. I'd say the most pessimistic, but still assuming that the data are good, is the FDA would require a full Phase 3 trial and then you'd get an approval in late '28.

Q Would delay of funding for two more months, in your view, jeopardize that progress?

A Well, as I testified before, the clinical trial would most likely cease or it would be disrupted in a manner to potentially ruin the data or not enable the accrual of the requisite number of patients or not conduct timely testing on patient samples or not oversee the trial in the correct way. I mean, the company is running out of money now.

Q Understood.

MR. BERDON: Your Honor, I'm going to move on to the preclinical companies now.

BY MR. BERDON:

Q Dr. Harrison, if you'd, just for the purpose of guiding us, we're going to take a look at page 7 of the PowerPoint in

front of you, and we're going to just discuss these, essentially, alphabetically.

Can you please explain to the Court what Aethon does.

A Aethon is a company that is creating what are called "companion medicines" for precision oncology drugs.

Q And what's the current status of the work going on at Aethon in terms of -- and I'll frame it -- their progress to the point where funding stopped or was drastically reduced?

A Well, Aethon, fortunately, has a strategic partner named "Revolution Medicines," which is a biotech company, which we call "RevMed" for short. And the RevMed deal has provided, I believe some 20 million in free cash to the company to work on RevMed programs. Those programs are to create companion antibodies for RevMed's own precision medicines in a -- that target a very important cancer-causing protein called "RAS."

That program has gone very well, moving from discovery research to development candidate, which is the stage just before you begin those standardized, sort of regulatory steps and procedures to prepare for an IND. RevMed is funding the company in a manner to create a small profit and, also, our team in running RevMed under these scarce-funded circumstances, have managed to eke out a margin of the team's time, as well. In those interstices, we've actually managed to work on some internal programs, wholly-owned project, in

addition to RevMed's.

So, I think the company has done very well on incredibly small funding and they have a pretty exciting program, where the problem in medicine today is that these precision oncology drugs, because they're so precise, they actually teach the cancer how to mutate around them. And so, the companion medicine that we design with them, holds the precision drug's effect for much longer. So it's a very sought-after model and that was the reason we founded the company.

Q Well, the argument, I'm sure it's going to be made, that the outside money is keeping Aethon alive.

Why not just keep going on that basis? What's the reason why you need Aethon to have funding, independent of this strategic partner?

A Well, we founded Aethon, I believe it's a five-year-old company, or close to it. The total investment that we've made during that time is $19 million. Where it's gotten to in that $19 million is very, very far. It could never have gotten there without RevMed's funding.

The base of the company is something that has to be maintained in order for a strategic partner like RevMed, or any of our other deals where there's a strategic partner, for them to want to continue to invest. It's not -- RevMed, alone, doesn't sustain the company; in fact, if we didn't

fund at all, there's a possibility and a likelihood that RevMed would not continue to fund and that would be -- it's kind of a chain reaction.

Q To put it another way, does the strategic partner view itself as being responsible for keeping its contract is partner solvent?

A Absolutely not.

A strategic partner is funding its own programs on the company's platform.

Q I'd like to direct your attention to the chart on page 18. My copy of page 18 doesn't have a number on it, but I'm looking to make sure it's adjacent to 19. And that's a slide that's titled company break -- "Funding Motion: Company Breakdown --

A Uh-huh.

Q -- Aethon (nondebtor)."

How much is -- how much are the Debtors seeking in funding on this motion for Aethon?

A Approximately $2.2 million.

Q So, as you're sitting, looking at this, our friends from Rigmora say no reasonable person would invest money and additional work for preclinical activities at this point and that somehow your judgment has been clouded.

What's your response to that?

A The mission of the fund is to develop early-stage

companies into preclinical companies, into clinical companies, and hopefully, ultimately, into healthy companies that have their own pipelines and revenue lines. And this has been what we've done historically. I'd like to think we did pretty well. And you can't do that without investing in what you're calling "preclinical companies."

Q Have you taken a look at the role of Aethon in the portfolio and made a decision one way or the other -- withdrawn.

What was the basis of your decision that Aethon should continue to be funded?

A Well, number one, just speaking pragmatically, continuing to fund yields the high likelihood of those compounds in the RevMed program being declared development candidates -- we're very close; we actually know what they are -- at which point RevMed would pay a $12 million milestone, which, in this context, is a good funding amount.

The second reason is that right now, basically, Aethon has become RevMed's CRO for companion drugs for its programs. That's fine as it goes, but it's not really a good investment proposition to invest capital in a single-digital royalty return when you can invest capital and own the entire drug. Aethon has its own programs, which it spent a lot of time researching and analyzing and comparing with competitors and also being, in some sense, schooled by all of its work by

RevMed on the RAS program in some cancer targets that are incredibly important. And those internal programs very much deserve funding as part of a portfolio of biotech companies that all move forward with judicious funding, and then some of them pop across different value stages or value thresholds. And you can't determine which in advance, but some will, and Aethon is one that is certainly worthy of that between the RevMed leverage and these internal programs, which definitely deserve funding.

Q Let's change our discussion over to Apertor. What's Apertor's current area of research?

A Apertor is developing a small-molecule drug that we believe will have a lot of value in non-small cell lung cancer.

Q And taking a look at Slide 16, can you tell the Court how much is being sought to fund Apertor in this motion.

A I'm sorry, 16?

Q Page 16.

A About one million dollars.

Q And does Apertor outsource its research and development work?

A Yes.

Q And is outsourcing a standard practice in the industry?

A Yes, there are contract research organizations that operate preclinically. There are contract research

organizations that operate clinically.

So a company like Apertor right now is contracting with preclinical CROs.

Q And in the ordinary course of business, would Apertor be paying its CROs to advance its research activities?

A Yeah, the way it works in this sort of company is that the internal programs or the internal infrastructure tends to be built around the competitive and proprietary advantage that you want or that you start with or develop it. So, in Apertor's case, there's a specific set of technologies that is funded internally.

But when it comes to the stage where Apertor is with this particular molecule, which is called "4E-BP1," those -- so that molecule is at the point of going into these tests that I referred to before, that the agency requires to put into your IND package that relate to toxicity of the molecule in different animal species for stipulate durations. And those are always outsourced, because you wouldn't build that infrastructure in-house.

So, the value stage here is very clear: you pay the contract to do those regulatory tox-type studies and then you work with the CRO to set up the studies and do them, and then you hopefully get the data and you, if it's good, you put it into your IND package.

Q And if I refer to those network as IND-enabling

studies; is that accurate?

A Yes.

Q Okay.

A I mean, there are a few more beyond that, but yes, those are part of the deal.

Q And is the market that that potential drug candidate would be aimed at, one that has a substantial number of patients?

A Yeah, I think it's the largest lung cancer or the largest cancer market.

Q The single-largest cancer market?

A Yes, I believe it's the largest cause of cancer death and the largest cancer market.

Q And, again, here, if you just keep things going where they are right now for two more months, is there a significant downside from the Apertor perspective?

A Apertor is a company that we were forced to drip-feed. We had a number of companies that we were literally meeting payroll bi-weekly, sending the money every two weeks to do just the basics.

I believe Apertor has four employees, or is it two, you know, some small number of employees and they need that money in order to continue. But at some point, if you have a program that is ready for IND, where all of the early-stage work shows you that it's actually knocking down the most

severe, the most aggressive animal models of a given disease in a way that people don't normally see with reasonable safety profile, to not take that forward, I mean, it does stall the capital gain. It does run the patent clock after the IP has been filed, which shortens the NPD of the project.

But at some point, it starts to become unethical to not drive a program like that forward, because you would get it into the clinic fast. If it's going to work, it's going to help people. People will see that, like the agency, and it will go quickly to approval. This is particularly what happens with these diseases.

So, by just sitting here, we're not engaging in that. And the way that we've proposed to engage is incredibly efficiently. The idea that you're funding cap -- you know, a million dollars to Apertor, or a company like Apertor, to do that kind of work, it's -- you know, "efficient," wouldn't begin to describe it. It's not normal.

So, it's -- sorry if I've gone on, but...

Q So, in the exercise of your business judgment, is there a sound, scientific rationale for moving forward with Apertor's work and funding it at the level that's requested?

A Yes, there's a reason; it's called the "clinical go/no-go decision."

Q Well, let's let the Court understand that.

Are you at clinical go/no-go right now?

A No, we need to do some more tests to get to that point and then you sit there and look at the totality of the data and you say, Okay, should we file an IND and do a Phase 1 trial or should we not? Because that's a step that'll cost five to $10 million and you're sort of in for a penny and for a pound. And that's what every company does.

Q Okay. Taking a look at Slide 16, again, Apertor does have approved budget, doesn't it?

A Indeed.

Q And it has over $19 million in approved budget, right?

A Yes.

Q And you're asking for a million dollars in funding in this motion?

A Yes.

Q Let's talk about Initial.

A Sure.

Q Initial is another debtor, correct?

A Yes.

Q Okay. What is the business of Initial -- withdrawn.

What is Initial researching?

A Well, Initial was one of the companies that was severely affected by the default, so we triaged. It was a platform company that did a certain thing and was working on several projects. And we, recognizing that there was not going to be any funding, we triaged the projects and chose

one to work on.

Q And so you're not proposing to go back to what Initial was working on in total, before, let's say, May of 2025?

A Correct, we're not.

Q Okay. You're going on for a single program?

A Yes.

Q Okay. Just for context, can you explain to the Court what you mean by a "platform company."

A Often, frequently, we're setting companies up as technology platforms that have the ability to break into biological or disease mechanisms in ways that are very much needed in the field and where we believe that particular approach can make some headway and progress, and also, where we have intellectual property advantage. And we spend a lot of time working with academic founders and people in the industry to determine what those angles are in technologies and then once that approach is settled on for a given company, we engage in discussions with founders, who, more often than not, tend to be academics, and with their institutions, such as universities, we create licensing deals between those institutions and the NewCo and then begin to set up the industrial version of whatever the technology advances were that they have in their lab, because if it works in an academic lab -- and we have to go through a lot of validation and due diligence to make sure -- scaling it up

to an industrial level is a different endeavor.

So we do that and we build that platform. Not in every company; there's some companies that begin with different premises. But when you're doing an early-stage biotech company that's going to be a platform company, the idea is you build a platform in-house and then you develop projects on top of it, drug projects, and that's what each of these companies has done. That's where Apertor's project came from. That's where Initial's project came from.

Q And so in your judgment, it makes sense for Initial to at least work on one project on a going-forward basis?

A No, not necessarily.

I think that when we triaged the portfolio, we looked across the portfolio and found the projects that we really thought were worthy, and this particular one at Initial is a quite-worthy project for stage and the investment required.

It wasn't that, oh, we need to find a project at Initial; on the contrary, it was: This is a great project.

Q Yeah, I think you misunderstood my question.

A Sorry.

Q But in the exercise of your business judgment, you believe that pursuing at least this one project at Initial is in the best interests to fund?

A Absolutely.

Q If the same constraints were not imposed, would you be

pursuing more than one project at Initial?
A Yes, we cut projects off that were -- should have been pursued. I mean, I don't think we have time to go into it now, but, you know, it was a shame.
Q I'd like to turn our discussion, now, to Evercrisp.
Is Evercrisp a debtor in this case?
A Yes.
Q Okay. I'd like to direct your attention to that same slide that wasn't numbered; it was on page 18, the same page with Aethon, and ask you to tell the Court how much funding the partnership is asking for, for this interim funding of Evercrisp?
A About $1.4 million.
Q Okay. Who are the founders of Evercrisp?
A We co-founded Evercrisp with Jennifer Doudna, who is the Nobel laureate for the discovery of gene editing, and a scientist named Tanja Kortemme at the University of California at San Francisco, who is an expert in using machine learning to design specific kinds of biological molecules.
Q And do you know -- tell the Court where Evercrisp is located?
A Northern California or the Bay Area. The Bay Area.
Q And approximately how many employees does Evercrisp have now?

A Seven.

Q Seven.

Let's talk, generally, about, in addition to -- withdrawn.

In addition to outsourced R&D, what are the other categories of spending that are included in these interim budget requests?

A In addition to employees?

Q Well, no.

Let's talk about employees.

A Well, employees, payroll, contract research. As we've discussed, typically, there are contracts for different kinds of manufacturing agreements, because when you're trialing a drug, even in animals, you need to have it made in a consistent and reliable way, and you're setting up, hopefully, for the same drug in patients.

Leases on facilities. Quite often, these companies, they don't actually own their expensive research equipment; although, in some cases, they do, if it's going to be helping them with a competitive advantage if they should have it in-house, but there are companies that own the equipment and lease the equipment to biotech companies. So there'd be those kinds of leases -- benefits.

Q Understood.

And are these the same -- withdrawn.

Are there also fees that are sometimes used for preserving intellectual property?

A Oh, yes. I'm sorry.

There are professional fees; I mean, we have IP lawyers who we work with very closely and they work with our portfolio companies to comb the researchers' notebooks and file patents and create intellectual property strategies, including withholding filing patents to save time on the patent clock.

Q And are these four or five areas of funding essentially the same for each of the companies that preclinically -- that the preclinical companies that we are here asking for funding?

A For these purposes, yes.

Q So, essentially, outside R&D spend, outside manufacturing, leases and rent, salaries, intellectual property, generically, are those pretty much the same across the board?

A Yes.

Q Okay. I'd like to change our discussion now to Marlinspike. If you could just turn to page 17.

Can you tell us the subject of Marlinspike's research?

A It's an anticancer agent called "SF3B1."

Q And what types of indications are we looking at here; again, broadly.

A Quite a few, because the biological target is a critical engager with a major cancer-causing protein, or oncoprotein, called "CMIC." So that underpins colon cancer, lung cancer, breast cancer, many cancers.

Q Understood.

So taking a look at Slide 17, how much is the fund, or the partnership looking for interim funding for Marlinspike?

A $700,000.

Q And in your estimation, is Marlinspike's work -- withdrawn.

In your estimation, is Marlinspike's research the funding in the amount of $700,000 --

A Yes.

Q -- over the next several months?

A Yes.

Q And do you have an understanding as to what the downside, if any, would be for delaying any funding to Marlinspike for the next two months?

A It's the same; you're running the patent clock unnecessarily. You're not embarking on a program that has a very interesting mechanistic and biological effect that's been commented on by potential corporate partners. So you're foregoing or delaying that possibility.

It's the fund's business to look at results like this and to fund them carefully to the next stage. It's a very

exciting project that could move fast with these small amounts of funding, achieving early, preclinical milestones.

For example, this compound should be at a development candidate in the next six to nine months. And from there, with a relatively small amount of funding from that point, be driven to a clinical go/no-go decision.

Q And does Marlinspike even have unfunded approved budget from pre-default days?

A It does, yeah.

Q And how much are you looking for, $700,000?

A Yes.

Q And an approved budget of $6.3 million; is that right?

A Yes.

Q Okay. Let's talk about Red Queen.

Is Red Queen a debtor in these cases?

A Yes.

Q And what's the work that Red Queen is involved with?

A Red Queen is developing a suite of antiviral drugs that can be used by immunocompromised patients and patients at risk for different kinds of viruses with a one-time use with a nasal sprayer or inhaler, which has no side effects, because the drug doesn't enter the system and which completely neutralizes the virus. And it becomes more powerful in its neutralization the more resistant the virus becomes, by the nature of the mechanism.

Q So, Rigmora has said that this is an anti-COVID program and they call into question the need to recommence funding of an anti-COVID program; is that right?

A We chose to do a clinical proof of concept.

So it's a little bit of a misnomer that Red Queen is a preclinical company. Red Queen actually conducted a clinical trial in SARS-CoV-2 or COVID.

But we chose to not continue after the pandemic was controlled for two reasons. One, because we were interested in syndicating the company and COVID went from super popular to not popular. But we actually saw a pretty massive market here, because the antiviral drugs have huge side effects; they create liver damage. Many people can't take them. And the COVID vaccines, they only work if you have an immune system to mount an immune response.

And quite a few people who are susceptible to these sorts of viruses -- not just COVID, but COVID in this case -- are immunocompromised, like the elderly, people in the hospital, people with cancer, children -- not in the case of COVID, but in the case of some of the other drugs -- children. And when you actually stack up the total markets of immunocompromised and patients who would be susceptible, they're kind of major markets.

When we said to Rigmora, Look, let's put another -- let's do a clinical trial focused on those patients, based

upon these results and develop the other projects that the COVID proof of concept essentially proved for RSV, for other viruses, for influenza, pan-influenza. They wouldn't hear about it. They're like, No, this is a COVID company. This is no good and it was just not true, but that was not -- at the time that we were trying to work with them and, although we had budget and we could have called the capital, we chose not to.

Q So there's $6.4 million in approved budget remaining for Red Queen?

A Yes.

Q And how much are you asking for in this funding motion?

A $900,000.

And that, by the way, doesn't work on COVID. There are two other projects that are -- one is for what's called a "triple-respiratory medicine." So, patients who are at risk for viral diseases can use this and that's one project, and another is for a PanFlu drug in the same format.

Q Let's talk about Nereid.

A Sure.

Q Is -- does Nereid have any remaining budget under the regime of the LPA?

A No, it does not.

Q How much are you asking for, for funding for Nereid?

A About $1.6 million.

Q And is Nereid a debtor in these cases?
A Yes.
Q Where did the technology from Nereid come from?
A It came from the labs of Dr. Cliff Brangwynne of Princeton University.
Q And do you have any personal connection with Dr. Brangwynne before Apple Tree made its investments?
A No.
Q Okay. The fact that --
A I'm proud that it came from Princeton --
Q -- your *alma mater* --
A -- yes.
Q I'm sorry, we can't talk over each other.
What was that?
A I'm sorry.
I'm proud that it came from Princeton, but we have no other connection prior to our investment.
Q Understood.
Is there a board of directors at Nereid?
A Yes --
Q And --
A -- there's a board of directors of every company, but yes, there's one of Nereid.
Q And are there outside directors on the board of Nereid, who are not affiliated with ATP?

A Yes.
Q Can you name one or two of them so the Court understands?
A Yeah, one is Bob Hugin. Bob is the former chairman and longtime CEO of a company called "Celgene." That was a major biotechnology company. He's extremely well-known in the industry. Celgene was sold to Bristol-Myers Squibb, ultimately, for $74 billion.
Q And --
A And the second is Laura Forese. Laura Forese is an orthopedic surgeon who wound up going into hospital administration and became the number two at Presbyterian Medical Center.
Q And what types of research has Nereid been performing?
A Well, Nereid has a very successful platform. It's something called "condensates." Condensates are the way the cell manages how certain molecules go from liquid to gel and that regulate cell processes, so when they get out of whack, that could lead to cancer, that could lead to neurodegenerative diseases, for example.

And Nereid, not only has created a successful platform that does that on an industrial scale; it also has three molecules at different stages: two in cancer and one in neurodegenerative disease, namely, ALS, the Lou Gehrig disease or Stephen Hawkings disease that came off of the

platform.

Q And you're asking for how much funding for Nereid?

A $1.6 million to drive all three programs. One of them is quite late in the game. It's an anticancer drug and it's heading for clinical go/no-go. Another is an anticancer agent that, it's actually the first time that we're aware of that anyone has actually knocked down the CMIC oncoprotein entirely with a single agent that's nontoxic in animals and also flatten the tumors. So it's a very exciting project. That's at a development candidate and needs to be driven forward.

And then there's the ALS project that is earlier-stage, but we'd like to drive it to development candidate, because we think that the biological target, which is well-known in the neurodegenerative disease research world and in pharma companies, with the right development candidate, it will have an extreme interest.

Q And did you give a lot of thought as to whether or not to continue work at Nereid before asking for this funding?

A Yes, very much a thought.

Q And have you talked to any of the -- withdrawn.

Have you spoken to anyone at Nereid about the funding situation?

A Yes.

Q Who have you spoken with?

A Bob Hugin, Laura Forese, the founder, Cliff Brangwynne, for example.
Q And to the best of your understanding, are you on the board at Nereid?
A I'm on the board, yes.
Q To the best of your understanding, does the Board of Nereid support going forward with the work that would be funded with this million and a half dollars?
A Yes.
Q I'd like to direct your attention to the company called "Nine Square." It's on page 19, as well.
Is Nine Square a debtor in these cases?
A Yes.
Q And do you know how much cash Nine Square has on hand right now?
A Close to zero, I'd imagine.
Q Do you know how much cash Nereid has on hand right now?
A About the same.
Q They're both down to --
A Close to zero, yes.
Q -- or close to zero?
A We were drip-feeding those companies. Nine Square had a grant from the Michael J. Fox Foundation for its Parkinson's disease program, but it had run through that grant.

Q And how much are you asking for, for Nine Square?
A $1.4 million.
Q And based on -- withdrawn.
Are you on the board at Nine Square?
A Yes.
Q The research that you're doing now, what's the platform?
A It's a little complicated.
Q Okay. I don't want to go, take too much time, so --
A So the platform has --
Q -- you don't have go into the tech.
A The platform has to do with -- it's been learned that many of these neurodegenerative diseases like Alzheimer's, ALS, Parkinson's, others, different forms of dementia are actually caused by neurons not properly removing and processing cellular debris and there are cascades of proteins that are responsible for doing that.
And so, we were approached by someone named Matt Jacobson. Matt Jacobson was the chair of the foremost medicinal chemistry faculty in the world at UCSF, and Matt is a very well-known serial founder of successful biotech companies and known to us through our venture partners, and I knew his mentor, I backed his mentor.
Matt had a very specific insight into neurodegenerative disease and he came to us because he understood how we had a

venture partner team and would fund companies. And he revealed to us that he had Parkinson's disease and that he wanted us to pursue a very specific approach that he had studied. And we did due diligence and we understood that he -- we believed him and, in fact, all the work that we did at Nine Square proved him right and led to our prosecution of two targets. One is called "TRPML1" and the other is called "Parkin"; both in that sort of cascade of enzymes that process cellular debris.

And we got very far in those programs to development candidate and they are very worthy of funding. Interestingly, after the default, there had been a fair amount of strategic partner interest, anyway, across the portfolio, but in Nine Square, in particular. And we, into the summer last year, we received a term sheet from a major pharma company for TRPML1 that would have completely bankrolled the company. But when they understood the precarity of the company's situation, they backed out.

Q So, in your view, is the technology at Nine Square, technology that justifies further investment?

A The programs definitely justify further investment.

MR. BERDON: Can we get an exhibit binder passed up to the witness, please?

(Pause)

BY MR. BERDON:

Q Okay. I don't want you digging quite yet.

UNIDENTIFIED MALE SPEAKER: And can we have a set for the bench, please, and for the (indiscernible) friends.

MR. BERDON: I'm not going to go through all of these documents, but they just are all living in here.

UNIDENTIFIED MALE SPEAKER: What is --

MR. BERDON: I'm sorry?

UNIDENTIFIED MALE SPEAKER: What exhibit is this? Has this been filed?

UNIDENTIFIED FEMALE SPEAKER: These are exhibits. What exhibits binder?

UNIDENTIFIED FEMALE SPEAKER: What is it?

MR. BERDON: It is -- I am going to be talking to the witness about some documents that are in these binders.

I am not suggesting that they are admitted into evidence unless I get it admitted.

(Pause)

BY MR. BERDON:

Q So --

MS. LABOVITZ: Your Honor, I'm going to express my confusion, again.

We've been, now, listening to Dr. Harrison testify for an hour and a half, giving fundamental information we've been asking for, for six weeks. We are -- if we have to spend time in this courtroom listening to all of this, we

can. We genuinely think that a better use of everyone's time would be to actually have conversations about the budgets that need to be funded or not and do that in the way that happens in a normal Chapter 11 case.

This isn't supposed to be a litigation where there are binders like that of surprise exhibits that may or may not ever be moved into evidence. And so, I'm just confused about why we're doing this.

MR. BERDON: Again, my learned friend's confusion is really beside the point. They have objected to the payment of the management fee and I want to address that with the witness, making reference to the relevant amendments to the LPA that have already been moved into evidence.

The fact that these binders also contain some other documents; I'm not going to elicit testimony as to anything that hasn't been admitted into evidence, without moving it into evidence.

The idea that we are, in some way, bound to follow Rigmora's desired agenda today is news to me. I am just trying to get testimony that would support this Court granting the relief that we've requested. And if I've gone on too long, I apologize, but there are a lot of Debtors here and each one is researching a different, very complicated thing.

THE COURT: Okay. I'm going to permit the debtor

to put on its case. If Rigmora had wanted to take depositions, they could have taken depositions and had discovery and there would be no surprises. I guess they didn't do that.

MS. LABOVITZ: To be clear, Your Honor, we did take a deposition.

THE COURT: Oh.

MS. LABOVITZ: We'll get into that when we cross Mr. Mandarino.

THE COURT: Okay. Then, you're in a position to cross.

Do I think it would be better if parties agreed on the budgets; of course, I think it would be better. And it might have been a better use of everybody's time.

I'm not sure why -- taking Ms. Labovitz' statements as true, when I have no reason to believe not, and I happen to know her, so I trust her to be candid with the Court -- I don't know why those conversations didn't happen.

But we are where we are. We'll get to where we get to today. We're at 4:10. So we'll get to where we get to today. I don't know if we'll finish or not. So, we'll see.

But we're going to go ahead and the evidence will come in as it comes in. If you need documents, that's fine.

MR. BERDON: I'm going to try and move on quickly,

Your Honor.

THE COURT: Okay.

MS. LABOVITZ: Thank you, Your Honor.

BY MR. BERDON:

Q Dr. Harrison, a little earlier, we talked about ATVN. Do you recall that?

A Yes.

Q And does ATVN have an economic role in the interactions between the fund, the GP, and yourself?

A The ATVN receives my management fee.

Q And do you own ATVN?

A My brother owns .5 percent and I own the rest.

Q Okay. Dr. Harrison, in the funding motion, we have asked on your behalf that $750,000 be funded, representing a quarter of your -- of the ATVN fee. And the other side has objected; arguing that it is subject to setoff.

Are you aware of that?

A Yes.

Q Okay. Are you familiar with the circumstances that gave rise to a potential claim of setoff?

A Yes.

Q Okay. Can you explain to the Court what those circumstances are.

A Yes, when we negotiated the fee, it was agreed that any compensation I would receive from the portfolio companies

would be offset. In the case of, like, if there were equity compensation, such as stock options for a public company, then that offset would occur after those -- after cash was received from your exercise.

So there was a portfolio company called "Akero Therapeutics" that we founded and eventually went public and Akero was sold for $5 billion, I think, in late '25 -- last year, I think the transaction closed in December. And that -- the options that I had received after Akero went public, while it was still an ATP portfolio company, those options, when they were exercised cashlessly through the acquisition, grossed me $1.6 million.

Q Okay. Let's unpack that a little bit.

To the best of your understanding, when did Akero go public?

A 2019.

Q And to the best of your understanding, when was the Akero equity distributed out of the fund?

A June of '21.

Q Okay. So after June of '21, was Akero a portfolio company of ATP?

A No.

Q Do you have records of the dates of the stock option grants that you received?

A Yes.

Q And are they maintained by any third-party institution?
A Multiple third-party institutions.
Q Do you have -- is there an account at E*TRADE?
A Akero used E*TRADE to track options.

MR. BERDON: Your Honor, I'd like to move into evidence, a copy of a document that is titled "Client Statement" for the period July 1 through September 30th, 2025, from E*TRADE -- from Morgan Stanley.

I'm going to offer my friends a copy and I would ask the Court's permission to approach.

THE COURT: You may.

(Pause)

THE COURT: Thank you.

BY MR. BERDON:
Q Dr. Harrison, can you take a look at the exhibit in front of you and tell me what it is.

Do you recognize that document?
A Yes.
Q What is it?
A This is the statement of the E*TRADE account that was set up by Akero, on my behalf, in which they deposited the stock options that I received as a board member of Akero, before it was acquired -- after it was public and before it was acquired.
Q Can you join me by flipping to page 5 of 8.

And taking a look at the bottom of the document, it says, "Stock plan details."

A Yes.

Q To the best of your understanding, does that accurately reflect the dates and amounts of stock option grants that you received from Akero?

A Yes, it should.

MR. BERDON: Your Honor, I'd move into evidence, as Exhibit 86, the document that's in front of the witness for identification right now.

THE COURT: Is there an objection?

MS. LABOVITZ: No, Your Honor.

THE COURT: It's admitted.

(Debtors' Exhibit 86 received into evidence)

BY MR. BERDON:

Q Dr. Harrison, so just for some housekeeping, the top-three grants were issued, were granted before Akero was distributed, correct?

A Yes.

Q And by 2022, Akero was no longer a portfolio company of ATP; is that correct?

A Yes, I served at that point, as an independent director.

Q And upon the exercise of your options, was a Form 4 filed with the SEC?

A Yes.

MR. BERDON: I'd like to put in front of the witness for identification, a copy of the Form 4 from December 2025.

May I approach?

THE COURT: You may.

MR. BERDON: Thank you, Your Honor.

THE COURT: Thank you.

BY MR. BERDON:

Q Dr. Harrison, I'd like you to keep handy, the E*TRADE statement, because I think it's going to be helpful.

Taking a look at the document that's in front of you, the Form 4 for identification, you'll see that there's a grant in the amount of 26,000 shares with a price of nineteen ninety-seven.

Can you look at the back of the Form 4.

A Yeah.

Q I'm sorry, I didn't mean to do that.

(Pause)

Dr. Harrison, is the stock option row at 1997, does that correspond to a disposition of 26,000 shares?

A Yes.

Q Okay. And 1997 was the Stripe price of a grant on 11/8/19 according to your E-Trade?

A Yes.

Q To the best of your understanding, does the Form 4 that is in front of you accurately represent the dates on which your stock options were exercised in connection with the Akero acquisition by Novo?

A Yes.

Q And it was signed by an attorney on your behalf?

A Yeah, Jonathan Young was general counsel of Akero.

MR. BERDON: Your Honor, I move into evidence Form 4 as Exhibit Number 87.

THE COURT: Any objection?

UNIDENTIFIED SPEAKER: No objection.

THE COURT: Its admitted.

(Debtors' Exhibit 87 received into evidence)

MR. BERDON: Thank you, Your Honor.

BY MR. BERDON:

Q So, Dr. Harrison, do you contest that your 2026 compensation, through ATVM, should be offset by the amount realized in the stock option game?

A No.

Q Now, the other side has argued that your, in some way, responsible for paying this amount before you could be paid any part of the ATVM annual fee. I want to just quickly walk through the documentation so that the Court has in front of it the right documents and so that argument can be had in a logical way.

Okay. Can you join me at Exhibit Number 67, Dr. Harrison?

A I'm there.

Q Do you recognize Exhibit Number 67? It will be Tab Number 67 in one of those two binders.

Dr. Harrison, is it fair to say that the LPA, as the Judge observed, is somewhat cumbersome?

A It became so, yes.

Q Take a look at Exhibit 67. What is it?

A Its amendment number eight to the LPA.

Q And does amendment number eight speak to the payment of the ATVM fee?

A Yes, at that time.

Q And taking a look at the third page of Exhibit 67, actually the fourth page, do you recognize that as an amendment to the management agreement --

A Yes.

Q -- between ATVM and the partnership debtor.

A Yes.

Q Okay. And does that speak to the payment of the management fee at least as to August of 2017?

A Yes.

Q Okay, bear with me. Please turn to Exhibit 53.

MR. BERDON: Your Honor, I would move into evidence amendment eight to the LPA that appears at

Exhibit 57 of our binder.

THE COURT: Any objection?

UNIDENTIFIED MALE SPEAKER: No, Your Honor. I think this was covered at the start.

UNIDENTIFIED FEMALE SPEAKER: No, Your Honor.

THE COURT: It's admitted.

(Debtors' Exhibit 57 received into evidence)

THE COURT: Okay. Where are we going now, 53?

MR. BERDON: 53, yeah. I am going to cut this very short, Your Honor.

BY MR. BERDON:

Q Dr. Harrison, taking a look at 53, are you there with me?

A Yes.

Q Okay. That is titled "Amendment 14."

A Yes.

Q That sets the management fee at $3 million, correct?

A Yes.

Q The last one that we're going to is going to be Exhibit Number 7. Dr. Harrison, do you recognize Exhibit Number 7?

A Yes.

Q And what is it?

A Its amendment number 18 to the limited partnership agreement.

MR. BERDON: Your Honor, I would move into

evidence the document that bears the legend JX-0126. I move that in as Exhibit 88.

THE COURT: Any objections?

UNIDENTIFIED SPEAKER: No, Your Honor.

THE COURT: Its admitted.

(Debtors' Exhibit 88 received into evidence)

BY MR. BERDON:

Q Can you turn, please, to the page that has the Number JX-0126.0005. And I would like to direct you to -- so, its (e), expenses and liabilities, and then (ii), towards the bottom where it reads:

"The limited partner shall make capital contributions to the partnership to fund the ATLS fee semi-annually in advance and the management fee annually in advance in each case as required by the general partner."

So, in practice, has the ATVM fee of $3 million been paid annually in advance?

A Yes.

Q And typically when is capital called to pay that?

A The last two weeks of December usually.

Q And has ATVM then paid that money -- withdrawn.

Has the partnership then paid that money to ATVM in the $3 million lumpsum?

A Yes.

Q And has that payment been reflected on the financial

statements of the fund?
A Yes.
Q And has there ever been a practice where the payment was paid in four equal installments over the year?
A Never.
Q And in connection with the audit, have your auditors ever commented on the payment of the fee?
A Never.
Q Well, I would like to --
A Oh, I'm sorry, that they never commented -- that anything was (indiscernible).
Q Okay. I am going to ask to show you a copy of a document that we are going to identify as --
MR. BERDON: Your Honor, I apologize, if I may approach.
THE COURT: You may.
MR. BERDON: It's going to be Exhibit 89, if admitted.
THE COURT: Thank you.
BY MR. BERDON:
Q Dr. Harrison, if you would just turn with me to page 20 -- well, withdrawn.
Dr. Harrison, take a look at the document that is in front of you. Do you recognize it?
A Yes.

Q What is it?
A It's a set of audited financials for the fund.
Q And is this part of the funds books and records that are maintained in the ordinary course of business?
A Yes.
MR. BERDON: Your Honor, I would like to offer this as Exhibit Number 89.
THE COURT: Objections?
UNIDENTIFIED SPEAKER: No, Your Honor.
THE COURT: Its admitted.
(Debtors' Exhibit 89 received into evidence)
BY MR. BERDON:
Q Taking a look at page 20, note 7, management fee.
A Yes, I see it.
Q Does that refresh your recollection as to whether any comment was made by your outside auditors with respect to the payment of the management fee annually and in advance?
A Yes, it does.
Q When did you start receiving the fee of $3 million annually in advance?
A I think it was 2019.
Q And in the intervening years, have your payments been, to the best of your understanding, reflected on the financial statements?
A Yes.

Q Have those financial statements been provided to Rigmora?
A Yes.
Q And has anyone for Rigmora ever commented on your being paid $3 million annually in advance as opposed to on a quarterly schedule?
A Never.
Q So, in the ordinary course of business, prepetition, would you have expected to be paid your $3 million fee in response to a capital call in December or January of 2026?
A In the ordinary course of business we would have called capital in late December but it received that capital that would have contained my ATVM fee and I would have received it the first week of January.
Q And as we sit here today, you agree that the $1.6 million received from the Akero stock option distribution can be offset against that $3 million fee for 2026?
A Absolutely.
Q And that would be remaining $1.4 million that you would expect to be due and payable today?
A Yes.
Q And you have offered to accept what amount in connection with this motion?
A $750,000.
Q And when would you propose that the remaining $650,000

be paid?
A April 1st, I believe.
Q So, essentially, at the beginning of the second calendar quarter in 2026?
A Yes.
MR. BERDON: I have nothing further at this time, Your Honor.
THE COURT: Thank you. Let's take a five-minute break.
Dr. Harrison, please do not speak to anybody about your testimony.
THE WITNESS: Thank you.
THE COURT: Thank you.
(Recess taken at 4:31 p.m.)
(Proceedings resumed at 4:40 p.m.)
THE COURTROOM DEPUTY: Please rise.
THE COURT: Please be seated.
Ms. Selden.
MS. SELDEN: Thank you, Your Honor. Good afternoon. Shannon Selden of Debevoise & Plimpton for the Rigmora LP's.

CROSS-EXAMINATION

BY MS. SELDEN:
Q Good afternoon, Dr. Harrison. It's good to see you again.

Dr. Harrison, you ended your testimony speaking about a company known as Akero, correct?

A Yes.

Q What was the net amount in dollars that you received from the exercise from your Akero stock options?

A Which ones, the ones pertaining to those that I received while I was the ATP director was $1.6 million.

Q Any Akero stock options as to which you have testified here today, can you quantify for us the amount that you received?

A I think I just did.

Q I'm sorry, could you say it again a little bit louder?

A I'm sorry, $1.6 million approximately.

Q Did you bring your exercise of the Akero stock options to the attention of Perry Mandarino, the CRO, at any point prior to the Rigmora LP's objection to the funding motion?

A I don't recall doing so, no.

Q Did you inform Mr. Mandarino of the net amount you received for the exercise of your Akero stock options at any point prior to the Rigmora LP's objection?

A I don't recall doing so, no.

Q Dr. Harrison, you began your testimony today speaking about -- or early in your testimony today you spoke about a company known as Aulos, correct?

A Aulos, yes.

Q The GP didn't call any capital for Aulos in May of 2025, correct?
A Correct.
Q Dr. Harrison, do you still have in front of you the demonstrative exhibit that debtors presented earlier today as the presentation for the January 20th, 2026 hearing?
A Yes, I do.
Q And if you turn to page 20 of that demonstrative there is a row there for non-debtor Aulos, correct?
A Correct.
Q And in the righthand column, on page 20 of the demonstrative, it describes the reason that debtors believe further funding in Aulos is warranted at this time. Is that correct?
A Correct.
Q Did you discuss this reason with the LP's or their representatives at any point after the Chapter 11 cases were commenced?
A No.
Q Are you willing to do so now?
A Not without counsel.
Q Have you provided the Rigmora LP's with the current program proposal, if any, for Aulos?
A I have not provided the Rigmora LP's with anything directly since litigation commenced.

Q Have you provided the Rigmora LP's with any program proposal for investment in Aulos since Chancellor McCormick issued her decision on December 5th, 2025?

A I had no contact with the Rigmora LP's directly since Chancellor McCormick issued her opinion.

Q Have you asked management of Aulos to prepare any form of written proposal related to the funding sought for Aulos in these cases?

A We have had extensive conversations with management and have received various materials, including written proposals both to us and to Aulos's board.

Q You haven't provided any of those written proposals to the Rigmora LP's, correct?

A To repeat, I have had no interaction with the Rigmora LP's directly since litigation commenced.

Q And to your knowledge, no representative of the debtors has provided the management proposals for Aulos to the Rigmora LP's since the commencement of these cases, correct?

A I don't know.

Q Are you willing to provide management's proposal for further funding for Aulos to the Rigmora LP's now?

A Anything related to the Rigmora LP's would need to be channeled through counsel.

Q Through counsel are you willing to provide any management proposal for further funding in Aulos to the

Rigmora LP's now?

MR. BERDON: Your Honor, I would object on the grounds of work product as to what the witness would or would not communicate to his counsel.

MS. SELDEN: I don't think that is work product and I'm only asking whether debtors are willing to provide to party in interest, Rigmora LP's, any management proposal supporting the request for further funding.

THE COURT: Overruled. You can answer.

THE WITNESS: I'm sorry, would you like me to answer that?

THE COURT: Yes, you can answer.

THE WITNESS: I would seek advice of counsel as to whether or not that made sense under the context of the process.

BY MS. SELDEN:

Q Do you know that the Rigmora LP's have said that they are willing to consensually fund Aulos?

A No, I don't believe that the Rigmora LP's would consensually fund anything.

Q No one told you that?

A My understanding of the word "consensual" is that the deal that one has will be followed and there won't be an extraction of value for extortion in exchange, as it were, and I do not believe that the Rigmora LP's would fund without

extracting something.

Q So no one has told you that the Rigmora LP's would be willing to consent to fund Aulos?

A When you say "willing to consent to fund Aulos" you mean we would make a capital call and they would fund Aulos?

Q Dr. Harrison, has -- are you aware that the Rigmora LP's have communicated that they would be willing to agree to funding for Aulos and to discuss that fund with debtors representatives. Are you aware of that?

A During what time period would this --

Q Since the commencement of these Chapter 11 cases.

A No, I am not specifically aware of that proposal.

I'm sorry, may I just ask for clarification?

Q Dr. Harrison, on page 20 of the demonstrative that refers to Aulos non-debtor and the reasoning for funding there are no exhibits or documents cited on that page or elsewhere corresponding to Aulos, correct?

A I don't believe there are any exhibits referring to Aulos in the presentation.

Q Are there exhibits or underlying documents that relate to the reasons presented here on page 20 with respect to Aulos?

A No.

Q Dr. Harrison, could you please turn back in the January 20th demonstrative provided by debtors counsel to page 16.

A Yes.
Q In the first row there is a reference there to the debtor portfolio company, Apertor. Do you see that?
A I do.
Q And in the column on the right, page 16 of the demonstrative, describes, at a high level, the purpose of further funding in Apertor, correct?
A Yes.
Q The demonstrative doesn't cite any management proposal to conduct this research, correct?
A Correct.
Q It does not cite any documents at all, correct?
A Correct.
Q Do documents from management supporting the reasoning set forth here on page 16 with respect to Apertor exist?
A Of course.
Q Would you be willing to provide them to the Rigmora LP's?
A Under the advice of counsel.
Q You haven't discussed this proposal for Apertor with the Rigmora LP's or their representatives at any point since filing the first of these Chapter 11 cases, correct?
A Correct.
Q And you didn't discuss this proposal for further funding of Apertor with the Rigmora LP's at any point after

the Chancery Court's December 5th decision and prior to first filing the Chapter 11 cases, correct?

A Correct.

Q Are you willing to discuss any proposal for funding for Apertor with the Rigmora LP's now?

A Under the advice of counsel.

Q You haven't provided any research program proposal for Apertor to the Rigmora LP's since filing the first of these Chapter 11 cases, correct?

A Correct.

Q Does the research program proposal for Apertor exist?

A Yes.

Q Would you be willing to provide it to the Rigmora LP's now?

A I'm sorry, didn't you just ask that question?

Q I'm asking specifically, Dr. Harrison, whether you are willing to provide the research program proposal for Apertor to the Rigmora LP's now?

A I believe I specifically answered under the advice of counsel.

Q Would you be willing to provide it or you don't know?

A Under the advice of counsel.

Q So, you are unable to give me an answer sitting here today as to whether you, the GP of ATP Life Sciences, the fund, would provide to the fund's LP's a copy of the research

program proposal for Apertor, the fund's portfolio company. Is that correct?

MR. BERDON: Objection to the form of the question. It implies that there is a single proposal and that's certainly not in the record.

MS. SELDEN: I think that is what Dr. Harrison just testified to. He answered "yes."

THE WITNESS: I'm sorry, I was answering your question. There were multiple --

THE COURT: I'm going to overrule that objection. You can respond.

THE WITNESS: To what question exactly.

THE COURT: You want to repeat it? I don't have a read back.

MS. SELDEN: I was going to say, I will endeavor to ask it again.

BY MS. SELDEN:

Q Dr. Harrison, are you testifying here today that as the managing director of the general partner of ATP Life Sciences limited partnership you will not provide to the Rigmora LP's a copy of the research program proposal for Apertor, one of the portfolio companies, in which ATP Life Sciences invests?

A No, I didn't testify that.

Q So, are you willing to provide the research program proposal for Apertor to the Rigmora LP's?

A Under the advice of counsel. Any communication that I have with Rigmora LP's will only take place with a lawyer present.

Q Are you testifying, Dr. Harrison, that you are willing to have your counsel provide the copy of the research program proposal for Apertor to the Rigmora LP's?

A I don't know. I have not spoken with them yet about this question.

Q You are unable to answer that question without consulting counsel. Is that your testimony?

A Yes.

Q Dr. Harrison, have you asked management of Apertor to prepare any form of written proposal related to the funding sought for Apertor in these cases?

A As with every portfolio company, I have had multiple conversations with management given the Rigmora defaults and the lack of funding environment. I have had multiple forms of -- multiple sets of materials that have been exchanged in developing the most efficient path through in triage. So, yes, of course.

Q You have received from management for Apertor written materials related to the funding that debtors seek for Apertor in these cases?

A Yes.

Q You haven't provided that to the Rigmora LP's, correct?

A I have had no communication of any kind with the Rigmora LP's since May 30th that has not been in a legal context written or oral. So, I have not provided them with any material directly since May 30th.

Q Are you aware, Dr. Harrison, of whether your counsel or counsel for any of the debtors in these cases, including Apertor's counsel, have provided any written materials from management for Apertor in support of the funding that they seek for Apertor in these cases to the Rigmora LP's?

A I am not aware of a specific document flow in this case.

Q Would you be willing to provide any written proposal or materials received from Apertor management in support of their request in these cases to the Rigmora LP's?

A My answer hasn't changed.

Q Dr. Harrison, the next portfolio company in the demonstrative is Initial. Do you see that below Apertor?

A Yes.

Q And Initial, similarly, has a reason for the funding sought in the righthand column. Do you see that?

A Yes.

Q That doesn't cite any documents at all, correct?

A Correct.

Q You haven't discussed this proposal for Initial with the Rigmora LP's or their representatives at any point since

filing the first of these Chapter 11 cases, correct?
A Correct.
Q Are you willing to do that now?
A Same exact pattern of answers as for Apertor.
Q And you haven't provided any research program proposal for Initial to the Rigmora LP's since filing the first of these Chapter 11 cases, correct?
A Correct.
Q Does a research program proposal for Initial exist?
A Yes and multiple documents relating to what you are calling the "research program proposal."
Q Are you willing to provide those documents to the Rigmora LP's now?
A Under the advice of counsel.
Q Did you ask management of Initial to prepare any form of written proposal related to the funding sought for Initial in these cases?
A As a matter of course, yes.
Q Did management of Initial, in fact, prepare any such written materials?
A Yes, there have been a lot of exchange of information related to each portfolio company in trying to manage through the absence of funding that should have been there.
Q And you don't know one way or another whether those materials have been provided to the Rigmora LP's, correct?

A Correct.
Q Are you willing to provide any such materials for Initial to the Rigmora LP's now?
A Under the advice of counsel.
Q Dr. Harrison, I am conscious --
MS. SELDEN: Your Honor, of the fact that it is approaching 5 o'clock and there are one, two, three, four, five, six more portfolio companies identified in debtors demonstratives for which you seek funding. I have the same questions as to each of these portfolio companies but for the sake of everyone I am happy to try to cut through that.
BY MS. SELDEN:
Q Is there any one of the remaining portfolio companies in debtors demonstrative that is seeking funding here as to which you have had discussions with the Rigmora LP's since the filing of these Chapter 11 cases?
A No.
Q Have you asked the management of each of the debtor portfolio companies to prepare any form of written proposal related to the funding sought for that company in these cases?
A In each case there has been a stream of communications related to the funding of each portfolio company, the result of which is here.
Q Have you had separate communications with the

management of each portfolio company that is seeking funding in these cases with respect to that portfolio company's funding?

A Yes.

Q And the management of each portfolio company has prepared or provided written materials related to its request for funding. Is that right?

A Yes, in various forms.

Q And each portfolio company has some form of research program proposal supporting the reasoning outlined in debtors demonstrative. Is that correct?

A Of course.

Q And you haven't provided that research program proposal for any of these debtor portfolio companies to the Rigmora LP's since the commencement of these Chapter 11 cases, correct?

A Correct.

Q And you haven't provided any of the materials or written proposals received from any of the debtor portfolio companies or non-debtor portfolio companies to the Rigmora LP's since the commencement of these Chapter 11 cases, correct?

A Correct.

Q Are you willing to provide the research program proposals and any and all written materials received from any

and all portfolio companies seeking funding in these cases to the Rigmora LP's now?

A Under the advice of counsel.

Q Dr. Harrison, I always have more questions for you but I will not ask them at this time. That is all I have for today.

THE COURT: Thank you.

Ms. McCollum, no questions?

(No verbal response)

THE COURT: Redirect.

MR. BERDON: Very short.

REDIRECT EXAMINATION

BY MR. BERDON:

Q Dr. Harrison, in connection with any communication with Rigmora about the potential funding of Aulos, what conditions has Rigmora expressed to you that they would require before even discussing that kind of funding?

MS. SELDEN: Objection, foundation and hearsay.

UNIDENTIFIED SPEAKER: And Rule 408.

THE COURT: Sustained in that what time period are you talking about because you have had no communications since May of --

BY MR. BERDON:

Q Dr. Harrison, on May 15th did you receive an email from Yuri Bogdanov?

MS. SELDEN: Objection, relevance.

THE COURT: I will hear the answer to that question. Did you?

THE WITNESS: Yes.

BY MR. BERDON:

Q And in that email did Mr. Bogdanov express to you any conditions that would have to serve as a predicate before discussing new budgets for the four clinical stage companies?

MS. SELDEN: Objection, hearsay.

THE COURT: You want to tell me who the doctor is and --

MR. BERDON: Yeah. It's not doctor, it's Mr. Bogdanov.

THE COURT: I'm sorry.

MR. BERDON: He is the chief executive officer of Rigmora. So, that would be --

THE COURT: He speaks for them?

MR. BERDON: He's an admission of a party opponent and he is the CEO.

THE COURT: Overruled.

THE WITNESS: Yes.

BY MR. BERDON:

Q And what condition did Mr. Bogdanov state on May 15th?

A That we were --

MS. SELDEN: May 15th of 2025?

MR. BORDEN: Yes. May 15th of 2025. Please don't interrupt.

BY MR. BERDON:

Q What did he express as a condition to his willingness to discuss the funding of Aulos?

A That we write-off the preclinical portfolio.

Q And when you say, "write-off the preclinical portfolio," what does that mean?

A Not fund the companies, which had budgets, except as dead the companies that did not have budgets such as Nine Square and Nereid, and sell them for scrap of whatever. Then, and only then, might it be possible to discuss funding of any clinical company because they all had different budget needs; most critically at that time, Aulos. Of course, that lead to litigation and management came forward, remarkably at Aulos, and building the breach for the past six, seven months.

Q To the best of your understanding, has Rigmora ever agreed to discuss funding of Aulos that was not attached to the condition that the preclinical companies be wound down?

A No.

MR. BERDON: No further questions.

THE COURT: Dr. Harrison, you may be excused.

THE WITNESS: Thank you.

THE COURT: Thank you.

(Witness excused)

MS. TOMASCO: Your Honor, the debtors call Mr. Perry Mandarino to the stand.

THE COURTROOM DEPUTY: Please state your full name and spell your last name for the Court record, please.

MR. MANDARINO: Perry Mandarino, M-a-n-d-a-r-i-n-o.

PERRY M. MANDARINO, DEBTORS' WITNESS, SWORN

THE COURTROOM DEPUTY: You may be seated.

Your Honor?

DIRECT EXAMINATION

BY MS. TOMASCO:

Q Mr. Mandarino, we're going to be really fast. Is that okay?

A Yes.

Q All right. State what your profession is and your relationship to the debtors?

A Sure. I am the head of restructuring at B. Riley Securities and B. Riley Restructuring Services. I am the chief restructuring officer of the debtors.

Q In your career, how many debtors have you advised in Chapter 11 cases?

A Probably more than 4 or 500.

Q 4 or 500?

A Yes.

Q That's more than me, Mr. Mandarino.

When were you appointed CRO of the debtors, approximately?

A Upon the filing of the Chapter 11's.

Q All right. I want you to turn in your exhibit book to Exhibit 50.

A I'm sorry, 50?

Q While you're looking for that exhibit, in connection with the wage motion do you understand that the U.S. Trustee has asked us to confirm some facts for the U.S. Trustees benefit?

A Yes.

Q If I read this to you can you tell me if you disagree. All bonuses to be paid to non-insiders under the wage motion that the Court has approved are either contained in an employment agreement or consistent with historical policy of the debtors. Is that true?

A Yes.

Q These non-insider bonuses represent a percentage of each employee's salary ranging from 5 to 25 percent. Is that true?

A Correct.

Q And they are consistent with industry practice?

A Correct.

Q All right, let's move on.

Looking at the budget, Exhibit 50 -- (off record

conversation).

All right. So, with respect to Exhibit 50, can you identify this document?

A Yes. This is the 26-week cash flow projection for the debtors and some non-debtors as well.

Q Okay. Now, this was filed on December 16th, 2026. Is that the approximate date of completing this budget?

A January 16th.

Q I'm sorry, January 16th.

A Yes.

Q And what was your involvement in the preparation of this budget?

A Oversaw the preparation of it.

MS. TOMASCO: Your Honor, I move to admit Exhibit 50 into evidence.

THE COURT: Any objections?

UNIDENTIFIED SPEAKER: We note that this is actually just a partial printout of Excel that is underlying Exhibit 50 and I would just ask if counsel is seeking to admit the full Excel or just the print of pages here.

MS. TOMASCO: Your Honor, I can't admit an exhibit that is not in my book. I am moving to admit this exhibit. If he wants to use a different exhibit, he's free to do so.

THE COURT: Okay, just this printed page.

UNIDENTIFIED SPEAKER: I have no objection to

these printed pages being admitted.

THE COURT: Thank you.

Any objections?

UNIDENTIFIED SPEAKER: No.

THE COURT: Its admitted.

(Debtors' Exhibit 50 received into evidence)

BY MS. TOMASCO:

Q In connection with preparation of this budget, with whom did you meet and consult?

A Many people at the debtor, and it was my team and I. We met with the debtors accounting and finance staff. We met with Dr. Harrison, with Joseph Bienchek (phonetic), and along with that several of the managers of the portfolio companies of the debtors and non-debtors.

Q Now, if you wouldn't mind just very briefly turning to page 16 of the PowerPoint presentation in front of you.

A Okay.

Q Does that chart represent, in column 1, it comes from page 36 of the Chancery Court opinion, do you see that?

A Page 16 of Exhibit 50?

Q Of the PowerPoint. I'm sorry.

A Oh, the PowerPoint. I'm sorry.

Q Its our cheat sheet for the day.

A Yes.

Q Now, let's just take -- we're going to take one debtor

and then we're going to apply the same principles to the rest of the columns. Is that okay for speed?

A Yes.

Q All right. Now, of the $19 million that was under the column of unfunded amounts, right, do you see that?

A Yes.

Q That is $19,400,000. How much is being approved today for the debtors to spend in accordance with that -- with a budget that is attached as Exhibit 50?

A Up to $979,780.

Q Is that a small fraction of the approved funding for Apertor?

A It is.

Q Let's talk about Initial, that funding amount, unused funding amount, is $7 million. Do you see that?

A Yes.

Q And the amount that we're seeking to use today, do you see that?

A Yes.

Q How much is that?

A Just under a million dollars.

Q Is that true of all of Initial, Red Queen, Evercrisp?

A Yes.

Q Now let's look at Aethon, Nereid -- I apologize, not Nereid. Let's look at -- and that is also true of Aethon, it

has an approved funding amount of $8 million and its using $2 million under this budget, correct?

A Yes.

Q Now, we have a couple of budgets -- debtors who are not under the auspices of a prior funding amount under the LP agreement, correct?

A Yes.

Q And those are Nereid, Nine Square, and Aulos.

A Yes.

Q Now, what are those amounts that are being asked to be funded today?

A For Nereid it's about $1.6 million, for Nine Square it's about $1.4 million, and for Aulos its $3.7 million.

Q Okay. Turning back to Exhibit 50, this budget is for a total of two 13-consecutive periods. Is that correct?

A Plus a 10-day step period.

Q Now, under the funding motion that we're here on today, the debtors are seeking to use approximately 13.9 percent --

A Million.

Q -- $13.9 million of that total amount, is that correct?

A Yes.

Q All right. How long will that $13.9 million last?

A We are seeking this final amount through February 13th.

Q Okay. After that, will the debtors have to seek alternative -- additional funding.

A Yes.
Q And what are the available sources to the debtors of that additional funding?
A Generally two. The first is the approximate $97 million, which was -- which is in a separate account, which was contributed by (indiscernible) result of the Chancery Court hearing or the Chancery Court order. The second is we can, and are exploring, third party debtor-in-possession financing.
Q Now, one of the complaints that we have heard from Rigmora is the form of this funding. The funding under the funding motion is being done pursuant to secured promissory notes, is that correct?
A That is.
Q All right. Now, have you also been responsible for seeking potential alternative debtor-in-possession financing?
A Yes.
Q And have you received any term sheets?
A We have.
Q Approximately how many?
A Five.
Q Now, compared to the 8 percent interest with no fees and a 13 percent default rate contemplated in the funding motion, how do those DIP offers currently compare?
A Well, I would couch it that, because we're still

negotiating, but generally a third-party DIP would be more expensive generally and it's a third-party DIP so any interest would go to a third party as opposed to the current funding it's going to the fund.

So, I think it's important to know, and I tried to make the point maybe not so great yesterday at my deposition, that there is not a lot of difference between note and funding under the Series A preferred.

In fact, the fund protects the limited partners because the fund is now a creditor and structurally senior to other potential creditors at the portfolio company level.

Q Is the debtors business -- and when we talk about the partnership debtor, what is the debtors business generally?

A The partnership is to make investments and make capital contributions to portfolio companies for the advancements of certain medicines and sciences as described by Dr. Harrison.

Q Is the funding contemplated in the funding motion in the ordinary course of the debtors business for the partnership debtor to provide and the portfolio debtors to receive -- and she's going to say it's a legal question.

UNIDENTIFIED SPEAKER: I was going to say objection only to the extent that its asking for a legal conclusion as opposed to Perry's -- Mr. Mandarino's colloquial understanding.

//

BY MS. TOMASCO:

Q It is to your colloquial understanding. I wouldn't have chosen that word because it's hard to say, but to your lay person's understanding, having been doing chief restructuring officer and financial advisory work in the restructuring space for 38 years, is it to your understanding in the ordinary course of the debtors business to provide funding to the portfolio companies and for the portfolio companies to receive said funding?

A That is the exact mandate of their business.

Q Is this type of relationship between the debtors typical of venture capital firms generally?

A In my experience, yes.

Q Now, with respect to the form of the funding in promissory notes, had the debtors loaned money, the partnership debtor, to the portfolio debtors in the form of secured notes prior to the filing of the petition herein?

A No, they did not.

Q Are you -- can you turn to Exhibits 38 through 43 in the exhibit books.

A Okay.

Q In general, are Exhibits 38 to 43 the secured promissory notes that were provided by the partnership debtor to the portfolio debtors after Rigmora refused to provided funding pursuant to the LPA?

A Yes, they are.
Q All right. What was the date of those notes?
A June 11th of -- oh, June 11th of 2025. I'm sorry, so they were before the Chapter 11.
MS. TOMASCO: Your Honor, I move to admit Exhibits 38 through 43.
THE COURT: Any objections?
UNIDENTIFIED FEMALE SPEAKER: No.
UNIDENTIFIED MALE SPEAKER: No, Your Honor.
THE COURT: Its admitted -- they are admitted.
(Debtors' Exhibits 38 through 43 received into evidence)
BY MS. TOMASCO:
Q Mr. Mandarino, in your role as CRO, have you become familiar with the general corporate structure of the debtors?
A Yes.
Q Now, with respect to each of the portfolio debtors, do they incur, in their businesses in reliance on the funding commitments, vendor debt?
A Yes.
Q And do you understand how much vendor debt exists across the portfolio companies?
A The debtor portfolio companies around $22 million.
Q And does -- do each of the portfolio companies, and the management debtors as well, do they all have executory

contracts with vendors and employees?

A They do.

Q Now, if funding doesn't occur pursuant to this funding motion, will that cause some of those amounts to not get paid?

A So, if there is no funding available to the portfolio companies then the portfolio companies can't make payroll, they can't pay their leases, they can't pay, you know, any amounts under contracts. It would result in the, again from a business not a legal conclusion, expansion of liabilities at the portfolio companies.

Q Now, when I use the words "structurally superior" do you know what I mean?

A Yes.

Q What does that mean?

A That the -- I guess the opposite of what I said before, structurally subordinate. That the group that has the structure superiority would get paid first out of any waterfall if there is any funds to pay.

Q Now, we talked about employee and vendor contracts, including what we have called CRO agreements, not chief restructuring officer but clinical research organization, those longer-term contracts would have to be rejected if they couldn't -- if the companies had to shut down, is that correct?

A That is right.
Q Now, is the same true of IP expenses like licensing fees and things that are necessary to keep the debtors intellectual property portfolio intact?
A Yes. Pursuant to the contracts if there were contracts, those contracts presumably couldn't be sold. They would be rejected.
Q Now, these portfolio companies, do they enter into these contracts with no visible means of paying them back or do they have written agreements with the limited partnership to fund their ongoing expenses?
A If there was -- they have the agreements, the Series A. You know, originally the Series A funding agreement before the promissory note agreements. So, there was a path to funding in their normal course of business because that is what they do.
Q All right. If you wouldn't mind turning to Exhibits 77 to 85.
A 77?
Q Uh-huh.
A Okay.
Q Do you recognize those agreements?
A I do.
Q What are they?
A These are the Series A preferred stock purchase

agreements for the portfolio companies.

MS. TOMASCO: Your Honor, I move to admit Exhibits 77 to 85.

THE COURT: Any objections?

UNIDENTIFIED SPEAKER: No objection, Your Honor.

THE COURT: They're admitted.

(Debtors' Exhibits 77 through 85 received into evidence)

BY MS. TOMASCO:

Q Now, I think you have heard Ms. Selden lament that the individual portfolio company research plans and programs were not provided to Rigmora. Do you recall when the funding motion was first filed?

A December 23rd, I believe.

Q Correct. Now, you also understand that your deposition was noticed and your deposition occurred yesterday, is that correct?

A Well, it occurred yesterday. It was noticed, I think, over the weekend or Friday. I am not sure when.

Q And you attended your deposition, correct?

A I did.

Q And you answered the questions that they had for you?

A I did.

Q Now, since your appointment, has Rigmora ever reached out to you and suggested that they would support funding all

of the portfolio companies?

A No.

Q And why would that, as the chief restructuring officer, be a problem?

A I'm sorry, why would it be a problem?

Q To not fund all of the portfolio companies as proposed in the funding motion.

A It would -- you know, as Dr. Harrison described, it would choke the portfolio companies and potentially lead them to a liquidation. Again, as I said, without funding you can't pay your bills, you can't pay your employees, it goes poof. It would be problematic without funding for the portfolio companies to continue their mission.

You know, I think to sort of take this in context a little bit, you know, there are many companies that come in this Court and others, they're supposed to make money and they're not making money, they're not making enough or they're over-levered, that is not the case here. The mission, the charter, you know, small (indiscernible) of this company is to provide funding to developmental stage companies, preclinical -- what I will call "preclinical" and then to clinical companies to advance a therapy, to advance a drug, to advance in the case of, you know, medical device and they're not supposed to make money. There is no -- it's not like you put in a dollar today and the company, in six months

from now, is going to be worth $3. Potentially it could.

It's -- that -- these companies aren't intended to make money. They are not intended to have cash flow. So, you know, what we're doing, in the funding motion, is to continue what the debtors business is. It's kind of that simple.

Q Now, Mr. Mandarino, is the funding motion designed to support maximization of the estates value?

A It is.

Q And how is that?

A By continuing programs that are under development.

Q Would a potential investor want for the portfolio companies to be shut down and incur outside liabilities for rejection of those contracts or would the potential investor want the portfolio companies to remain intact?

A I mean, any potential investor -- again, in a venture portfolio you -- I mean, in my view, you look at it as a portfolio. There are some companies that will do really well and there are some companies that will do really well and there may be some that don't, and there may be some that do okay but it's a portfolio.

So, having the scope of, you know, a number of different companies, yes, is absolutely important to any outside investor, to any outside DIP lender who would look at this as collateral, you know, to any third party. And they, of course, do their own diligence but that would be important

to them.

MS. TOMASCO: I have a question but I didn't rehearse it so I'm going to skip it, Your Honor. No further questions.

THE COURT: Cross.

CROSS-EXAMINATION

BY MR. TAFT:

Q Good evening, Mr. Mandarino. Will Taft from Debevoise & Plimpton for the Rigmora LP's.

A Good evening.

Q You are the CRO for the partnership debtor, correct?

A Correct.

Q So, that is the fund, correct?

A Correct.

Q You are also the CRO for the general partner, correct?

A Yes.

Q And the CRO for the management company, correct?

A Yes.

Q And you are CRO for seven different portfolio companies, correct?

A The debtor portfolio companies, yes.

Q None of those portfolio companies is wholly owned by the fund, correct?

A I would need to see a chart. I thought they owned all the Series A preferred stock. Maybe there is an exception but

I thought that they were mostly owned by -- you know, under -- there is an exhibit in here that describes their exact ownership, I believe.

Q Could we pull up Exhibit 3, which is Dr. Seth Harrison's first day declaration. This is page 3, Exhibit A -- sorry, Exhibit 3. It is just to refresh your recollection.

A Again, I don't recall the exact ownership percentages.

Q If we could go to Exhibit 3 of this declaration. Thank you.

A Exhibit 3 in my book is a master services agreement.

Q I'm sorry. I will be showing it on the screen. If you need more hard copies that is fine but just to refresh your recollection.

Could we go to Exhibit A of this declaration. Thank you.

Mr. Mandarino, on the left side of this do you see the ownership percentages of the fund in each of these portfolio companies?

A I'm not sure if this reflects the Series A preferred or if this is the fully diluted.

Q Does it indicate -- did -- is that indicated on this chart?

A It is not. Are you making that representation that this is fully diluted or Series A?

Q Are you -- it's not indicated here, so I won't make the representation.

Are you aware that there are other individuals who hold either stock options or equity interest in each of the portfolio companies?

A I am.

Q Okay. You have testified that in your understanding your duties require you to act in the best interests of all of the estates and not just the partnership debtor. Is that correct?

A That is right.

Q Do you have the handout that was given?

A Yes.

Q Could you turn to page 15 of that? This is the debtors demonstrative. The first bullet on page 15 reads:

"The primary purpose of these Chapter 11 cases is to save, preserve, and maximize the value of the portfolio companies."

Do you agree with that statement?

A I do.

Q Okay. Your proposed budget seeks to maximize the collective value of all of the bankruptcy estates, correct?

A I don't understand that question.

Q You prepared the budget that was introduced earlier, correct?

A Right.
Q And was the goal of that budget to maximize the collective value of all of the bankruptcy estates?
A It was -- I'm sorry, I'm not being -- its meant to -- our mission is consistent, portfolio companies in bankruptcy estates. Right now, the portfolio companies are the ones -- sorry, the debtors are the ones most at risk. Debtor portfolio companies have other -- you know, there is a couple -- there is two clinical companies, they don't need the support of the fund anymore. So, it's consistent with this.
Q Did -- your budget was not designed solely to maximize the value of the partnerships bankruptcy estate to the extent such an estate exists, correct?
A I don't know how to answer that question.
Q Okay. Could we pull up the transcript from yesterday's deposition at page 56? Thank you.
I asked you about the budget and I said:
"So that budget was not designed solely to maximize the value of the partnership's bankruptcy estate, correct?"
You answered:
"That is right."
A Right.
Q Do you recall that testimony?
A Yeah, but I don't think that -- did you just ask me

that exact question because it didn't sound like this reading it.

Q I asked:

"The budget that you prepared was not designed to maximize the value of the partnership's bankruptcy estate, correct?

UNIDENTIFIED SPEAKER: Objection, Your Honor. He misread it. He left out the word "solely" and I think that is a key word in that question.

THE WITNESS: It is.

BY MR. TAFT:

Q It was not designed solely to maximize the value of the partnership's bankruptcy estate, correct?

A Right. I don't think you asked that before. So, if you add "solely" to your question before then I would answer that is right.

Q You are recommending that the partnership debtor loan approximately $13.9 million to nine different portfolio companies, correct?

A Yes.

Q And you are recommending loaning just over $1.4 million of that to Nine Square, correct?

A As an example, the amount is consistent with what is in here of Nine Square's $1.4 million, then yes.

Q And you are recommending --

A I'm looking at page -- excuse me, I'm looking at -- yes, page 19, $1.4 million. That is correct.
Q And you are recommending that the partnership loan, approximately $1.5 million, to Nereid, correct?
A I think I rounded it up to $1.6 million. That is right.
Q Okay. And you are aware that Nereid does not have a budget approved in accordance with the LPA, correct?
A I am aware of that.
Q And you are aware that Nine Square also does not have a budget approved in accordance with the LPA, correct?
A I am aware of that.
Q Okay. You have not analyzed the likelihood that any of the loans to any of the portfolio companies will be repaid, correct?
A What I've analyzed, and I think it's what I said yesterday, and what I've said a few minutes ago, and what I will say again, is that the -- the short answer is, no, you know, that is not how you look at it, can it be repaid under -- you know, in the next 26 weeks. It is I analyzed that it's the right thing to do for the portfolio to maximize values to continue the funding.
Q Have you analyzed how long it might take to repay these loans?
A I have not.

Q Okay. Have you analyzed the risk of any of these portfolio companies defaulting on the loans?

A Well, the terms of the loan are -- I mean, they are generally a friendly loan to the -- it was done for the structural, you know, seniority as we have discussed on my direct. So, that wasn't -- it's not a concern. What happens in these companies is that when the funding is made -- well, when I say it's not a concern, I was being glib. I shouldn't have said if that directly. It is less of a concern.

What happens is the way to preserve -- what is most important, as I have said yesterday and today and probably in our calls today, is that these companies continue to receive funding to continue their mandates. That is the assessment that was made. If that happens and it works then everything else falls into place.

Q So, in your view and in your judgment as CRO for the partnership, is it more important to make the loan then that the loan get repaid?

A The loan is a bit of form over substance. Again, I'm not treading on legal, right. I don't want someone to come and say, well, this really isn't a loan, its equity, right. The loan is intended -- it was a mechanism developed, through counsel, in order to not only protect the partnership, Mr. Taft, but to protect the portfolio companies. It is to benefit the partnership but to benefit the portfolio

companies because it allows them to continue their mission and their mandate and to not incur liabilities.

Q Would you agree that the terms of the proposed loans are exceedingly favorable to the portfolio companies?

A I haven't thought about that.

Q Can we pull-up, Mr. White, the funding motion at 18? Page 18, please.

At the bottom of the funding motion it says --

A What paragraph?

Q Paragraph 30, Docket Number 89. It says:

"The terms are exceedingly favorable to the portfolio companies."

Do you agree with that statement?

A Again, I -- is this the motion?

Q It is.

A Yes. Again, you know, its favorable -- well, I guess exceedingly is they're favorable. You know, exceedingly favorable is in the motion, I guess. I would view them and your question before was exceedingly favorable. I mean, as I said before, they're on good terms. It's a little bit of form over substance. So, yes. What benefits the portfolio companies benefits the partnership.

Q So, some of these portfolio companies have no cash flow generating operations at all. I think you said that earlier, correct?

A As they were intended to do, as they were intended when this fund was set up, as is the normal course of business, yes.

Q And as I think you also testified, you haven't done any analysis of the likelihood of these loans being repaid?

UNIDENTIFIED SPEAKER: Objection, Your Honor. Asked and answered.

MR. TAFT: I will withdraw it.

BY MR. TAFT:

Q Have you analyzed whether alternative uses of their capital, rather than loaning it to these portfolio companies, might provide a higher risk adjusted return?

A No.

Q And have you analyzed the anticipated return to the fund of making these loans?

A Mr. Taft, that is not what you do in a company like this, okay. What you do in a company like this is you continue the mission of the funding to get to the next stage, as Dr. Harrison. It is not, as I said before on my direct, okay, you put in a dollar today and it's going to be worth $3 tomorrow. That is not how you do it. I believe your client, who is a pretty sophisticated doctor himself, understands that as well.

Q Okay, so --

A Excuse me, please let me finish. So, when you look at

this -- to answer the premise of your question is something I cannot answer. That is not the mission of this fund or of any venture fund.

Q So, the venture -- the mission of no venture fund is to obtain a return on their investments?

A That is not what I said and I believe you know that.

Q Well, you haven't analyzed whether these -- these are investments, correct?

A They are.

Q And you haven't analyzed whether by making these investments the fund can anticipate any return, correct?

A No, because what -- but it is -- and I'm sorry, I don't mean to get frustrated. What I'm saying is that, in a venture portfolio the funding, it is not -- you know, it is not building a new plant for an automaker that, you know, in two years the plant will be running, you'll be able to produce a million cars out of the plant and here's the ROI on it, that's not the same measures that you take. The measures you take is that you go through the pre-clinical trials and the clinical trials to get to commercialization and somewhere along the line, at different points along the line, you decide that it's a go or no-go.

And so, you know, you can't see, gee, we're going to create this great Parkinson's remedy and say, gee, it's going to be worth $2 billion on day one, you know, it's not -- it's

not the way that it's looked at, it's looked at, you know, over stages. So, I -- and that's how I would respond accurately and truthfully to your question.

Q And you were also responding accurately and truthfully yesterday in your deposition when I asked you whether you had performed any analysis of the potential return on investment for the proposed funding and you said, I have not, correct?

A And I think that's entirely consistent with what I just said. I was helping you a little bit more to understand.

Q Thank you. In connection with the proposed loans, you're advising the fund, correct? You're exercising judgment on behalf of the partnership?

A I'm exercising judgment on both -- on the partnership fund and the portfolio companies, which is entirely consistent and benefits both.

Q Okay. And have you taken any steps to consider bringing in a different professional solely to represent the interests of either the portfolio companies or the funds in connection with the proposed loans?

A What type of professional?

Q Somebody just like you, but who's solely interested in whether or not their actions are increasing the value of the partnership debtor bankruptcy estate?

A I think that would be a waste of estate money, which you claim is your money or your client's money. So, I think

that would not be a good use of funds.
Q Okay. And that's the judgment you've made in your role as CRO for the GP, the partnership fund, the management company, and all seven debtor portfolio companies?
A Well, I haven't -- I actually, until you just mentioned it, haven't thought about it. So, I would have to really confer with counsel and with the management of the company to come up with that right answer, but sitting here, you know, in real time, to me it would seem like it's a waste of dough to do that.
Q Okay. So just to level set, at least with respect to these proposed loans, you are representing the interests of both the lender and the borrower, correct?
A I think that calls for a legal conclusion. I mean, lender and borrower, it's -- I mean, they're related companies. These aren't two independent parties where to me things like conflict exist, which this Court sees all the time, right? These are two -- they're related parties. I mean, it benefits both, it continues -- and let's not lose sight of the fact of what's the most important thing, and that is to continue the funding of the company to continue their missions because that's how value gets realized.
Q You accept that the Rigmora LPs feel that the most important thing is to maximize the value of the -- specifically of the partnership debtor estate, correct?

A I would have to breach 408 discussions to answer that. If I'm allowed to, that would be great.
Q Okay. You are --
A May I?
Q Let me just, in the interest of time, keep moving.
You're assessing -- you assessed the appropriate interest rate to charge on these intercompany loans, correct?
A It was existing and it was fine.
Q So, you took the eight percent with a five percent default surcharge that was in the prepetition intercompany loans, is that where you got the rate?
A That's right, which, you know, in comparison to my knowledge of market is a favorable loan to the portfolio company and, you know, it -- yes.
Q Favorable to the portfolio company; is that favorable to the fund?
A Yes.
Q Okay. You've said third parties have begun discussions at least about offering DIP funding for portfolio companies, correct?
A Well, for the whole -- for all the debtors, yes.
Q For all the debtors or have you had discussions with any individual -- about funding for any individual portfolio company?
A I have not because, as I said before, investors look at

this as a portfolio, not just as one company.
Q Okay. So that would be DIP funding at the fund level?
A We haven't gotten into the whole structure of -- and, again, I'm a little hesitant to give those details only because it's a competitive process still with multiple lenders, there's different structures that have been presented.
Q Have you provided any of those details to the Rigmora LPs?
A We have not.
Q Would you be willing to provide those details to the Rigmora LPs?
A I would need to speak to counsel about that.
Q Okay. So you used the prepetition loans as the basis for the -- all the terms are from the prepetition loans and you're just transporting those over to the post-petition loans, correct?
A Okay.
Q Is that --
A Yes --
Q -- is that an accurate statement --
A -- sorry, yes.
Q -- of what you're proposing?
A Yes.
Q Okay. The new loans would be junior to the prepetition

secured notes, correct?
A I believe that's correct.
Q Okay. That means they have a greater credit risk than those prepetition notes, correct?
A And a higher credit risk than a Series A contribution -- a better risk than the Series A contribution.
Q But you recommended using the same interest rates for the junior -- proposed junior post-petition loans, correct?
A Right.
Q Did you do any analysis as to whether or not that made economic sense from the perspective of the partnership debtor?
A Again, it's -- I viewed it in the sense of it's better than putting in equity and, you know, with the ownership structure it's related. It is -- again, not to, you know, compromise any legal position, I'm not saying it is equity, but it's better than putting in equity and it, you know, gets -- again, keeping in mind the big picture, right, where the real value comes from and how the loans get repaid is the continuation of the company's business and the mission of the portfolio companies.
Q And yet you have not evaluated the likelihood of any of these loans being repaid, correct?
MS. TOMASCO: Objection; asked and answered for the fourth time.

MR. TAFT: He's proffering the --

THE COURT: Overruled. You can answer.

THE WITNESS: I'm sorry, what was the question again?

BY MR. TAFT:

Q The question was, you're saying over time with the possible repayment of the loans, I'm just saying you haven't analyzed whether or not any of these loans are likely to be repaid, correct?

A Again, I think it was asked and answered, and I think what I said at the beginning is that the best way, the most probable way that any investment in the portfolio companies would get repaid is there's a continuation of the mission of the portfolio companies and continued research, so the drug or therapy could get developed.

Q And I'm asking you, have you actually assessed the probability of those repayments happening with respect to the proposed funding?

A What do you mean by assessed?

Q Have you done any economic analysis as to the likelihood that any dollar that you propose putting into a portfolio company now will actually be repaid to the fund?

A If the -- well, if the therapy or drug is successful, it will be repaid; if it's not, it won't be repaid; that's the assessment, but that's -- that's the mission of the fund,

that's the normal-course business, that's what a venture fund is.

Q I'm asking you, have you --

A You're not buying -- excuse me -- you're not buying stocks on the market and assessing, well, gee, will stock XYZ, you know, go up or down, that's not what this is. This is -- this is the -- this is a venture fund and how a venture fund operates.

Q If I understand your testimony it is that, if the borrower portfolio companies get some money, enough money down the road, they will be -- that money will be used to repay these loans, is that your testimony?

A I don't know if that's what I said.

Q Okay. Have you assessed how much more money any portfolio company borrower might need in order to achieve commercial success?

A Well, there's the -- you know, for the companies that have the capital B budget under the LPA, there's the -- you know, there's amounts that have been funded, you know, the unfunded amounts which are on these same charts, and so there's one -- there's at least one data point as to what else they'll need.

Q Have you assessed that that amount of unfunded budget will be sufficient for -- take anyone, take Marlinspike -- I don't care, take Marlinspike -- it has an unfunded budget,

correct?

A Marlinspike does.

Q Have you done an assessment as to whether the amount of the unfunded budget in Marlinspike will be sufficient for Marlinspike to reach a commercially viable state?

A I didn't need to do that for this funding motion.

Q To get your answer, you did not do that analysis, correct?

A I didn't -- it wasn't a consideration for this funding motion.

Q Okay. And just to circle back to the original question, have you analyzed how much money any of these portfolio companies would need in order to get to a position where they might be able to have enough cash flow to repay these loans?

A The same answer as I just gave.

Q So the answer is, no, you have not done that analysis?

A It's the same answer that I just gave. It's more than just one no, it's -- I described it in much more detail.

Q Have you determined that all of the portfolio companies are equally creditworthy?

A I have not.

Q Okay, but you're proposing to use the same loan terms for all of the loans, correct?

A All of -- all of -- again, my answer goes back to what

I've said at least three times during this cross already. The first is the loan structure is a little bit of form over substance, it is a mechanism that provides funding for the portfolio companies to continue their mission and, given the ownership structure, it was my determination, the company's determination that this was the best path to do it in.

Q Did you consider not loaning any money to these portfolio companies?

A Not loaning any --

Q Not funding any of the portfolio companies.

A No, that would be an -- that would be, I think, a ridiculous thing to do, not fund them.

Q Is that because you've done an analysis of these portfolio companies and determined that they have value?

A It is because of what I've testified already.

Q In fact you have not done an analysis of any of the portfolio companies to determine that they have value today, correct?

A Their value is in their research and their research is continuing. So that is one definition of value that they do have value, yes.

Q I'm going to appeal to your hard heart as a chief restructuring officer and ask whether or not you have done an analysis of whether any of the portfolio companies that you are proposing lending money to have economic value today?

A Well, I think people think I'm a teddy bear, Mr. Taft, so I don't know if I have a hard heart, but I will tell you that the value is in continuing the programs and, to me, that's a definition of value.

Q Just one or two more questions. You testified that there were prepetition loans that provided emergency DRIP (ph) funding for the -- or, sorry, this would be in your declaration -- do you recall describing the prepetition loans as emergency DRIP funding?

A I take your word for it if that's what it says, I don't have it memorized.

Q Are you aware of any instance prior to June of 2025 where the fund invested in a portfolio company by way of a loan as opposed to a purchase of shares?

A I am unaware.

Q Okay. Are you aware of any instance in which the fund invested in any way into a portfolio company that had filed for bankruptcy?

A I believe in its history, I'm not sure if it was -- if it was the fund or another, but I know Dr. Harrison has had some experience in an investment made through bankruptcy, I'm not sure if that was with the fund or not.

MR. TAFT: Thank you. No further questions at this time.

THE COURT: Thank you. Any redirect?

REDIRECT EXAMINATION

BY MS. TOMASCO:

Q Mr. Mandarino, can you find the exhibit that is the audited financial somewhere on the witness stand?

A Which exhibit? There's only --

Q It's a loose exhibit --

A Oh --

Q -- it should still be up there.

A -- sorry. Yes, I have it.

Q I believe it's 99, it's been marked as 99.

A Yes, I have it.

Q Okay. Would you mind turning to the page that is marked -- well, I'm going to say it's -- after the Grant Thornton page and the signature, it is going to be the fourth page.

A So it's titled the ATP Life Sciences Ventures, L.P. and subsidiaries' consolidated statement of assets, liabilities, and partners' capital as of December 31st, 2024?

Q Yes.

A I have it.

Q That page that says, "Consolidated schedules of investments continued," do you see that?

A Yes, I think it's number 4 on the bottom.

Q Okay. Now, are you pretty familiar with audited financials, Mr. Mandarino?

A I am.
Q All right. Now, each one of these portfolio companies has been assessed at fair value, do you see that?
A I do.
Q Okay. Now, with respect to those numbers, it's not zero, is it?
A It is not.
Q Okay. And this is as of December 31 of 2024, do you see that?
A That's right.
Q Okay. Now, so these companies inherently have value based on the audited financials of the partnership, is that correct?
A Yes.

MR. TAFT: Objection, leading.

THE COURT: Why don't you ask him what it means?

MS. TOMASCO: Your Honor -- okay.

BY MS. TOMASCO:
Q Mr. Mandarino, what does this column mean on these audited financials with respect to the fair value of the portfolio companies?
A Sure, that under, you know, GAAP rules and ASC, which is the Accounting Standard rules, that the auditors made a determination that the fair value of the investments in total totaled 3.9 billion, almost $4 billion.

Q Okay. Now, that includes some pretty hefty numbers for each of the debtor portfolio companies here, do you see that?
A I do.
Q And of course there are very, very commercial portfolio companies as well?
A That's right.
Q All right. Now, with respect to the idea that this management team has a pretty good track record, would you agree with that?
A I would.
Q Okay. And why?
A Given the returns that they've returned to their investors, I believe that of the -- rough numbers, 2.3, $2.4 billion that Rigmora has invested over the years, they've been actually paid back something like 2.1 billion of it, and there's still the value that they own of the companies that are still there.
Q All right. For example, what is the fair market value of Braeburn, give or take?
A I mean, according to Dr. Harrison's testimony earlier, I think he said $2.9 billion.
Q All right, so there's plenty of value here. And also, with respect to this management team, can you turn to slide 10 in the PowerPoint presentation?
(Pause)

A Okay.
Q Are you familiar with that?
A I am.
Q And what is it?
A It's a chart that compares the IRR of the -- of a bunch of different funds similar or used as a comparison to Apple Tree and then Apple Tree, and Apple Tree's internal rate of return of pure-play biotech funds which is exceeding in a billion of assets is 23.22 percent and, you know, which compares to -- you know, favorably with its peer group, there was only two -- there was only one that has a higher IRR and that is a Bain Capital Life Sciences fund, and Bain has, you know, tens of billions of dollars of capital at their disposal.

So it is a -- you know, the median of all the comps is 8.8 percent and ATP Life Sciences is 23.22 percent. So, you know, presumably that's why they have one investor that did put in the $2.3 billion.
Q What is your lay definition of business judgment, Mr. Mandarino?
A It's complicated, but business judgment is what a company, debtor -- you know, to do the right thing, what is the best thing to do for its enterprise, for its stakeholders, its shareholders, its creditors, you know, its equity, what -- it is based on its experience and knowledge,

you know, what it -- how it makes its decisions.

Q And is it your business judgment that funding these portfolio companies using secured loans is the best use of funds for the partnership debtor?

A Yes.

MS. TOMASCO: No further questions, Your Honor.

RECROSS-EXAMINATION

BY MR. TAFT:

Q Mr. Mandarino, do you know -- you weren't prepared -- you weren't involved in the preparation of these audited financial statements for the fund, correct?

A I was not.

Q Okay. Do you know if the fair values listed here primarily reflect the amounts invested in each portfolio company?

A My understanding of fair value calculations for an audit is it is done under the ASC standards, which is, you know, what is the value of that investment, and there's many criteria of that. So it's not solely how much money has been put in.

Q But that is a factor, correct?

A Presumably, what the cost -- well, I don't know. With that, that's just a cost basis, there could be what the cost basis is of what -- how much money has been put in as compared to the value of it could be different, you know, it

could be higher or lower theoretically. I mean, the -- but, again, it is -- you know, I take comfort that Grant Thornton is a top-notch accounting firm and that these numbers and values are to the best of their professional judgment as of December 31st, 2024.

Q But you don't know what factors they actually considered in reaching these valuation determinations, correct?

A Sure, the factors under the ASC rules.

Q Okay. And is it your testimony that the value that you would achieve in a -- if somebody were to sell this company, the fund were to sell any of these debtor portfolio companies, is it your position that the expected sale price would have some relationship to the GAAP fair value reported in these audited financial statements?

A No.

Q Okay. Do you know if the fair value of some of these companies is less than the cost that -- the amounts that were invested in them?

A Some could be less, some -- I don't know, some could be less --

Q Okay.

A -- some could be more. This was as of a certain date, this was as of December 31st of 2024, some of these companies -- you know, Aulos, Replicate, for example, you

know, galvanize Braeburn, the -- you know, the commercial ones, maybe they're worth more based on their financial perform -- you know, for the commercial ones from their portfolio, and some could be less due to the choking off of funding by the limited partners, you know, since May of 2015.

Q And you don't know because you have not performed an analysis of the value of any of the portfolio companies, correct?

A I have not done a valuation, that's right.

Q Okay. And just very briefly on this return analysis, you weren't involved in generating any of this analysis of the history of success, correct?

A I was not.

Q Okay. And you don't know whether any of the numbers presented here are accurate, correct?

A You know what, when I first saw this originally, when I first met the company I was given something like this, and I asked one of my guys to fact check one of them because I was just interested, right? And, you know, he -- it was -- he wasn't -- we weren't sure if it was the same fund because some of this information is proprietary, but the Bain Capital Life Sciences fund's return was pretty consistent with some, you know, research that we did independently. Again, that was just a fact check that we did, you know, as a comparison.

Q And other than that --

A That was it.

Q Thank you.

MR. TAFT: No further questions.

THE COURT: Thank you. Mr. Mandarino, do you know where the $15 million in cash that the debtor has on hand comes from?

THE WITNESS: It was funds that they had from -- it's their existing cash on hand, so it was funds that -- I mean, I believe most of it came from, you know, prior capital calls, but I don't know if there was other sources of income in that.

THE COURT: And do you happen to know -- I don't know if my notes are right or not -- Akero Therapeutics sold for $5 billion in late 2025, do you know if that's right?

THE WITNESS: I do, it sold -- so what happened, Akero -- I think it's A-i-k-e-t-o -- wait, hold on, I have it right here. It is, I'm sorry, A-k-e-r-o, Akero. Yes, so Akero was a portfolio company which was sold I think -- of ATP sold in 2021, and then it was then sold again. It wasn't sold by the venture fund, it was sold by the party they sold it to, and it sold at $54 a share. Yeah, I think it was like either right under or right below five billion, but that value didn't come to us or the LP.

THE COURT: Okay. Thank you.

THE WITNESS: That would be a different story if

it was.

THE COURT: Okay. Thank you.

Does that prompt any questions from anybody?

MS. TOMASCO: Oh, no, we're -- we would like for Mr. Mandarino to leave the stand. I don't think there's anything else to ask.

THE COURT: Mr. Taft?

MR. TAFT: I'm sorry, it did prompt an offer, which is if Your Honor is interested in a submission as to the source of the $15.5 million, we would certainly participate in that.

THE COURT: Thank you. Thank you --

THE WITNESS: Thank you, Your Honor.

THE COURT: -- you may step down.

(Witness excused)

MS. TOMASCO: Your Honor, we have -- obviously, we have the stay enforcement motion is --

THE COURT: Well, let's -- I want to clean this up. Does the debtor have any more witnesses?

MS. TOMASCO: The debtor does not have any more witnesses.

THE COURT: Okay. Does Rigmora have any witnesses or evidence they want to present on this motion?

MR. TAFT: No, Your Honor.

THE COURT: Okay. Thank you.

Ms. McCollum?

MS. MCCOLLUM: No evidence.

THE COURT: Okay, so the evidentiary record is closed.

MS. LABOVITZ: Your Honor, we're a little confused, as usual. The debtors filed and offered in support of their motions and referred to in their motions the declarations of Dr. Harrison and three declarations of Mr. Mandarino. Ms. Tomasco is now suggesting that those will not be moved into evidence and may not be moved into evidence.

THE COURT: They don't have to be. I had testimony; I had people on the stand.

MS. TOMASCO: Yeah, I come from the very traditional Texas courts where declarations are not a thing.

THE COURT: They aren't -- they aren't evidence.

MS. LABOVITZ: Well, here we go then.

MS. TOMASCO: So, Your Honor, we've moved into -- we've had the witnesses, we've moved into evidence all of the exhibits that we wanted to have admitted with respect to the funding motion. My understanding is that Rigmora has no witnesses and obviously, to the extent they have exhibits, they would need to be self-authenticating.

MS. LABOVITZ: Do you have any argument in support of your motion, Patty?

THE COURT: Okay. Well, I'm making sure I've got the evidence closed.

MS. TOMASCO: The evidence is closed, Your Honor.

THE COURT: Okay. So, now we can turn to argument. And obviously we're not getting to the motion to enforce today.

MS. TOMASCO: Your Honor, I think that the evidence is overwhelmingly on the debtors' side. Rigmora has taken its shots, but the debtor has demonstrated that the funding motion is in the best interest of these estates.

While one could say that this should happen in the form of an equity investment in the portfolio companies versus a loan, the loan seemed to make the most sense given that that was the structure that the debtors had adopted when the funding became uncertain. And you can certainly understand that from an intercreditor viewpoint, just like every other intercreditor borrowing that happens in a Chapter 11 case, usually it's done in the cash management motion, in this case it's not going to happen that way, it's going to happen via secured loans. We could call them, you know, superpriority administrative loans and the effect would be the same, and that is that these are funds from one debtor to another of a jointly administered estate where the equity is fully owned by the partnership debtor. Any of those loan proceeds will go to pay what would otherwise be a claim

against the portfolio debtor, either in the form of rejection damages or employee contract damages, and because this will be a solvent estate before it reaches the partnership, the limited partners, those amounts are going to have to be paid in full anyway. And, from a pure pragmatic viewpoint, what you're going here is simply preventing for a period of time the abrupt shutdown and nonpayment of valid vendor claims, employee claims, and contract claims.

THE COURT: When you say it's going to be a solvent estate, I need some further explanation on that. What's going to be a solvent estate?

MS. TOMASCO: Well, just structurally. Each one of the portfolio companies has its funding from the partnership debtor, but it is done pursuant to the Series A funding agreements by which they can say I've met this -- I've met this criteria and you have to fund me now. Right?

So, it's not as if you can strand any of these individual portfolio companies without them in turn or their creditors saying we relied on these Series A funding agreements before we entered into this CRO agreement or before we entered into this employment agreement, and those are all going to be claims that need to be paid whether we stop today or we stop six months from now, those claims are going to be rejection damages claims, and that's the kind of harm that we're preventing.

THE COURT: Well, I understand the harm; I don't understand the solvent debtor comment.

MS. TOMASCO: Well, so --

THE COURT: I understand the harm.

MS. TOMASCO: Correct, Your Honor, but in order for money to flow up to the limited partners there has to -- all of the creditors have to be paid in full.

THE COURT: Well, yes, I understand that in the sense of, if there's going to be a distribution up the chain, there can only be a distribution in a scenario where creditors are paid, but you're talking about putting money down into a debtor and how do you know that debtor is going to be solvent? That's what I thought you were saying; that's what I don't understand.

MS. TOMASCO: Oh, well, Your Honor, it -- the funding agreements between the limited partners and the portfolio companies are obligations of the limited partnership.

THE COURT: So there's a claim.

MS. TOMASCO: There's a claim.

THE COURT: There's a claim --

MS. TOMASCO: Correct.

THE COURT: -- that would have to be brought --

MS. TOMASCO: That would have to be brought and the limited amount of funding compared to the overall

budgeted amount --

THE COURT: Is fair, I get that.

MS. TOMASCO: Okay. Now, what we're doing is we're preventing that claim from ever having to be brought; whether it's successful or not, we don't know, but that is one of the elements of the debtors' justification and its business judgment.

Now, you add on top of that is like, where do we go from here. And I know it's on everybody's mind and we have -- you know, we have meetings and plans and things that will come to fruition shortly, but Mr. Mandarino's and Mr. Harrison's testimony, which is the only evidence before the Court, was quite clear, you can't shut down these portfolio debtors mid-experiment or mid-clinical trial, that in and of itself is going to produce more claims and, you know, it's not possible to isolate those at the portfolio companies with any certainty.

We also know that the interest in these debtors, from Mr. Mandarino's testimony, is as a portfolio and not as cherry-picked debtors that are essentially you fund this, you don't fund that.

What has happened here is what has -- what we know is the debtors' business judgment that is entitled to deference, and we've explained explicitly and painstakingly why each portfolio debtor needs this funding in order to

continue, and we've explained like the rationale behind how this funding gets us from point A to point B, and that's the point of the debtors' business judgment.

So, I know this is different because we're talking about a limited partnership and you have some nuances in the limited partnership agreement, but I look at this situation and I'm sort of sitting there going imagine if you had a corporate Chapter 11 debtor and you had a shareholder coming in and saying I don't like the debtors' DIP budget, I think they should be spending their money differently, right? But that shareholder doesn't have management rights, doesn't have the right to approve the budget after it's already been -- you know, after he's already invested his --

THE COURT: But this company does. These limited partners do have some rights with respect to budgets.

MS. TOMASCO: They have rights to approve budgets as a condition to making a capital call; after that, they do not.

THE COURT: So the general partner makes a capital call and says here's the budget I want you to fund.

MS. TOMASCO: Correct.

THE COURT: The limited partner funds that --

MS. TOMASCO: Correct.

THE COURT: -- based on the budget that was given.

MS. TOMASCO: Correct.

THE COURT: And then the general partner can use the money any way it wants to regardless of the budgeting and how that money came in?

MS. TOMASCO: Apparently, according to the documents at hand, that's how it's structured. And the problem -- and you would say, you know, as most conflicts appear before you, if the documents were written differently, that would not be the case, but once the funds come in and they're used for that portfolio debtor, the --

THE COURT: Do they have to be used for the portfolio debtor, or can they be used for another debtor?

MS. TOMASCO: Well, ordinarily, they would be used for that portfolio debtor, right?

THE COURT: And what makes this not ordinary?

MS. TOMASCO: So, currently, the funds that the debtor has on hand are property of the estate and any conditions on their use are subject to 541(c).

THE COURT: I keep hearing that. You're going to have to brief that for me at some point, but apparently you guys decided you weren't briefing that today.

So, tell me about -- so, the contractual right -- and I've looked at it and I'm going to ask the limited partners as well -- it just seems odd to me that you could base a budget -- you could make a capital call, get money based on a budget, and then execute differently than the

budget that was the basis of the capital call.

MS. TOMASCO: But that was the finding of the Chancery Court, Your Honor. They said --

THE COURT: Where did she make that finding?

MS. TOMASCO: -- she said explicitly that the milestones and the budgets were not -- were explicitly not applicable here.

THE COURT: No, she said something different about the milestones. I don't remember that. I'm not sure I -- I'll go back and read it. If she made that finding, great, but I don't think so.

MS. TOMASCO: Yes, Mr. -- I am not --

THE COURT: It's on page -- I want to say page 53, because it made an impression on me, the milestones. So -- and I think what she recognized is, yeah, you know, milestones, that's what we go for, but we don't always hit them. Okay?

MS. TOMASCO: I'm going to let the people who tried the case talk about it.

THE COURT: But what I really want to hear is where in the document -- and I have this for the limited partner -- where in the document does it say that once you fund and budgeting is explicitly on the capital call that you have then further discretion to -- where does it say that? I don't think it does.

MR. BERDON: Your Honor, Andrew Berdon on behalf of the debtors.

It is true that, under the LPA, funds that are called pursuant to a capital call are to be spent in accordance with an approved budget on the projects that have been approved.

THE COURT: Okay.

MR. BERDON: So we do not argue that there is discretion given in the LPA itself to spend capital that is called on projects other than the specific project for which the capital was called.

THE COURT: Okay. So how does that line up with what the debtor is asking to do here?

MR. BERDON: Your Honor, in -- I'm not a bankruptcy lawyer and the issue that needs to be briefed is a specific piece of the Bankruptcy Code --

THE COURT: Okay.

MR. BERDON: -- but I can --

THE COURT: Fair enough.

MR. BERDON: -- I'm here to go on record as stating our understanding as to how the LPA itself deals with the issue.

THE COURT: Okay. And the LPA says it needs to be for the project that the capital call was made for?

MR. BERDON: That's true.

THE COURT: Okay. Thank you.

MS. TOMASCO: Your Honor, and which is what we've tried to do with the charts that are on -- so we've spelled out the company-by-company authorized funding and how much of that funding is being used, right?

THE COURT: Right.

MS. TOMASCO: Okay. So --

THE COURT: And with respect to those that have an approved -- an unfunded, but approved budget, at least I have a budget, which quite frankly to me means that the limited partners made a decision already that it was in the business judgment to fund these companies to this amount --

MS. TOMASCO: Right.

THE COURT: -- even though they may not think so now, but at some point they did --

MS. TOMASCO: Correct.

THE COURT: -- because they -- there was an approved budget and a decision made there, but what about those for which there is not an approved budget?

MS. TOMASCO: Your Honor, that is where there are funds on hand from the capital calls, granted, perhaps from other sources, but for which these debtors need to be able to use funds notwithstanding the fact that they're outside of the budget. The basis for doing that is 541(c), and that is that any restriction on the use of property of the estate is

abrogated in a bankruptcy -- in a Chapter 11 case.

THE COURT: I don't think that's what it says. You're going to have to convince me of that. It says it can come -- it says property can come into the estate notwithstanding a restriction on it. So, now it's in the estate.

MS. TOMASCO: Correct.

THE COURT: Where does it say, once it's in the estate, I can just ignore the restrictions on it? It's in the estate. That's the transfer from the debtor to now the debtor-in-possession, our two fictional entities, right?

MS. TOMASCO: Correct, but if those restrictions continued to exist, then 541(c) would have no meaning.

THE COURT: No, I don't think so.

MS. TOMASCO: Well, if --

THE COURT: What about commodity futures? I mean, it's -- the bankruptcy makes -- there are other provisions of the Code that impact pre-bankruptcy rights. You're going to have to brief me on 541(c) because that is not how I read it. I haven't had the issue before, but it's not how I read it. It brings it into the estate is what it does.

MS. TOMASCO: The debtor can use property of the estate under 363(b) in the ordinary course.

THE COURT: But, for example, you can't sell property that state law prohibits you from selling, Third

Circuit, whatever -- that's Integrated Solutions. Okay? There is law out there that says, wait, restrictions matter. Now, maybe this restriction doesn't, but you're going to have to show me that it doesn't.

MS. TOMASCO: Okay, Your Honor, it sounds like we have agreement with respect to at least six of the nine debtors.

THE COURT: It could be.

MS. TOMASCO: With respect to the three additional debtors, perhaps the Court would benefit from some briefing, but I will note that this goes beyond what Rigmora objects to. They object to funding any pre-clinical company --

THE COURT: I understand that.

MS. TOMASCO: -- regardless of the fact that they approved a budget before.

THE COURT: I understand that.

MS. TOMASCO: And that's been really the source of the tension since May, right? And that is that the debtors are not willing to give up those pre-clinical companies with approved budgets in order to trash them because Rigmora wants to.

THE COURT: Yeah, I hear the debtors' business judgment and I don't doubt that. I don't doubt the debtors' business judgment here --

MS. TOMASCO: Sure.

THE COURT: -- that all the funding they've requested should be granted, but there's a couple of different questions.

MR. BERDON: Your Honor, Andrew Berdon for the debtors, I just want to add a fact that you asked about that our colleagues have offered to make a presentation on. Well, money is fungible, there is cash on hand derived from two sources, one was the repayment of a note by Braeburn that was owed to the fund that was done in July of 2025, and that put I believe $42 million into the fund, there was then a $10 million payment as a post-closing earn-out payment from the sale of a company called Tendyne that was received. And so there was $52 million basically paid into the fund in July and August of 2025 that's independent of any specific response to a capital call on an approved budget.

THE COURT: Okay. Thank you.

MS. TOMASCO: So, Your Honor, because we have -- if we were to say whether or not Rigmora has an interest in the funds sufficient under 363(f), our argument is that they don't have -- it's not a lien. Whatever interest they have is contractual, right? It's under an LPA agreement that once we, you know, find an alternative investor and reorganize that LPA agreement will no longer be around. And this particular set of funds to the non-approved-budget debtors should be viewed as not subject to Rigmora's interest to the

extent one would exist under 363(f). And to the extent that they could be forced in an equitable proceeding to accept the money judgment, I also think that 363(f) supports the relief.

THE COURT: Yeah. I don't know if it's 363(f) that's an issue, though. This is really interesting to me. And it's not a good word coming from a Bankruptcy Judge, oh, this is interesting, right? But what I am hearing is that there are funds that belong to the limited partnership --

MS. TOMASCO: Correct.

THE COURT: -- that it has that it wants to loan to the portfolio companies. And there hasn't been a dividend declared and so the money is at the limited partnership.

MS. TOMASCO: That's correct, Your Honor, and to the extent the Court wants additional evidence on that, we're happy to present it. But also briefing, to the extent the Court needs it, can be done very quickly. And we suggest that, critically, one of the unbudgeted portfolio debtors is Aulos, who is in the middle of clinical trials for cancer patients, for all those reasons --

THE COURT: As I said, I think the evidence was compelling. Maybe there should have been some discussions.

Ms. Labovitz?

MS. MCCOLLUM: Your Honor --

THE COURT: Oh, Ms. McCollum.

MS. MCCOLLUM: -- if I might beg the Court's

indulgence for a brief recess? My garage closes at 7:00 and I can't get my car out if I'm still there. So, if you could give me ten minutes to go --

THE COURT: Yes --

MS. MCCOLLUM: -- and move my car --

THE COURT: -- I'll give you ten minutes. We're in recess.

MS. MCCOLLUM: Thank you, Your Honor.

(Recess taken at 6:28 p.m.)

(Proceedings resumed at 7:00 p.m.)

THE COURT: Please be seated.

MS. TOMASCO: The debtors wish to express their appreciation to the U.S. Trustee for making us take a break because I think we have a resolution for today --

THE COURT: For today.

MS. TOMASCO: -- only for today. The most significant thing is that we are going to reduce -- if you want to turn to page 18 in the PowerPoint.

THE COURT: Yes.

MS. TOMASCO: Okay. Rigmora has agreed to fund the Aulos amount.

THE COURT: The Aulos amount?

MS. TOMASCO: Correct --

THE COURT: Okay, that's --

MS. TOMASCO: -- 3.7 million --

THE COURT: -- where is that?

MS. TOMASCO: Okay, the bottom column on page 18.

Oh, sorry, I have a wrong version of the PowerPoint.

THE COURT: Okay, I've got that.

MS. TOMASCO: Okay. Sorry about that.

THE COURT: It's okay.

MS. TOMASCO: Okay. So, as you know, these are the debtors' funds, they have withdrawn their objection to the funding of the Aulos amount in the amount of 3.7 million.

If you go up that column to where it says Nine Square --

THE COURT: Yes.

MS. TOMASCO: -- okay, that amount is going to be reduced to $210,000, instead of 1.434 million.

THE COURT: Okay.

MS. TOMASCO: The Nereid amount is going to go from 1,556,125 to 835,000.

THE COURT: Eight thirty five. Okay.

MS. TOMASCO: This is only -- this is contingent on a couple of things. Also, we are going to defer the $750,000 payment to Mr. Harrison's management company. We are not -- nobody is waiving any rights, this is an interim agreement.

THE COURT: I understand.

MS. TOMASCO: The debtors' funding based on the funding motion will only last through approximately the week of the 13th, but -- we need to have a hearing, but -- we have a hearing date set for the 13th, but we need to move it to the next week. The 18th or 19th, Your Honor, is preferred.

THE COURT: Since I'd rather start this in the morning, I'm going to go with the 19th at 10:00.

MS. TOMASCO: That's perfect, Your Honor. Thank you.

THE COURT: And we're going to save the day, which I hope we don't need.

(Laughter)

MS. TOMASCO: We're all going to take Evelyn Woods speed-speaking lessons for --

THE COURT: No, I don't want speed speaking --

(Laughter)

THE COURT: -- no, I want resolution.

MS. TOMASCO: Yeah, we'll -- and we had retentions scheduled for the 13th, those are also going to be moved to the 19th.

THE COURT: We're going to move everything, yeah.

MS. TOMASCO: Correct, Your Honor.

THE COURT: Now, I want to make sure, you didn't go through the other six --

MS. TOMASCO: Yeah --

THE COURT: -- are they being funded at those amounts?

MS. TOMASCO: Correct.

THE COURT: Okay. I just want to make sure I understand the agreement.

MS. TOMASCO: Correct. So we think that that resolves the parties' issues, there's obviously still going to be some wood to chop. I believe that that is the agreement; we think it resolves the motion fairly.

I believe that Ms. Labovitz wants to speak her piece.

THE COURT: Okay.

MS. LABOVITZ: Your Honor, I waited all day, and I've been waiting for a couple hearings now.

I just want to frame a couple of the legal issues which were discussed, but I didn't have a chance to weigh in on the way I'm thinking about those legal issues, and I think it will help the Court as we all go back into our offices over in the next three weeks and get ready for what may be a couple of meaty hearings.

One point: Ms. Tomasco I think just said these are all the debtors' funds. I just want to put down a marker and say that's not the way we actually think it works in these cases and at some point, as you say, we'll have to brief this.

Ms. Tomasco has stated the debtors' position that under Section 541(c), notwithstanding any provisions of the LPA -- and perhaps notwithstanding any provisions of Cayman law, I'm not sure how she's trying to think about that, but it may be that she's using Section 541(c) to address that -- they're arguing that these funds are all part of the partnership debtors' estate. From our perspective, as Ms. Selden laid out in the early days of this Chapter 11 case, we believe that under Cayman law the fund constitutes a trust. And so that brings up issues under Section 541(d) and I want to make that point that, if we're briefing 541(c), we're briefing 541(d). I think this is a trust and that means the assets are not necessarily part of the partnership debtors' estate. So, I want to put a pin in that. I want to put a pin in a couple of other points as well.

Your Honor, there's been a lot of discussions today about milestones and whether they restrict or don't restrict the funds, what the Chancery Court ruled. And I think we agree with the summary that says that you can't take -- under the LPA, right, you can't take funds that were budgeted for one portfolio company and use them for another, and it may be that the milestones were meant more as guidelines. From our perspective, though, that is really important from -- in answering the question of what was ordinary course of business, what was the legitimate

expectation of the investors in the fund, of the parties in interest. The expectation, though, was that there would be some level of milestone, there would be some level of progress, measurement of the process.

And if we had gotten deeper into all of this today, I think part of what we would have highlighted is, Dr. Harrison testified a lot about we just need a little more funding to get to a better place, we haven't focused on how much funding has already gone into the portfolio companies and, from the perspective of the LPs, that matters a lot. For the record, if there's anybody still listening who's an employee, a landlord, or any other constituent of the portfolio companies, the LPs have invested two -- over $2 billion in the fund, they have every interest in maximizing the value of that investment.

I think we've all seen cases, Your Honor, where there's a secured creditor that comes in and says let me just sell the assets so that I get -- you know, in a fire sale so that I get my value back and who cares about the junior creditors. It almost feels like that's what the debtors are saying is happening here that the LPs are just out for the LPs and they're not out for the portfolio companies or they're not out to invest in science. They invested $2 billion in science, actually they care about science.

THE COURT: They did with Dr. Harrison as their

management.

MS. LABOVITZ: So I'm just coming back to it, though, and that is an issue that we think is before the Cayman court. We're going to deal with that on February 25th, right? But I think the key point, though, is that the LPs want to maximize the value of their investment, they're just very concerned about the priorities that are being applied here.

And it's things like the testimony we heard today when -- well, gosh, the presentation they put forward says the purpose of the Chapter 11 case is to maximize the value of the portfolio companies, not even thinking about the fund, which is a debtor where both Dr. Harrison and Mr. Mandarino have fiduciary duties, that's confusing to me. I think that there needs to be a lot more clear safeguards about who's looking out for the fund, who's looking out for the LPs, they are the fulcrum security at the level of the fund. There may be creditors at the level of the portfolio companies, but the LPs are the fulcrum security at the level of the fund. It's troubling to me that business judgment decisions are being made without consulting at all with the LPs who are the fulcrum security.

THE COURT: But wasn't that the structure? That's the structure of the limited partnership agreement --

MS. LABOVITZ: So --

THE COURT: -- funding management -- I've looked for those kinds of things. And I don't want to say too much because --

MS. LABOVITZ: No, I get it.

THE COURT: -- you guys have an agreement, okay?

MS. LABOVITZ: We do, I'm just --

THE COURT: And I'm holding you to it --

MS. LABOVITZ: -- I'm saying my piece --

THE COURT: -- we're not backing out of that.

MS. LABOVITZ: -- we're not going to go much further.

THE COURT: But that's what -- you know, I'm looking big picture, how does this work, funding, management. Things changed a couple years ago, I understand that. So --

MS. LABOVITZ: I'm looking big picture too. And to be candid, much as I love appearing before Your Honor and I do, we do think that this should be heard in the Cayman Islands.

THE COURT: I understand that, and you'll have your day on that.

MS. LABOVITZ: Yeah, and we will. But, Your Honor, to the extent that we're here, this is a Chapter 11 case. And so, from my perspective, in a Chapter 11 case you're not looking at debt covenants anymore, you're looking at what is the best thing for the investors, what is the best

thing for the fulcrum security, and we're saying that we think they should talk to us. Today was actually a perfect example. There was a deal to be had, this deal is not very different from the deal that's been on the table -- actually, it's in our pleadings, if you go back and read it -- the position we landed on today is not very different from the place where the LPs started.

When we come back on February 19th, I think we just agreed, they're going to be looking for more funding, the cheapest place to get it is probably the $97 million that's on hand. They should probably talk to us. It would probably be a good idea for -- in consultation with counsel for Dr. Harrison to decide to share the information he has that demonstrates why he thinks that the funding is in the best interest of the fund of the LPs. And, ultimately, what we have here, it's a two-party dispute, right? That also we're going to deal with on February 25th, I am not pre-arguing it, but what we have is a breakdown in trust, a breakdown in communication. And we're saying for as long as we're here, which is at least the next 34 days, we think that there should be better communication. That's all.

THE COURT: Thank you.

MR. TAFT: We rest.

(Laughter)

THE COURT: Okay. So, I will look for a form of

order that memorializes the agreement that was reached here today and put on the record.

I will say that -- oh, yes?

UNIDENTIFIED FEMALE SPEAKER: No, I'm so sorry. We do have one more housekeeping item, so I'd like to preview it with Ms. Tomasco, first. I don't want to --

(Counsel confers)

THE COURT: Let me suggest, since I overheard this --

(Laughter)

UNIDENTIFIED FEMALE SPEAKER: That looks easier, Your Honor. This is sausage-making in real time.

THE COURT: Yes. Let me suggest that there be an agreed-upon communication that is brief to the judge, who, of course, is entitled to know that, I think, dates that he has set aside on his calendar aren't going to happen because of the schedule that we just set in this court, which extends beyond the dates that he has set aside. And so, certainly, as a matter of courtesy, if nothing else, there needs to be a joint communication.

But the stay is still in place and there's not to be a communication that slants anything one way or the other or suggests any untoward motives on either party; simply a communication with a schedule of this Court, which makes the dates in front of him not possible, in an agreed-upon,

hopefully, one communication.

I can't tell the Cayman lawyers what to do and their responsibilities, but the stay is in place.

UNIDENTIFIED FEMALE SPEAKER: That's understood, Your Honor.

UNIDENTIFIED FEMALE SPEAKER: Oh, but that brings up one more housekeeping matter and that is, that we were going to hear the stay-enforcement motion.

We always thought that it should be heard along with the lift stay, because (indiscernible), but to the extent we're not hearing it today, should that also be continued to the --

THE COURT: Yeah, let's throw it all on there.

UNIDENTIFIED FEMALE SPEAKER: -- 19th?

THE COURT: Yes.

UNIDENTIFIED FEMALE SPEAKER: Okay.

THE COURT: So, I've got you on the 19th and on --

UNIDENTIFIED FEMALE SPEAKER: The 25th.

THE COURT: I see that, but...

(Laughter)

THE COURT: That was too much, huh?

Okay. So, I mean, we -- I understand the funding issues, so, okay.

UNIDENTIFIED FEMALE SPEAKER: All right.

THE COURT: We will address that.

I would, of course, as always in every case, encourage parties to talk. I understand the Dallas litigation. That has been happening for the last, what, seven months now, and I'm sure before that, the issues.

But we are in bankruptcy and that changes the landscape, too. So parties should talk. Where there can be agreement, there should be. Where there can't be, I'll decide things. But if they can be narrowed, if things can be narrowed; it helps everybody.

MS. TOMASCO: (Inaudible.)

(Laughter)

THE COURT: I'm not getting out of here. Okay.

UNIDENTIFIED FEMALE SPEAKER: Or are we?

UNIDENTIFIED FEMALE SPEAKER: We also -- you also had scheduled the first days for the three recent Debtors: Nereid --

Yeah, I'll let Ms. Good speak.

THE COURT: Well, y'all have the joint administration and then the order that adds some other stuff.

Can y'all -- can we do a certification on that?

UNIDENTIFIED FEMALE SPEAKER: We have to read them --

THE COURT: Right.

UNIDENTIFIED FEMALE SPEAKER: -- but, probably, yes.

THE COURT: Okay.

MS. GOOD: Yeah, that's what I was going to say. I know we had requested that to go forward today. I think it makes sense for us to talk and see if we can't submit an order under COC, and if we can't, we'll be in communication with chambers.

THE COURT: Okay. Perfect.

Anything else?

(No verbal response)

THE COURT: Last chance.

Thank you, Ms. McCollum, for forcing the break.

MS. MCCOLLUM: Just to throw a wrench in everything, we appointed a committee today.

THE COURT: Oh, okay. Interesting. Someone else to talk to, everybody. Okay?

We're adjourned.

(Proceedings concluded at 7:17 p.m.)

CERTIFICATION

We certify that the foregoing is a correct transcript from the electronic sound recording of the proceedings in the above-entitled matter to the best of our knowledge and ability.

/s/ William J. Garling January 21, 2026
William J. Garling, CET-543
Certified Court Transcriptionist
For Reliable

/s/ Mary Zajaczkowski January 21, 2026
Mary Zajaczkowski, CET-531
Certified Court Transcriptionist
For Reliable

/s/ Tracey J. Williams January 21, 2026
Tracey J. Williams, CET-914
Certified Court Transcriptionist
For Reliable

/s/ Coleen Rand January 21, 2026
Coleen Rand, CET-341
Certified Court Transcriptionist
For Reliable

EXHIBIT B

Michaelmas Term
[2024] UKPC 32
Privy Council Appeal No 0045 of 2023

JUDGMENT

Kuwait Ports Authority and another (Respondents) *v* Mark Eric Williams and 2 others (Appellants) (Cayman Islands)

From the Court of Appeal of the Cayman Islands

before

Lord Reed
Lord Hodge
Lord Hamblen
Lord Leggatt
Lady Simler

JUDGMENT GIVEN ON
28 October 2024

Heard on 20 June 2024

Appellants
Graham Chapman KC
Andrew Pullinger
Harry Shaw
(Instructed by Campbells LLP and Sinclair Gibson LLP)

Respondents
David Allison KC
Dan McCourt Fritz KC
Rachael Reynolds KC
(Instructed by Ogier (Cayman) LLP and Baker & McKenzie LLP (London))

LORD HAMBLEN:

Introduction

1. The Cayman Islands Exempted Limited Partnership Act (2021 Revision) (the "Act") provides for the establishment of exempted limited partnerships (an "ELP"). A limited partner in an ELP enjoys limited liability but is precluded from participating in the conduct of the business of the ELP, which is carried out exclusively by a general partner.

2. This appeal concerns the circumstances in which a limited partner can bring a derivative action on behalf of the ELP for injury or damage done to the ELP. This is governed by section 33(3) of the Act which provides that such an action may be brought if the general partner has "without cause, failed or refused to institute proceedings".

3. This is the first case in which this issue has been considered. In its decision the Court of Appeal of the Cayman Islands (Sir Richard Field, Sir Michael Birt and Sir Jack Beatson JJA) provided general guidance as to the approach to be adopted to derivative actions brought pursuant to section 33(3) of the Act and concluded that the general partner in this case did refuse or fail to institute proceedings "without cause" and that as a matter of discretion it was appropriate to allow the respondents' derivative claims to be brought. The appellants contend that the Court of Appeal was wrong so to conclude. The respondents cross-appeal is in respect of one aspect of the general guidance provided, namely at what point in time the section 33(3) test falls to be assessed.

Factual background

4. The Port Fund LP (the "Fund") is a Cayman Islands ELP which invested in port-related assets around the world. It was established in 2007 by KGL Investment Company KSCC ("KGLI Kuwait") which acted as the Fund's sponsor and placement agent and was also one of the limited partners in the Fund. The Fund has one general partner and eleven limited partners including KGLI Kuwait and the two respondents, Kuwait Ports Authority ("KPA") and The Public Institution for Social Security ("PIFSS"). The limited partners invested a total of US$188,152,000, approximately 65% of which was invested by the respondents.

5. The general partner of the Fund is Port Link GP Ltd, a Cayman Islands exempted limited company (the "General Partner"). It was appointed as the sole general partner from 21 March 2007 onwards pursuant to identical limited partnership agreements between itself and the limited partners.

6. The first appellant ("Mr Williams") is the ultimate beneficial owner of the General Partner and has very close connections with the second appellant, Wellspring Capital Group Inc ("Wellspring"), and the third appellant, KGL Investment Company Asia ("KGLI Asia"). In summary:

(1) Mr Williams was a vice president of KGLI Kuwait from September 2007 until 2008 and its investment director from 2009 until 2011. Mr Williams was also a member of the Investment Committee of the Fund from 2009 until 2013.

(2) Mr Williams is the sole shareholder and director of Port Link Holdings USA Inc ("Port Link Holdings"), which since July 2018 has owned the entirety of the issued share capital of the General Partner.

(3) On 23 January 2020 Mr Williams was appointed as the authorised representative of the General Partner in relation to proceedings against it by KPA seeking information regarding the condition of the Fund pursuant to section 22 of the Act ("the section 22 proceedings"). The resolution conferred full authority on Mr Williams to take all necessary actions in relation to those proceedings.

(4) Mr Williams is also the chief executive, chief financial officer, president, vice president, treasurer and secretary of Wellspring. Wellspring is owned by the Mark E Williams Living Trust, the trustees of which are Mr Williams, his wife and his brother.

(5) Mr Williams has been the chief executive officer of KGLI Asia since 1 January 2012. KGLI Asia is owned by KGLI Kuwait. KGLI Asia is said by the appellants to have provided administrative support to the Fund between December 2017 and August 2020 pursuant to an administrative services agreement dated 1 December 2017. KGLI Asia has been in voluntary liquidation since 20 December 2020.

7. The respondents began raising concerns with the General Partner concerning the management of the Fund from October 2016. On 29 January 2020, KPA commenced the section 22 proceedings against the General Partner seeking disclosure of certain documents to which it claimed to be entitled.

8. Also on 29 January 2020, after Mr Williams was appointed as the authorised representative of the General Partner, certain professional directors from FFP (Directors) Ltd (the "FFP Directors") were appointed as directors of the General Partner by Abdulghfoor Alwadhi ("Mr Alwadhi") and Mr Williams. They initially acted alongside Mr Alwadhi, who was a director of the General Partner from 2010 until he resigned on

28 March 2021. Mr Alwadhi was the sole appointed director from 24 May 2018 until 29 January 2020, which was when much of the wrongdoing alleged by the respondents took place. The FFP Directors have no connection to such wrongdoing and describe themselves as "independent directors". They remained in office until they resigned on 15 February 2023.

9. KPA's application in the section 22 proceedings was opposed by the General Partner at a time when the FFP Directors were in post, but KPA obtained an order requiring the General Partner to disclose various documents in August 2020. The General Partner sought to appeal that order but that appeal was compromised and the General Partner agreed to provide various documents to the respondents pursuant to a consent order made in November 2020.

The proceedings

10. On 14 October 2020, the current proceedings were commenced in the Grand Court of the Cayman Islands (the "Grand Court") by the respondents against the General Partner only.

11. On 12 February 2021, the respondents' statement of claim was amended and re-filed joining the appellants as the second to fourth defendants respectively. The respondents advance both direct and derivative claims on behalf of the Fund against Mr Williams and Wellspring, and derivative claims only against KGLI Asia. The respondents allege that the assets of the Fund, which are held on statutory trust by the General Partner, have been misappropriated as part of an unlawful means conspiracy and/or due to dishonest and/or negligent breaches of trust and fiduciary duty, in which each of the appellants have wrongfully participated, in some cases having knowingly received some or all of the proceeds.

12. So far as relevant, the claims made by the respondents may be summarised as follows (see para 152 of the Court of Appeal judgment):

(1) The respondents allege that the General Partner has been guilty of wrongdoing which has caused the Fund loss said to be well in excess of US $100m.

(2) The claims against the General Partner allege that, in breach of its fiduciary, contractual and other duties, it acted contrary to the interests of the Fund and the limited partners by making substantial payments, using the Fund’s monies, that were not for the benefit of the Fund and/or the limited partners. Amongst these is the alleged sham settlement of proceedings brought against it in the Dubai International Finance Centre Court (the “DIFCC proceedings”) as a result of which

US $59,990,461.30 (the "Wellspring Payment") was paid to Wellspring. It is alleged that the General Partner conspired with, amongst others, Mr Williams and Wellspring to cause loss to the Fund and/or the limited partners by unlawful means in relation to the DIFCC proceedings and the Wellspring Payment.

(3) The claims against Mr Williams are that he orchestrated the DIFCC proceedings and the Wellspring Payment and was accordingly party to the above conspiracy. It is further alleged that he dishonestly assisted in the General Partner's breach of trust/fiduciary duty, knowingly procured the General Partner to breach its contractual duties and was in breach of fiduciary duties he owed to the Fund and/or the General Partner.

(4) The claims against Wellspring are for knowing receipt of the Wellspring Payment, conspiracy in relation to the Wellspring Payment and the DIFCC Proceedings and for repayment of the Wellspring Payment.

(5) The claim against KGLI Asia is for knowing receipt in respect of a number of payments said to have been made to it in breach of trust and/or fiduciary duty by the General Partner.

13. The appellants deny the claims against them, counterclaim against the respondents, alleging that the proceedings are an abuse of process commenced for an improper collateral purpose, and crossclaim against the General Partner in respect of alleged underpayments and rights to indemnification. No application has been made to strike out the respondents' claims on their merits or for reverse summary judgment. The claims must therefore be treated as having a real prospect of success.

14. The FFP Directors stated in sworn evidence that, for the purpose of determining whether there was cause for the derivative claims to be pursued by the Fund as required by section 33(3) of the Act, they conducted an intensive, forensic investigation into the actions of the General Partner and the former management team of the Fund. The stated results of the FFP Directors' investigations are set out in various memoranda dated from 28 May 2021 and in the third affidavit of Richard Lewis (one of the FFP Directors) dated 4 June 2021. These set out that, in the General Partner's view (acting by the FFP Directors), there was currently no cause to bring the derivative claims against the General Partner or the appellants, and that even if such claims did have merit, the General Partner would need to undertake a cost/benefit analysis of whether it was in the best interests of the Fund to pursue them and, if so, whether the Fund was in a position to pursue them or could raise funding to do so.

15. On 7 June 2021, the General Partner and the appellants applied to the Grand Court to strike out the derivative claims against them, on the grounds that such claims failed to

satisfy the statutory test under section 33(3) of the Act. Those applications were heard by Parker J between 13-19 October 2021. On 25 November 2021, the Grand Court handed down its judgment granting part of the General Partner's summons on discrete points that did not result in any claims against it being struck out and dismissing the appellants' application.

16. The Grand Court's order was appealed by both the General Partner and the appellants. That appeal was heard by the Court of Appeal on 25 and 26 May 2022 and its judgment was handed down on 20 January 2023. It dismissed the strike out appeal save in relation to the derivative claims made against the General Partner.

17. On or around 15 February 2023, the FFP Directors resigned as the General Partner was apparently unable to pay their professional fees. The respondents thereafter applied (i) to be joined as defendants to the appellants' crossclaim against the General Partner and (ii) for receivers to be appointed in respect of the General Partner.

18. On 2 May 2023, the General Partner was placed into voluntary liquidation by resolution of its sole shareholder, Port Link Holdings, that is ultimately beneficially owned by Mr Williams.

19. By an order dated 1 June 2023, Parker J ordered the appointment of receivers in respect of the General Partner for the express purpose of conducting all litigation on behalf of the General Partner and the Fund (the "Receivers").

20. By an order dated 2 June 2023, Parker J ordered that the respondents be joined as defendants to the appellants' crossclaim against the General Partner in the proceedings. An appeal from this order was dismissed by the Court of Appeal on 15 August 2024.

21. The joint voluntary liquidators of the General Partner applied, in accordance with their statutory obligation to do so, to convert the voluntary liquidation of the General Partner into an official liquidation. This application was dismissed by Parker J on 18 September 2023 and the Receivers were permitted to continue managing the litigation commenced by and against the General Partner and the Fund. The Receivers therefore have conduct on behalf of the General Partner and the Fund of all litigation to which the General Partner or Fund are parties (save for the respondents' derivative claims). The Receivers have decided that the General Partner is not to appeal the Court of Appeal’s decision.

The legal framework

The Act

22. Section 3 provides that the rules of equity and of common law applicable to partnerships as modified by the Partnership Act (2013 Revision) but excluding certain sections shall apply to ELPs, except where they are inconsistent with the express provisions of the Act.

23. Under section 4, ELPs are to consist of general partners and limited partners. General partners are liable for the debts and obligations of the ELP whilst limited partners generally have no such liability.

24. Section 14 provides that all contracts, letters, deeds, instruments or other documents are to be entered into by the general partner on behalf of the ELP and that the limited partners are not to take part in the conduct of the ELP's business.

25. Under section 16, any rights or property of the ELP, including choses in action, are held by the general partner upon trust as an asset of the ELP. The Act thereby creates a statutory trust.

26. Section 19 provides that the general partner is to act at all times in good faith. Subject to any express provisions to the contrary in the partnership agreement, the general partner is to act in the interests of the ELP and limited partners owe no fiduciary duties to the ELP or the other limited partners.

27. Proceedings involving an ELP are governed by section 33 which provides:

> "(1) Subject to subsection (3), legal proceedings by or against an exempted limited partnership may be instituted by or against any one or more of the general partners only, and a limited partner shall not be a party to or named in the proceedings.
>
> (2) If the court considers it just and equitable any person or a general partner shall have the right to join in or otherwise institute proceedings against any one or more of the limited partners who may be liable under section 20(1) or to enforce the return of the contribution, if any, required by section 34(1).

> (3) A limited partner may bring an action on behalf of an exempted limited partnership if any one or more of the general partners with authority to do so have, without cause, failed or refused to institute proceedings.
>
> (4) If any action taken pursuant to subsection (3) is successful, in whole or in part, as a result of a judgment, compromise or settlement of any action, the court may award any limited partner bringing any action reasonable expenses, including attorney's fees, from any recovery in any action or from an exempted limited partnership."

Relevant case law

28. Although there is no prior case law concerning section 33 of the Act, the Court of Appeal recognised that some assistance may be derived from common law and equitable principles developed in relation to the bringing of derivative claims in the context of trusts and limited partnerships, particularly given the statutory trust imposed by section 16 of the Act (paras 101 and 140(ix)).

29. The relevant principles in relation to trusts are summarised in *Lewin on Trusts (20th Edition)* at paras 47-006 and 47-008:

> "47-006. However, as an alternative to proceedings brought in the name of trustees, a beneficiary may, sometimes, bring an action in his name on behalf of the trust against a third party. The fact that the action is brought in the name of a beneficiary rather than the name of the trustees does not alter its character. The action is a derivative action in which the beneficiary stands in the place of the trustees and sues in right of the trust, and does not enforce duties owed to him rather than to the trustees; a beneficiary can be in no better position than trustees carrying out their duties in a proper manner…
>
> 47-008. A beneficiary can bring a derivative action only in special circumstances, for example circumstances which tend to disable the trustees from suing (as where their acts and conduct with reference to the trust fund are impeached), or circumstances rendering it difficult or inconvenient for the trustees to sue, as where there is a conflict between their interest and duty. Special circumstances are not confined to circumstances of these kinds. The guiding principle is that there

> must be exceptional circumstances, which embrace a failure, excusable or inexcusable, by the trustees in the performance of a duty to the beneficiaries to protect the trust estate, or to protect the interest of the beneficiaries in the trust estate. The special circumstances relied on must have something to do with the willingness or ability of the trustee or alleged trustees to bring the action."

30. The fact that the special circumstances must have "something to do with the willingness or ability of the trustee or alleged trustees to bring the action" provides a clear link to the focus in section 33(3) on the justification for the failure or refusal of the general partner to institute proceedings.

31. Recent leading cases on the requirement for special circumstances include *Hayim v Citibank NA* [1987] AC 730 and *Roberts v Gill & Co* [2010] UKSC 22; [2011] 1 AC 240. In the latter case Lord Collins of Mapesbury provided the following summary of the law at para 46:

> "The cases go back to the 18th century, and many of them were reviewed in *Hayim v Citibank NA* [1987] AC 730. The special circumstances which were identified in the earliest authorities as justifying a beneficiary's action were fraud on the part of the trustee, or collusion between the trustee and the third party, or the insolvency of the trustee, but it has always been clear that these are merely examples of special circumstances, and that the underlying question is whether the circumstances are sufficiently special to make it just for the beneficiary to have the remedy…."

Lord Walker of Gestingthorpe (at para 110) stated that "what has to be special about the circumstances – is that the derivative action is needed to avoid injustice…."

32. The determination of whether there are circumstances which are special therefore involves a consideration of what the interests of justice require – see *In re Field, decd* [1971] 1 WLR 555 at 561 per Goff J, cited with approval by Lord Collins in *Roberts v Gill* at 258D-F: see also *Nurcombe v Nurcombe* [1985] 1 WLR 370 at 378D-H per Browne-Wilkinson LJ.

33. In *Certain Limited Partners in Henderson PFI Secondary Fund II LLP (a firm) v Henderson PFI Secondary Fund II LP (a firm)* [2012] EWHC 3259 (Comm); [2013] QB 934 ("Henderson") Cooke J held that that the special circumstances test also applied to the bringing of a derivative claim by a limited partner on behalf of an English limited

partnership. As with an ELP, a limited partnership established under the Limited Partnerships Act 1907 is not a separate legal entity and limited partners have no role in the management of the partnership business, which is exclusively carried out by the general partner. There is, however, no provision equivalent to section 33 of the Act.

34. The Board agrees with the Court of Appeal that the special circumstances test and case law are relevant to the interpretation and application of section 33. If there are special circumstances which mean that a derivative action is needed to avoid injustice then the failure or refusal of the general partner to institute proceedings may well be without cause. Conversely, if there are no such circumstances then the failure or refusal to do so may well be justifiable and therefore with cause.

35. Graham Chapman KC for the appellants submitted that the case law relating to the bringing of derivative claims on behalf of a company is also of assistance and in particular the fraud on the minority exception to the rule in *Foss v Harbottle* (1843) 2 Hare 461, 67 ER 189 that the proper plaintiff for a wrong done to a company is the company itself. There are, however, a number of important distinctions between ELPs and companies which mean that little assistance can be derived from such case law. In particular:

(1) An ELP has no separate legal personality.

(2) A company's articles of association constitute a contract between the company and its members, but no contractual relationship exists between an ELP and its constituent partners. The rights and obligations of the partners in an ELP are governed by a contract between the partners and a statutory trust.

(3) The directors of a company owe fiduciary duties to the company alone and not to the company's shareholders, whilst the general partner of an ELP owes fiduciary duties to all the ELP's limited partners.

(4) The directors of a company are treated as trustees in respect of the company's assets which are under their control, holding them for the company rather than for its shareholders. In contrast, the general partner of an ELP holds the ELP's assets on trust for all the limited partners.

(5) When a wrong is done to a company, it is the company, not its shareholders, that suffers loss. When a wrong is done to an ELP, its constituent partners suffer loss directly: the ELP itself does not suffer any loss that is separate or distinct from the partners' loss.

(6) A majority of shareholders in a company generally have a range of rights and powers, including the power to remove or replace directors and to pass a special resolution requiring a company to bring legal proceedings. A majority of limited partners in an ELP do not have an equivalent power; faced with a general partner who refuses to bring proceedings on behalf of an ELP without cause, their only recourse is to bring a derivative claim.

(7) The fraud on the minority exception concerns control over the bringing of proceedings by the majority shareholders. No such issue arises as between limited partners. As this case illustrates, the majority of limited partners may be seeking to bring the derivative claim.

The Court of Appeal judgment

36. At para 140 of its judgment the Court of Appeal gave general guidance in respect of derivative proceedings under section 33(3) of the Act. This guidance will be considered further below, but it includes the following summary of the nature of the court's task in deciding whether the requirements of section 33(3) have been complied with:

> "(viii) The essential task for the court at such a hearing is to determine whether the limited partner has brought himself within the terms of section 33(3), namely that the general partner has failed or refused to bring the relevant proceedings without cause.
>
> (ix) In determining this issue, the court is likely to be assisted by consideration of whether special circumstances (as developed in cases concerning trusts, limited partnerships and other entities) exist, but the court's task remains one of applying the statutory test set out in section 33(3).
>
> (x) Whilst reference to a 'good arguable case' may be a helpful indicator of the level of comfort which the court should have when deciding whether the requirements of section 33(3) are met, the court's task is essentially an evaluative one having regard to the facts as they appear to the court at that stage of the proceedings from the material before the court and the need to avoid injustice balanced with the need to respect the fact that a derivative action is an exception to the general principle in the [Act] that management (including decisions as to litigation) of an ELP is for the general partner, not the limited partners. …

> the court should consider, inter alia, the strength of the evidence that the general partner has failed or refused to institute proceedings without cause, the strength of the underlying claim which is sought to be brought and the likelihood and nature of any injustice if the derivative claim is not permitted.
>
> (xi) The court should reach its decision as to standing by reference to the facts as they appear at the date of the hearing of the strike out or preliminary issue.
>
> (xii) Even where the requirements of section 33(3) are met, the court has a discretion as to whether to permit a derivative claim to continue. One of the factors which is likely to be relevant in exercising that discretion is whether the plaintiff has an alternative remedy."

37. In relation to the interpretation of section 33(3), the Court of Appeal held that the expression "without cause" must carry the implication of "good" cause**,** noting that the legislature cannot have intended that a decision for any cause, no matter how inhibited or conflicted the decision maker might be, would be sufficient to prevent the bringing of a derivative action under section 33(3) (para 95). The Court of Appeal further held that the relevant inhibition or conflict of interest is that of the general partner itself, as opposed to that of its directors from time to time (para 168).

38. On the facts, the Court of Appeal held that the section 33(3) test was satisfied as the General Partner was under a relevant inhibition when it determined (acting by the FFP Directors) that there was cause not to bring the derivative claims against the appellants. The Court of Appeal observed that, on the respondents' case, the General Partner was deeply involved in the alleged wrongdoing, as was Mr Williams, and that the General Partner had to decide whether to institute proceedings against the appellants, in circumstances where (para 158):

> (1) The essential wrongdoing giving rise to the claims against the appellants was that of the General Partner itself in making various payments and where the General Partner was part of the unlawful means conspiracy to injure the Fund involving Mr Williams and Wellspring.
>
> (2) The contemplated proceedings would have to be brought against Mr Williams, the ultimate beneficial owner of the General Partner and against two companies with which he is deeply and closely involved, namely Wellspring and KGLI Asia.

(3) The General Partner would also have to consider whether (as general partner) it should sue itself (in its own right) as a co-conspirator in the alleged unlawful means conspiracy.

39. The Court of Appeal found (para 159) that this amounted to an "obvious and serious conflict of interest" by reason of which the General Partner was under an inhibition which would amount to special circumstances in the context of a trust or limited partnership and which also meant that the failure by the General Partner to bring proceedings was without cause. In so finding the Court of Appeal was upholding the Grand Court's conclusion to the same effect.

40. As to discretion, it was submitted that because the respondents have direct claims against the first and second appellants they have an alternative remedy against them and so there is no need to bring a derivative claim. The Court of Appeal concluded, however, that it was appropriate to allow the claim to continue in circumstances where there was uncertainty around whether the respondents had direct claims against the first and second appellants and whether the court could order restoration of the trust fund on the success of such direct claims in the absence of a derivative claim on behalf of the Fund (para 170). Both the direct and derivative claims against the first and second appellants were therefore permitted to continue.

The appeal

41. The appellants contend that the Court of Appeal erred in the interpretation of section 33(3) and/or the exercise of its discretion by:

(1) Finding that the General Partner was subject to a relevant inhibition precluding it from making a valid determination as to whether to bring the derivative claims.

(2) Failing to give due regard to the commercial judgment of the General Partner (acting by the FFP Directors) that the derivative claims should not be pursued.

(3) Allowing the respondents to continue the derivative claims in circumstances where the General Partner had validly determined with "cause" that the derivative claims should not be pursued.

(4) Establishing a test which allows a limited partner to bring or continue a derivative claim simply by impugning the conduct of the general partner so as to

> give rise (on the basis of the Court of Appeal's findings) to a perceived potential conflict of interest that inevitably renders any decision not to bring such claims as one "without cause".

(1) Did the Court of Appeal err in finding that the General Partner was subject to a relevant inhibition precluding it from making a valid determination as to whether to bring the derivative claims?

42. The appellants accept that a failure to bring proceedings may be without cause where the decision making is subject to a relevant inhibition.

43. The appellants also accept that an actual conflict of interest would be a relevant inhibition (see para 90 of their written case).

44. A conflict of interest is a clear example of special circumstances justifying the bringing of a derivative claim. This is one of the examples given in *Lewin* at para 47-008. It was also the basis upon which Cooke J held that special circumstances existed in *Henderson.* In that case a derivative claim was allowed to be brought by the limited partners for alleged wrongdoing by the management company appointed by the general partner, which was a sister company of the general partner. Cooke J held that this sister company relationship gave rise to an "irreconcilable conflict of interest" and that the partnership's prospects of obtaining redress against the management company were "virtually eliminated" (para 57).

45. Mr Chapman submitted that there was no relevant conflict of interest in this case as the Court of Appeal had merely held that there was a potential conflict of interest rather than an actual conflict of interest and there was no finding, as in *Henderson,* as to the impact of that conflict on the prospects of obtaining redress.

46. In the Board's view, it is clear that the Court of Appeal correctly held that there was an actual conflict of interest and indeed an equivalent conflict of interest to that found to be established in *Henderson.* As the Court of Appeal stated (emphasis added):

> "158. We respectfully agree with the decision of Cooke J in *Henderson*. In our judgment there *is* a similar conflict of interest in the present case. On the plaintiffs' case, D1 as the general partner was deeply involved in all the alleged wrongdoing as was Mr Williams. …

> 159. On the face of it, *by reason of the obvious and serious conflict of interest*, D1 *is* under an inhibition which would amount to special circumstances in the context of a trust or limited partnership and this inhibition also means that the failure by D1 to bring proceedings against D2 – D4 is without cause for the purposes of section 33(3).
>
> …
>
> 163. … [the General Partner] *is* subject to the conflicts of interest we have summarised above…
>
> …
>
> 167. … There is no doubt in our view that [the General Partner] *was and is* suffering from an inhibition … ."

47. It is correct that the Court of Appeal refers (at para 163) to the fact that the General Partner "cannot be seen to be in a position to take a fair and independent decision about the potential litigation", but that (and other like comments) is a description of the consequence of the conflict of interest rather than of its nature.

48. If the General Partner's decision whether or not to institute proceedings is subject to the conflict of interest which the Court of Appeal identified then the decision is inhibited thereby – it is not necessary or appropriate to go on to consider how it in fact affected the decision.

49. Further, in concluding that there was an actual conflict of interest the Court of Appeal was upholding the like finding made by the Grand Court:

> "104. The [General Partner] is a defendant to litigation where it is accused of serious wrongdoing: wilful default, liability under the Fraudulent Dispositions Act, and conspiracy with the other defendants are alleged.
>
> 105. A large number of the claims against [the appellants] are premised on a breach of duty by the [General Partner]. For example the allegation of knowing receipt is based upon a breach of duty by the [General Partner]. In the circumstances

> the [General Partner] cannot be expected to be the arbiter of whether to bring a claim against another defendant that is premised on its own breach of duty. It is in my view incapable of exercising an impartial decision-making function."

50. The Board agrees with the reasoning and conclusion of the Court of Appeal and the Grand Court.

(2) Did the Court of Appeal err in failing to give due regard to the commercial judgment of the General Partner (acting by the FFP Directors) that the derivative claims should not be pursued?

51. The appellants contend that the General Partner's decision not to bring the claims which are now brought derivatively was the product of a careful and thorough investigation and, ultimately, the considered exercise of commercial judgment by the General Partner acting by its independent FFP Directors. They reasonably concluded that the claims were not of sufficient merit to justify the bringing of proceedings. They appropriately also took into account how such claims might be funded and that the bringing of such proceedings might give rise to claims against the Fund, as it has done. This commercial decision is one with which the court should not interfere.

52. For a number of reasons, the fact that a commercial decision was taken by the FFP Directors does not avoid the conflict of interest which the Court of Appeal found there to be or the resulting inhibition on decision making.

53. First, as both the Grand Court and the Court of Appeal held, it is the position of the General Partner, not its directors, which must be considered. This is made clear by section 33 in general, which focuses on the "general partner", and by section 33(3) in particular, which refers to the "general partner" having failed or refused to bring proceedings without cause.

54. If, as the Court of Appeal held, the General Partner was subject to a disqualifying conflict of interest in making the decision whether or not to bring proceedings then that is not affected by the identity or independence of its directors. The conflict and the inhibition remain regardless of the identity of the directors from time to time.

55. Nor is this conclusion affected by the possibility adverted to by the Court of Appeal (at para 163) that different considerations might arise if liquidators were appointed by the court. It is not necessary to decide whether or not this is correct but, as the Court of Appeal observed, liquidators are not in the same position as directors as they are subject to the supervision of the court.

56. Secondly, even if it is appropriate to have regard to the position of the FFP Directors, they too were subject to a disqualifying conflict of interest and, moreover, one which they seemingly did not recognise. That conflict arises because the FFP Directors owed a duty to act in the best interests of the General Partner. Where there is a conflict between the interests of the General Partner and the Fund then that duty puts the FFP Directors in a conflicted position. The fact that the General Partner has a duty to act in the best interests of the Fund does not avoid that conflict; indeed, it highlights it.

57. As the Grand Court held, the FFP Directors were "seriously inhibited from making impartial decisions" regarding the bringing of proceedings because "they owe their duties primarily to the [General Partner] and it is obviously not in the [General Partner's] interests to be sued" (para 110). The Court of Appeal similarly recognised the conflict "between acting in the best interests of [the Fund] (which might include taking action against [the General Partner] as a co-conspirator) and acting in the best interests of [the General Partner] (which might be said to include the avoidance of being sued)" (para 163).

58. Thirdly, in any event the Grand Court further found that there was a "prima facie case that [the FFP Directors] are unable to assess the claims properly in an independent and objective way, notwithstanding Mr Lewis' extensive evidence" (para 110) and a "prima facie case that [the FFP Directors] have been guided (until recently) in their investigations by information provided by those who were under investigation themselves, and by their legal advisers, who were also conflicted" (para 111). This led the Grand Court to reach the following conclusion on the evidence:

> "121. Based on the available evidence, I have formed the view that there is a relevant inhibition which prevents the FFP Directors' decision making process being fair, because the decisions not to pursue the claims are insufficiently distinct from the wrongdoing upon which the claims are founded. …"

59. Mr Chapman submitted that this conclusion was undermined by the fact that the Grand Court had wrongly evaluated the evidence on the basis that it was only necessary to show a "prima facie" case. However, notwithstanding the different approach which the Court of Appeal held to be appropriate, it endorsed the Grand Court's conclusion, stating as follows:

> "168. Given our decision to uphold the judge's conclusion that it is the position of [the first defendant] as the general partner which must be considered in relation to any inhibition rather than the position of the directors from time to time, it is not necessary for us to address his finding about the position of the

> FFP Directors. Suffice it to say that, if we had found it necessary to do so, we would have considered that the judge was entitled to reach the conclusions which he did in this respect."

60. That endorsement of the Grand Court's conclusion necessarily includes the findings upon which that conclusion was based, as summarised above. Those findings are not open to challenge on this appeal.

(3) Did the Court of Appeal err in allowing the respondents to continue the derivative claims in circumstances where the General Partner had validly determined with "cause" that the derivative claims should not be pursued?

61. The basis upon which the appellants contend that the Court of Appeal so erred is that the FFP Directors had determined that the claims should not be pursued. All the reasons set out above as to why that decision was and remained conflicted and so was not made with "cause" equally apply to the exercise of any discretion to allow a derivative claim. This issue does, however, raise the question of whether there is such a discretion and, if so, its juridical basis. This question was raised by the Board at the hearing and, since the parties had not come to court prepared to deal with the issue, they were invited to address it by making written submissions.

62. Having had the benefit of those submissions, the Board concludes that there is no proper basis for the two stage approach adopted by the Court of Appeal whereby the court considers first if the section 33(3) test of whether there has been a refusal or failure to institute proceedings without cause is satisfied, and secondly whether as a matter of discretion the derivative claim should be permitted. Given that this two stage approach was common ground before the Court of Appeal, its appropriateness was not an issue which it addressed.

63. Section 33 does not refer to the court having any discretion, nor does it lay down any requirement for the court to grant permission or leave for the derivative proceedings to be brought. The sole statutory criterion is whether the requirements of section 33(3) are met. Although the subsection states that the limited partner "may" bring derivative proceedings where the test is satisfied, this relates to what the limited partner may do, not what the court may allow the limited partner to do. It is inconsistent with that statutory scheme to import a separate requirement that the bringing of derivative proceedings is additionally subject to the exercise of the court's discretion.

64. As explained above, however, the special circumstances test is relevant to the interpretation and application of section 33(3) and that involves a consideration of what the interests of justice require. This allows the court to take into account factors which

might otherwise be regarded as relevant to the exercise of a discretion ("discretionary considerations") as part of its evaluative determination of whether the requirements of section 33(3) are met. This would include, for example, whether there is an alternative remedy available, or whether the derivative claim is being brought for an ulterior motive, or views expressed by other limited partners.

65. Indeed, this is implicitly recognised in the Court of Appeal's description of how the court should approach the determination of whether the requirements of section 33(3) are met in para 140(x) of its judgment. It there refers to the court's task being an "evaluative one" which involves balancing "the need to avoid injustice" with "the need to respect the fact that a derivative action is an exception to the general principle" that decisions as to litigation are for the general partner. It also refers to the need to consider "the likelihood and nature of any injustice if the derivative claim is not permitted". Such an approach allows the court to have regard to discretionary considerations.

66. The Court of Appeal was therefore correct to have regard to discretionary considerations in reaching its conclusion, albeit that this should have been as part of its determination that the requirements of section 33(3) were met rather than as a separate step in a two stage approach. For the reasons stated in para 61 above, there was no error in its treatment of such factors.

(4) Did the Court of Appeal err by establishing a test which allows a limited partner to bring or continue a derivative claim simply by impugning the conduct of the general partner so as to give rise (on the basis of the Court of Appeal's findings) to a perceived potential conflict of interest that inevitably renders any decision not to bring such claims as one "without cause"?

67. As already stated, the Court of Appeal did not hold that there was "a perceived potential conflict of interest" but rather an actual conflict of interest and one which was, moreover, "obvious and serious".

68. Mr Chapman nevertheless submitted that the Court of Appeal's interpretation of section 33(3) set the bar too low and would be likely to lead to an undesirable proliferation of derivative claims in relation to ELPs.

69. As the Court of Appeal observed (para 173), such arguments do not bear on the proper interpretation of section 33(3) and are more matters for the legislature.

70. In any event, the Board would not accept that the bar has been set low. The Court of Appeal's decision is only likely to apply to a conflict of interest on the part of the general partner in the case of a claim against persons closely associated with the general

partner, or a claim in which the general partner is implicated, and which is seriously arguable.

71. Mr Chapman further submitted that the effect of the Court of Appeal's decision is that once a general partner is conflicted it is always likely to be conflicted and that the only way to avoid such a conflict is going to be the replacement of the general partner. Further, in the present case, due to the terms of the partnership agreement, that would lead to dissolution of the ELP.

72. Conflicts of interest may, however, take many different forms and be of varying levels of seriousness. In many cases, it may be possible to remove and resolve the conflict without there being any need to replace the general partner. This case may be different because of the "obvious and serious" nature of the conflict of interest, if there is substance in the allegations in the respondents' claims. As to the potential difficulties arising from the terms of the partnership agreement, this is not inherent in the operation of the Act; it is the consequence of the partnership terms agreed.

The cross-appeal

73. The respondents' position is that the Court of Appeal was correct as to the meaning, effect and application of section 33(3), save that, by their cross-appeal, the respondents submit that the Court of Appeal erred when it held that the point at which the section 33(3) test is to be assessed is the date of the strike out hearing, rather than, as the Judge held, at the time the derivative claim was commenced (the "Timing Issue").

74. On the Timing Issue the Court of Appeal held that the Judge's approach would require the court to ignore anything that had happened between the institution of proceedings and the hearing, which could lead to highly unsatisfactory results. It gave the example of the appointment of a new general partner which removed any question of inhibition or conflict of interest. It concluded that "the legislature cannot have intended that the court should allow a derivative claim to proceed in circumstances where, as at the date of the hearing of the strike out or preliminary issue, the requirements of section 33(3) are not met …" (para 125).

75. The respondents criticise that decision and rely in particular on the fact that the words "failed or refused" in section 33(3) are in the past tense, which suggests that the relevant failure or refusal must have taken place before the date of institution of the derivative claim.

76. In the Board's view the Court of Appeal reached the correct conclusion for a number of reasons.

77. First, although section 33(3) uses the past tense when it refers to whether the general partners "have, without cause, failed or refused to institute proceedings", that can refer to a failure or refusal to do so which began before the derivative action was commenced and continues up until the time of the court's determination. Similarly, although section 33(3) states that a limited partner may "bring" an action, which would most obviously refer to the commencement of the action, it can also refer to commencing and maintaining an action.

78. Secondly, this interpretation of section 33(3) is supported by pragmatic considerations and the fact that the nature of the evaluative decision which the court is called upon to make under section 33(3) is one which requires regard to be had to all relevant circumstances at the time of the decision. In particular, any consideration of what the interests of justice require can only properly be made on the basis of what justice currently requires, as opposed to what it may in the past have required.

79. As the Court of Appeal held, it would be highly unsatisfactory if the court could not have regard to how circumstances may have changed since the initiation of the proceedings, including, for example, the removal of the inhibition or conflict that was the basis for contending that the refusal or failure to institute proceedings was without cause.

80. Other examples given by the appellants of potentially important developments post-dating the initiation of proceedings include: (i) the insolvency of the derivative defendants; (ii) the defendants being denied insurance coverage for the claimed loss; (iii) determinative documents arising on discovery; (iv) adverse interlocutory findings during the course of proceedings; and (v) the costs of proceedings exceeding the value of the claim.

81. The respondents recognised the force of this point and acknowledged that it should be possible for the court to take into account later developments. They contended that the court could do so in the exercise of its discretion. On their approach there are two stages. The first stage is whether the requirements of section 33(3) are met, which is to be determined on the basis of the facts as at the time of the initiation of the proceedings. The second stage is the exercise of the court's discretion to allow the proceedings to be brought, which is to be determined on the basis of all facts as known at the time of the hearing before the court. However, for the reasons set out above, there is no two stage process; there is a single evaluative decision to be made which will include consideration of discretionary considerations. Unless that decision is made on the basis of the facts as they appear to the court at the hearing, it will not be possible to take into account changing circumstances, notwithstanding the respondents' acknowledgment of the need to do so.

82. Thirdly, the authorities on special circumstances show that that is an issue which goes to the cause of action being asserted and is required to be pleaded and proved. So,

for example, in *Roberts v Gill* Lord Walker stated that "special circumstances are part of his cause of action" which must be pleaded (para 103, p 272F) and that special circumstances are one of the "building blocks" and "essential facts … which must be pleaded and proved (if not admitted) in order to establish the cause of action" (para 108, p 274B-C).

83. This is borne out by the majority decision in *Roberts v Gill* that the amendment to add a derivative claim involved a new cause of action being brought after the expiry of the relevant limitation period. In that case the claimant commenced proceedings against two firms of solicitors who had advised the former personal representatives of his grandmother's estate. This claim was brought in his personal capacity as a beneficiary of the estate. After the limitation period had expired, he applied to amend to bring a derivative claim on behalf of the estate. The application was dismissed by the deputy judge on the grounds that no special circumstances existed. Although the Court of Appeal held that special circumstances did exist, it dismissed the appeal on the grounds that the amendment required the addition of a new party, the administrator of the estate, and that this was not permissible under CPR r 19.5(3)(b) (now CPR r 19.6(3)(b)) as such addition was not necessary in order to pursue the personal claim originally made. The House of Lords allowed the appeal against the Court of Appeal's decision as to the existence of special circumstances, but the majority (Lord Rodger of Earlsferry, Lord Walker and Lord Collins) also held that the Court of Appeal was correct to hold that the application did not meet the requirements of rule 19.5. Integral to that decision was their conclusion that the bringing of a derivative claim involved a new cause of action, as the capacity in which the party is suing is part of the cause of action. As Lord Collins stated at para 41:

> "The [derivative] claim is a claim involving a new cause of action since the capacity in which [the claimant] makes the claim is an essential part of the claim".

84. This decision implies that, at common law, the special circumstances justifying a derivative claim must, if disputed, be proved in order for the claim to succeed. If that is so, then it follows that, at common law, the special circumstances must continue to exist at the date of determination. Reading "bring" as meaning "commence and maintain" therefore has the consequence that the statutory regime is similar in this respect to the common law relating to derivative claims. That this is likely to have been intended is supported by the general preservation of common law rules except where inconsistent with express provisions (section 3 of the Act), and the link between the special circumstance mentioned in section 33(3) and the common law, to which attention has already been drawn (see paras 30−34 above).

The guidance

85. As referred to above, in its judgment the Court of Appeal gave general guidance as to how applications under section 33 should be approached and determined. The parties did not take issue with this guidance, save in relation to the Timing Issue. For the reasons explained above, the Board considers that the Court of Appeal erred in stating that the court has a discretion as to whether to permit a derivative action to continue even where the requirements of section 33(3) are met. There is a single evaluative decision to be made as to whether the statutory requirements are met, but that decision allows for account to be taken of discretionary considerations. For the same reason, it is not strictly correct to refer to the court permitting or allowing derivative proceedings to be brought. There is no permission or leave requirement. Subject to those clarifications, the Board endorses the guidance given by the Court of Appeal, in the amended form set out below:

(1) There is no requirement for leave to bring derivative proceedings under section 33(3). A limited partner may simply institute such proceedings.

(2) A limited partner must however plead the facts and matters relied upon as showing that it can bring itself within the requirements of the subsection.

(3) If a defendant wishes to raise an issue as to whether the requirements of the subsection are met, it should do so by means of a strike out application or seek the trial of a preliminary issue.

(4) Whichever of these routes is chosen does not affect the test which has to be applied in deciding whether section 33(3) is complied with.

(5) The decision of the court on such an application or preliminary issue is determinative (subject to appeal). If the court holds that the derivative claim may be continued, the limited partner may pursue the claim. It is not an issue which is deferred until or revisited at trial (save possibly in the context of costs at the end of the trial).

(6) The court should not conduct a mini trial as to whether the requirements of section 33(3) are satisfied. The court has to reach its decision on the basis of the material before it, which will be more limited than it will be following discovery and trial.

(7) At the hearing, the onus is on the limited partner to satisfy the court that the requirements of section 33(3) are met. Reference to ‘onus’ is not to be mistaken as

a reference to a 'burden' in the sense of having to show something on the balance of probabilities.

(8) The essential task for the court at such a hearing is to determine whether the limited partner has brought itself within the terms of section 33(3), namely that the general partner has failed or refused to bring the relevant proceedings without cause.

(9) In determining this issue, the court is likely to be assisted by consideration of whether special circumstances (as developed in cases concerning trusts, limited partnerships and other entities) exist, but the court's task remains one of applying the statutory test set out in section 33(3).

(10) Whilst reference to a good arguable case may be a helpful indicator of the level of comfort which the court should have when deciding whether the requirements of section 33(3) are met, the court's task is essentially an evaluative one having regard to the facts as they appear to the court at that stage of the proceedings from the material before the court. Regard should be had to the need to avoid injustice balanced with the need to respect the fact that a derivative action is an exception to the general principle in the Act that management (including decisions as to litigation) of an ELP is for the general partner, not the limited partners. The court should consider, inter alia, the strength of the evidence that the general partner has failed or refused to institute proceedings without cause, the strength of the underlying claim which is sought to be brought and the likelihood and nature of any injustice if the derivative claim does not proceed. This will allow for account to be taken of discretionary considerations, such as whether the plaintiff has an alternative remedy.

(11) The court should reach its decision by reference to the facts as they appear at the date of the hearing of the strike out or preliminary issue.

Conclusion

86. For the reasons set out above the Board will humbly advise His Majesty that the appeal and the cross-appeal should be dismissed.

EXHIBIT C

Neutral Citation Number: [2025] CIGC (FSD) 106

Cause No: FSD 2025-0151 (JAJ)

IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

IN THE MATTER OF THE EXEMPTED LIMITED PARTNERSHIP ACT (2025 REVISION), THE COMPANIES ACT (2025 REVISION) AND THE PARTNERSHIP ACT (2025 REVISION)

AND IN THE MATTER OF ATP LIFE SCIENCE VENTURES, L.P.

Appearances:	**Mr Andrew Scott KC of counsel instructed by Mr Liam Faulkner, Mr Hugo Farmer, Ms Yuan Wen and Mr Jordie Fienberg of Campbells LLP for the Petitioner** **Mr Andrew Ayres KC of counsel instructed by Ms Shelley White and Ms Rebecca Moseley of Walkers for ATP III GP, Ltd**
Before:	**The Honourable Justice Jalil Asif KC**
Heard:	**31 October 2025**
Ex tempore judgment delivered:	**2 November 2025**
Finalised judgment approved:	**6 November 2025**

Exempted limited partnership—winding up on just and equitable basis—application of CWR O.3, r.12(1)(a) or (b) to winding up of exempted limited partnership—whether court can order petition to proceed against partnership or against general partner, with partnership as subject matter

- -

JUDGMENT

- -

1. This is my judgment on a novel point that has arisen in the course of a directions hearing in connection with this just and equitable winding up petition, which concerns an exempted limited partnership formed under the Exempted Limited Partnership Act.

2. The essential background is that the exempted limited partnership in this case operates in the life sciences or biotech space. The Petitioners are limited partners in the partnership and have contributed around 98% of the capital of the partnership. Dr Seth Harrison, a successful life sciences entrepreneur, has driven the research and development of the products and the portfolio companies developing them. He has contributed approximately 2% of the partnership's capital. There are a number of other limited partners who are said to have acquired minor partnership interests in the exempted limited partnership, apparently as employee incentives.

3. The general partner of the partnership, ATP III GP, Ltd, is a limited company owned and controlled or directed by Dr Harrison.

4. In recent months, the relationship between the individuals behind the Petitioners and Dr Harrison has broken down. I do not need to go into the reasons for that for the purposes of this judgment, but they have given rise to three sets of proceedings between the parties in which their disputes are being decided:

   4.1 a contractual dispute being tried in Delaware;

   4.2 a writ action commenced in the Cayman Islands, and seeking declaratory relief regarding the validity, or otherwise, of certain steps taken by the general partner in relation to capital calls; and

   4.3 these winding up proceedings.

5. In the winding up proceedings, the Petitioners seek the winding up of the partnership on the just and equitable basis. They assert that they have lost all confidence in Dr Harrison and the general partner. This is said to be due to:

   5.1 alleged mismanagement, prejudicial conduct, and a lack of probity in the conduct of the partnership's affairs.

   5.2 alleged conflicts of interest affecting the general partner through Dr Harrison's interest in it, and breach of fiduciary duty by the general partner;

   5.3 a loss of substratum in that the general partner is set on continuing to fund non-performing portfolio companies, contrary to the limited partners' legitimate expectation for the operation of the partnership; and

   5.4 a need for an investigation of the partnership's affairs.

6. Dr Harrison, and through him the general partner, strenuously disputes the Petitioners' claims and is determined to contest the allegations that have been made against them.

7. Due to the potential effect of the dispute on the ongoing operation and management of the portfolio companies, this winding up petition and the writ action have both been advanced on a compressed timetable and are due to be tried together in early January 2026, having been filed in early June 2025.

8. The issue that has arisen in the course of the summons for directions concerns how the petition is to be contested. The Petitioners seek an order under CWR O.3, r.12, as modified by section 36(3) of the Exempted Limited Partnership Act, that the petition be treated as an inter partes proceeding between the Petitioners and the general partner. The Petitioners say that that reflects the substance of the dispute.

9. The general partner resists such an order and contends that the petition should continue between the Petitioners and the exempted limited partnership. The importance of this point is the cost consequences that follow under CWR O.24, r.8. Section 36(3) of the Exempted Limited Partnership Act provides that:

> *"(3) Except to the extent that the provisions are not consistent with this Act, and in the event of any inconsistencies, this Act shall prevail, and subject to any express provisions of this Act to the contrary, the provisions of Part V of the Companies Act (2021 Revision) and the Companies Winding Up Rules, 2018 shall apply to the winding up of an exempted limited partnership and for this purpose —*
>
> *(a) references in Part V to a company shall include references to an exempted limited partnership;*
>
> *(b) the limited partners shall be treated as if they were shareholders of a company and references to contributories in Part V shall be construed accordingly, except that the application of the provisions shall not cause a limited partner to be subject to any greater liability than that limited partner would otherwise bear under this Act, but for the application of this paragraph;*
>
> *(c) references in Part V to a director or officer of a company shall include references to the general partner of an exempted limited partnership;"*

10. Part 3 of CWR O.3 concerns petitions presented by contributories, which, by virtue of section 36(3) of the Exempted Limited Partnership Act, is the analogue for the current situation.

11. CWR O.3, r.12 requires that at the hearing of the summons for directions, the court shall give directions as appropriate in respect of certain specified matters, including:

> *"(a) whether or not the company is properly able to participate in the proceeding or should be treated merely as the subject-matter of the proceeding;*
>
> *(b) whether the proceeding should be treated as a proceeding against the company or as an inter partes proceeding between one or more members of the company as petitioners and the other member or members of the company as respondents;"*

12. CWR O.24, r.8(2) states:

> *"(2) In the case of a contributory's winding up petition under Order 3, Part III, the general rules are that —*
>
> *(a) if the Court has directed that the company itself is properly able to participate in the proceeding, the general rule is that the costs of a successful petitioner be paid out of the assets of the company; or*
>
> *(b) if the Court has directed that the winding up petition be treated as an inter partes proceeding between one or more members of the other members or members of the company as respondents, the general rule is that none of the costs should be paid out of the assets of the company and the unsuccessful parties should pay the costs of the successful party, such costs to be taxed on the standard basis unless agreed."*

13. I interpose here that there is an obvious error in CWR O.24, r.8(2)(b). The wording *"between one or more members of the other members or members of the company as respondents"* makes no grammatical sense. By comparison with CWR O.3, r.12(b) it appears that two errors have crept into the drafting of CWR O.24, r.8(2)(b). The first is that the words *"company as petitioners and the"*

has been omitted after *"between one or more members of the"*. Secondly, an *"s"* has been wrongly added to *"member"* on the second occasion that it is used in subparagraph (b). In my judgment, I should treat CWR O.24, r.8(2)(b), as if it read:

> *"(b) if the Court has directed that the winding up petition be treated as an inter partes proceeding between one or more members of the* [company as petitioners and the] *other member*[**s**] *or members of the company as respondents, the general rule is that none of the costs should be paid out of the assets of the company and the unsuccessful parties should pay the costs of the successful party, such costs to be taxed on the standard basis unless agreed."*

Counsel agreed in the course of argument with this proposition and construction of CWR O.24 r.8(2)(b).

14. To resume my summary of the Rules, CWR O.24, r.8(2) thus determines the prima facie allocation of the costs of defending the petition, as between the petitioner on one side and the company or members of the company other than the petitioner, as appropriate, on the other.

15. The Petitioners in this case argue that this provision also applies to a winding up of an exempted limited partnership. Applying section 36(3)(a) and (b) of the Exempted Limited Partnership Act, they say that *"members of the company"* in the Companies Winding Up Rules becomes *"members of the exempted limited partnership"* and the members of an exempted limited partnership are the limited partners and the general partners together. Thus, the Petitioners say, there is a direct read over without any need to strain the statutory language. The court should therefore make an order on the summons for directions determining that the petition should proceed as a claim between the Petitioners and the general partner, with the exempted limited partnership as the subject matter of the petition.

16. The Petitioners support that approach to the construction of the Companies Winding Up Rules by arguing that the purpose of CWR O.24, r.8(2) is to apply the legal costs principle, namely that a company's money should not be spent on disputes between shareholders.

17. The Petitioners say that that principle applies wherever the real contest is between parties other than the company itself, for example between its members. The Petitioners say that the reason why that principle is engaged in the context of just and equitable winding up proceedings is because, as stated by Segal J in Re Uphold Limited (unreported, 16/02/23), just and equitable proceedings are:

> *"42. […] grounded on a dispute between the shareholder petitioner and those in control of the company where those in control have behaved in a way that is fundamentally inconsistent […]*

> *with the basis on which the shareholder subscribed for or purchased his / her shares so as to justify the termination of the corporate relationship. It is usually the case that those accused of misconduct should pay for the costs of defending the petition"*

18. The Petitioners argue it would be contrary to the legal costs principle for the general partner to use assets of the partnership, which are held overwhelmingly for the benefit of the Petitioners, to defend the petition by which the Petitioners seek to impugn the general partner's own conduct and other fiduciary failings. The Petitioners say this would effectively have the result that the Petitioners would end up funding both the pursuit of the claim and also its defence.

19. The general partner disputes the Petitioners' stance, based on the wording of section 36(3) of the Exempted Limited Partnership Act. The general partner submits that the Petitioners' approach is not permitted by section 36(3) of the Exempted Limited Partnership Act, so that I do not have jurisdiction to make the order sought by the Petitioners. The general partner's argument is as follows.

    19.1 The general partner says that by virtue of section 36(3)(a) and (b), *"company"* is to be read as *"exempted limited partnership"* and *"contributories"*, in other words, shareholders or members, is to be read as *"limited partners"*.

    19.2 The general partner argues that the reference in section 36(3)(c) to the general partner being assimilated to the position of a director of the company means that the general partner is <u>not</u> to be treated as a *"member"* for the purpose of CWR O.3, r.12, and CWR O.24, r.8.

    19.3 The general partner says in paragraph 16 of its skeleton argument:

> *"16. The choices under (a) and (b) are interdependent, and there are only two options: either (i) the Partnership is properly able to participate, and the proceeding should be treated as being against the Partnership; or (ii) the proceedings is an inter partes proceedings between different limited partners, and the Partnership is merely the subject-matter."*

    19.4 The general partner adds that the fact that there is a binary choice is clear from the structure of CWR O.24, r.8 which mirrors and follows the structure of CWR O.3, r.12.

    19.5 Therefore, the general partner argues, the only question that the court needs to ask is whether the proceedings should be treated as being between different limited partners, or as between limited partners and the exempted limited partnership itself.

20. The general partner submits that the Petitioner's construction requires that the meaning of *"members of the company"* in the Company Winding Up Rules sometimes means limited partners and sometimes means all of the partners in the exempted limited partnership, which the general partner submits indicates that the Petitioners' construction must be wrong.

21. The general partner says that Segal J's comments in *Re Uphold* are simply not relevant, as that case concerned the situation of a company, not an exempted limited partnership.

22. In response to the Petitioner's reliance on the legal costs principle, the general partner argues that there is no room for an argument based on principle where the Exempted Limited Partnership Act expressly requires the court to read the Companies Winding Up Rules in a particular way.

23. Relying on a dictum of Segal J in *Re China Shanshui Cement Group Limited* [2021] 1 CILR 253 at paragraph 39, the general partner submits that:

> *"39. A critical question is whether the company can show that it has a real interest independent of its shareholders in defending the petition (does the company have a separate interest to protect?). As Foster, J. said in* Freerider *(ibid., at para. 45), the court must decide whether the company has any independent interest in the dispute."*

In this case, I have to read *"company"* as *"limited partnership"*.

24. Finally, the general partner argues that even if the court has discretion to make an order under CWR O.3, r.12, the court should not exercise that discretion on the facts of this case. The general partner says that the exempted limited partnership has an independent interest in defending itself and continuing to exist because it has assets built up over many years that generate financial benefits for its limited partners, including 14 limited partners other than the Petitioners. Although that must be the case for many partnerships where disputes arise.

25. I agree with the Petitioners that the legal costs principle is an important one. As explained by Harman J in *Re A Company, ex parte Johnson* [1991] BCC 234, which was a case concerning an unfair prejudice petition under section 459 of the English Companies Act of 1985:

> *"The train of authority being well established, it seems to me quite clear that, if it is shown that directors of a company have been causing the company's money to be spent on financing the resistance either to a "pure" section 459 petition or, according to Plowman J in* Re A &BC Chewing Gum *and myself in* Re Hydrosan*, in financing the company's resistance to a member's winding-up petition based on the just and equitable ground, the court should prevent such*

> *expenditure. Such expenditure is a misfeasance, there is no excuse for it in law and it is not a question of an arguable case being raised showing that it might be right to permit misfeasances. Misfeasances are not matters that are permitted by the courts and there is no question of an arguable case at all."*

26. The Petitioners referred me to *Re Cybernaut Growth Fund LP* (unreported, 11/09/13), where the question of making an order under CWR O.3, r.12, and O.24, r.8 in respect of the winding up of an exempted limited partnership was dealt with by consent. Both parties before me accepted that, whilst it thus provides an example of a case where an order was made, the ability of the court to do so was not in issue and was not considered by either of the judges before whom the matter was listed. In my view, it therefore does not advance the argument.

27. In *Re Freerider Ltd* [2009] CILR 604, Foster J at paragraph 42 rejected the submission that what is now CWR O.3, r.12, was *ultra vires* the Insolvency Rules Committee because it was a legislative change or addition to the provisions of Part V of the Companies Act. He concluded that CWR O.3 r.12 is procedural in nature, giving effect to the legal costs principle, which he considered to be well established in law. In particular, he said, at paragraph 20:

> *"20. It is in this overall context that it seems to me the IRC are empowered by s.155(1)(a) of the Companies Law to make rules, in particular to enable the court giving directions to determine in its discretion in the particular circumstances which parties should most appropriately participate in winding-up proceedings brought under the Companies Law. In my view in the light of this, the relevant provisions of O.3, r.11(2)(a) and (b)* [now O.3, r.12(2)(a) and (b)] *are essentially procedural in nature and are directly related also to the provisions which the IRC is empowered to make and has properly made in relation to the costs of petitions. I do not think there can be any doubt that the IRC is empowered to make such costs rules.*
>
> *21. I also consider that it is probable that the members of the IRC were aware, or were made aware, of the English authorities in which the courts there have either restrained a company from active participation or refused a company permission to participate actively in a winding-up petition on the just and equitable basis and/or a petition under s.459 of the Companies Act 1985 and/or to do so at the expense of the company, when the reality is that the proceedings are in essence a dispute between shareholders and not a dispute with the company itself. […] Wickens, V.C. said* [in *Pickering v. Stephenson*] *(L.R. 14 Eq. at 340):*
>
> > *'It seems to me that where a quasi partnership of this sort is divided into a majority and minority who differ on a question of internal administration, and litigation results from the difference, it is contrary to the spirit of the partnership to pay the expense of the litigation out of the general fund; and that this is independent of the question whether the majority is overwhelming or a bare majority.'"*

28. At paragraph 32, Foster J commented that the provisions of CWR O.3 r.12 are a mechanism to enable the court to determine at an early stage whether the legal costs principle is engaged. He said:

> *"32. I would comment in passing that the provisions of O.3, r.11(2)(a) and (b) of the Companies Winding Up Rules may perhaps be seen as a sort of mechanism of the kind referred to by Lindsay, J. in that they will enable determination by the court at any early stage in the proceedings by way of directions of whether or not it is procedurally appropriate and desirable, in the particular circumstances, for the company concerned to participate in the petition proceedings or whether it should be treated simply as the subject-matter."*

29. The Petitioners submit at paragraph 48 of their skeleton argument:

> *"48. In the context of petitions for the just and equitable winding up of an ELP it is often the case that: (i) the dispute is grounded on the general partner's conduct of the partnership's affairs and (ii) the general partner (and the general partner alone) has the ability to access and deploy partnership assets towards funding a defence of the petition. There is no reason for the Legal Costs Principle not to apply in that context to prevent a general partner from deploying partnership assets (i.e. trust assets) towards defending allegations of misconduct against it."*

30. In my view, that understates the position. Given the statutory roles of the general partner and the limited partners, as provided for by the Exempted Limited Partnership Act, namely that the limited partners have no role in the management of the exempt limited partnership and do not owe any duties to the partnership or to the other limited partners; whereas the general partner is responsible for the management of the exempted limited partnership and does owe fiduciary and other duties to the limited partners, it is hard to see how a just and equitable petition would ever involve parties other than one or more limited partners on one side and the general partner, and possibly an intermeddling limited partner, on the other.

31. This points against the general partner's submission that the proper construction of CWR O.3 r.12 is that it is directed at limited partner on limited partner disputes. This is because it is extremely difficult to contemplate circumstances giving rise to a just and equitable petition in which the dispute would arise between the limited partners and would arise in such a way that it does not involve the general partner, given that no duties owed are owed by limited partners to each other and limited partners have no roles in management, and that the general partner is the entity that owes duties to each limited partner and is responsible for management of the partnership.

32. In addition, I consider there is a conceptual flaw in the argument that the petition should proceed as a dispute between limited partners and the exempted limited partnership. This is because an exempted limited partnership does not have any separate legal personality from the limited partners and the general partner. Neither side appears fully to have grappled with the consequences of this in the arguments that they have advanced before me.

33. By referring to the exempted limited partnership throughout as being the appropriate respondent to the petition, in the absence of separate legal personality, the effect of the general partner's position is that the Petitioners should both pursue the petition and at the same time be respondents to the petition. That is neither legally nor procedurally possible. It would necessarily involve obvious and irreconcilable conflicts of interest for the Petitioners. It also flies in the face of section 33(1) of the Exempted Limited Partnership Act, which provides that:

> *"(1) Subject to subsection (3), legal proceedings by or against an exempted limited partnership may be instituted by or against any one or more of the general partners only, and a limited partner shall not be a party to or named in the proceedings."*

Subsection (3) deals with the situation where a general partner has failed to bring proceedings against a third party and a limited partner in those circumstances wishes to pursue that claim on behalf of the exempted limited partnership. So that subsection is irrelevant for the purpose of the debate before me.

34. If, as I consider must be correct, the exempted limited partnership cannot itself be a respondent to a just and equitable petition brought by a limited partner, and that only the general partner and any intermeddling limited partners can be the respondents, then it also follows that CWR O.24 r.8(a) cannot be operative as against an exempted limited partnership because the court will not and cannot direct that the exempted limited partnership itself can participate in the proceeding. This is because the exempted limited partnership does not have separate legal personality and the petitioning limited partner cannot also be a respondent. Thus, the respondents to a just and equitable petition can only be the general partner and any limited partners who have intermeddled or who wish to take an active role in defending the petition.

35. In principle, therefore, whilst I accept that there is substantial force in the Petitioners' argument that the legal costs principle should apply equally to just and equitable petitions in the context of the winding up of an exempted limited partnership, just as it applies to companies, I find it impossible to apply the manifestation of it in the CWR, given the legal nature of an exempted limited partnership and the consequences of that nature on the operation of the CWR as regards exempted limited partnerships.

36. In my judgment, this is a situation covered by the opening words of section 36(3) of the Exempted Limited Partnership Act, namely, *"except to the extent that the provisions are not consistent with*

this Act and in the event of any inconsistencies, this Act shall prevail." The Exempted Limited Partnership Act, which creates the legal structure of an exempted limited partnership, has created an animal that does not fit within the application of the relevant rules of the CWR. The provisions of CWR O.3, r.12, and O.24, r.8, in my judgment, are therefore inconsistent with the Exempted Limited Partnership Act, and the Exempted Limited Partnership Act must prevail.

37. I therefore accept that the Court cannot make an order under CWR O.3, r.12(a) or (b) in this case, although not for the reasons advanced by the general partner.

38. It also follows from my conclusion that the joint position of counsel in *Re Cybernaut Growth Fund LP* that the court can apply CWR O.3, r.12 in the context of an exempted limited partnership was incorrect, and that *Re Cybernaut Growth Fund LP* should not be treated as authority for that proposition.

39. As required by section 33(1) of the Exempted Limited Partnership Act, the petition must continue as between the Petitioners and the general partner.

40. Mr Ayres submitted that it is important not to confuse the question of the prima facie liability for costs, which in my judgment will always be with the general partner, and the general partner's right to indemnity under the limited partnership agreement governing the partnership for the costs it has incurred. I agree with Mr Ayres on this point. There is clearly going to be a dispute in this case whether the general partner is entitled to indemnity from the exempted limited partnership's assets for the costs of defending the just and equitable petition and also the Delaware and Cayman writ proceedings.

41. I do not intend to prejudge the outcome of that debate, which will turn upon the wording of the limited partnership agreement. However, it does seem fairly plain that the real disputes are between the two Petitioners on one side and the general partner on the other. This does not appear to be a case where the exempted limited partnership has its own position to put forward, even if that were legally and procedurally possible, which I do not consider it is for the reasons I have already set out.

42. If any of the other limited partners wish to participate in the proceedings, that is a matter for them. Their position as limited partners can be put forward by them as respondents if they have a different interest to advance although, given the procedural position of these proceedings and the approaching trial, any limited partners who wish to do so should make an application to be joined urgently.

43. Finally, I record that Mr Ayres was at pains to say that the general partner does not accept the Petitioners' criticisms, either of the general partner or of Dr Harrison, and that I should avoid forming a view that there is a "good" side and a "bad" side of the court. Mr Ayres said that the general partner and Dr Harrison are very keen to vindicate the position of the general partner.

44. I acknowledge that that is Dr Harrison's and the general partners' position. However, it seems to me that there is a real danger that the general partner is failing to heed the words of Kawaley J in *One Thousand and One Voices Africa Fund I LP* [2024] 1 CILR 371 at paragraphs 30 to 34. The learned judge said:

> *"30. […] The petitioner's case, in a nutshell, amounts to this. It would be inconsistent with elementary principles of winding-up law for the court not to replace the general partner when it has unarguably lost the trust and confidence of 97% of the economic stakeholders of the ELP, no matter what the reasons may be. There is no need for the court to consider the merits of the original complaints laid against the GP. That position appears to be an unassailable one.*
>
> *31. Section 36(13) of the Act confers an unfettered discretion on the court. […] The very fact that the GP does not apparently accept the fundamental principle that in a liquidation the wishes of the majority stakeholders prevail (assuming the opposition to the petition is maintained) appears to demonstrate the need for a fresh appointment.*
>
> *32. Unfortunately, the opposition to the present petition has an all too familiar ring. The best way for a manager who has lost the confidence of the investors to demonstrate their probity is to step aside, demonstrating confidence that their impugned management of the fund will be vindicated by independent scrutiny. Instead, the importance of their continuing at the helm is apparently given priority over the wishes of the investors, and the recalcitrant manager claims to know better than the investors where their best commercial interests lie. Regrettably, whatever unique expertise the scorned manager truly possesses, the distinct impression is created that the determination to cling to office is motivated by self-interest at best, or the desire to forestall independent investigation into suspect dealings at worst.*
>
> *33. In the instant case it is admittedly extremely plausible that the GP's Mr. Jordaan has specialist knowledge of and unique contacts with the businesses the ELP has invested in. The appointment of independent liquidators would not necessarily preclude his expertise being deployed if this was demonstrably in the best interest of the investors as a whole."*

45. It is difficult not to observe the strong similarity between that case and this one on the material that I have seen so far but, as I have indicated, these are all matters that Dr Harrison, through the general

partner, wishes to contest. No doubt at the trial I will hear argument and evidence on both sides of the court in relation to the allegations that are made against Dr Harrison and the general partner by the Petitioners and the counter-allegations that are made by Dr Harrison and the general partner against the Petitioners, and I will make a final decision on the basis of the evidence and argument that I hear on that occasion. However, in doing so, both parties are likely to continue to incur very substantial costs that will have to be paid by the various parties, depending on the costs orders that are made.

46. As to the costs of arguing this issue before me, Mr Ayres contended that the general partner was the winner, albeit for different reasons than he had argued, and should have its costs. Mr Farmer addressed me on costs for the Petitioners and argued that costs should be reserved, which would be the usual outcome on a summons for directions.

47. I have concluded that the general partner has effectively been the winner on this particular issue; the Petitioners raised the specific issue of making an order under CWR O.3, r.12 and have not obtained what they were seeking, and it is right that general partner should have its costs of arguing this point on the summons for directions, to be taxed on the standard basis if not agreed. I do not consider it is appropriate to reserve the costs to the hearing of the petition.

Dated 2 November 2025



THE HONOURABLE JUSTICE JALIL ASIF KC
JUDGE OF THE GRAND COURT

EXHIBIT D

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

ATP III GP, LTD., in its capacity as general partner of ATP Life Science Ventures, L.P., Plaintiff, v. RIGMORA BIOTECH INVESTOR ONE LP and RIGMORA BIOTECH INVESTOR TWO LP, Defendants.	Case No. 2025-0607-KSJM

AN EXPERT OPINION OF

MICHAEL BLOCH KC

ON CAYMAN ISLANDS LAW

Confidential

A. PRELIMINARIES

1. I am a barrister and King's Counsel practising in the courts of England and Wales and other British Commonwealth jurisdictions, including the courts of the Cayman Islands, where, in accordance with the rules, onshore counsel are called on a case-by-case basis where appropriate. I was called to the bar of England and Wales in 1979 and appointed to Silk in 1998. A copy of my curriculum vitae as it appears on my chambers' website is attached as Appendix A hereto.

2. I am not an academic, and I have no legal publications to disclose. I have provided expert evidence on legal issues in other proceedings. I have not been required to attend court in any of those proceedings, and I do not believe that any of the opinions which I have provided in those proceedings would be material to the

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JX-1574
C.A. No. 2025-0607-KSJM

evidence I am giving in these proceedings. I do not recall having provided an expert opinion over the last 5 years.

3. I have been asked by the attorneys for the plaintiff in these proceedings, ATP III GP, Ltd., in its capacity as general partner of ATP Life Science Ventures, L.P. ("**the General Partner**"), to describe the substantive laws of the Cayman Islands to which I shall refer, and to give my opinion on the issues which I shall address. As I understand it, I may also be asked to consider and respond to an opinion or opinions to be given by an expert or experts retained by the defendants in these proceedings, Rigmora Biotech Investor One LP and Rigmora Biotech Investor Two LP ("**Rigmora**").

4. My remuneration under my retainer in connection with these proceedings is based on a rate of GBP1,250 per hour which is unexceptional for me, and I am being reimbursed for reasonable travel and out-of-pocket expenses. I do not believe that the views I express here have been influenced by the remuneration I have received or am to receive for providing it, and I have endeavoured to present my views fairly and accurately. My compensation in connection with this matter is not dependent on my opinions, and it is not contingent on the outcome of this matter.

5. I have no affiliation with the parties or their legal advisors apart from my retainer for the provision of my evidence in these proceedings. I affirm that this report and the opinions expressed in it are my own opinions, and not those of any organization or group with which I am or have been affiliated, or any other third party.

6. This report and the opinions expressed in it are based on my familiarity with the law to which I refer, to the reading I describe of the documents to which I refer, to my understanding, as I describe it, of the context in which the contractual documents to which I refer were concluded and my analysis of the same. I qualify the opinions I express in this report where I consider that my understanding of the

facts and matters relevant to the issues to which it relates makes it appropriate for me to do so.

7. I have been provided with a copy of a document which I understand to be the First Amended and Restated Partnership Agreement of ATP Life Science Ventures, L.P. (formerly known as Apple Tree Partners IV, L.P.) and twenty-two written amendments executed by the parties between November 2012 and December 2024.[1] As I understand it, there is no dispute between the parties to these proceedings as to the validity or coming into effect of this agreement as amended by them. I shall refer to this amended agreement in its various emanations as "**the LPA"**, to specific amendments as "**Amendment 1**" etc., and to the First Amended and Restated Partnership Agreement as amended by, for example, Amendment 22, as "**the LPA Am22**".

8. A complete list of the materials I relied upon in forming the opinions contained in this report is attached as Appendix B.

Road Map

9. I have structured this report as follows.

A. PRELIMINARIES 1
Road Map 3
B. SUMMARY 4
C. FACTUAL BACKGROUND 5
D. THE LAW OF THE CAYMAN ISLANDS 5
General Principles of Interpretation 6
Express Terms 6
Implied Terms 9
Terms and Principles Creating and Controlling Rights of Determination and Their Exercise 18
Consequences 23

[1] The First Amended and Restated Limited Partnership Agreement of ATP Life Science Ventures, L.P., dated as of November 1, 2012, has been produced in this litigation at ATP_00202247. Bates numbers for the LPA are available in Appendix B.

E. THE LPA....28
Amendment 22....29
Scenarios....33
Scenarios 1 - 3....33
Scenario 4....36
Scenario 5....37
F. THE MEANING AND EFFECT OF THE BOGDANOV EMAIL....38
G. CONCLUSION....39

B. SUMMARY

10. The fact that the LPA has been amended twenty-two times, that later amendments refer to earlier ones and that there is no restatement of the LPA from LPA Am1 onwards makes it harder to follow than it might be, and the fact that each of the amendments made to it will have been made in a context which might affect its meaning makes it harder to understand than it might be. Nonetheless, I believe that the nature and objects of the partnership to which it relates ("**the Partnership**"), and the roles which it envisages for, grants to and requires of the partners to that Partnership, in particular, under LPA Am22, and in relation to budget approvals, are clear, at least, on the face of the LPA.

11. In my opinion, in the absence of strong contextual indications to the contrary of which I am unaware, the budget approval processes set out in Paragraphs 5 and 26 of the LPA Am22 require Rigmora to engage with those processes and to do so in an honest and rational manner.

12. In my opinion, in the absence of some dealings between the parties of which I am unaware or of an underlying commercial justification which I am not in a position to assess, the Bogdanov Email (defined herein) may constitute or demonstrate a failure on the part of Rigmora to engage with the budget approval processes and to do so in an honest and rational manner.

13. Further, if Rigmora have failed to engage with the budget approval processes or to do so in an honest and rational manner, the General Partner may, in my opinion, be entitled to treat any requirement for their approval of the budgets as satisfied and any right they may have had to refuse such approval as waived.

C. FACTUAL BACKGROUND

14. My understanding of the circumstances in which the LPA and its various amendments were entered into, and of the facts relating to the dispute between the parties as to the performance of the LPA is derived from the documents listed at Appendix B. It is apparent to me that there are matters of fact of potential relevance to the issues on which I am being asked to express my opinion which are in dispute in these proceedings, and I shall endeavour to make it clear where the outcome of any such dispute might affect my opinion.

15. The Partnership is an exempted limited partnership under the Exempted Limited Partnership Act (2025 Revision) ("**the Exempted Limited Partnership Act**") organised pursuant to the LPA, with the General Partner as its general partner, and with 18 limited partners.

16. There is a dispute between the General Partner and two of the limited partners, Rigmora Biotech Investor One LP and Rigmora Biotech Investor Two LP.

D. THE LAW OF THE CAYMAN ISLANDS

17. The LPA is governed by the law of the Cayman Islands. LPA ¶ 18(g).

18. The Cayman Islands are a British overseas protectorate with its own legislature, courts and binding case law. The final court of appeal from the Grand Court of the Cayman Islands and the Cayman Islands Court of Appeal is to His Majesty's Privy Council; the panels of the Privy Council are largely drawn from the judges of the Supreme Court of England and Wales; and, when it comes to matters of common

law and equity, if and insofar as they are unaffected by statutes or regulations or local policies which are specific to the Cayman Islands, the members of the Privy Council may be expected to adjudge the law as they would when sitting in the Supreme Court of England and Wales.

General Principles of Interpretation

19. The LPA is an agreement of the partners which provides for the establishment of, and regulates the affairs of, a Cayman Islands exempted limited partnership, the conduct of its business and the rights and obligations of the partners amongst themselves.

20. The LPA is governing in relation to such matters subject only to any relevant mandatory provisions of the Exempted Limited Partnership Act, and, whilst the content and purposes of the Exempted Limited Partnership Act may inform the interpretation of the LPA, I do not believe that there are any relevant mandatory provisions of the Exempted Limited Partnership Act which resolve the issues on which I have been asked to opine. As I see it, these are, at least, primarily matters of Cayman Islands contract law.

Express Terms

21. The general principles of interpretation of contracts such as the LPA are set out and explained in the decisions of the Supreme Court of England and Wales in *Arnold v Brittan* [2015] UKSC 36 and *Wood v Capita* [2017] UKSC 24.

22. These Supreme Court decisions have been referred to and followed in Cayman cases such as *Re Tyr Capital Partners SPC* Unreported, FSD 370 of 2023, 21 June 2024, Doyle J.

23. The fundamental principle which emerges from these cases is as follows.

(1) "When interpreting a written contract, the court is concerned to identify the intention of the parties by reference to "what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the context to mean" ...": Lord Neuberger (with whom Lord Sumption and Lord Hughes agree) in *Arnold v Britton* at [15].

(2) "The court's task is to ascertain the objective meaning of the language which the parties have chosen to express their agreement. It has long been accepted that this is not a literalist exercise focused solely on a parsing of the wording of the particular clause but that the court must consider the contract as a whole and, depending on the nature, formality and quality of drafting of the contract, give more or less weight to elements of the wider context in reaching its view as to that objective meaning.": Lord Hodge (with whom Lord Neuberger, Lord Mance, Lord Clarke and Lord Sumption agree) in *Wood v Capita* at [10].

24. Three of the seven factors which Lord Neuberger emphasises in *Arnold v Britton* in the context of that case at [17] – [19] may warrant emphasis here.

"17. First, the reliance placed in some cases on commercial common sense and surrounding circumstances (eg in Chartbrook, paras 16-26) should not be invoked to undervalue the importance of the language of the provision which is to be construed. The exercise of interpreting a provision involves identifying what the parties meant through the eyes of a reasonable reader, and, save perhaps in a very unusual case, that meaning is most obviously to be gleaned from the language of the provision. Unlike commercial common sense and the surrounding circumstances, the parties have control over the language they use in a contract. And, again save perhaps in a very unusual case, the parties must have been specifically focussing on the issue covered by the provision when agreeing the wording of that provision.

18. Secondly, when it comes to considering the centrally relevant words to be interpreted, I accept that the less clear they are, or, to put it another way, the worse their drafting, the more ready the court can properly be to depart from their natural meaning. That is simply the obverse of the sensible proposition that the clearer the natural meaning the more difficult it is to justify departing from it.

However, that does not justify the court embarking on an exercise of searching for, let alone constructing, drafting infelicities in order to facilitate a departure from the natural meaning. If there is a specific error in the drafting, it may often have no relevance to the issue of interpretation which the court has to resolve.

19. The third point I should mention is that commercial common sense is not to be invoked retrospectively. The mere fact that a contractual arrangement, if interpreted according to its natural language, has worked out badly, or even disastrously, for one of the parties is not a reason for departing from the natural language. Commercial common sense is only relevant to the extent of how matters would or could have been perceived by the parties, or by reasonable people in the position of the parties, as at the date that the contract was made."

25. The way in which issues of interpretation are to be approached is elaborated further by Lord Hodge in *Wood v Capita* at [12] & [13]:

"12. This unitary exercise involves an iterative process by which each suggested interpretation is checked against the provisions of the contract and its commercial consequences are investigated: Arnold para 77 citing In re Sigma Finance Corpn [2010] 1 All ER 571, para 10 per Lord Mance. To my mind once one has read the language in dispute and the relevant parts of the contract that provide its context, it does not matter whether the more detailed analysis commences with the factual background and the implications of rival constructions or a close examination of the relevant language in the contract, so long as the court balances the indications given by each.

13. Textualism and contextualism are not conflicting paradigms in a battle for exclusive occupation of the field of contractual interpretation. Rather, the lawyer and the judge, when interpreting any contract, can use them as tools to ascertain the objective meaning of the language which the parties have chosen to express their agreement. The extent to which each tool will assist the court in its task will vary according to the circumstances of the particular agreement or agreements. Some agreements may be successfully interpreted principally by textual analysis, for example because of their sophistication and complexity and because they have been negotiated and prepared with the assistance of skilled professionals. The correct interpretation of other contracts may be achieved by a greater emphasis on the factual matrix, for example because of their informality, brevity or the absence of skilled professional assistance. But negotiators of complex formal contracts may often not achieve a logical and coherent text because of, for example, the conflicting aims of the parties, failures of communication, differing drafting practices, or deadlines which require the parties to compromise in order to reach agreement. There may often therefore be provisions in a detailed professionally drawn contract which lack clarity and the lawyer or judge in interpreting such provisions may be particularly helped by considering the factual matrix and the purpose of similar provisions in contracts of the same type. ..."

26. There are some rules of interpretation under English law which may not be followed in other common law jurisdictions such as the rule excluding evidence of pre-contractual negotiations discussed by Lord Hoffmann in *Chartbrook v Persimmon* [2009] UKHL 38 at [41] - [46]. However, I anticipate that the fundamental principle articulated by Lord Neuberger and Lord Hodge, and the general considerations which inform its application, will be matters with which any common law jurist would be familiar.

27. There is a temptation to seize on the emphasis in the latest case as indicating a departure from what has been said before. However, as Lord Hodge noted in *Wood v Capita* at [15]: "The recent history of the common law of contractual interpretation is one of continuity rather than change".

28. In this case, changes of circumstances have, no doubt, been reflected in the amendments made to the agreement. *In Stena Line Ltd v MNRPF Trustees Ltd* [2011] EWCA Civ 543, at [30] citing *British Airways Pension Trustee Ltd v. British Airways plc* [2002] EWCA Civ 672, Arnold LJ (with whom Toulson and Rimer LJJ agree) observes:

> "[t]he general principle is that each new provision should be considered against the circumstances prevailing at the date when it was adopted rather than as at the date of the original trust deed: see per Millett J in Re Courage Group's Pension Schemes, above, at 505–506. Likewise, the meaning of a clause in the scheme must be ascertained by examining the deed as it stood at the time the clause was first introduced."

Implied Terms

29. English and Cayman law recognise two types of implied term, as explained by Lady Hale in *Societe Generale v Geys* [2012] UKSC 63 at [55] & [56]:

> "First, there are those terms which are implied into a particular contract because, on its proper construction, the parties must have intended to include them: see *Attorney General of Belize v Belize Telecom Ltd* [2009] UKPC 10... Second, there are those terms which are implied into a class of contractual relationship, such

as that between landlord and tenant or between employer and employee, where the parties may have left a good deal unsaid, but the courts have implied the term as a necessary incident of the relationship concerned, unless the parties have expressly excluded it…"

30. I am unaware of any case in which terms have been implied into an exempted limited partnership agreement as a matter of law (otherwise than as provided by statute). However, exempted limited partnerships and the exempted limited partnership agreements which constitute such partnerships will be characterised by certain key features as noted, for example, in the decision of the Cayman Islands Court of Appeal in *Kuwait Port Authority v Williams* 2023 1 CILR 50 at [22] – [26]:

"22. The judge dealt with direct claims by a limited partner at [60]-[65]. Before doing so, at [46]- [59] he helpfully considered and analysed the characteristics of an ELP, how it differs from an ordinary partnership and a company, and the statutory regime established by the ELPA.

23. He stated at [46]-[47] that the rights and obligations of the limited partners and the general partner (or partners) inter se are regulated by the ELPA, the express provisions of which are to prevail where they are inconsistent with the rules of equity and of common law applicable to partnerships as modified by the Partnership Act (2013 Revision). He also referred at [46] to the provision in section 3 of the ELPA that absent such inconsistency those rules "shall apply to an exempted limited partnership".

(a) Characteristics of an ELP that differ from those of an ordinary partnership:

24. At [46]-[53] the judge identified the following characteristics of ELPs which he considered to be important points of distinction from an ordinary partnership, and which create different rights and obligations between the partners to those in an ordinary partnership:

> (1) By section 4(2) and 20 of the ELPA, the limited partners in an ELP have limited liability whereas the general partner is liable for all debts and obligations of the ELP: [48].
>
> (2) By section 14 of the ELPA limited partners have no active involvement in the business in their capacity as limited partners. The business is carried out by the general partner who enters into all contracts by or on behalf of the ELP: [49] and [52].

(3) Section 19(1) of the ELPA imposes an express duty of good faith on the general partner of an ELP requiring the general partner to act in the interests of the ELP: [50].

(4) Whereas in an ordinary partnership, mutual and reciprocal rights and obligations are owed to each other by partners, section 19(2) of the ELPA provides that, unless the partnership agreement provides to the contrary, a limited partner owes no fiduciary duty either to the ELP or to other partners: [51].

(b) Characteristics of an ELP that differ from those of a company:

25. At [54]-[55] the judge stated that the fundamental legal distinction is that an ELP has no separate legal personality and exists only as its constituent partners and cannot own property in its own right. He stated that the consequence of the ELP not having a separate legal personality is that its general partner holds its rights and property, including choses in action, on trust for each of the partners. Because a limited partnership has no legal personality, the partnership as a whole is not able to enforce the general partner's obligations as trustee.

26. The judge then identified other characteristics of ELPs which he considered to be important points of distinction from those of companies:

(1) the general partner of an ELP owes its duties to all of the individual limited partners whereas the board of directors of a company only owe duties to the company (as the legal entity) and not to its shareholders: [56]-[57].

(2) because in the case of a company directors' duties are owed to the company, any breach by them is generally only actionable by or on behalf of the company and not by shareholders, although there are important exceptions where the wrongdoer directors are in control of the company: [57]-[59].

(3) by section 33(1) of the ELPA, the general partner in an ELP is the only entity who can institute proceedings on behalf of the partnership, whereas in the case of a company there are exceptions to the rule in Foss v Harbottle (1843) 2 Hare 461 where the wrongful directors are in control of the company. The judge stated that "if the limited partners have claims against the GP it is in practice unworkable for it to bring proceedings against itself for breach of duty. If the GP is the arbiter of whether to bring claims against itself that clearly gives rise to a conflict of interest": [60]."

31. Upon appeal to the Privy Council in *Kuwait Port Authority v Williams* [2024] UKPC 32, the Privy Council identified similar distinctions between exempted limited partnerships and companies, as follows at [35]:

"(1) An ELP has no separate legal personality.

(2) A company's articles of association constitute a contract between the company and its members, but no contractual relationship exists between an ELP and its constituent partners. The rights and obligations of the partners in an ELP are governed by a contract between the partners and a statutory trust.

(3) The directors of a company owe fiduciary duties to the company alone and not to the company's shareholders, whilst the general partner of an ELP owes fiduciary duties to all the ELP's limited partners.

(4) The directors of a company are treated as trustees in respect of the company's assets which are under their control, holding them for the company rather than for its shareholders. In contrast, the general partner of an ELP holds the ELP's assets on trust for all the limited partners.

(5) When a wrong is done to a company, it is the company, not its shareholders, that suffers loss. When a wrong is done to an ELP, its constituent partners suffer loss directly: the ELP itself does not suffer any loss that is separate or distinct from the partners' loss.

(6) A majority of shareholders in a company generally have a range of rights and powers, including the power to remove or replace directors and to pass a special resolution requiring a company to bring legal proceedings. A majority of limited partners in an ELP do not have an equivalent power; faced with a general partner who refuses to bring proceedings on behalf of an ELP without cause, their only recourse is to bring a derivative claim.

(7) The fraud on the minority exception concerns control over the bringing of proceedings by the majority shareholders. No such issue arises as between limited partners. As this case illustrates, the majority of limited partners may be seeking to bring the derivative claim."

32. Similar features were also noted in the judgment of Field JA (with whom Birt & Goldring JJA agree) in *Aquapoint v Xiaohu Fan* (unreported 4 October 2024, *CICA) (Civil) Appeal No. 0014 of 2022* at [62]:

"[the appellant exempted limited partnership] is very different from a conventional partnership under the Partnership Act for the reasons identified by Mr Smith. Nonetheless, under the law of the Cayman Islands it is a partnership, albeit an exempted limited partnership, and a partner therein has a statutory right

under section 36 (3) (g) to petition for its winding up on the ground that it is just and equitable to do so."

33. Accordingly, whilst there may be no terms to be read into the LPA as a matter of law in the sense explained by Lady Hale in *Societe Generale v Geys*, the nature of the LPA in the context of the Exempted Limited Partnership Act and the remedies which the law provides in connection with the regulation of partnerships may be relevant to the implication of terms into the LPA on a factual or *ad hoc* basis.[2]

34. The general principles governing the implication of *ad hoc* contractual terms are set out and explained in the decisions of the Supreme Court of England and Wales in *Marks & Spencer v BNP Paribas* [2015] UKSC 72 and *Tesco Stores v USDAW* [2024] UKSC 28.

35. The decision in Mark*s & Spencer v BNP Paribas* has been referred to and followed in Cayman Islands cases such as *Primeo Fund (In Official Liquidation) v Bank of Bermuda (Cayman) Limited* [2017 (2) CILR 334]; and *Cayman Shores v Registrar of Lands* [2021 (2) CILR 1], [2023 (1) CILR 252].

36. The fundamental principle is that "*to be implied, the term must be necessary either to spell out what is so obvious that it goes without saying or to give business efficacy to the contract*": Lord Leggatt in *Tesco Stores v USDAW* at [102].

37. The fundamental principle is elaborated and explained in the judgment of Lord Neuberger (with whom Lord Sumption and Lodge Hodge agree) in *Marks & Spencer v BNP Paribas* at [21] – [29]:

"21. In my judgment, the judicial observations so far considered represent a clear, consistent and principled approach. It could be dangerous to reformulate the principles, but I would add six comments on the summary given by Lord Simon in

[2] For the purposes of *Barton v Morris* [2023] UKSC 3 at [134] and [135] in the dissenting judgement of Lord Leggatt the distinction made by Lady Hale in *Societe Generale v Geys* is treated as being the same as distinction between 'default rules' and 'gap fillers' which I understand is sometimes made in the states of the United States and which Lord Steyn adopts in *Equitable Life v Hyman* [2002] 1 AC 408 at 458-459. Whether the two distinctions are the same for all purposes may be another matter.

BP Refinery as extended by Sir Thomas Bingham in Philips and exemplified in The APJ Priti. First, in Equitable Life Assurance Society v Hyman [2002] 1 AC 408, 459, Lord Steyn rightly observed that the implication of a term was "not critically dependent on proof of an actual intention of the parties" when negotiating the contract. If one approaches the question by reference to what the parties would have agreed, one is not strictly concerned with the hypothetical answer of the actual parties, but with that of notional reasonable people in the position of the parties at the time at which they were contracting. Secondly, a term should not be implied into a detailed commercial contract merely because it appears fair or merely because one considers that the parties would have agreed it if it had been suggested to them. Those are necessary but not sufficient grounds for including a term. However, and thirdly, it is questionable whether Lord Simon's first requirement, reasonableness and equitableness, will usually, if ever, add anything: if a term satisfies the other requirements, it is hard to think that it would not be reasonable and equitable. Fourthly, as Lord Hoffmann I think suggested in Attorney General of Belize v Belize Telecom Ltd [2009] 1 WLR 1988, para 27, although Lord Simon's requirements are otherwise cumulative, I would accept that business necessity and obviousness, his second and third requirements, can be alternatives in the sense that only one of them needs to be satisfied, although I suspect that in practice it would be a rare case where only one of those two requirements would be satisfied. Fifthly, if one approaches the issue by reference to the officious bystander, it is "vital to formulate the question to be posed by [him] with the utmost care", to quote from Lewison, The Interpretation of Contracts 5th ed (2011), para 6.09. Sixthly, necessity for business efficacy involves a value judgment. It is rightly common ground on this appeal that the test is not one of "absolute necessity", not least because the necessity is judged by reference to business efficacy. It may well be that a more helpful way of putting Lord Simon's second requirement is, as suggested by Lord Sumption in argument, that a term can only be implied if, without the term, the contract would lack commercial or practical coherence.

...

27. Of course, it is fair to say that the factors to be taken into account on an issue of construction, namely the words used in the contract, the surrounding circumstances known to both parties at the time of the contract, commercial common sense, and the reasonable reader or reasonable parties, are also taken into account on an issue of implication. However, that does not mean that the exercise of implication should be properly classified as part of the exercise of interpretation, let alone that it should be carried out at the same time as interpretation. When one is implying a term or a phrase, one is not construing words, as the words to be implied are ex hypothesi not there to be construed; and to speak of construing the contract as a whole, including the implied terms, is not helpful, not least because it begs the question as to what construction actually means in this context.

28. In most, possibly all, disputes about whether a term should be implied into a contract, it is only after the process of construing the express words is complete that the issue of an implied term falls to be considered. Until one has decided what the parties have expressly agreed, it is difficult to see how one can set about deciding whether a term should be implied and if so what term. This appeal is just such a case. Further, given that it is a cardinal rule that no term can be implied into a contract if it contradicts an express term, it would seem logically to follow that, until the express terms of a contract have been construed, it is, at least normally, not sensibly possible to decide whether a further term should be implied. Having said that, I accept Lord Carnwath's point in para 71 to the extent that in some cases it could conceivably be appropriate to reconsider the interpretation of the express terms of a contract once one has decided whether to imply a term, but, even if that is right, it does not alter the fact that the express terms of a contract must be interpreted before one can consider any question of implication.

..."

38. The fundamental principle governing the implication of a term is also explained in the judgment of Lord Leggatt in *Tesco v USDAW* at [102] – [106]:

"102. The main rule governing the implication of a term is that, to be implied, the term must be necessary either to spell out what is so obvious that it goes without saying or to give business efficacy to the contract. The first of these tests is sometimes called the "officious bystander test", referring to a personification of it described by MacKinnon LJ in Shirlaw v Southern Foundries (1926) Ltd [1939] 2 KB 206, 227. He imagined an "officious bystander" present while the parties were making their agreement who suggests that they should include a term as an express provision. The test for implication is met if the parties "would testily suppress [the bystander] with a common 'Oh, of course!'." As was rightly pointed out in Belize Telecom, para 25, this thought experiment, colourful as it is, is unhelpful because it invites speculation about how the actual parties to the contract might have responded rather than adopting the objective approach which the law requires. The law is not concerned with the hypothetical answer of the actual parties, but with that of notional reasonable people in their position at the time of contracting: see eg Marks and Spencer, para 21. This may account for why judges sometimes imagine the officious bystander answering the relevant question rather than posing it to the parties (as the original version of the test envisages): see eg Aberdeen City Council v Stewart Milne Group Ltd [2011] UKSC 56; [2012] SLT 205, para 33, where Lord Clarke of Stone-cum-Ebony (with whom Baroness Hale of Richmond, Lord Mance and Lord Kerr of Tonaghmore agreed) said:

> "If the officious bystander had been asked whether such a term should be implied, he or she would have said 'of course'."

103. A broader criticism is that a test of obviousness is purely impressionistic and unreasoned. Perhaps this contributes to the enduring attraction of the officious bystander, who may be felt to give a semblance of objectivity to what is really no more than the judge's own hunch. It may also explain why judges seldom rely on the test of obviousness alone. Although a separate test, it is generally applied in combination with the second, "business efficacy" test. In Marks and Spencer, para 21, Lord Neuberger suggested that in practice it would be a rare case where only one of those two requirements would be satisfied.

104. The business efficacy test has its origin in Bowen LJ's classic statement in The Moorcock (1889) 14 PD 64, 68, that "if one were to take all the cases, and they are many, of implied warranties or covenants in law, it will be found that in all of them the law is raising an implication from the presumed intention of the parties with the object of giving to the transaction such efficacy as both parties must have intended that at all events it should have." Bowen LJ further explained that "what the law desires to effect by the implication is … to make each party promise in law as much, at all events, as it must have been in the contemplation of both parties that he should be responsible for in respect of [the] perils or chances [of the transaction]."

105. In Marks and Spencer, para 21, Lord Neuberger aired a suggestion made by Lord Sumption in argument in that case that another way of putting the business efficacy test might be to say that "a term can only be implied if, without the term, the contract would lack commercial or practical coherence." While that would no doubt be a sufficient reason to imply a term, it seems to me to invite consideration of the wrong question. The question is not whether the contract would work at all without the implied term, but whether, without the implied term, the contract would work in the way the parties must reasonably have intended and expected it to work. I agree with Sir Kim Lewison that that is the idea that Lord Steyn was expressing in Equitable Life Assurance Society v Hyman [2002] 1 AC 408, 459, when he described the implication of a term as "essential to give effect to the reasonable expectations of the parties": see Lewison, The Interpretation of Contracts, 8th ed (2024), para 6.85; Equitas Insurance Ltd v Municipal Mutual Insurance Ltd [2019] EWCA Civ 718; [2020] QB 418, para 150. It also accords with the original statement of the test in The Moorcock. as seeking to give to the transaction "such efficacy as both parties must have intended that at all events it should have." I agree too with the Supreme Court of New Zealand that formulating the test in terms of commercial or practical coherence risks distracting from the purpose of implication, which is to give effect to the parties' bargain as objectively assessed. It is the parties' bargain, not some broader concept of business coherence, that is the focus of implication: see Bathurst Resources Ltd v L & M Coal Holdings Ltd [2021] NZSC 85; [2021] 1 NZLR 696, para 110.

106. Properly understood, Bowen LJ's famous statement of the law describes a more analytical approach. The first step is to identify, from one or more express terms of the contract construed in their factual setting, a relevant contractual purpose. The question then is whether the implication of a term is necessary to

give effect to that purpose and prevent it from being defeated. Any term implied must be both strictly necessary and no wider than is necessary give the contract such efficacy. It must also, of course, be consistent with the express terms of the contract."

39. The relevant principles are drawn together by Lady Justice Carr DBE in *Yoo Design Services v Iliv Realty Pte* [2021] EWCA Civ 560 at [51]:

> 51. In summary, the relevant principles can be drawn together as follows:
>
> i) A term will not be implied unless, on an objective assessment of the terms of the contract, it is necessary to give business efficacy to the contract and/or on the basis of the obviousness test;
> ii) The business efficacy and the obviousness tests are alternative tests. However, it will be a rare (or unusual) case where one, but not the other, is satisfied;
> iii) The business efficacy test will only be satisfied if, without the term, the contract would lack commercial or practical coherence. Its application involves a value judgment;
> iv) The obviousness test will only be met when the implied term is so obvious that it goes without saying. It needs to be obvious not only that a term is to be implied, but precisely what that term (which must be capable of clear expression) is. It is vital to formulate the question to be posed by the officious bystander with the utmost care;
> v) A term will not be implied if it is inconsistent with an express term of the contract;
> vi) The implication of a term is not critically dependent on proof of an actual intention of the parties. If one is approaching the question by reference to what the parties would have agreed, one is not strictly concerned with the hypothetical answer of the actual parties, but with that of notional reasonable people in the position of the parties at the time;
> vii) The question is to be assessed at the time that the contract was made: it is wrong to approach the question with the benefit of hindsight in the light of the particular issue that has in fact arisen. Nor is it enough to show that, had the parties foreseen the eventuality which in fact occurred, they would have wished to make provision for it, unless it can also be shown either that there was only one contractual solution or that one of several possible solutions would without doubt have been preferred;
> viii) The equity of a suggested implied term is an essential but not sufficient pre-condition for inclusion. A term should not be implied into a detailed commercial contract merely because it appears fair or merely because the court considers the parties would have agreed it if it had been suggested to them. The test is one of necessity, not reasonableness. That is a stringent test."

40. An *ad hoc* term is not to be implied simply because it is reasonable. At the same time, as Lord Leggatt observed in *Tesco v USDAW* at [105] (in a passage discussing Lord Steyn's statement in *Equitable Life Assurance v Hyman* [2002] 12 AC 408 at 459 that the term should be "*essential to give effect to the reasonable expectations of the parties) whether to imply a term may depend on "whether, without the implied term, the contract would work in the way the parties must reasonably have intended and expected it to work*"."

Terms and Principles Creating and Controlling Rights of Determination and Their Exercise

41. The LPA contains an array of express provisions affording to or imposing on one or more of the parties a right or obligation to determine something for the purposes of the LPA and, in some cases, these provisions spell out how far the party or party concerned is fettered in their exercise or performance of that right or obligation.

42. Examples of such provisions which include express fetters are: LPA ¶ 9(a) (requiring the General Partner to value assets "in good faith"); and Amendment 3 ¶ 5(a)(ii) (conditioning acceleration of budgets on the General Partner's representation "that it has a good faith belief that the Project (or portion thereof covered by such budget) will be completed within the aggregate amount budgeted therefor.").

43. The LPA is a lengthy and detailed document. However, this does not prevent the court from reading implied terms into it.

44. The fact that the draftsman has included fetters in some provisions but not others in the LPA does not mean that the parties intended the exercise of the other rights and obligations to be unfettered. This is a matter for the interpretation of the agreement as a whole informed by the fetters which have, and have not, been read into or applied to the performance of instruments with similar features in other cases.

45. There are many implied terms and principles which have been held to serve and prayed in aid to curb the scope for abuse in the performance of contractual obligations and the exercise of contractual rights.

46. First, there is the general principle that a party should not be allowed to benefit from its own wrong. This is referred to in the context of the consequences of termination in a passage from the speech of Lord Diplock in *Cheall v A.P.E.X* [1983] 2 A.C. 180, at [188-189]:

> "My Lords, the New Zealand Shipping case [1919] A.C. 1, from which, it is contended, the supposed rule of law can be extracted, was an appeal upon a case stated by an umpire in an arbitration of a phrase in a shipbuilding contract: " thereupon this contract shall become void," where the events to the occurrence of which " thereupon " referred were of different kinds; some of them could only be brought about by some breach of the contract by the shipbuilder, others could happen without any breach of contract by either party. The umpire had found as a fact that the event relied upon by the shipbuilders as bringing the clause into operation so as to render the contract void happened without any breach of the shipbuilding contract by either party, and the actual decision of this House, was that the shipbuilder was entitled to treat the contract as void. In the course of the speeches, which are not entirely consistent with one another, reference was made by all their Lordships to the well known rule of construction that, except in the unlikely case that the contract contains clear express provisions to the contrary, it is to be presumed that it was not the intention of the parties that either party should be entitled to rely upon his own breaches of his primary obligations as bringing the contract to an end, i.e. as terminating any further primary obligations on his part then remaining unperformed. This rule of construction, which is paralleled by the rule of law that a contracting party cannot rely upon an event brought about by his own breach of contract as having terminated a contract by frustration, is often expressed in broad language as: "A man cannot be permitted to take advantage of his own wrong." But this may be misleading if it is adopted without defining the breach of duty to which the pejorative word " wrong " is intended to refer and the person to whom the duty is owed.
>
> The breach of duty which it is suggested disentitled A.P.E.X. in the instant case to rely upon rule 14 as against Cheall was its duty under the Bridlington principles not to poach members from A.CT.S.S. This duty, though moral only and not legally enforceable, it owed to A.CT.S.S. and T.G.W.U. and, may be, other trade unions that are members of the T.U.C.; but plainly it cannot have owed such duty to individual members" of trade unions, since only trade unions were parties to the agreement embodied in the Bridlington principles.

> Since rule 14 can only come into effect when there has been a breach by A.P.E.X. of the duty owed by it to another trade union under the Bridlington principles, it is hopeless to argue that A.P.E.X. is debarred from relying on the rule to terminate the membership of a poached member, merely because it acted in breach of the Bridlington principles in poaching him. So counsel for Cheall felt constrained to introduce the concept of a distinction to be drawn between a "conscious and deliberate" breach of the Bridlington principles and a breach that was merely inadvertent. The former it was argued disentitled A.P.E.X., as a matter of law, ever to rely upon rule 14 to terminate the membership of the person in respect of whom the conscious and deliberate breach was committed, while an inadvertent breach did entitle it to do so.
>
> My Lords, I know of no principle of law which justifies this distinction. The New Zealand Shipping case [1919] A.C. 1, the only authority relied upon for it, contains no hint that any such distinction between deliberate and inadvertent breaches of duty is to be drawn in applying the rule that was the subject of discussion in that case. To attract the principle, whether it be one of construction or one of law, that a party to a contract is not permitted to take advantage of his own breach of duty, the duty must be one that is owed to the other party under that contract; breach of a duty whether contractual or non-contractual owed to a stranger to the contract does not suffice. I have no hesitation in rejecting the argument based upon the supposed rule of law."

47. Second, there is the prevention principle pursuant to which a term may be implied that a party should do nothing to prevent the circumstances for the performance of its obligations under the contract arising. *In Duval v 11-13 Randolph Crescent* [2020] UKSC 18 at [48] Lord Kitchin (with whom Lady Hale, Lord Carnwath, Lady Black and Lord Sales agree) refers to it being “well established that a party who undertakes a contingent or conditional obligation may, depending upon the circumstances, be under a further obligation not to prevent the contingency from occurring; or from putting it out of his power to discharge the obligation if and when the contingency arises.”

48. Third, there is the cooperation principle pursuant to which a term may be implied that a party will cooperate in bringing about the circumstances in which the contract may call for performance. In *Compagnie Noga d’Importation et d’Exportation SA v Abacha (No 3)* [2002] CLC 207 at [103] – [107] Rix LJ refers to the duty of cooperation as found by Devlin J (as he then was) in *Mona Oil*

Equipment and Supply Company Ltd v Rhodesia Railways Ltd (1949) 83 L1 L Rep 178 and to the classic case of *Mackay v Dick (1881) 6 App Cas 251*.

49. Fourth, there may be an implied term to exercise a power or right in a way which is consistent with the purpose for which it is conferred. In *British Telecommunications v Telefonica 02 UK* [2014] UKSC 42 at [37] Lord Sumption (with whom Lord Neuberger, Lord Mance, Lord Toulson and Lord Hodge agree) states: "it is well established that in the absence of very clear language to the contrary, a contractual discretion must be exercised in good faith and not arbitrarily or capriciously... This will normally mean that it must be exercised consistently with its contractual purpose ...".

50. Fifth, in some circumstances, as Rix LJ (with whom Laws & Lloyd agree) held in *Socimer International Bank v Standard Bank* [2008] EWCA Civ 116 at [60] – [66] "a decision maker's discretion will be limited, as a matter of necessary implication, by concepts of honesty, good faith and genuineness, and the need for the absence of arbitrariness, capriciousness, perversity and irrationality".

51. Sixth, there may be an implied duty of good faith. In *Sheikh Al Nehayan v Kent* [2018] EWHC 333 Leggatt LJ (as he then was) sitting at first instance identifies the characteristic relational nature of those contracts in which it may be appropriate to imply a general duty of good faith going beyond that discussed in the *Compass* and *Product Star* cases. Full reviews of the relevant jurisprudence are to be found in the judgment of Fancourt J in *UTB v Sheffield* [2019] EWHC 2322 (Ch) at [196] – [205] and Fraser J in *Bates v Post Office (No.3)* [2019] EWHC 606 at [702] – [710].

52. Seventh, there may be implied fiduciary duties. I note that section 19(2) of the Exempted Limited Partnership Act provides as follows.

"Subject to any express provisions of the partnership agreement to the contrary, a limited partner of an exempted limited partnership in that capacity does not owe any fiduciary duty in exercising any of its rights or authorities or otherwise in

performing any of its obligations under the partnership agreement to the exempted limited partnership or any other partner."

53. I am unaware of any case which explores the limits of the class of duties encompassed by the reference to fiduciary duties in section 19(2) of the Exempted Limited Partnership Act. In my view, it is arguable whether or to what extent it may encompass a duty of good faith in the sense that may arise in relational contracts such as those discussed in *Sheikh Al Nehayan v Kent*. However, I do not read section 19(2) of the Exempted Limited Partnership Act as precluding the implication of a term which serves to fetter the exercise of a right or the performance of an obligation honestly, rationally or for the purpose for which the contract provides for it.

53. As a matter of principle, even if one is satisfied that there is some such fetter, it is necessary to consider how it operates in the context of the agreement at issue, and, in practice, there may be no magic to the taxonomy which I have adopted here. In many of the cases in this area of the law more than one rationale may be given for implying the same term.

54. In considering the content of the term to be implied in any particular case, it will be necessary to consider, for example, how far it is consistent with the agreement as a whole for the party to or on whom the right or obligation is conferred to have regard to its own interests, circumstances, whims or animus. In some cases, as the Privy Council held in the decision given by Lord Millett in *Reda v Flagg* [2002] UKPC 38 at [45] and [52], the express terms leave no room for any such implied term.

Braganza

55. The judgment of Lady Hale (with whom Lord Kerr agrees) in *Braganza v BP Shipping* [2015] UKSC 17 [17] – [31] has given its name to a class of implied terms which fetter the exercise of a right or power in circumstances where a conflict of interest

may arise, and, in particular, require the right or power to be exercised rationally in the sense explained in the obiter dicta of Lord Sumption in *Hayes v Willoughby* [2013] UKSC 17 at [14]:

> "I do not doubt that in the context of section 1(3)(a) purpose is a subjective state of mind. But in my opinion, the necessary control mechanism is to be found in the concept of rationality, which Eady J touched on in Howlett v Holding [2006] EWHC 41 (QB) and Moses LJ seems to have been reaching for in his judgment in the present case. Rationality is a familiar concept in public law. It has also in recent years played an increasingly significant role in the law relating to contractual discretions, where the law's object is also to limit the decision-maker to some relevant contractual purpose: see Ludgate Insurance Co Ltd v Citibank NA [1998] Lloyds Rep IR 221, para 35 and Socimer International Bank Ltd v Standard Bank Ltd [2008] Bus LR1304 , para 66. Rationality is not the same as reasonableness. Reasonableness is an external, objective standard applied to the outcome of a person's thoughts or intentions. The question is whether a notional hypothetically reasonable person in his position would have engaged in the relevant conduct for the purpose of preventing or detecting crime. A test of rationality, by comparison, applies a minimum objective standard to the relevant person's mental processes. It imports a requirement of good faith, a requirement that there should be some logical connection between the evidence and the ostensible reasons for the decision, and (which will usually amount to the same thing) an absence of arbitrariness, of capriciousness or of reasoning so outrageous in its defiance of logic as to be perverse. For the avoidance of doubt, I should make it clear that, since we are concerned with the alleged harasser's state of mind, I am not talking about the broader categories of Wednesbury unreasonableness, a legal construct referring to a decision lying beyond the furthest reaches of objective reasonableness."

56. The underlying principles are not new. However, *Braganza* is recognised as the leading case, for example, in the judgement of Males and Leggatt LJJ (with both of whom Patten LJ agrees) in *Equitas Insurance v Municipal Mutual Insurance* [2019] EWCA Civ 718 at [106] – [113] and [148] – [154].

Consequences

57. It is, perhaps, unsurprising that the law has found ways of defeating the antics of those who would breach a contract in order to evade performance of their primary obligations under it.

58. The law on consequences of breach in such cases has been recently reviewed by Popplewell LJ in *King Crude Carriers v Ridgebury* [2024] EWCA Civ 719. The key paragraphs are as follows:-

(1) As regards the wrongful prevention of the fulfilment of a condition precedent depriving a party of the right to rely upon it at [48]:

> "48. In the Court of Appeal in *Panamena* ((1943) 76 Lloyd's Rep 113) Goddard LJ had articulated the principle in the following terms at p. 127:
>
> "It is and must be conceded that if a party desires to rely on the non-performance of a condition precedent, he must do nothing to prevent the condition from being performed, and if there is anything that must be done by him to render possible the performance of the condition, a failure by him to do what is required disentitles him from insisting on performance of the condition.""

(2) As regards a condition precedent being treated as fulfilled where its fulfilment has been prevented by breach of an implied term at [52]:

> "52. In Mona v Rhodesia Railways, Devlin J identified the two propositions for which Mackay v Dick was authority at pp. 186-7. The first was the implied term of cooperation identified by Lord Blackburn, breach of which gives rise to a claim for damages. The second was that of Lord Watson:
>
> "The second proposition, based on the opinion of Lord Watson, advances a stage further and gives the plaintiff in appropriate cases an additional form of relief. If the breach of the implied term prevents the plaintiff from performing a condition binding upon him, he is to be taken as having fulfilled that condition: and if the condition is one on which his right to payment depends, he may therefore sue for payment instead of damages. That these propositions are distinct is shown by the fact that Lord Blackburn's reasoning does not involve the second at all. His construction of the contract does not require it. He says at p. 264 "...". On this view, there was no question of the defender preventing the pursuers from claiming payment; he prevented himself from escaping from the liability to pay. ..... Lord Watson, Mackay v Dick, sup.at p. 270, proceeded on a different construction of the contract and so invoked the principle I have stated. He rested it upon well-established doctrine (see also the authorities cited by McCardie, J., in Colley v Overseas Exporters, sup., at p. 308) and not upon any implication in the contract.""

(3) As regards the similar effect of a breach of the implied duty of cooperation at [61]:

> "*61. In* Geys v Société Générale [2013] AC 523 at [131] *, Lord Sumption JSC referred to*
>
> > *"the doctrine of deemed performance endorsed by the House of Lords in* Mackay v Dick (1881) 6 App Cas 251 *, according to which a party who is prevented by the non-cooperation of the counterparty from satisfying a condition precedent to his right to receive remuneration may be deemed to have earned it notwithstanding the condition"*."

(4) By way of conclusion at [78] – [85], with reference to the recognition of the principle in the opinion of the Privy Council given by Sir Harry Gibbs in *Newmont Property Ltd v Laverton Nickel NL* (1982) 44 ALR 588 at 606:

> " 78. Unlike the Judge, and contrary to Mr Eaton's submissions, I consider that the Mackay v Dick principle, as so formulated, involves no inconsistency with established tenets of contract law, but on the contrary, gives effect to them.
>
> 79. It is first helpful to seek to identify a juridical basis for the principle. It arises from the concept that a person should not be permitted to take advantage of their own wrong, but that is a statement of policy, or as the Judge described it, a 'maxim', rather than a juridical basis for the rule. It is not a freestanding principle of universal application even in contract law. It may be very profitable for a party to break its contract without inflicting an equivalent loss on a defendant, but generally speaking in such cases the law does permit it to take advantage of its own wrong and to keep the profit: damages are generally compensatory and, save in limited circumstances, do not involve disgorgement of profits.
>
> 80. The authorities use a series of different epithets to describe how the principle takes effect. In some cases the language is that of deemed fulfilment of the condition: Lord Watson in Mackay v Dick (the condition is "held as accomplished"); Ashurst J in Hotham ("equal to performance"); Parker LJ in The Aello ("condition deemed to have been fulfilled"); Lord Sumption in Geys ("deemed performance"). In others it is that the condition is dispensed with: Lord Thankerton in Panamena ("absolved from the necessity of obtaining the surveyor's certificate"); Goddard LJ in Panamena ("disentitles him from insisting on performance of the condition"). In others it is the language of estoppel or quasi estoppel or waiver: Lord Donaldson MR in Cory v LRB ("quasi estoppel"); Devlin J in Tiberghien ("not permitted to assert" non fulfilment of the condition and

"in effect waiver"); Millett LJ in Little v Courage ("precluded from claiming that the condition has not been fulfilled"). These, however, are merely descriptors of the effect of the principle, not by way of identification of a legal doctrine whose ingredients must be fulfilled and are then applied. None of the authorities, with their various descriptions of the effect of the principle, seeks expressly to identify its legal basis.

81. In my view, the legal basis of the rule is that it represents the presumed contractual intention of the parties. That is a principled basis for it, because in order for it to apply there must be (1) an agreement capable of giving rise to a debt rather than damages; (2) an agreement that the debt will accrue and/or be payable subject to fulfilment of a condition precedent; and (crucially) (3) an agreement that the obligor will not do the thing which prevents the condition precedent being fulfilled so as to prevent the debt accruing and/or becoming payable, whether that agreement takes the form of the implied term of cooperation identified by Lord Blackburn in Mackay v Dick , or an express term, as in this case. Unless (3) exists, the principle has no application, as Cheall confirms. The natural presumption arising out of that combination of ingredients is that the parties intend that in those circumstances the obligee will have the benefit of the debt for which it has bargained. The presumption is not, as Mr Eaton would have it, merely that the breach of element (3) should give rise to a claim in damages, because that ignores the bargain that in certain circumstances the obligee should have the benefit of a right in debt, which is recognised by elements (1) and (2). Put another way, the agreement that the obligor will not engage in the conduct which prevents the debt accruing and/or becoming payable implicitly carries with it an agreement that the consequence should be that the debt accrues and is payable.

82. That contractual intention is the juridical basis for the principle was recognised in Newmont Property Ltd v Laverton Nickel NL (1982) 44 ALR 588, a decision of the Privy Council on an Australian appeal about an agreement between provisional liquidators of mining companies which was conditional on approval by the court. It was held that the principle in Mackay v Dick had no application in such circumstances, because the condition was not one for the benefit of the parties only, but by way of statutory supervision whose main purpose was the protection of the contributors and creditors against the background of insolvency; and not one which the provisional liquidators could fulfil or the fulfilment of which they could procure. The Opinion of the Board, comprising Lords Diplock, Keith and Roskill, Sir John Megaw and Sir Harry Gibbs was given by Sir Harry Gibbs who said at p. 606:

"In argument counsel for the appellant cited cases such as Mackay v Dick (1881) 6 App Cas 251 in support of the submission that where one party makes it impossible for a condition of the contract to be fulfilled, the condition is to be taken as satisfied. That is true in some cases, but not in

> all; whether performance of a condition precedent is excused where a party has prevented its performance must depend upon the nature of the condition and circumstances of the case. In some cases the nature and purposes of the condition will themselves be sufficient to indicate that the parties must have intended that the obligations which are expressed to be dependent on the fulfilment of the condition will come into existence only if the condition is fulfilled, and that it will not be enough that performance of the condition has been prevented by the wrongful act of one of the parties."
>
> 83. For these reasons I am unable to accept Mr Eaton's argument that the principle interferes with freedom of contract. It is a principle which gives effect to contractual intention, not one which frustrates it. If a contrary intention is sufficiently clearly expressed or can be implied from the circumstances of the case, the principle will not apply.
>
> 84. This accords with the approach to the maxim that a party should not be entitled to take advantage of their own wrong in the contractual field more generally. As I have explained, it has regularly been applied as a matter of construction since at least the early 18th century, but it has always been treated as a principle of construction, not of law, and as subject to a sufficiently clearly expressed contrary intention: see, for example, Cheall at pp.188H-189A, Alghussein Establishment v Eton College [1988] 1 WLR 587 at p. 595G; and BDW Trading ltd v JM Rowe (Investments) Ltd [2011] EWCA Civ 548 at [31] .
>
> 85. I would therefore formulate the principle as being that an obligor is not permitted to rely upon the non-fulfilment of a condition precedent to its debt obligation where it has caused such non-fulfilment by its own breach of contract, at least where such condition is not the performance of a principal obligation by the obligee, nor one which it is necessary for the obligee to plead and prove as an ingredient of its cause of action, and save insofar as a contrary intention is sufficiently clearly expressed, or is implicit because the nature of the condition or the circumstances of the case make it inappropriate."

59. Put simply, in an appropriate case, the court may find that the objective intention of the parties is that, where a precondition is not satisfied as a result of a breach of the contract by the party which would rely upon it, the benefit of the precondition may be deemed to have been waived or lost, and the innocent party may proceed as if the precondition had been satisfied.

E. THE LPA

60. An essential characteristic of an exempted limited partnership as the Exempted Limited Partnership Act envisages such partnerships is that the conduct of the business of the partnership is vested in the general partner and the limited partners have neither control over, nor liability for, what is done in the partnership's name.

61. In the ordinary way, the limited partnership agreement which constitutes an exempted limited partnership will specify, *inter alia*, the objects of the partnership, the capital which the limited partners are committed to provide, and the circumstances in which the general partner may call upon the limited partners to provide it.

62. The LPA has all these features.

(1) The object of the Partnership is "to invest, directly or indirectly through one or more entities directly or indirectly owned in whole or in part by the Partnership (each such entity, an 'Intermediary'), in pharmaceutical medical device and other medically related companies and business projects." LPA Am1 ¶1(c) (restating Paragraph 1(c) of the LPA).

(2) The duties and powers of the General Partner cover "The management, policies, and control of the affairs, and the conduct of business, of the Partnership shall be vested exclusively in the General Partner." LPA ¶ 2(b).

(3) The LPA authorizes the General Partner to call capital for Projects within an approved Project budget. LPA Am3 ¶5(a)(ii).[3]

[3] LPA Am3 ¶ 5(a)(ii) ("the "General Partner may only call capital … to … (D) invest in Projects approved … in accordance with a Board-approved budget," and "(E) invest in Projects approved by holders of a majority of the Preferred Units in writing in accordance with a budget therefor approved by such holders."). *See also* LPA Am2 Sched. C; LPA Am13; LPA Am20 ¶ 21(e); LPA Am20 ¶ 22(e).

(4) The LPA also affords the Limited Partners or the Subject Limited Partners, who hold the majority of the Preferred Units in the Partnership, certain voting and approval rights, including a right to approve budgets for Partnership Projects.[4]

63. Provided that a budget has been approved, consistent with the power and authority granted to the General Partner to manage the conduct of the business, LPA ¶ 2(b), the General Partner then has the discretion to call capital within that budget. LPA ¶ 5(a)(i) (authorizing the General Partner to call capital in amounts equal to or in instalments of the Contingent Subscription); LPA Am3 ¶ 5(a)(ii) (authorizing the General Partner to call capital to cover an approved budget). Paragraph 5 requires the Limited Partner to make a capital contribution after the General Partner has exercised its discretionary right to call the capital within an approval Project budget. *See* LPA ¶ 5(a)(i); LPA Am3 ¶ 5(a)(ii). The General Partner may call a default "If a Limited Partner does not make a capital contribution required by this Paragraph 5 when due." LPA ¶ 5(c).

64. The purpose of the Partnership as stated in the LPA is to invest in medical science projects of a kind which may, as I understand it, take many years to reach a point at which they will either attract third party investors or be cash-positive and, hence, self-sustaining. However, for the purposes of my opinion the details of this do not matter.

Amendment 22

65. Amendment 22 Paragraph 26 deals with the budgets for the certain clinical-stage portfolio companies, including Ascidian, Aulos, and Replicate and certain early-stage companies, including Nereid and Nine Square. The amendment establishes

[4] Amendment 2 Schedule C outlines the "project budget process." Schedule C refers to "ATC" and the "Board" of ATC. The "Board" refers to the board of directors of ATC. LPA ¶ 2(n). However, Amendment 14 Section 10 to the LPA provides that "All references in the Agreement to 'ATC' and 'Apple Tree Consolidated, SPRL,' … are … deleted from the Agreement." And, as I understand it, it is common ground that the right to approve budgets now resides with the Subject Limited Partners, that is, Rigmora. See also LPA Am3 ¶ 5(a)(ii); LPA Am13 Introduction; LPA Am2 Sched. C; LPA Am20 ¶ 20(e); LPA Am22 ¶ 26.

budget contingencies for these five portfolio companies, providing twelve-month operating budgets with specific timelines through 2025-2026. It also makes the implementation of any budget approval contingent upon the Subject Limited Partner realizing at least $300 million from an ATP LLC sale or financing. The pertinent terms amend Paragraph 26 of the LPA to provide as follows:

> "26. Budgets for Certain Other Portfolio Companies. From and after the date of this Amendment, the General Partner and the Subject Limited Partner shall discuss new budgets for the Partnership in accordance with the process set forth in this Agreement to allow it to invest in Ascidian Therapeutics, Inc., Aulos Bioscience, Inc., Nereid Therapeutics Incorporated, Nine Square Therapeutics Corporation and Replicate Bioscience, Inc. sufficient amounts to enable each of them to operate for a period of twelve months after the remaining unfunded amounts, if any, under their respective existing approved budgets are expected to have been fully utilized, i.e., January 2025, in the case of Aulos Bioscience, Inc.; February 2025, in the case of Replicate Bioscience, Inc.; April 2025, in the case of Nereid Therapeutics Incorporated; May 2025, in the case of Nine Square Therapeutics Corporation and the first quarter of 2026, in the case of Ascidian Therapeutics, Inc. (provided that the General Partner and the Subject Limited Partner shall discuss, in the near term, a new budget to fund a major clinical trial of Ascidian Therapeutics, Inc.). If any approval of a new budget is given by the Subject Limited Partner, such approval shall be contingent upon at least $300 million being realized (including through deemed distributions) by the Subject Limited Partner on a sale or financing of its interest in ATP LLC."

66. I note the following textual indications as to the meaning and effect of Paragraph 26.

(1) The words "shall discuss" as used in the phrase "the Subject Limited Partner shall discuss new budgets for the Partnership" are apt to denote a discussion in which both parties are obliged to engage.

(2) The words "in accordance with the process set forth in this Agreement" stipulate how the discussion in which the parties are to engage is to be conducted by them.

(3) The words "to allow it to" as used in the phrase "to allow it to invest in Ascidian Therapeutics, Inc., Aulos Bioscience, Inc., Nereid Therapeutics Incorporated,

Nine Square Therapeutics Corporation and Replicate Bioscience, Inc." are apt to denote a purpose.

(4) The words "sufficient amounts to enable each of them to operate for a period of twelve months after the remaining unfunded amounts, if any, under their respective existing approved budgets are expected to have been fully utilized …" are apt to describe facts and matters which are to be taken into account in considering whether or not budgets reflect the specified purpose.

(5) The words "(provided that the General Partner and the Subject Limited Partner shall discuss, in the near term, a new budget to fund a major clinical trial of Ascidian Therapeutics, Inc.)" are apt to indicate that a further discussion in relation to the budget for "a major clinical trial of Ascidian Therapeutics, Inc." must also take place.

(6) The words "If any approval of a new budget is given by the Subject Limited Partner, such approval shall be contingent upon at least $300 million being realized (including through deemed distributions) by the Subject Limited Partner on a sale or financing of its interest in ATP LLC" are apt to indicate what facts or matters unrelated to the specified purpose of a new Ascidian clinical trial budget may be taken into account and in what way.

(7) The words "such approval shall be contingent upon" are apt to indicate that the collateral consideration which Paragraph 26 goes on to specify is not to be taken into account as part of the new budget approval process but rather as a condition to putting any such approved new budget into effect.

(8) The fact that Paragraph 26 provides for the fund-raising issue and only the fund-raising issue to operate as a contingency is apt to indicate that no other collateral issue should affect the approval of new budgets.

67. In my view, at least, on a textual analysis of LPA Am22, in order for the LPA Am22 to work as the parties objectively intended it to work, it would appear to be necessary that the Subject Limited Partners engage in good faith discussions regarding the approval of budget proposals for the companies referred to there.

The Meaning and Effect of LPA Am22

68. As I understand it, the issues in these proceedings relate to matters occurring since the partners entered into LPA Am22, and, consequently, that what matters for the purposes of these proceedings is the meaning and effect of LPA Am22.

69. What is critical, as I see it, is that, if the budget approval provisions in the LPA Am22 were to be interpreted as affording the Subject Limited Partners an unfettered right to decline to approve budgets, the Subject Limited Partners would have a power over the conduct of the Partnership which would be at odds with the right and responsibility to control the conduct of the Partnership afforded to the General Partner.

70. Moreover, if the budget approval provisions in the LPA Am22 were to be interpreted as affording the Subject Limited Partners a right which they had no obligation to exercise, or were free to exercise for any reason whatsoever, any contingent capital commitment would be meaningless.

71. The LPA provides that "[a] Partner may not make less than the full amount of any required capital contribution." LPA ¶ 5(a)(i), and, if a Partner fails to make less than the full amount of any required capital contribution, it will be at risk that the General Partner make exercise the powers granted to it to treat the Partner as a Defaulting Partner. None of these provisions would have any force if the Limited Partners have an absolute right under LPA Am22 to refuse to approve budgets and, thereby, avoid the circumstances in which they might apply from arising.

Scenarios

72. As I understand it, the factual scenarios which may arise in these proceedings include the following:

(1) First, Rigmora may be found to have failed to engage in one or more of the budget approval processes for which LPA Am22 provides;

(2) Second, Rigmora may be found to have failed to approve one or more budgets otherwise than as a result of a rational and genuine assessment of the best interests of the Partnership in the entities to which the budgets relate;

(3) Third, Rigmora may be found to have made their approval of one or budgets for particular portfolio entities conditional on the General Partner doing something else in relation to the Partnership which the LPA did not oblige him to do and which he genuinely considered contrary to the interests of the Partnership;

(4) Fourth, Rigmora may be found to have failed to meet a capital call in respect of an amount covered by a budget or budgets which were approved by them;

(5) Fifth, Rigmora may have represented to the General Partner that they would do one or more of these things.

Scenarios 1 - 3

73. Were an unfettered right to decline to approve budgets to exist, the basic scheme of the LPA Am22 would lack coherence, and, accordingly, in my view, in the absence of clear language to the contrary, it is necessary to read into the approval provisions in the LPA Am22 an obligation on the Subject Limited Partners to engage with the process and exercise their power of approval properly.

74. I have used the term “properly” as a place holder. The extent of the fetter on the manner in which the Subject Limited Partners exercise their approval powers in

relation to particular budgets may be affected by the circumstances in which the amendments to the LPA under which those budgets have been presented to the Subject Limited Partners and their powers of approval arise.

75. As I understand it, the vast majority of the capital contributed to the Partnership has been contributed, and always was going to be contributed, directly or indirectly, by the ultimate beneficial owner or owners of the Subject Limited Partners and, as I understand it, the Subject Limited Partners may contend that this 'reality' should inform the meaning and effect to given to the LPA, and, in particular, the need to imply any constraints on the manner in which the Subject Limited Partners may exercise and discharge their rights and obligations under the LPA.

76. I do not find this argument compelling. The fact that any rights afforded to the holders of the majority of the Preferred Units or the Subject Limited Partners would be so readily exercisable by them might be thought to render it all the more important that they should be precluded from exercising them in a way which would undermine the operation of the Partnership or the ability of the general partner to manage the Partnership effectively.

77. It is true that the ownership of the vast majority of the units in a Partnership may inform the exercised of the court's discretion on a petition to wind up a partnership. However, this is only on the assumption that such limited partners have established an appropriate ground on which the court may do so. The fact that the majority owner of an exempted limited partnership would prefer the general partner to do its bidding, rather than manage the partnership on the terms agreed by all the partners, is not to be treated as giving rise to a breakdown in trust and confidence however unused the majority owner might be to anyone disregarding its wishes.

78. What is clear, in my opinion, is, as a matter of principle:

(1) First, that the constraint on the exercise of the budget-approval powers of the Subject Limited Partners to be read into the LPA Am22 should have the essential characteristics of such constraints recognised in such authorities as *Braganza*, *Socimer* and *British Telecommunications*;

(2) Second, that, as a failure to engage in the approval process could be self-serving and, on its face, prevent the satisfaction of a pre-condition to the General Partner's right to make a capital call on the Subject Limited Partners, a breach by the Subject Limited Partners of their obligation to engage and engage properly in the budget approval procedures would engage the principles recognised in the authorities cited in *King Crude Carriers v Ridgebury* in relation to a part's reliance on its own wrong, the prevention principle and the cooperation principle; and

(3) Third, that, if the Subject Limited Partners either have failed to engage with the approval process in breach of an express or implied obligation to do so, or have failed to engage in the process in the manner required of them, the Subject Limited Partners may be taken to have lost or waived their power to approve the budgets in issue with the consequences recognised in *King Crude Carriers v Ridgebury* and the cases cited there.

79. As I understand it, there is a dispute between the parties as to the amount, if any, of the Subject Limited Partners' outstanding capital commitment. I have not been asked to consider this, and I have not formed an opinion on it. If and insofar as I discuss the circumstances in which the General Partner may be entitled to make a capital call, it is, of course, subject to there being a commitment on which to make it.

80. In my view scenarios 1 – 3 would all be caught by the kind of implied term or terms which I have been addressing.

Scenario 4

81. Scenario 4 is one in which Rigmora have approved one or more budgets and, as I understand it, there is no further condition precedent to the making of a capital call for the General Partner to satisfy. In Scenario 4 it is Rigmora which may seek to have a constraint read into the LPA to fetter the power of the General Partner.

82. On its face, the fourth of these scenarios would involve a breach of the LPA unless it is also found that the merits of making a call to cover the approved budgets had so materially changed that the General Partner could not honestly or rationally rely upon it or that, in making the call the General Partner was abusing his power.[5]

83. The General Partner owes fiduciary duties to the Partnership; it is not obliged to make a capital call simply because budgets have been approved in respect of them; its power to make a call is to be exercised rationally and in good faith; and it is incumbent on the General Partner to ensure that it does not exercise it in furtherance of interests of its own which conflict with those the Partnership.

84. However, the framework of the Partnership proceeds on the basis that the General Partner should be able to exercise his powers without regard to any interests of its own which conflict with those the Partnership, and, accordingly, the mere fact that the exercise of a power may affect conflicting interests cannot begin to impugn that exercise.

[5] Or, of course, that Rigmora had fully discharged it capital commitment.

Scenario 5

85. Scenario 5 relates to what, as I understand it, is referred to in the Complaint as an "anticipatory breach". The term 'anticipatory breach" is used in the contract law of England and Wales and of the Cayman Islands to refer to a representation of an intention not to perform an obligation in the future, and, in the ordinary way, an anticipatory breach which goes to the fundamentals of the bargain between the parties will afford the innocent party the option to rescind the contract and seek repudiatory damages.

86. An anticipatory breach in the sense in which it gives rise to a right to rescind the contract need not be a breach in itself. However, there is no reason why, in an appropriate case, the court should not imply a term that a party will not commit an anticipatory breach if, for example, the innocent party will be obliged to make alternative arrangements once it has been put on notice of an anticipatory breach and, consequently, suffer damages even if the wrongdoer ultimately performs the obligation which it has represented it will not perform.

87. Moreover, if and insofar as the anticipatory breach evinces an intention on the part of one party to a contract not to engage in a process with the other party to the contract, the other party may be excused from attempting to engage any further itself, as long as it remains ready and able to do so if the party which has evinced an intention not to engage were to change its mind.

F. THE MEANING AND EFFECT OF THE BOGDANOV EMAIL

88. My attention has been drawn to an email from Yuri F. Bogdanov, who I understand to be the co-CEO of the entity which controls Rigmora, to Seth Harrison, who I understand to be the managing director of the General Partner dated May 15, 2025 ("**the Bogdanov Email**"). *See* Compl. Ex. 10.

89. As I understand it, the Bogdanov Email is relied upon by the General Partner as constituting and evidencing a failure to engage or engage properly in the approval process for either the seven "early-stage companies", or the "clinical stage companies" referred to there.

90. In my view, if the Subject Limited Partners remained under a contingent obligation to commit further capital to the Partnership, the Bogdanov Email may be read as disclosing (1) an intention on the part of Rigmora not to engage with the approval process or meet capital calls in accordance with their obligations under the LPA, and (2) a disregard for any *Braganza* type restraints that might be found to fetter the exercise of their rights and the performance of their obligations in connection with the budget approval process.

91. In my opinion, this is the "natural and ordinary" way in which to read the Bogdanov Email. However, the Bogdanov Email should be read with an understanding of any circumstances known to both parties which may have informed or given rise to it, and, as I may lack such an understanding, I cannot say whether such considerations would tend to confirm or point away from the natural and ordinary reading.

92. As I understand it, the Bogdanov Email refers to two groups of portfolio entities, that is, the early-stage companies in respect of which there were approved budgets and the clinical stage companies in respect of which the General Partner was seeking to obtain the approval of Rigmora in accordance with the LPA.

93. It is unclear to me if Rigmora claim an unfettered right to grant or withhold the approval of budgets as they think fit and if they consider it properly open to them to use the actual or threatened withholding of approval of budgets as a means of wresting the effective management of the Partnership from the General Partner, or if Rigmora contend that the position presented in the Bogdanov Email is consistent with any *King Crude* and/or *Braganza* type obligations on them.

94. I am unable to express a firm view on this, as it is always possible that either the commercial circumstances or prospects of the portfolio entities or the Partnership as a whole, or the context in which the Bogdanov Email was sent, or some other factors which will emerge in the course of the trial will cast a different light on this. However, on the face of it, the Bogdanov Email appears to me to disclose a refusal to engage or to engage in a genuine way with the approval of budgets for the clinical stage companies, and that the demand that the General Partner should not invest further in the early-stage companies, notwithstanding the approval of their budgets, evidences an attempt to exert a control over the effective management of the Partnership which is at odds with the way in which the LPA and, in particular, LPA Am22 is meant to work.

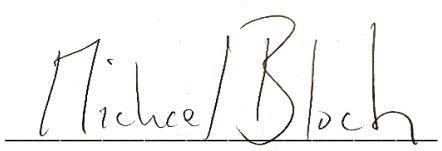
G. CONCLUSION

95. Having regard to the general law which I have addressed in this report, having regard to my reading of LPA Am22 as I have explained it in this report, and in the absence of contextual considerations to the contrary of which I am unaware, I would conclude that the role which LPA Am22 affords to the Subject Limited Partners is, as a matter of necessity, fettered in its exercise and performance in accordance with and for the reasons given in the Braganza case and the cases cited there.

96. Whether the same can be said in relation to the LPA prior to Amendment 22 is another matter. Initially, the Board of ATC could grant the Partnership the approvals it required to make capital calls. Subsequently, the operation of the

Partnership depended on the engagement of the Subject Limited Partners, that is Rigmora.

97. If Rigmora have failed to engage with the budget approval processes under LPA Am22 or failed to do so in an honest and rational manner, whether pursuant to the Bogdanov Email or otherwise, the General Partner may, in my opinion, be entitled to treat any requirement for Rigmora's approval of the budgets referred to in Paragraph 26 of the LPA Am22 as satisfied and any right which Rigmora may have had to refuse such approval as lost.



Michael Bloch KC

August 15, 2025

Appendix A
Curriculum vitae

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Michael Bloch KC



"Michael is an extremely experienced and tactical silk. You don't want him ever to be against you."

— CHAMBERS AND PARTNERS, 2025

Year of call: **1979**
Appointed to silk: **1998**
Degree: **MA (CANTAB), MPhil UEA**

Michael Bloch KC is a trial and appellate advocate who has advised and appeared in a wide range of high value and high profile domestic and international disputes; he is accomplished and at ease whether analysing esoteric points of law or cross-examining on dense or technically complex factual issues; and, whilst he is sensitive to what the court is thinking, he is also forceful and, where appropriate, fearless.

Michael is a registered Advocate before DIFC Courts (Dubai International Financial Centre) and called to the Bar in the BVI.

Michael is recognised as a leading silk in the latest editions of both the leading legal directories, Chambers and Partners and Legal 500, for his expertise in intellectual property, commercial litigation and international arbitration. He was also highlighted as a Recommended Individual in JUVE Patent Rankings 2021, 2022 and 2023.

- "Michael is an extremely experienced and tactical silk. You don't want him ever to be against you." - Chambers UK, 2025
- "Michael has a phenomenal intellect and a rigorous advocacy style. He is also phenomenally bright, he will test arguments until they are robust, and he carries the room easily when speaking." - Legal 500, 2025

Previous comments include:

- "One of the top advocates at the Bar. His grasp of both strategy and practicalities is superb, and his mind is razor sharp."- Chambers UK, 2024
- "A superb advocate. Able to grasp the most complex fact patterns and distil them into simple arguments. A true silver-tongued speaker, who is able to command the bench and be robust when needed." - Legal 500, 2024
- "We have been blown away by Michael's advocacy skills and his ability to react with alacrity despite only having been instructed a short time before a hearing."- Chambers UK, 2023

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- "From an advocacy point of view, he is excellent – a more mellifluous and silver-tongued counsel solicitors cannot think of, and he is not afraid to take on the judge if required."- Legal 500, 2023
- "An absolutely outstanding commercial lawyer, who is very user-friendly and a really, really good trial advocate. He is an amazing cross-examiner."- Chambers UK, 2022

In the field of commercial litigation, Michael is advising and representing several high net worth individuals in relation to offshore disputes, including Abdulhameed Dhia Jafar in proceedings in the Cayman Islands relating to the collapse of the Abraaj investment platform, he is advising several private equity funds in connection with claims relating to distressed debt against the Republic of Mozambique and the sale of debt by Credit Suisse, he has advised and represented Koza in a dispute with the Erdogan regime and he has acted for and is advising a global petrochemical refinery enterprise in connection with a series of ongoing disputes, as well as a private equity enterprise in connection it its control of a Scandinavian gold mine.

Michael's recent telecoms experience includes advising and representing ZTE in the Conversant case at first instance, in the Court of Appeal and the Supreme Court; he has advised and represented Lenovo, ZyXel and Xiami in connection with anti-suit and jurisdiction disputes, he is advising and representing Apple in its dispute with Unwired Planet and Pan Optis, and he is also acting for several other SEP owners and cellular telecommunication providers in relation to anti-suit, jurisisdictional and FRAND issues.

Michael's specialist Intellectual Property work includes advising and representing two automobile manufacturers in connection with an ongoing registered design right cases concerning new and vintage vehicle designs (which may be seen as building on his work in relation to the Land Rover Defender); he is advising and representing garment manufacturers in the Oh Polly copyright dispute; he is acting for multi-national entertainment and media conglomerate in connection with a copyright and trade mark dispute (which may be seen as building on his work in relation to the StarWars case); he has advised and represented American Eagle in a global licensing and trade mark dispute with Lyle & Scott; and he has advised and represented a multinational US based technology enterprise in pursuing breach of confidence claims against ex-employees involved in the development of satellite communication systems, as well as a host of FRAND cases in which Michael has dealt with both IP and commercial aspects in dispute.

Michael is also advising and representing several major undertakings in the pharmaceutical space on licensing and other IP related commercial issues.

EXPERIENCE

Commercial

Michael is versed in the law and practice of commercial disputes generally. He has advised and appeared in many proceedings concerning pre-emptive, interim and ancillary relief, as well as jurisdictional, justiciability and forum challenges in addition to trials in the Commercial Court and Chancery Division and Antigua, BVI, Cayman Islands and appeals to the Court of Appeal, the Supreme Court and the Cayman Court of Appeals in relation to banking, company law, confidence, contract, fiduciary duty, oil and gas, partnership, proprietary, restitutionary, tort and trust claims.

"Michael is fiercely smart and great at strategy."

— CHAMBERS AND PARTNERS, 2025

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The company law matters on which Michael has been recently and is currently working include disputes as regards the validity and interpretation of UK company articles, shareholder disputes relating to the control, dilution and management of UK and off-shore companies and the contested position of the directors of and professional advisers to UK and non-UK companies in the context of international undertakings and multi-jurisdictional disputes.

Michael is at home in the courts and before arbitrable panels in jurisdictions and territories throughout the Caribbean where he has/is currently working on a wide range of corporate and commercial disputes relating to financial services, private equity and other businesses; he also has hands-on experience of acting in proceedings in Canada, Hong-Kong, Russia and the United States; and is familiar with the procedural rules, as well as the substantive law, of the jurisdictions in which he practices, having advised and appeared in high value cases at all stages of the litigation from anti-suits, anti-anti-suits and jurisdiction challenges to final trials, appellate proceedings and settlement processes.

Michael is advising and representing several high net worth individuals in relation to offshore disputes, including Abdulhameed Dhia Jafar in proceedings in the Cayman Islands relating to the collapse of the Abraaj investment platform, he is advising several private equity funds in connection with claims relating to distressed debt against the Republic of Mozambique and the sale of debt by Credit Suisse, he has advised and represented Koza in a dispute with the Erdogan regime and he has acted for and is advising a global petrochemical refinery enterprise in connection with a series of ongoing disputes, as well as a private equity enterprise in connection it its control of a Scandinavian gold mine.

Cases

IPCom GmbH v Lenovo Technology UK Ltd

Chancery Division, 2019

Resisting an application for an anti-anti suit injunction in the English court following an application for an anti-suit injunction in the United States court in relation to a worldwide technology patent dispute.

Interdigital Technology Corporation v Lenovo Group Ltd

[2021] EWHC 3401 (Pat); [2021] EWHC 3192 (Pat); [2021] EWHC 89 (Pat); [2020] EWHC 1318 (Pat)

Acting for Lenovo in FRAND jurisdictional and anti-suit proceedings.

Philips v Xiaomi Technologies

Chancery Division, 2021

Jurisdiction challenge in relation to a claim for global FRAND damages for alleged breaches of patents.

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Jafar v Abraaj Holding & Ors

[2022] (Grand Court of the Cayman Islands, Financial Services Division; FSD 203 of 2020)

This claim arises out of the notorious and widely-publicised collapse of the Abraaj Group, believed to be the largest ever collapse of a private equity platform (valued at over $13.6 billion) as a result of years' worth of alleged financial mismanagement and fraud, whilst the Group purported to act as a world leader in ethical, impact investing. Acted for Mr Jafar, the Founder of Crescent Petroleum, who brings claims in deceit against certain Abraaj Group entities in respect of loans of over US$300 million procured in a belated attempt to rescue the business.

Teva Pharma v Eli Lilly

Contractual construction and patent dispute.

Pan Optis & Ors v Apple

Patents Court, ongoing

Instructed by Apple in its FRAND dispute with Pan Optis.

Brunswick Gold v Otso Gold

Acting for a private equity enterprise in connection to its control of a Scandinavian gold mine.

Republic of Mozambique fraud dispute

Commercial Court, ongoing

Substantial fraud proceedings involving allegations of fraudulent wrongdoing against former officials of the Republic of Mozambique. Acting for two secondary market purchasers in multiple claims against Credit Suisse International and the Republic of Mozambique arising out of the US$2 billion so called "tuna bonds" scandal.

Conversant Wireless Licensing v Huawei

A jurisdiction dispute over the forum for the determination of FRAND licences. Acted for ZTE at first instance, in the Court of Appeal and in the Supreme Court.

Iokovleva v Zakharov & Another

A case concerning the enforcement of a foreign judgment agaisnt assets in the possession of a non party.

Eaton Partners v Esso Cayman Partners

An LCIA arbitration arising out of the breakdown in the relationship between a Cayman based carried interest partner for certain special opportunity funds and a U.S. based placement agency.

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Antiguan Power Company v the Attorney General & others

A case in the High Court of Antigua and Barbuda relating to the repudiation of a power purchase agreement by the public utilities authority.

Midtown v EGFL

A case concerning the enforcement of a foreign judgment and the operation of CPR 71, 83 & 85, the Tribunals, Courts and Enforcement Act 2007 and the Taking Control of Goods Regulations 2013.

Payment Platform

A case concerning an unlawful means conspiracy to manipulate the share price of a payment platform.

Process Components v Kason Kek-Gardner

A case in the Court of Appeal concerning the termination of a joint venture.

Takahata Precision v Sentec

A case concerning the development and cross-licensing of intellectual property.

Cattles v PwC

An auditor's negligence case in the Commercial Court concerning the collapse of a sub-prime lender.

Burlington Resources (Irish Sea) v Hydrocarbon Resources

A Commercial Court case concerning the termination of a suit of agreements relating to the supply of gas infrastructure and processing services.

Crown Bidco v Vertu

A commercial court case concerning breach of warranty claims under an SPA relating to a global handset business.

Nedgroup v Renova

A derivative action in the Grand Court of the Cayman Islands concerning the alleged diversion of a partnership opportunity in breach of fiduciary duty.

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Cavendish v Madkessi
[2013] EWHC 421 (Comm)

A commercial court case concerning the sale and purchase of an international advertising business, the enforceability of the restrictive covenants imposed on the sellers and the application of the penalties doctrine to adjustments to the Consideration and Call and Put Options.

Cavendish v Madkessi
[2012] EWHC 4305 (Comm)

An application for leave to apply to commit a party for contempt of court in connection with the signing of a Statement of Truth.

HTC v Nokia
Ch D (Patents Ct) 12/09/2013

An application in the Chancery Division concerning the recognition of the terms of the protective orders granted by US courts in relation to evidence obtained for use in English proceedings.

Renova v Gilbertson
Grand Court, Cayman Islands 21/08/2012

A Cayman Islands case concerning alleged breaches of fiduciary duties allegedly owed to a company within a structure created to operate a hedge fund or joint venture in connection with the intended acquisition of metals and mining assets and the actual acquisition from Unilever of world-wide rights in FABERGE. The decision of the Appeals Court in Cayman is pending.

Coward v Phaestos Ltd and Ors
[2013] EWHC 1292 (Ch)

A case in the Chancery Division concerning the ownership of the rights in quantitative trading software used by a hedge fund operated through a series of partnerships and international corporate structures.

Coward v MFB
A case in the BVI concerning the impression of trusts on distributed profits of a family business and the status of a “Letter of Wishes”.

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Civil Fraud, Asset Recovery & Injunctive Relief

Michael has advised and appeared in a series of cases in which it was necessary to master, debate and cross-examine on substantial quantities of accounting, corporate and transactional documentation, as well as expert testimony relating to BVI, Cayman, Cypriot, French, German, Greek, Russian, US and other systems of foreign law. He is widely recognized as a formidable and effective cross-examiner, as well as for his deep interest and understanding of the proprietary and trust aspects of fraud disputes.

Cases

Private equity dispute

ICC Arbitration

A private equity dispute worth $1billion involving telecommunication assets in the United States. Related proceedings in Hong Kong and the Cayman Islands seeking worldwide injunctive and Norwich Pharmacal relief.

Jafar v Abraaj Holding & Ors

[2022] (Grand Court of the Cayman Islands, Financial Services Division; FSD 203 of 2020)

This claim arises out of the notorious and widely-publicised collapse of the Abraaj Group, believed to be the largest ever collapse of a private equity platform (valued at over $13.6 billion) as a result of years' worth of alleged financial mismanagement and fraud, whilst the Group purported to act as a world leader in ethical, impact investing. Acted for Mr Jafar, the Founder of Crescent Petroleum, who brings claims in deceit against certain Abraaj Group entities in respect of loans of over US$300 million procured in a belated attempt to rescue the business.

Republic of Mozambique fraud dispute

Commercial Court, ongoing

Substantial fraud proceedings involving allegations of fraudulent wrongdoing against former officials of the Republic of Mozambique. Acting for two secondary market purchasers in multiple claims against Credit Suisse International and the Republic of Mozambique arising out of the US$2 billion so called "tuna bonds" scandal.

Niru Battery v CAI

[2002] EWHC 1425 (Comm)

A case at first instance and on appeal to the Court of Appeal concerning a letter of credit fraud raising issues of contribution, recoupment and subrogation.

The Jyske Bank case

A case concerning a rogue bank manager making fraudulent investments in Spanish property.

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Bankers Trust v City of Moscow
A case concerning the diversion of a syndicated loan.

ICB v Akingbola
A fraud case in the commercial court raising Nigerian law issues and Carl Zeiss issues.

Kaiser v Silverbrook
A commercial court case concerning an anti-suit injunction and other related relief founded on alleged breaches of a joint venture agreement between a US foundation and an Australian inventor.

Protank Orinoco
A commercial court case concerning the falsification of survey records in connection with the sale of an oil tanker.

Arbitration

Michael has appeared and acted in several substantial UNCITRAL, ICC, LCIA, ad hoc and other arbitrations over the last couple of years seated in the Isle of Man, London, Paris, Russia and the US.

"Lateral thinking, very bright, great with clients, good fun."
— LEGAL 500, 2023

Cases

Private equity dispute
ICC Arbitration

A private equity dispute worth $1billion involving telecommunication assets in the United States. Related proceedings in Hong Kong and the Cayman Islands seeking worldwide injunctive and Norwich Pharmacal relief.

Axis Bank v Republic of the Maldives
Axis Bank v Republic of the Maldives.

InterDigital v Intel
An UNCITRAL arbitration for one of the world's largest computer and telecommunication CHIP and software businesses in relation to the cross licences granted in connection with a joint venture.

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GSK v Novartis
An ICC arbitration for one of the world's largest pharmaceutical groups in relation to the rights arising in connection with the development, manufacture and supply of vaccines.

GMR v Republic of the Maldives
An arbitration under the Singapore Arbitration Act concerning the termination of a concession agreement governing the development and operation of the Maldives principal international airport.

GMR v Republic of the Maldives
An arbitration under the Singapore Arbitration Act concerning the termination of a concession agreement governing the development and operation of the Maldives principal international airport.

Eaton Partners v Esso Cayman Partners
An LCIA arbitration arising out of the breakdown in the relationship between a Cayman based carried interest partner for certain special opportunity funds and a U.S. based placement agency.

GMIAL v MACL
An UNCITRAL arbitration raising issues concerning the operation of the doctrine of abuse of process in arbitration proceedings.

Concession Agreement Arbitration
An arbitration under the Singapore Arbitration Act concerning the termination of a concession agreement relating to development and operation of the main international airport of the state at issue.

Cross Border Energy
An UNCITRAL arbitration relating to cross border energy supplies.

Payment of Agency Fees
An LCIA arbitration relating to the payment of placement agency fees.

Preclusive Defences
An UNCITRAL raising issues as to the availability in arbitration of preclusive defences.

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Loan Repayment
An arbitration under the Singapore Arbitration Act concerning the liability of a sovereign state and state owned company to repay loans under a quasi guarantee.

Border & Customs Control System
An ICSID arbitration relating to a border and customs control system.

Cross Licence
An UNCITRAL arbitration for one of the world's largest computer and telecommunication CHIP and software businesses in relation to the cross licences granted in connection with a joint venture.

Development, Manufacture and Supply of Vaccines
An ICC arbitration for one of the world's largest pharmaceutical groups in relation to the rights arising in connection with the development, manufacture and supply of vaccines.

Breach of Lock Out Provisions
An ICC arbitration for a major Asian supplier of electric power in relation to the breach of the lock out provisions in an agreement concerning the acquisition of an interest in a power station from one the world's largest engineering groups.

Leveraged Acquisition
An LCIA arbitration brought under the SPA for the leveraged acquisition of a Greek chemicals conglomerate.

Co-operation and Distribution Agreement
An LCIA arbitration brought under a co-operation and distribution agreement raising intellectual property rights in a pharmaceutical MAB platform.

Intellectual Property

Michael has advised and appeared in a host of substantial breach of confidence, copyright, design right, IP licensing, passing off, patent and trademark cases in the Chancery Division, the Court of Appeal, the Supreme Court and the CJEU.

The independent legal directories credit Michael as one of a handful of leading silks in this field, noting his expertise in copyright and trade mark cases, as well as IP-related commercial contracts disputes.

"Michael's legal abilities are beyond question and he is a very effective advocate."

— CHAMBERS AND PARTNERS, 2025

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Cases

Philips v Xiaomi Technologies
Chancery Division, 2021

Jurisdiction challenge in relation to a claim for global FRAND damages for alleged breaches of patents.

Original Beauty v G4K
Advising and representing garment manufacturers in the Oh Polly copyright dispute.

Ineos v Jaguar Land Rover
Advising and representing two automobile manufacturers in connection with an ongoing registered design right dispute concerning new and vintage vehicle designs.

Interdigital Technology Corporation v Lenovo Group Ltd
[2021] EWHC 3401 (Pat); [2021] EWHC 3192 (Pat); [2021] EWHC 89 (Pat); [2020] EWHC 1318 (Pat)

Acting for Lenovo in FRAND jurisdictional and anti-suit proceedings.

IPCom GmbH v Lenovo Technology UK Ltd
Chancery Division, 2019

Resisting an application for an anti-anti suit injunction in the English court following an application for an anti-suit injunction in the United States court in relation to a worldwide technology patent dispute.

Teva Pharma v Eli Lilly
Contractual construction and patent dispute.

Conversant Wireless Licensing v Huawei
A jurisdiction dispute over the forum for the determination of FRAND licences. Acted for ZTE at first instance, in the Court of Appeal and in the Supreme Court.

GSK v Novartis
An ICC arbitration for one of the world's largest pharmaceutical groups in relation to the rights arising in connection with the development, manufacture and supply of vaccines.

UPL v ACA
A case concerning trade mark infringement in connection with the licensing and marketing of pesticides.

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Lush v Amazon

A trade mark infringement case relating to the use of Google AdWords and the results of organic searches on the Amazon.co.uk website. The case was settled in the course of the Court of Appeal hearing.

GMR v Republic of the Maldives

An arbitration under the Singapore Arbitration Act concerning the termination of a concession agreement governing the development and operation of the Maldives principal international airport.

Warner-Lambert v Generics UK

An appeal case relating to whether the pursuit of a proposed patent amendment would be an abuse of process.

Merck Sharp & Dohne Ltd & Another v ONO Pharmaceutical Co Ltd & Others

A case concerning, amongst other things, the determination of royalties in respect of the use in or in relation to the U.K. of a patented invention practised directly or indirectly by joint venture partners globally.

Saatchi v Saatchi Online

A Chancery case concerning rights in the Saatchi name.

GNIC v NBTY-EU

A Chancery case concerning the alleged breach of a trademark licence and the infringement of the licensed marks by allegedly unlicensed use.

Jack Wills v House of Fraser

A passing off and trade mark infringement case relating to a logo or sign appearing on articles of clothing.

Nestle v Cadbury

[2013] EWCA Civ 1174

A Court of Appeal case concerned with the registration of colour marks and, in particular, a shade of the colour purple.

Sky & Microsoft

[2013] EWHC 1826 (Ch)

A trademark infringement case concern with the use of the name “SKYDRIVE” on the Microsoft Windows Platform.

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Generics & Actavis v Warner-Lambert

A patent case at first instance and on appeal to the Court of Appeal concerning post trial amendments and abuse of process.

Generics (UK) v Yeda

[2012] EWCA Civ 726

A Court of Appeal case concerning the duties of in-house patent attorneys to former and current employers and the potential conflicts of interest that may arise.

Powerchord v Peeks

A case concerning the application of trade mark law and the law of passing off to start ups in the music and social media spheres.

The Racing Partnership v SIS & Others

A case concerning database right, confidence and conspiracy in relation to betting data.

Ineos v Jaguar

A trade mark case concerning the registration of vehicle shapes.

Generics v Actavis

[2015] EWHC 3370 (Pat)

A Court of Appeal case concerning, among other things, the legal principles applicable to the test of abuse of process in relation to post trial applications to amend patent claims.

Gloucester Place Music LTD v Simon Le Bon & 11 ORS (Duran v Duran)

[2016] EWHC 3091 (Ch)

A case concerning the interplay between English and foreign law in the assignment of musical copyrights governed by English law.

GSK v Wyeth

A case concerning, among other things, the principles applicable to the taking of an account of profits and assessing user based damages.

Societe Des Produits Nestle SA v Cadbury UK LTD (2017)

[2017] EWCA Civ 358

A trade mark case in the Court of Appeal concerning the registration of the KITKAT shape.

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Media & Entertainment

Michael has advised and appeared in many media and entertainment cases calling for both commercial and IP experience and expertise. He has also advised and/or appeared in defamation and confidence cases for most of the major media groups, including the BBC, The Times, The Guardian, Time Out and The Express, as well as for many politicians, journalists and celebrities. Cases include Lion Laboratories v Evans [1985] QB 526 and Hyde Park Residence v Yelland [2001] Ch. 143

ACHIEVEMENTS

Selected earlier reported cases

Commercial

- Lehman Brothers US bankruptcy
- Yukos v Rosneft [2010] EWHC 784 (Comm), [2011] 1 All ER (Comm) 172
- easyGroup v easyJet [2009] EWHC 895 (Pat)
- I-CD Publishing v Popkov / The Odnoklassniki case (2009)
- GSK v Abbott
- Welcome Break Group Acquisition
- Celltech v Medimmune
- Virgin Atlantic Airways v British Airways
- Co-Operative Wholesale Society v Green
- Advising one of the principal utility providers in the UK in relation to contractual disputes relating to the provision of an integrated IT system.
- Acting on behalf of Deutsche Bank in Commercial Court proceedings against the Norwegian export guarantee department in relation to a dispute relating to ISDA form derivatives.
- A dispute concerned with the winding-up of an offshore hedge fund.
- Bayer Cropscience v DEFRA and Friends of the Earth
- Bugging Cases
- A series of disputes raising acquiescence, estoppel, laches and waiver issues in connection with agreements governing commercial partnerships and joint ventures.

Civil Fraud, Asset Recovery & Injunctive Relief

- Niru Battery v CAI [2002] EWHC 1425 (Comm)
- The Jyske Bank case
- The Canada Trust case
- Bankers Trust v The City Of Moscow

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Arbitration

- An arbitration arising out of a military procurement partnership dispute.
- An arbitration concerning the introduction of new technologies in the coatings and cosmetics industries.
- An arbitration between one of the former CIS countries and a U.S. power supplier in respect of the use of the national grid to export power to other countries.
- Bankers Trust v City of Moscow
- Pilkington v PPG Industries

Intellectual Property

- Numatic v Qualtex [2010] EWHC 1237 (Ch)
- Specsavers v ASDA [2010] EWHC 2035 (Ch)
- BUD and Budweiser cases [2002] EWCA Civ 1534
- Lucasfilm Ltd v Ainsworth, The Star Wars case [2011] UKSC 39, [2012] 1 A.C. 208
- Inter Digital Technology Corp v Nokia
- United Biscuits v ASDA [1997] RPC 513
- Chocosuisse v Cadbury [1999] ETMR 1020
- Aspinal v Kiki James
- Philip Morris v BAT
- The European v The Economist [1998] ETMR 307
- Royal Mail
- Mars v Nestle [2005] 3 CMLR 12

VAT registration number: 245722267

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Appendix B

Materials Relied Upon

Case law from England and other common law jurisdictions

1. *Mackay v Dick* (1881) 6 App Cas 251
2. *Mona Oil Equipment and Supply Company Ltd v Rhodesia Railways Ltd (1949) 83 L1 L Rep*
3. *Newmont Property Ltd v Laverton Nickel NL* (1982) 44 ALR 588
4. *Cheall v A.P.E.X* [1983] 2 A.C. 180
5. *Abu Dhabi National Tanker Co v Product Star Shipping Ltd* [1993] 1 Lloyd's LR 397
6. *Compagnie Noga d'Importation et d'Exportation SA v Abacha (No 3)* [2002] CLC 207
7. *Stena Line Ltd v MNRPF Trustees Ltd* [2011] EWCA Civ 543; [2011] Pens. L.R. 223
8. *Reda v Flagg* [2002] UKPC 38
9. *Equitable Life v Hyman* [2002] 1 AC 408
10. *Socimer International Bank v Standard Bank* [2008] EWCA Civ 116; [2008] Bus LR 1304
11. *Chartbrook v Persimmon* [2009] UKHL 38; [2009] 1 AC 1101
12. *Hayes v Willoughby* [2013] UKSC 17; [2013] 1 WLR 935
13. *Braganza v BP Shipping* [2015] UKSC 17; [2015] 1 WLR 1661
14. *Societe Generale v Geys* [2012] UKSC 63; [2013] 1 AC 523
15. *British Telecommunications v Telefonica 02 UK* [2014] UKSC 42; [2014] 4 All ER 907
16. *Arnold v Brittan* [2015] UKSC 36; [2015] AC 1619
17. *Marks & Spencer v BNP Paribas* [2015] UKSC 72; [2016] AC 742
18. *Wood v Capita* [2017] UKSC 24; [2017] AC 1173
19. *Sheikh Al Nehayan v Kent* [2018] EWHC 333; [2018] 1 CLC 216
20. *Equitas Insurance v Municipal Mutual Insurance* [2019] EWCA Civ 718; [2020] QB 418
21. *UTB v Sheffield* [2019] EWHC 2322
22. *Bates v Post Office (No.3)* [2019] EWHC 606

23. *Duval v 11-13 Randolph Crescent* [2020] UKSC 18; [2020] AC 845
24. *Yoo Design Services v Iliv Realty Pte* [2021] EWCA Civ 560
25. *Barton v Morris* [2023] UKSC 3; [2023] AC 684
26. *King Crude Carriers v Ridgebury* [2024] EWCA Civ 719; [2025] KB 311
27. *Tesco Stores v USDAW* [2024] UKSC 28; [2025] 2 All ER 565

Cayman Islands case law

1. *Primeo Fund (In Official Liquidation) v Bank of Bermuda (Cayman) Limited* (2017 (2) CILR 334)
2. *Cayman Shores v Registrar of Lands* (2021 (2) CILR 1)
3. *Kuwait Port Authority v Williams* (2023 1 CILR 50)
4. *Cayman Shores v Registrar of Lands* (2023 (1) CILR 252)
5. *Kuwait Port Authority v Williams* [2024] UKPC 32
6. *Re Tyr Capital Partners SPC* (unreported, 21 June 2024, Doyle J)
7. *Aquapoint v Xiaohu Fan* (unreported, 4 October 2024, CICA)

Cayman Islands legislation

1. Exempted Limited Partnership Act (2025 Revision)

Bates-stamped documents

1. First Amended and Restated Limited Partnership Agreement (Nov. 1, 2012), ATP_00202247
2. Amendment No. 1 to the First Amended and Restated Limited Partnership Agreement (Jan. 1, 2014), ATP_00202344
3. Amendment No. 2 to the First Amended and Restated Limited Partnership Agreement (Aug. 15, 2014), ATP_00202349
4. Amendment No. 3 to the First Amended and Restated Limited Partnership Agreement (Sept. 1, 2014), ATP_00202357

5. Amendment No. 4 to the First Amended and Restated Limited Partnership Agreement (Apr. 1, 2015), ATP_00202362
6. Amendment No. 5 to the First Amended and Restated Limited Partnership Agreement (May 11, 2015), ATP_00202365
7. Amendment No. 6 to the First Amended and Restated Limited Partnership Agreement (Dec. 31, 2015), ATP_00202375
8. Amendment No. 7 to the First Amended and Restated Limited Partnership Agreement (May 31, 2017), ATP_00202378
9. Amendment No. 8 to the First Amended and Restated Limited Partnership Agreement (Aug. 9, 2017), ATP_00202383
10. Amendment No. 9 to the First Amended and Restated Limited Partnership Agreement (Dec. 22, 2017), ATP_00202388
11. Amendment No. 10 to the First Amended and Restated Limited Partnership Agreement (Jul. 1, 2018), ATP_00202407
12. Amendment No. 11 to the First Amended and Restated Limited Partnership Agreement (Oct. 26, 2018), ATP_00202412
13. Amendment No. 12 to the First Amended and Restated Limited Partnership Agreement (Dec. 1, 2018), ATP_00202416
14. Amendment No. 13 to the First Amended and Restated Limited Partnership Agreement (Feb. 4, 2019), ATP_00202424
15. Amendment No. 14 to the First Amended and Restated Limited Partnership Agreement (Apr. 17, 2019), ATP_00202429
16. Amendment No. 15 to the First Amended and Restated Limited Partnership Agreement (Jul. 10, 2019), ATP_00202437
17. Amendment No. 16 to the First Amended and Restated Limited Partnership Agreement (Feb. 1, 2020), ATP_00202440
18. Amendment No. 17 to the First Amended and Restated Limited Partnership Agreement (Sept. 9, 2020), ATP_00202444

19. Amendment No. 18 to the First Amended and Restated Limited Partnership Agreement (Nov. 5, 2020), ATP_00202461
20. Amendment No. 19 to the First Amended and Restated Limited Partnership Agreement (Nov. 27, 2020), ATP_00202477
21. Amendment No. 20 to the First Amended and Restated Limited Partnership Agreement (Jun. 21, 2021), ATP_00024441
22. Amendment No. 21 to the First Amended and Restated Limited Partnership Agreement (Dec. 05, 2022), ATP_00202482
23. Amendment No. 22 to the First Amended and Restated Limited Partnership Agreement (Dec. 20, 2024), ATP_00202487
24. Email from Yuri Bogdanov to Seth Harrison et al., May 15, 2025 - RIGMORA00023359 (reproduced as Exhibit 10 to the Complaint)

Pleading

1. Verified Complaint, *ATP III GP, LTD., in its capacity as general partner of ATP Life Sciences Ventures, L.P., v. Rigmora Biotech Investor One LP and Rigmora Biotech Investor Two LP*, Case No. 2025-0607-KSJM, May 30, 2025

EXHIBIT E

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

ATP III GP, LTD., in its capacity as General Partner of ATP Life Science Ventures, L.P.,	)	
Plaintiff,	)	
v.	)	C.A. No. 2025-0607-KSJM
RIGMORA BIOTECH INVESTOR ONE LP and RIGMORA BIOTECH INVESTOR TWO LP,	)	
Defendants.	)	

POST-TRIAL MEMORANDUM OPINION

Date Submitted: December 3, 2025
Date Decided: December 5, 2025

Michael A. Barlow, Shannon M. Doughty, Morgan R. Harrison, QUINN EMANUEL URQUHART & SULLIVAN LLP, Wilmington, Delaware; Garrett B. Moritz, Roger S. Stronach, A. Gage Whirley, ROSS ARONSTAM & MORITZ LLP, Wilmington, Delaware; Andrew M. Berdon, Rachel E. Epstein, Kathryn D. Bonacorsi, Jonathan M. Acevedo, Taylor L. Jones, Jenny Braun, QUINN EMANUEL URQUHART & SULLIVAN, LLP, New York, New York; Jessica T. Reese, John F. Ferraro, QUINN EMANUEL URQUHART & SULLIVAN, LLP, Boston, Massachusetts; *Counsel for Plaintiff ATP III GP, Ltd.*

Blake Rohrbacher, Daniel E. Kaprow, Christine J. Chen, Zachary R. Greer, Benjamin O. Allen, RICHARDS, LAYTON & FINGER, P.A, Wilmington, Delaware; Shannon Rose Selden, William H. Taft V, Zachary Saltzman, Natascha Born, Carl Micarelli, Sebastian Dutz, DEBEVOISE & PLIMPTON LLP, New York, New York; *Counsel for Defendants Rigmora Biotech Investor One LP and Rigmora Biotech Investor Two LP.*

McCORMICK, C.

The plaintiff is the general partner of a Cayman exempted limited partnership that holds a portfolio of Delaware life science companies. The plaintiff sued its limited partners to enforce capital calls, to force them to work in good faith to approve budgets for the portfolio companies, and to obtain declarations concerning the plaintiff's rights under the fund agreement. The funding freeze at issue here placed several of the portfolio companies at risk of insolvency, and so the court entered a highly expedited schedule leading to trial.

This post-trial decision orders specific performance of all but one of the capital calls and otherwise sides with the limited partners. The plaintiff's effort to force budget approvals rests on an implied contractual duty of good faith recognized under Cayman law, a duty that constrains the exercise of discretionary contractual rights when it is implied. Although Cayman law recognizes this implied duty, no court has implied the duty in the context of an exempted limited partnership. This court will not be the first. And the plaintiff's requested declarations that are ripe, which also implicate primarily Cayman law, do not relate to the capital call or budgeting issues that warranted expedition of this case. They relate mainly to issues pending parallel proceedings in a Cayman court. This court thus defers to the Cayman court on those issues.

That's a highly abbreviated summary of what follows. Given the precarious position of the affected portfolio companies, the court worked hard to issue this decision promptly.[1] Wasting no time on wordsmithing, this introduction foregoes an

[1] The plaintiff requested that the court issue this decision on or by December 5, 2025.

extensive and riveting account of the facts learned at trial—the deeply human story of a fund formed by two doctors-turned-businessmen motivated to develop drug therapies that improve human health, their many successful years of collaboration, the temporary surge in early stage biotech investment spurred by a global response to the pandemic, the geopolitical events and attendant adjustments to risk strategies that strained the parties' relationship, and the complex legal framework governing their dispute. Although the court streamlined the decision given the press of time, these details and more follow.

I. FACTUAL BACKGROUND

Trial took place on October 16 and 17, 2025. The record comprises 1,930 trial exhibits, live testimony from five fact witnesses and three expert witnesses, deposition testimony from four fact witnesses, and 57 stipulations of fact.[2] These are the facts as the court finds them after trial.

[2] This decision cites to: C.A. No. 2025-0607-KSJM docket entries (by docket "Dkt." number); trial exhibits (by "JX" number); the trial transcript, Dkts. 277–79 ("Trial Tr."); and stipulated facts set forth in the Parties' Stipulation and Pre-Trial Order, Dkt. 209 ("PTO"). The parties called the following fact witnesses: Yuri Bogdanov (Rigmora CEO), Seth Harrison (ATP Founder and Managing Partner), Spiros Liras (ATP Venture Partner), Dmitry Rybolovlev (Rigmora Founder), and Joseph Yanchik (ATP Venture Partner). The parties called the following expert witnesses: Ilonna Rimm (Rigmora Biotechnology Investing Expert), Mark Robbins (ATP Biotechnology Investing Expert), and Ilya Strebulaev (Rigmora Venture Capital Expert). The parties submitted the deposition transcripts of the live witnesses and called the following witnesses by deposition only: Michael Ehlers (ATP Chief Scientific Officer, Venture Partner, and Portfolio Company Officer & Director), William Engels (ATP CFO), Daniel Finkelman (ATP General Counsel), and Alexey Yakovlev (Rigmora CFO). Depositions transcripts are cited using the witnesses' last name and "Dep. Tr."

A. The Fund And The Limited Partnership Agreement

In 2012, Dr. Seth Harrison and Dr. Dimitry Rybolovlev formed Apple Tree Partners IV, L.P., which was later renamed to ATP Life Science Ventures, L.P., a Cayman Islands exempted limited partnership (the "Fund").[3]

Both Harrison and Rybolovlev were medical doctors. Harrison received his M.D. from Columbia Medical School[4] and worked as a surgeon at a New York City hospital for a year.[5] He then left the field of medicine to attend Columbia Business School.[6] After business school, in the 1990s, he joined a large venture capital firm and formed Apple Tree Partners I to hold his life-science investments.[7]

Rybolovlev received his medical degree in 1990 from Perm Medical Institute and practiced medicine for a year after.[8] He switched careers in the 1990s when the Soviet Union was privatizing.[9] Rybolovlev acquired stakes in multiple companies before consolidating his investments in the most successful, a fertilizer manufacturer named Uralkali.[10] Rybolovlev acquired voting control of Uralkali by 2000, instituted "western style" corporate governance mechanisms,[11] and took it public in 2007 on the

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[3] PTO ¶ 23.

[4] Trial Tr. at 7:22–8:1 (Harrison).

[5] *Id*. at 8:1–3 (Harrison).

[6] *Id*. at 8:2–16 (Harrison).

[7] *Id*. 8:13–21 (Harrison).

[8] *Id*. at 345:2–14 (Rybolovlev).

[9] *Id*. at 346:8–347:1 (Rybolovlev).

[10] *Id*. at 347:2–16 (Rybolovlev).

[11] *Id*. at 347:20–348:5 (Rybolovlev).

London Stock Exchange.[12] Rybolovlev sold his interests in Uralkali in 2010, personally earning around $5 billion through the transaction.[13]

Rybolovlev decided to invest the proceeds in companies addressing the "three major ways" in which, in his view, the future of "humanity will benefit the most": "health, . . . food, and entertainment."[14] He ultimately invested in a diverse array of companies intended to fulfill these goals, including a cellular-based meat producer and AS Monaco Football Club.[15] To promote human health, Rybolovlev met with fund managers in the U.S. "to find an optimal way to invest in biotech industry."[16] He ultimately determined to replicate the investment strategy that led to his success with Uralkali, creating a "family-owned pharma company" using the "apparatus" of "venture capital."[17]

In 2010, a biotech analyst at Merrill Lynch introduced Harrison to Rybolovlev.[18] Harrison liked Rybolovlev's investment strategy.[19] Harrison and Rybolovlev formed the Fund to invest in and develop biotechnology.[20]

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[12] *Id.* at 348:6–7 (Rybolovlev).

[13] *Id*. at 348:11–13 (Rybolovlev).

[14] *Id.* at 351:2–6 (Rybolovlev).

[15] *Id.* at 351:7–352:6 (Rybolovlev).

[16] *Id*. at 349:24–350:5 (Rybolovlev).

[17] *Id.* at 16:18–23 (Harrison); *id*. at 350:6–9 (Rybolovlev).

[18] *Id.* at 9:10–14 (Harrison).

[19] *Id*. at 350:14–17 (Rybolovlev).

[20] *Id*.; *id.* at 9:24–10:10 (Harrison); *id.* at 349:20–351:9 (Rybolovlev); JX-1 (LPA) at 3; JX-1574 ("Bloch Report") ¶ 15.

ATP III GP, Ltd. ("ATP") serves as the General Partner of the Fund, and Harrison is the manager of ATP.[21] The Fund's largest limited partners, contributing approximately 98% of the Fund's overall capital,[22] are Defendants Rigmora Biotech Investor One LP and Rigmora Biotech Investor Two LP, both owned by Rybolovlev's family trust.[23] The Rigmora entities are successors-in-interest to the original limited partners Blue Horizon Enterprise Ltd. and Ezbon International Ltd. (together with the Rigmora entities, "Rigmora").[24]

On November 1, 2012, the parties entered into the First Amended and Restated Limited Partnership Agreement (the "LPA"), which governs the Fund's operations.[25] The LPA is governed by the law of the Cayman Islands.[26] The parties have amended the LPA twenty-two times.[27]

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[21] PTO ¶¶ 13, 15.

[22] JX-1237 at 4 (contributions through 2024); JX 1302 at 3–5 (showing Defendants' combined contributions accounted for about 98% of the Fund's ~$2.309 billion of capital contributions as of December 31, 2024); PTO ¶¶ 57, 59–61, 63 (contributions in 2025); Trial Tr. at 469:11–22, 470:12–17 (Yakovlev) (explaining how to navigate JX-1237 and calculate total contributions); *id.* at 208:10–18 (Strebulaev). Harrison and Les Pommes have contributed $54.7 million combined. JX-1400 ¶ 44; Trial Tr. 11:16–12:5 (Harrison).

[23] PTO ¶¶ 17–20; *see also* Trial Tr. at 270:12–271:3, 271:13–15 (Bogdanov).

[24] PTO ¶ 18; *see also* Trial Tr. at 11:4–7, 25:10–17 (Harrison).

[25] LPA; *see also* PTO ¶¶ 24–25.

[26] LPA ¶ 18(g).

[27] JX-1–JX-6 (LPA and LPA Ams. 1–5); JX-8–JX-17 (LPA Ams. 6–15); JX-19 (LPA Am. 16); JX-89 (LPA Am. 17); JX-126 (LPA Am. 18); JX-132 (LPA Am. 19); JX-222 (LPA Am. 20); JX-480 (LPA Am. 20); JX-1068 (LPA Am. 22).

At issue here, the LPA provides a framework for making capital calls and approving budgets.[28] Also relevant to this litigation, the LPA contains an "Exculpation Provision" that protects ATP from liability for actions taken in good faith that are not willful fraud, willful misconduct, gross negligence, or an intentional and material breach of the LPA.[29] It as well contains a "Discretionary-Action Provision" that grants ATP the discretion to take action against any limited partner who breaches the LPA.[30] The LPA's "Global Default Provision" authorizes ATP as General Partner to declare a Limited Partner who failed to honor its capital call obligations a "Defaulting Partner," and outlines a set of remedies that ATP can elect to pursue.[31] Those remedies include imposing a "Default Charge" by reducing the limited partner's preferred units.[32]

B. The Historical Budgeting Process

The LPA authorizes the General Partner to call capital for "Projects approved by" the Limited Partners "in writing" and "in accordance with a budget therefor approved" by the Limited Partners.[33] The LPA thus granted Rigmora the right to approve budgets for projects before the General Partner can call capital for those projects.

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[28] LPA ¶ 5(a); LPA Am. 3 ¶ 3.

[29] LPA ¶ 2(g).

[30] *Id.* ¶ 18(g)(iv).

[31] *Id.* 5(c).

[32] *Id.*

[33] LPA Am. 3 ¶ 5(a)(iii).

Until late 2024, the process by which the parties agreed on budgets began with informal discussions among Rigmora's Chief Investment Officer (whoever occupied that position at the time), Harrison, and Rybolovlev.[34] For each new Series A investment, Harrison and Rybolovlev met—often in person, although Harrison lives in the United States and Rybolovlev lives in Switzerland—to discuss the opportunity, its prospects for commercial and scientific success, and funding needs.[35]

Rybolovlev personally approved every new investment informally.[36] Once he did so, ATP prepared a packet of materials to secure formal approval.[37] The packet included things like a CFIUS memorandum,[38] a request for formal budget approval,[39] and an investment memorandum.[40]

ATP employees drafted the investment memoranda,[41] which served as a "roadmap from the implementation of a project all the way to the delivery of value as measured by exits."[42] The investment memoranda included the investment thesis, the investment rationale, and an assessment of the quality of the company's

[34] Trial Tr. at 14:1–24 (Harrison).

[35] *Id.* at 31:15–32:4, 33:5–10 (Harrison); *id*. at 349:9–14, 355:4–12 (Rybolovlev).

[36] *Id.*

[37] *Id.* at 32:19–33:4 (Harrison).

[38] JX-310 at 6–7.

[39] Trial Tr. at 31:15–33:4 (Harrison); *id*. at 355:9–18 (Rybolovlev).

[40] *Id.* at 32:19–33:4 (Harrison); *id.* at 245:13–17, 251:3–13 (Liras).

[41] *Id.* at 132:8–12 (Harrison).

[42] *Id*. at 241:21–24 (Liras).

founders.[43] The memoranda also contained performance milestones by which ATP could "measure progress against stated goals."[44]

As Harrison explained, milestones supplied a useful starting point in projecting a portfolio company's performance, but the initial milestones identified in the investment memoranda became less important in middle and later stages of the investment.[45] As the portfolio companies were "developing drugs from new technologies" and "working with teams of scientists of various stripes," their progress could not easily be predicted from the outset and they would often pivot if their initial strategy was not progressing well.[46]

In this litigation, Rigmora argues that the milestones served as conditions to Rigmora's obligation to fund approved budgets.[47] For this purpose, Rigmora cites to evidence reflecting the significance that ATP placed on milestones.[48] But that

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[43] *See, e.g.,* JX-150 at 8.

[44] Trial Tr. at 242:1–6 (Liras). They also included risk mitigation strategies, which could involve analyses of comparable companies to assess the novelty of the science and its potential value to patients and investors. *Id*. at 242:6–10 (Liras).

[45] Trial Tr. at 134:5–135:13 (Harrison).

[46] *Id*.

[47] JX-1579 ("Rimm Report") Figs. 5–11; *see also, e.g.*, JX-243 at 32 (Evercrisp) (dividing funding into "six milestone-driven tranches"); JX-114 at 1, 7, 32–33 (Apertor) (establishing $50m financing in "milestone-driven tranches"); JX-269 at 27 (Red Queen) (establishing tranches "based on milestones and progress").

[48] *See* Dkt. 269 ("Rigmora Post-Trial Br.") at 8, 28 (citing investment memoranda explaining the significant of milestones, JX-243 at 32, JX-309 at 4, JX-269 at 27; Ehlers's testimony that milestones were valuable for focusing the company's management and protecting investors, Trial Tr. at 403:20–404:2 (Ehlers); and Harrison's investment deck characterizing the Fund's investing practices as "[d]iscipline funding" consisting of "[m]ilestone-based tranches infused over time," JX-2280 at 6).

evidence reflects that ATP viewed milestones as important tools for managing the portfolio companies. No evidence suggests that anyone intended the performance milestones identified in the investment memoranda to serve as conditions to Rigmora's obligation to fund budgets that it approved. Harrison and Rybolovlev never discussed nor negotiated the milestones.[49] Rigmora lacked the substantive expertise to set or track performance milestones.[50] Only two of the approved budgets contained any express milestones, and they were based on corporate strategy metrics.[51] The fact that certain of the Rigmora approved budgets contained express milestones suggests that the parties did not intend to condition the other budgets on milestones contained in the investment memoranda.

After formal budget approval, the Fund would enter into Series A stock purchase agreements with the relevant portfolio companies.[52] ATP viewed the Series A commitments as key to recruiting top scientists and staff.[53] This is because most of the Fund's portfolio companies rely on funding from the Fund exclusively.[54]

[49] *Id*. at 33:11–14 (Harrison).

[50] Bogdanov Dep. Tr. at 31:2–9; 45:23–46:10; 46:11–15; Blöchlinger Dep. Tr. at 37:17–25; Yakovlev Dep. Tr. at 30:23–31.

[51] *Id*. at 33:23–34:5 (Harrison); JX-1192 at 2.

[52] Trial Tr. at 34:19–35:2 (Harrison).

[53] JX-1174 at 2.

[54] Trial Tr. at 20:8–21:1 (Harrison).

C. Rigmora's Capital Commitments

Since the inception of the Fund, Rigmora agreed to multiple capital commitments. The LPA limits ATP's right to call capital to the maximum amount of money each limited partner, including Rigmora, committed to the Fund, which the LPA refers to as a limited partner's "Contingent Subscription."[55] Rigmora's commitments began with an initial commitment of $1.425 billion alongside the November 2012 LPA and were followed by additional commitments negotiated in connection with amendments to the LPA.

1. Rigmora Commits $1.425 Billion To Establish The Fund.

The parties agreed to capitalize the Fund with $1.5 billion initially.[56] Rigmora would supply $1.425 billion and Harrison would supply the remaining $75 million pursuant to a loan from Rigmora.[57] Rigmora made its initial capital commitments totaling $1.425 billion on November 1, 2012, under subscription agreements signed by Blue Horizon for $698.25 million and Ezbon for $726.75 million.[58] The

[55] LPA ¶ 5(a)(i).

[56] Trial Tr. at 350:18–23 (Rybolovlev).

[57] PTO ¶¶ 26–27; Trial Tr. at 23:16–25:22 (testifying that Rigmora's total subscription at the time the parties executed the LPA was $1.425 billion when combining Blue Horizon's and Ezbon's subscriptions); JX-212 at 19–23; JX-213 at 19–23; JX-216 at 19–23; Trial Tr. at 25:18–26:3 (Harrison); *id*. at 354:12–19 (Rybolovlev); *see also* JX-1, Sch. D (describing Rigmora's financing of Harrison's capital contributions).

[58] JX-212 at 19–23 (signature pages); JX-213 at 19–23 (signature pages); Trial Tr. at 25:18–22 (Harrison).

subscription agreements were "[s]ubject to the terms and conditions set forth in . . . the [LPA]."[59]

Rigmora also agreed to "make such other capital contributions and payments to the Fund as provided for in the LPA, in the manner and at the times provided in the [LPA]," and to become "bound by the terms of the [LPA]."[60] ATP's right to call capital, in addition to being limited in amount to each partner's Contingent Subscription, was restricted to contractually specified purposes.

2. The Parties Amend The LPA To Create Investment Pools.

Amendment 13 to the LPA, dated February 4, 2019, introduced a Fund structure through which commitments, assets, and contributions would be allocated and tracked across separate "pools."[61] The aim of the pool concept was to segregate money so that profits on new investments would not leak to former Fund employees.[62] As Harrison explained, "we had old teams and new teams coming in that would found [sic] new deals. So we needed to segregate their deals in a pool out of fairness."[63] Pools also allowed the parties to increase capital commitments without having to establish new entities, thus avoiding potential know-your-customer roadblocks.[64]

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[59] JX-212 ¶ 1; JX-213 ¶ 1.

[60] *Id.*

[61] JX-15 (LPA Am. 13) ¶ 17(a).

[62] Trial Tr. at 27:11–28:9 (Harrison)

[63] *Id.* at 27:13–17 (Harrison).

[64] *Id.* at 27:11–28:9 (Harrison).

Amendment 13 established two pools: Pool A, which held the existing projects, and Pool B, which held the Fund's new projects.[65] Rigmora was responsible for funding 100% of capital called for Pool B.[66] Amendment 13 stated that expenses "directly attributable" to a particular pool would be allocated exclusively to that pool with other expenses apportioned between the pools based on the relative cost basis of the remaining assets in each pool.[67] Amendment 13 identified the "Management Fee" paid to Harrison, and the "Apple Tree Life Sciences, Inc. Fee, or "ATLS Fee" for Fund expenses incurred across the portfolio companies, as expenses attributable to both pools.[68]

Amendment 13 further provided that "separate and distinct records shall be maintained for each Pool, and capital contributions . . . shall also be accounted for separately on a Pool-by-Pool basis."[69]

3. Rigmora Commits An Additional $1 Billion.

Rigmora increased its commitment to the Fund as early-stage biotech investment surged in 2020 and 2021, spurred by the global response to the Covid-19

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[65] LPA Am. 13 ¶ 17(a).

[66] *Id.*¶ 17(b).

[67] *Id.* ¶ 17(d)).

[68] JX-9 (LPA Am. 7) Schedule A ¶ 3; JX-19 (LPA Am. 13) ¶ 17(d). ATLS is a wholly owned subsidiary of the Fund that covers Fund operational expenses like facility costs, leases, rents, and employee costs. JX-9 (LPA Am. 7) Schedule A ¶ 3; Trial Tr. at 17:17–18:4 (Harrison). The parties allocated the Management Fee and ATLS Fee between the pools according to fixed percentages. LPA Am. 20 ¶ 6.

[69] LPA Am. 13 ¶ 17(a).

pandemic.[70] Amendment 17 to the Limited Partnership Agreement, dated September 9, 2020, committed Rigmora to fund an additional $1 billion to be allocated between Pool B and a new Pool C.[71] Thereafter, Pool A would consist of Rigmora's original $1.425 billion capital commitment and all economics of the Fund not expressly allocated to Pools B or C. Pools B and C would split Rigmora's new $1 billion commitment.[72]

Amendment 17 further specified that Pool B would contain: Chinook Therapeutics U.S., Inc.; Nine Square Therapeutics Corporation; and Initial Therapeutics, Inc., along with a proportionate share of the Management Fee and ATLS Fee.[73] Pool C would contain Kynos Therapeutics Ltd and any new projects after the execution of Amendment 17, along with a proportionate share of the ATLS Fee and Management Fee.[74]

Each of these pools would be funded "exclusively" by Rigmora, and "[a]ll capital invested in the Pool C Projects . . . [would] be treated as contributed to [Pool C]."[75]

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[70] Trial Tr. at 362:7–12 (Rybolovlev); *see also id.* at 402:20–22 (Ehlers); JX-1579 ¶ 19.

[71] Trial Tr. at 29:1–19 (Harrison); JX-89 (LPA Am. 17).

[72] LPA Am. 17 ¶ 20(a)

[73] *Id.*

[74] *Id.*

[75] *Id.* ¶ 20(b).

After Amendment 17, the parties executed amended subscription agreements under which Blue Horizon and Ezbon committed to contributing $490 million and $510 million, respectively, to Pools B and C.[76]

In Amendment 19, dated November 27, 2020, the parties renamed Pools A, B, and C, as Pool ATP IV, Pool ATP V-1, and Pool ATP V-2, respectively.[77] In their testimony, the witnesses further shortened the Pool names to Pool IV, Pool V-1, and Pool V-2,[78] and this decision follows suit.

D. Amendment 20 To The Limited Partnership Agreement

In 2021, while investments in early-stage biotech companies still surged, the parties decided to restructure the economic rights and obligations surrounding an existing Pool IV project called Braeburn Inc. The Fund founded Braeburn in 2012 as "a Phase 1 company."[79] By 2021, it was "market[ing] a drug for opioid addiction" and had around "$300 million in sales revenue."[80] Pool IV held Braeburn, but the company was "capital intensive."[81] So Rybolovlev agreed to fund the capital commitments to Braeburn, and ATP agreed to "change[] . . . carry economics in favor of [Rybolovlev]."[82] To facilitate this arrangement, the parties amended the LPA to

[76] Trial Tr. at 41:11–42:14 (Harrison); JX-99; JX-101.

[77] JX-132 (LPA Am. 19) ¶ 1; Trial Tr. at 28:22–24 (Harrison).

[78] *See, e.g.*, Trial Tr. at 40:19–23 (Harrison).

[79] Trial Tr. at 44:14–19 (Harrison).

[80] *Id.* at 44:13–21 (Harrison).

[81] *Id.* at 45:8–21 (Harrison).

[82] *Id*. at 45:8–24 (Harrison); LPA Am. 20 ¶ 21(b).

"segregate the investment in Braeburn."[83] Meanwhile, ATP had placed new executives in charge of existing projects.[84] This, coupled with changes at Braeburn, prompted a wholesale restructuring of Pool IV to allocate existing assets and liabilities to newly created pools and align managers' carried interests with their performance.[85]

In June 2021, the parties executed Amendment 20 to for this purpose.[86] Amendment 20 created two new pools.[87] The first, "Pool Braeburn," held Braeburn in a segregated fund for which Rigmora would be the exclusive source of capital.[88] The second, "Pool V-3," held seven companies formerly under Pool IV that "hadn't quite made it" and "would be managed by the members of our new team"[89]—Ascidian Therapeutics, Inc., Gala Therapeutics, Inc., Galary, Inc., Galvanize Therapeutics, Inc., Galaxy Medical, Inc., Intergalactic Therapeutics, Inc., and Marengo

[83] *Id.* at 44:22–45:2 (Harrison).

[84] *Id.* at 46:6–15 (Harrison).

[85] LPA Am. 20 ¶¶ 21(a), 22(a) (describing Pools V-3 and Braeburn as "consist[ing] of the assets, liabilities, income, gains, losses and expenses associated with the Partnership's investments" in the relevant portfolio companies); Trial Tr. at 44:22–45:11 (Harrison) (Pool Braeburn created to change "carry economics" for investment in Braeburn); *id.* at 39:21–41:10, 46:6–15 (Harrison) (Pool V-3 set up to segregate economics for new managers).

[86] Trial Tr. at 44:11–46:15 (Harrison).

[87] LPA Am. 20 ¶¶ 21, 22.

[88] LPA Am. 20 ¶ 21; *id.* ¶ 21(b) (stating that capital shall be called from Rigmora "exclusively" and that "[n]o other Partner shall be required to contribute capital to or in respect of Pool Braeburn").

[89] Trial Tr. at 46:6–15 (Harrison).

Therapeutics, Inc.[90] Amendment 20 also reduced Rigmora's funding commitments to Pool IV.[91]

The parties dispute whether Rigmora agreed to increase its overall capital commitments through Amendment 20. Before Amendment 20, Rigmora had committed a total of $2.425 billion: $1.425 billion to Pool IV and $1 billion to Pools V-1 and V-2.[92] Of that amount, Rigmora had contributed approximately $1.3 billion[93] to Pool IV and $58.5 million to Pools V-1 or V-2.[94] Rigmora's commitments thus left around $1.067 billion in head room in its Contingent Subscription to achieve the then contemplated projects.[95] In this litigation, Rigmora argues that $1.067 billion was

[90] LPA Am. 20 ¶ 22(a).

[91] LPA Am. 20 ¶ 24.

[92] PTO ¶ 30; JX-212 at 19–23 (Blue Horizon SA signature pages); -213 at 19–23 (Ezbon SA signature pages); LPA Am. 17 ¶ 20(a) (committing an additional $1 billion to Pools B and C); JX-99 ¶ 1; JX-101 ¶ 1; LPA Am. 19 ¶ 1 (renaming Pool A to Pool IV and Pools B and C to Pools V-1 and V-2 respectively).

[93] *See* JX-221, Tab "Capital Contributions – ATP IV," Cells D163, E163 (stating Ezbon and Blue Horizon contributed $662,918,351.14 and $636,921,696.00 to ATP IV respectively, which combined equals $1,299,840,047.14).

[94] *See id.*, Tab "Capital Calls – V-1 and V-2," Adding cells D23 and D47, the totals for Rigmora's contributions to V-1 and V-2, yields $58,486,530.

[95] As described in the legal analysis, immediately prior to Amendment 20's adoption, Rigmora committed $2.425 billion to the Fund. PTO ¶ 30; JX-212 at 19–23 (Blue Horizon SA signature pages); JX-213 at 19–23 (Ezbon SA signature pages); LPA Am. 17 ¶ 20(a); JX-99 ¶ 1; JX-101 ¶ 1; LPA Am. 19 ¶ 1. Rigmora's combined contributions to all pools immediately prior to Amendment 20's adoption was $1,358,326,577.14. JX-221, Tab "Capital Contributions – ATP IV," Cells D163, E163 (showing Rigmora's total contributions to Pool IV as $1,299,840,047.14); *id.*, Tab "Capital Calls – V-1 and V-2," Cells D23, D47 (showing Rigmora's total contributions to Pools V-1 and V-2 as $58,486,530). Subtracting Rigmora's capital contributions of $1,358,326,577.14 from its then current Contingent Subscription of $2.425 billion yields unfunded capital commitments of $1,066,673,422.86.

more than enough to accomplish anticipated projects. And the parties did not expressly amend the subscription agreements in connection with Amendment 20 as they had with prior LPA amendments.[96]

But Amendment 20 and communications leading up to it, all during the biotech boom, reflect that the parties anticipated unfunded commitments exceeding $1.067 billion, and total commitments from Rigmora exceeding $2.425 billion.

In May 2021, Harrison emailed a draft outline of the transaction to Rigmora's then-CEO and CIO Anna Kolonchina, who indicated Rigmora's assent to the outline a few days later.[97] The outline included a section titled "Remaining Unfunded Capital Commitments" of approximately $1.385 billion as follows: (1) $20 million for ATP IV; (2) $220 million for ATP V-1; (3) $664 million for ATP V-2; (4) $291 million for new Pool ATP V-3; and (5) $189.95 million for new Pool Braeburn.[98] Adding up Rigmora's obligation for those commitments (approximately $1.384 billion),[99] to its then-funded commitments ($1.3 billion) equals $2.684 billion.

On its face, Amendment 20 reflects a minimum in unfunded commitments of approximately $2.814 billion, more than those of the May 2021 outline.[100]

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[96] *See* PTO ¶¶ 26–27, 30 (listing amendments to subscription agreements).

[97] JX-195 at 1 (Kolonchina circulated a revised draft and stating it "make[s] sense to start drafting a long form" amendment).

[98] JX-195 at 4–5.

[99] Of that, Rigmora would be responsible for approximately $1.384 billion based on its agreement to fund 99.6028% of Pool IV and Pool V-3 and 100% of the remaining pools. JX-195 at 1, 4–5.

[100] LPA Am. 20.

Amendment 20 reflected anywhere from $304.6 to $309.2 million in contributions to Pool V-3[101] (more than the $291 million reflected in the outline). It also reflected a minimum of $189.9 million to Pool Braeburn plus a commitment to fund additional securities fees (thus likely more than the flat $189.9 million reflected in the outline).[102] Amendment 20 reduced the $1.425 billion commitment to Pool IV consistent with the email (subtracting approximately $92 million to even the

[101] As discussed in the legal analysis, to Pool V-3, Amendment 20 reflected a total commitment of $500 million. LPA Am. 20 ¶ 22(b). This included $189,544,660 in "deemed commitments" to the existing investments into the Pool V-3 companies and implied approximately $310.5 million in new commitments. *Id.* The new commitments expressly identify two new expenses totaling $305.8 million: $70,853,399 in previously approved, unfunded budgets and $235 million in additional commitments to those companies. *Id.* Amendment 20 further states that "Ezbon, Blue Horizon, Harrison, and Les Pommes shall contribute 50.7974%, 48.8054%, 0.1869%, and 0.2103%, respectively," to any unfunded remaining budgets. *Id.* Assuming the implied $310.5 million, then Rigmora would be required to contribute approximately $309.2 million. Assuming the expressly noted $305.8 million, then Rigmora would be required to contribute approximately $304.6 million. So Amendment 20 reflects anticipated additional capital commitments from Rigmora to Pool V-3 in a range of $304.6 million to $309.2 million.

[102] As discussed in the legal analysis, to Pool Braeburn, Amendment 20 reflected Rigmora's commitment of $189.9 million. LPA Am. 20 ¶ 21(a). Amendment 20 also committed Pool Braeburn to "any additional securities of Braeburn acquired by the Partnership after the date of Amendment 20" and fees and expenses related to Pool Braeburn. *Id.* ATP's former CFO Engels testified that the Braeburn later purchased $30.6 million in additional Series B shares for Braeburn and called approximately $9 million in expenses to Pool Braeburn. Engels Dep. Tr. at 355:3–15. The parties executed a settlement agreement in December 2024 to resolve a dispute that Rigmora initiated in Cayman. Trial Tr. at 71:5–10 (Harrison). Pursuant to that settlement, the parties waived the then-remaining $21.3 million in commitments to Pool Braeburn. Engels Dep. Tr. at 355:16–21; JX-1068 (LPA Am. 22); JX-1072.As Engels explained, these commitments "netted out to a total obligation of $208,355,000." Engels Dep. Tr. at 355:22–356:4. Even assuming that the parties did not know the precise costs of the additional securities, fees, and expenses at the time of executing Amendment 20, the Amendment anticipated $189.9 million in additonal funding to Braeburn.

commitment to the funds already contributed and adding the then-anticipated $20 million in fees)[103] but did not reduce the $1 billion commitment to Pools V-1/V-2.

And immediately following Amendment 20, ATP began calling committed capital from Rigmora and Harrison. On June 24, 2021, ATP transmitted a capital call to Rigmora for approximately $16.4 million, consisting of $2 million for Pool Braeburn, $1.6 million for Pool V-2, and $12.8 million in expenses charged to the pools, all split among Rigmora and Harrison in line with their commitment obligations to the pools.[104]

This capital call—and every call that followed—included as "Exhibit A" a tracker of the outstanding capital commitments.[105] The tracker included the amount of funds being called from each party on a pool-by-pool basis (including the breakdown of ATLS fees proportionately for each pool), and the amount of unfunded committed capital that would remain following the capital call.[106] Exhibit A to the June 2021 capital call evidenced a total remaining commitment of $1.447 billion.[107] Before this

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[103] The parties agreed to reduce Pool IV's remaining unfunded commitments from the initial $1.5 billion to approximately $20 million to be used to cover expenses, including the cost of litigating a then-ongoing portfolio company exit. JX-1061 (LPA Am. 20) ¶ 24. The actual cost of expenses related to that litigation, and what was ultimately paid into Pool IV after Amendment 20, totaled around $33.3 million. Engels Dep. Tr. at 321:20–322:22. Adding Rigmora's share of those costs to the amount Rigmora contributed to Pool IV prior to Amendment 20 equals $1,333,059,463.85. *See infra* § II.A.1.

[104] Trial Tr. at 47:10-48:3 (Harrison); JX-230 at 1–2.

[105] JX-230 at 4; Trial Tr. at 48:19–50:18 (Harrison).

[106] *Id.*

[107] JX-224 at 3.

litigation, no one at Rigmora (including then-CEO Kolonchina, who received these calls) ever objected to the accounting.[108]

E. Amendment 22 To The Limited Partnership Agreement

Biotech markets retrenched in 2022,[109] and Russia invaded the Ukraine early that year.[110] Rigmora's investment strategy and risk appetite changed after these events,[111] and the parties' relationship began to strain.[112] By 2023, Rigmora had started conditioning its capital contributions on budget reductions.[113] Braeburn had achieved commercial success.[114] The FDA approved Braeburn's drug Brixadi, transforming Braeburn into a commercial-stage company with multi-billion dollar potential.[115] In July 2021, Braeburn entered into a royalty purchase agreement with ATP which gave ATP a license to Braeburn's IP and the associated royalty

[108] Trial Tr. at 48:19–51:1 (Harrison); *id.* at 474:22–476:10 (Yakovlev) (testifying that he was "not . . . aware" of anyone at Rigmora challenging these records)

[109] *Id.* at 382:10–19 (Rybolovlev).

[110] *Id.* at 199:2–3 (Strebulaev).

[111] JX-463 at 2–3; Trial Tr. at 51:15–52:12 (Harrison). At trial, Rybolovlev denied that the invasion of Ukraine played a part in Rigmora's decision making. Trial Tr. at 352:20–353:3 (Rybolovlev).

[112] *See* Trial Tr. at 51:15–52:12 (Harrison).

[113] JX-698.

[114] PTO ¶¶ 48–50.

[115] *Id.*

payments.[116] And Rigmora demanded immediate distributions from Braeburn.[117] ATP refused the demand.[118]

Ultimately, ATP sued in the Cayman Islands to compel Braeburn distributions.[119] In that litigation, Rigmora previewed the defense it would make in this litigation. On October 10, 2024, Kolonchina filed an affidavit in the Cayman court.[120] The LPA authorizes the General Partner to request capital calls in "an amount equal to, *but not in excess of*" the "Contingent Subscriptions" as that term is defined in the LPA.[121] In an October 10, 2024 affidavit, Kolonchina stated, for the first time, that Rigmora's "combined Contingent Subscriptions are US$2.425 billion."[122] Because Rigmora had already funded $2.6 billion, in Rigmora's view, "it is therefore impossible" that Rigmora had outstanding Contingent Subscriptions.[123]

Rigmora did not stand on its newly formed legal defense in the Cayman litigation but instead agreed to meet its capital obligations.[124] The day that she filed her affidavit, Kolonchina stated in an email to ATP that Rigmora would pay a

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[116] JX-586 at 2,

[117] Trial Tr. at 67:9–68:14 (Harrison); PTO ¶¶ 51, 53.

[118] PTO ¶ 52.

[119] PTO ¶ 54; Dkt 57 ("Answer") ¶¶ 98, 100.

[120] JX-1002.

[121] LPA ¶ 5(a)(i) (emphasis added).

[122] JX-1002 ¶¶ 23–26.

[123] *Id.*

[124] JX-998 at 1.

pending capital call although it was "not obligated to do so."[125] By October 2024, Rigmora was explicitly disclaiming any obligation to respond to capital calls for budgets already approved in writing, insisting that further payments would be made only "on a voluntary basis."[126]

During this time, ATP portfolio companies were nearing the end of their Series A commitments and initial budgets, making new budgets critical.[127]

Harrison flew to Monaco and suggested to Rybolovlev that they settle the Cayman litigation.[128] This led to a "couple of days of meetings" where they "agreed to the basic outline of a settlement in order to continue to work together."[129] On December 20, 2024, the parties implemented the settlement terms through Amendment 22 to the LPA.[130]

Through Amendment 22, Rigmora agreed to "discuss" budgets for ATP portfolio companies in exchange for distributions from a newly secured Braeburn royalty valued at approximately $700 million.[131] Amendment 22 provides:

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[125] *Id.*

[126] *Id.*

[127] Trial Tr. at 72:6–73:10 (Harrison).

[128] *Id.* at 68:22–69:1 (Harrison).

[129] *Id.* at 68:24–69:4 (Harrison).

[130] *See* LPA Am. 22 ¶ 26; Trial Tr. at 275:6–21 (Bogdanov).

[131] LPA Am. 22 ¶¶21, 26. By this time, Braeburn was a successful public company and the Braeburn royalty reflected the Fund's share of the company's cash flows. Trial Tr. at 64:18–65:12 (Harrison). ATP removed the Braeburn royalty from the Fund into a separate entity, ATP LLC. *Id.* Amendment 22 allowed Rigmora to receive distributions from the Braeburn royalty. LPA Am. 22 ¶ 21.

> From and after the date of [Amendment 22], the General Partner and [Rigmora] shall discuss new budgets for the Partnership in accordance with the process set forth in this Agreement to allow it to invest in Ascidian Therapeutics, Inc., Aulos Bioscience, Inc., Nereid Bioscience, Incorporated, Nine Square Therapeutics Corporation and Replicate Bioscience, Inc. sufficient amounts to enable each of them to operate for a period of twelve months after the remaining unfunded amounts, if any, under their respective existing approved budgets are expected to have been fully utilized . . . .[132]

Amendment 22 noted, on its face, the projected dates by which each company would run out of cash: January 2025 for Aulos, February 2025 for Replicate, April 2025 for Nereid, May 2025 for Nine Square, and first quarter 2026 for Ascidian.[133]

At the same time, Amendments 22 created a "Royalty Financing" contingency. It stated that "[i]f any approval of a new budget is given by [Rigmora], *such approval shall be contingent upon* at least $300 million being realized (including through deemed distributions) by [Rigmora] on a sale or financing of its interest in ATP LLC."[134] Put differently, no budget for entities identified in Amendment 22 would be approved, and thus subject to capital calls, absent a Royalty Financing.

Harrison expected that the parties would work together to obtain the Royalty Financing.[135] These expectations were consistent with the terms of Amendment 22, which mandates that, in pursuing the financing, as well as approving budget proposals, each party would "do and perform, or cause to be done and performed, all

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[132] LPA Am. 22 ¶ 26.

[133] *Id.* ¶ 26.

[134] *Id.* ¶ 26 (emphasis added).

[135] Trial Tr. at 77:24–78:3 (Harrison).

such further acts and things . . . as any other party may reasonably request in order to carry out the intent and accomplish the purposes of this Amendment and the consummation of the transactions contemplated hereby."[136]

F. Rigmora's New Management Shifts Funding Priorities And Delays Budget Approvals.

In October 2024, Kolonchina left Rigmora,[137] and Rybolovlev promoted Yuri Bogdanov to CIO and co-CEO.[138] Rybolovlev had known Bogdanov for two decades.[139] Before Rigmora, Bogdanov had worked for Uralkali in Russia.[140] Prior to his elevation at Rigmora, Bogdanov worked as a special advisor for several years which entailed giving a "second opinion" and challenging management on investments and other matters.[141] Bogdanov was promoted due to his "general understanding" of Rigmora's operations.[142] But Rybolovlev identified drawbacks to his elevation. For one, "background i[n] auditing" made him "very, very, conservative."[143] Also, Bogdanov had no prior involvement in the Fund's company budgets nor any meaningful exposure to biotech.[144]

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[136] LPA Am. 22 ¶ Miscellaneous.

[137] Trial Tr. at 378:7–14 (Rybolovlev)

[138] *Id.* at 271:24–272:7 (Bogdanov).

[139] Trial Tr. at 273:20–274:1 (Bogdanov).

[140] *Id.*

[141] *Id.* at 272:14–20 (Bogdanov).

[142] Rybolovlev Dep. Tr. at 51:5–52:4.

[143] *Id.* at 50:17–51:3.

[144] Trial Tr. at 272:8–24, 316:24–13 (Bogdanov).

1. Bogdanov Proposes Drastically Reducing Rigmora's Investment In ATP.

Years before his elevation, Bogdanov was working as an investment analyst at Rigmora and recommended that Rigmora slash its investment in ATP.[145] By the fall of 2022, Rigmora's investment strategy and macroeconomic trends landed Rigmora in what Bogdanov described as a "liquidity crisis."[146] To address it, Bogdanov prepared an internal memorandum proposing a change in investment strategy.[147]

In the memorandum, Bogdanov observed that "two to three years ago" a crisis with similar characteristics had been "resolved by liquidating the private equity portfolio."[148] He warned that Rigmora's structure, with mainly "venture businesses (biotech [and] gaming) carries similar risks that had led to the current crisis: poorly predictable money inflows (divestments) and massive outflows (capital calls), which will grow exponentially if the divestments are delayed."[149]

Bogdanov's solution was straightforward: "The current cash gap can be closed by drastic reduction in venture investment (and particularly biotech) and divestiture."[150] Otherwise, Rigmora would remain trapped in "the same logic of

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[145] JX-446.

[146] *Id.*; *see also* Trial Tr. at 352:10–15 (Rybolovlev) (testifying that Rigmora did "not like to keep a lot of liquidity on hand" because "the money, whether it's cash, it has to work").

[147] JX-446; *see* Trial Tr. at 318:2–321:23 (Bogdanov).

[148] JX-446 at 1.

[149] *Id.*; Trial Tr. at 320:11–18 (Bogdanov).

[150] JX-463 at 2; Trial Tr. at 320:3–7 (Bogdanov).

shifting money from less risk (Private Equity Funds, real estate, boat) to more risky assets with 'fire extinguishing' from time to time" to resolve periodic emergency cash shortages.[151]

According to Bogdanov, Rigmora would "most importantly" re-encounter emergency cash shortages due to "guaranteed obligations on . . . biotech venture projects."[152] "Biotech ventures" referred to the Fund.[153] And although the Fund could be "a source of capital gains," it could not "serve as a reliable source of cash for funding [Rigmora's] regular needs."[154] If Rigmora were to exit its biotech investments, it would gain a "buffer" of at least $300 million—enough to mitigate Rigmora's liquidity crisis and achieve a "stable position" long term.[155] Bogdanov concluded that the way "to start moving towards the cash buffer" was "to drastically reduce ATP payments."[156]

[151] JX-463 at 2; Trial Tr. at 320:19–24 (Bogdanov).

[152] JX-440 at 2 (emphasis added). This email was sent by Bogdanov's associate, but Bogdanov testified that he is "the author." Bogdanov Dep. Tr. 162:5–10.

[153] Trial Tr. at 320:8–10 (Bogdanov).

[154] JX-440 at 2.

[155] JX-446 at 1.

[156] JX-462 at 2 (emphasis added); Bogdanov Dep. Tr. at 174:14–21.

Bogdanov believed that Rigmora could achieve "drastic" payment reductions through "tight controls," including "clear rules for review and approval of new projects."[157] His "priority number one [was] to create the cash buffer."[158]

2. Bogdanov Delays Budget Approvals To Reduce Funding Commitments.

No one gave Bogdanov any "specific instructions" on his new priorities when he became CIO and co-CEO in late 2024.[159] All indications are that Bogdanov set his fall 2022 plans in motion and began implementing a shift toward reducing long-term investments and building a cash buffer by cutting funds to ATP.

Meanwhile, ATP was on the verge of crisis. That is what prompted Harrison to make settlement overtures to Rybolovlev, overtures that led to Amendment 22 and Rigmora's commitment to discuss new budgets. And ATP wasted little time after executing Amendment 22 before sending Rigmora proposed budgets.[160]

Bogdanov had negotiated Amendment 22 for Rigmora and remained ATP's point of contact.[161] On December 24, 2024, Harrison emailed Bogdanov budget requests for:[162] Auolos, "align[ing] with management's recommendation for the middle scenario of $28M"; Replicate, for "$11M"; and Nine Square, "with a budget

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[157] JX-462 at 2; Bogdanov Dep. Tr. at 173:16–22.

[158] JX-462 at 2.

[159] Trial Tr. at 342:20–343:3 (Bogdanov).

[160] JX-1079 at 1; Trial Tr. at 79:10–80:5 (Harrison).

[161] Trial Tr. at 271:24–272:7, 275:2–5 (Bogdanov).

[162] JX-1079 at 1.

request of $15M" (the "Budgeting Requests").[163] Harrison also explained that he had attached materials concerning budgets for: Nereid, which could merge with Marlinspike and "utilize Marlinspike's remaining budget" and therefore required no additional funds; and Ascidian, which would "require more discussion and time to understand" due to "contingent variables" expected to "emerge" in the coming year.[164]

Harrison provided a spreadsheet showing "expected tranching by quarter for 2025," plus access to data rooms with "supporting materials for the new budgets."[165] ATP had not historically provided this level of information when requesting budget approval.[166] Harrison testified at trial that ATP provided this information "to make sure [Rigmora] understood that after the settlement agreement we were being radically transparent."[167] Bogdanov forwarded Harrison's email to Rigmora's analyst, Zufar Iskhakov, exclaiming "Let's start. Merry Christmas!"[168] This seems like a positive response. Yet Bogdanov testified in deposition that he did not mean "let's start approving budgets."[169] And events that followed seem to suggest that he meant "let's start" imposing "tight controls."

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[163] *Id.*

[164] *Id.*

[165] *Id.*

[166] Trial Tr. at 80:18–81:7 (Harrison).

[167] Trial Tr. at 128:6–9 (Harrison).

[168] JX-1079 at 1.

[169] Bogdanov Dep. Tr. at 228:13–15.

Bogdanov prioritized Replicate, which Harrison had warned would "run out of cash by the third week of January."[170] Over the holidays, Bogdanov's team prepared a "list of the follow-up diligence questions,"[171] which Bogdanov sent to Harrison.[172]

Bogdanov testified that this was appropriate. He characterized the list as "basic diligence questions on the company's past performance" and "how the company executed its original plan."[173] The questions determine the "most important indicators before [] mak[ing] any decision on the new budget."[174]

Harrison, on the other hand, viewed Bogdanov's diligence questions as bizarre.[175] As he testified, Rigmora "already knew about" Replicate and had "approved the budget[.]"[176] Replicate had pivoted "from oncology to a rabies vaccine over the course of the fund's investment."[177] As Harrison explained: "this is a company that we founded I think in 2021 and on which we'd reported extensively, were the sole owner, and we had many, many, many conversations about with [Rybolovlev]."[178]

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[170] Trial Tr. at 291:11–16 (Bogdanov).

[171] *Id.* 291:17–20 (Bogdanov).

[172] JX-1107 at 1–5.

[173] Trial Tr. at 292:1–8 (Bogdanov).

[174] *Id.* at 292:9–15 (Bogdanov).

[175] Trial Tr. at 129:3–5 (Harrison).

[176] *Id.*

[177] *Id.* at 128:19–23 (Harrison); JX-1107 at 3.

[178] Trial Tr. at 82:23–83:3 (Harrison).

Rigmora's diligence requests ignored this history. Some of the requests were open-ended, seeking, for example, narratives explaining whether Replicate had "lost its differentiation," and how its "technology evolved over the past four years compared to its main peers."[179] When confronted on cross-examination about whether he knew if his diligence questions could "be answered in a reasonable amount of time," Bogdanov admitted: "I didn't know."[180]

Rigmora ultimately approved Replicate's budget.[181] But the budgeting experience for Replicate marked a departure from the parties' historically collaborative approach over the Fund's twelve-year history and, in that way, foretold events to come.

3. To Move Forward, Harrison Proposes Reallocating Committed Funds To Clinical-Stage Companies.

Additional meetings occurred in March 2025 in Monaco to discuss the budgeting efforts contemplated by Amendment 22, including Aulos, Ascidian, and Marengo.[182] Bogdanov continued to issue requests for extensive information in connection with the budgeting process.[183] And ATP continued responding to those requests.[184] The senior management teams for those budgets under review flew

[179] *Id.* at 130:4–16 (Harrison); JX-1107 at 3.

[180] *Id.* at 328:17–329:1 (Bogdanov).

[181] *Id.* at 87:4–17 (Harrison); *id.* at 295:13–18 (Bogdanov).

[182] *Id.* at 92:15–18 (Harrison).

[183] *Id.* at 293:3–19 (Bogdanov).

[184] *Id.* at 94:5–24 (Harrison); JX-1222 at 1.

overseas, as did consultant Bill Grossman, whom ATP engaged for Bogdanov's and Rybolovlev's benefit.[185]

The Monaco meetings, however, did not result in approved budgets for Aulos, Ascidian, or Marengo.[186] Nor had Rigmora made any progress toward Royalty Financing.[187] With the understanding that the only capital the Fund would receive from Rigmora would be capital called within approved budgets, Harrison proposed as a compromise that the parties reallocate funding to "move some of the clinical projects along."[188] He proposed reallocating some of the approved budget amounts from the preclinical companies to clinical companies.[189]

Harrison put the reallocation proposal forward although he believed that the preclinical projects had value.[190] He engaged Rigmora to "attempt to minimize any need for near-term cash funding."[191] He sought to neutralize Rigmora's "incessant refrain that it faced cash flow issues and that it either could not, or would not, meet the funding needs of the Pool V-1 and V-2 portfolio companies."[192]

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[185] Trial Tr. at 95:1–18 (Harrison). Grossman assessed courses of action for Aulos. *Id.* at 95:19–96:6. Eventually, Rybolovlev deferred to Harrison's expertise before agreeing, in Harrison's words, "we should do Aulos." *Id.* at 95:24–97:15 (Harrison).

[186] *Id.* at 97:16–18 (Harrison).

[187] *Id.* at 98:1–12 (Harrison).

[188] *Id.* at 97:19–98:20 (Harrison).

[189] *Id.* at 98:21–99:2 (Harrison).

[190] *Id.* at 101:19–102:7 (Harrison).

[191] JX-1336 at 1.

[192] *Id.*

4. In Response To A Hostile Reaction From Rigmora, Harrison Withdraws The Reallocation Proposal.

Rigmora did not agree to Harrison's reallocation proposal.[193] At first, Rigmora seemed receptive to the approach. On May 9, Harrison held a Zoom call with Bogdanov, Rybolovlev, and Anna Batarina, an ATP partner.[194] At this meeting Harrison provided a brief introduction and then offered a more formal presentation.[195] In response, Bogdanov and Rybolovlev said that a presentation would be unnecessary because it is moving in the right direction, and the next step would be to speak with Rigmora's lawyers.[196]

Harrison spoke with Rigmora's lawyers on May 12, 2025.[197] Harrison characterized the call as an "ambush."[198] In his view, the lawyers distorted the purpose and meaning behind his reallocation proposal, saying to Harrison "it's obvious that you think the preclinical companies are worthless, otherwise why would you have proposed this reallocation."[199] Harrison withdrew the proposal during the May 12 call.[200]

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[193] Trial Tr. at 99:3–6 (Harrison).

[194] *Id.* at 47:20–23, 99:7–15 (Harrison).

[195] *Id.*

[196] *Id.*

[197] *Id.* at 99:8–100:8 (Harrison).

[198] *Id.* at 100:18–21 (Harrison).

[199] *Id.* at 101:2–12 (Harrison).

[200] *Id.* at 305:2–20 (Bogdanov).

G. Rigmora Disclaims Any Outstanding Capital Commitments To ATP.

Rigmora ratcheted up the parties' level of conflict further on May 15, 2025, when Bogdanov emailed ATP an alarming communication (the "May 15 Email").[201]

In the email, Bogdanov declared that the Fund should cease further funding of seven preclinical companies, which he referred to as the "Early-Stage Companies," and which all had approved yet unspent budgets.[202] He claimed those companies had "no way for a path to commercial success," had "failed to meet the milestones set out in the investment memoranda on which [Rigmora's] initial funding was premised," and there was "no third party interest."[203] In describing the companies as dead-ends, the May 15 Email contorted the purpose of Harrison's reallocation proposal, misstating that Harrison "hold[s] a similar view" that "further funding of those Early-Stage Companies will waste the ATP Fund's assets."[204]

Although Rigmora had already approved budgets for the preclinical companies, Bogdanov invited a "detailed explanation" of why, despite the companies' supposed unworthiness, Rigmora should "contribute further capital" to the preclinical companies.[205] Bogdanov stated Rigmora's intent to "comply" with the LPA but

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[201] JX-1319 at 1.

[202] *Id.*

[203] *Id.*

[204] *Id.*

[205] *Id.*

conditioned its cooperation on whether ATP could "demonstrate that the LPA allows" ATP to call further capital.[206]

And although the parties had just spent months discussing budgets for the four clinical-stage companies, and ATP had called capital for those companies on December 24, 2024, Bogdanov conditioned any further funding for those companies on ATP's agreement to "wind down or liquidate the Early-Stage Companies."[207]

Bogdanov gave ATP an ultimatum: liquidate the preclinical companies with already approved budgets to obtain funding for companies during clinical trials. Rigmora stated that it would not even "consider" the budgets for clinical-stage companies until ATP agreed to release Rigmora from its obligations to meet capital calls for already-approved budgets and abandon existing investments through liquidation or wind down.

The May 15 Email demanded "objective information" to "facilitate the discussion" of any "new budgets"— ignoring the past five months' of data and erecting new hoops for ATP to jump through.[208]

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[206] *Id.*

[207] *Id.* Bogdanov did not address the two preclinical companies Nereid and Nine Square that had already expended their initial Series A funding. *See id.*

[208] *Id.*

In the penultimate sentence, the May 15 Email stated that Rigmora did "*not presently have any outstanding capital commitments to ATP Fund* and therefore has full discretion on whether to agree to fund any new investment proposals."[209]

H. ATP Calls Six Months Of Capital.

The May 15 Email ultimatum left ATP with very few options. ATP decided to lean on its contractual rights. On May 30 and June 1, the GP called $87.76 million in capital needed to maintain six months of research activity for ten companies—the seven preclinical companies as well as Replicate, Marengo, and Ascidian—and $19,371,099 in ATLS Fees and partnership expenses (the "Capital Calls").[210] The capital called and unfunded approved budgets are below:

[209] *Id*. (emphasis added).

[210] *See* JX-1387 at 1; JX-1388 at 1; JX-1390 at 1; JX-1391 at 1; JX-1393 at 1; JX-1394 at 1; JX-1395 at 1; JX-1396 at 1; JX-1397 at 1; JX-1398 at 1; JX-1415 at 1; *see also* Trial Tr. at 110:8–21 (Harrison) (testifying that the figures were keyed to estimates for six months of budgets, with the goal of permitting company survival and "following forward on . . . research plans"); *id.* at 392:8–11 (Rybolovlev) (corroborating Harrison's view that six-months' worth of money permits a company's "normal functioning").

Company	Pool	Capital Called	Unfunded Approved Budget[211]
Aethon	ATP V-2	$5,000,000	$8,000,000
Apertor	ATP V-2	$7,100,000	$19,400,000
Ascidian	ATP V-3	$6,000,000	$6,000,000
Deep Apple	ATP V-2	$9,000,000	$9,000,000
Evercrisp	ATP V-2	$7,000,000	$49,000,000
Initial	ATP V-1	$7,000,000	$19,880,000
Marengo	ATP V-3	$29,960,000	$29,960,000
Marlinspike	ATP V-2	$6,300,000	$36,275,000
Red Queen	ATP V-2	$6,400,000	$23,600,000
Replicate	ATP V-2	$4,000,000	$13,000,000
TOTAL:		$87,760,000	$214,170,000

Except for Replicate, for which the GP issued a revised capital call on June 1, 2025, the Capital Calls were due on June 13.[212] The revised Replicate capital call was due June 16, 2025.[213] ATP issued Default Notices on June 17, 2025.[214] With ATLS Fees and the June 1 revision, the Capital Calls totaled $101,103,759. Rigmora has never contributed capital in response to any of the Capital Calls.[215]

I. ATP Files This Litigation.

Concurrently with sending the May 30 capital calls, ATP filed this suit.[216] The Verified Complaint (the "Complaint") asserts five Counts.

- In Count I, ATP claims that Rigmora breached the LPA and Amendments 17, 18, and 20 to the LPA, by refusing to engage in

[211] JX-1622.

[212] *See* JX-1387 at 1; JX-1388 at 1; JX-1390 at 1; JX-1391 at 1; JX-1393 at 1; JX-1394 at 1; JX-1395 at 1; JX-1396 at 1; JX-1397 at 1; JX-1398 at 1; JX-1415 at 1.

[213] JX-1415 at 1.

[214] *See, e.g.*, JX-1620.

[215] PTO ¶ 78.

[216] Dkt. 1, Verified Complaint ("Compl.") ¶¶ 23, 183–196.

substantive discussions of new budgets, imposing improper conditions to the occurrence of budget discussions, and repudiating any obligation to consider new budgets.

- In Count II, ATP claims that Rigmora breached or repudiated its obligations under the LPA to fund capital calls made consistent with the budgets it approved.
- In Count III, ATP claims that Rigmora breached its implied obligations under Cayman law to act rationally and in good faith in exercising discretionary rights (absent clear language to the contrary) by refusing to consider requests for new budgets for the Fund's clinical-stage portfolio companies.
- In Count IV, ATP seeks a declaration that the Global Default Provisions of the LPA warrant a Global Default penalty on Rigmora—not on a project-by-project or pool-by-pool basis, but across all of the Limited Partner's interests in the Fund.
- In Count V, ATP seeks a declaration that the Fund is entitled to exculpation, under Paragraph 2(g) of the LPA, for filing this action.

ATP moved to expedite proceedings due to the impending shutdown of several of the affected portfolio companies for lack of funding.[217] The court granted the motion to expedite over Rigmora's opposition and scheduled trial for September.[218]

J. Rigmora Files Competing Litigation In The Cayman Islands.

On June 2, Rigmora filed a Writ of Summons against ATP in the Grand Court of the Cayman Islands.[219] Rigmora resurrected its argument debuted in the prior Cayman litigation—that Rigmora committed $2.425 billion in Contingent Subscription, Rigmora has already made capital commitments in excess of that amount, and thus Rigmora is not required to fund any further capital calls under the

[217] Dkt. 1, Pl.'s Mot. to Expedite Proceedings ¶ 1.

[218] Dkt. 31; Dkt. 39 at 43:8–22.

[219] PTO ¶ 11.

LPA.[220] Four days later, Rigmora filed a Winding Up Petition against ATP in the same court (together with the Writ of Summons, the "Cayman Litigation").[221] Rigmora argued that it had lost trust and confidence in ATP due to ATP's "mismanagement and lack of probity[.]"[222] And Rigmora sought to accomplish through the Cayman court what Bogdanov had unilaterally demanded in the May 15 Email—a liquidation.

K. Forum Jockeying Ensues.

Through motion practice in the competing lawsuits, the parties fought bitterly over the dominance of their preferred forums. On June 9, 2025, Rigmora moved to dismiss ATP's claims and a motion to stay this proceeding pending the resolution of the Cayman Litigation. Three days later, Rigmora filed an ex parte summons in the Cayman Litigation seeking an injunction barring ATP from declaring Rigmora in default of the LPA or issuing any further capital calls.[223] ATP responded by moving to stay the Cayman Litigation.[224]

This court denied Rigmora's motion to dismiss or stay these proceedings, concluding that its motion relied on convenience defenses that it waived in the LPA, and that ATP's allegations supported a finding of irreparable harm to multiple

[220] JX-1416 ¶¶ 4–5.

[221] PTO ¶ 11.

[222] JX-1417 ¶ 4.

[223] JX-1434.

[224] JX-1446.

Delaware entities absent expedition.[225] The Cayman court entered Rigmora's requested injunction and scheduled trial for January 2026 (the "Writ Injunction").[226] And ATP withdrew its motion to stay the Cayman Litigation.[227]

The parties began a sprint to trial in both fora.[228] The parties engaged in further motion practice in these proceedings, filing a combined five motions to compel in one month.[229] This court continued the September trial to October based on Rigmora's claim that ATP's late-produced documents prejudiced its ability to prepare for trial.[230] When seeking a continuance, Rigmora stated that its trial team "may not be able to review [the documents] in time to integrate them into their preparations for the trial[,]" and that "[t]here's no question that there's been actual prejudice" to Rigmora.[231]

Rigmora used its newfound time secured by the continuance to return to the forum fight. Rigmora filed an emergency motion in the Cayman court based on the late-produced documents, seeking the appointment of provisional liquidators to take

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[225] Dkt. 56 at 51:10–52:18. The LPA contains provisions (i) selecting both Delaware and the Cayman Islands as the exclusive forums for related suits, and (ii) waiving all venue and forum non conveniens defenses as to suits filed in Delaware or the Cayman Islands.

[226] JX-1439 ¶¶ 1–2; JX-1446.

[227] JX-1533 ¶ 5.

[228] *Id.* ¶¶ 6, 16.

[229] *See* Dkts. 92, 113, 141, 143, 186.

[230] Dkt. 225.

[231] Dkt. 215 ¶ 7; Dkt. 238 at 13:3–4.

control of the Fund.[232] The Cayman court scheduled a hearing on the emergency motion for October 31.[233]

ATP responded to Rigmora's new advances in the Cayman Litigation by petitioning this court for an emergency status quo order that would prevent Rigmora from pursuing relief in the Cayman court pending resolution of this action.[234] After an initial hearing on the motion for a status quo order,[235] Rigmora agreed not to pursue a hearing on the emergency application in the Cayman court before October 31 and would provide notice to this court of any change in position.[236] The parties ultimately reached a resolution on the status quo order that involved Rigmora withdrawing its emergency application in the Cayman Litigation. [237]

The court held a two-day trial from October 16, 2025 through October 17, 2025.[238] The parties completed post-trial briefing on November 12, 2025, presented post-trial arguments on November 21, 2025, and submitted the Schedule of Evidence on December 3, 2025.[239]

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[232] Dkt. 232 (Pl.'s Mot. for Status Quo Order Br.) at 5–6.

[233] *Id.* at 3.

[234] *Id.*

[235] Dkt. 261.

[236] Dkt. 267 at 7:13–8:13.

[237] Dkt. 267 at 7:13–8:13.

[238] Dkt. 259.

[239] Dkt. 265 (ATP Post-Trial Opening Br.); Dkt. 262 (Rigmora Post-Trial Br.); Dkt. 272 ("ATP Post-Trial Reply Br."); Dkt. 282 (Schedule of Evidence).

L. The Current Status Of The Portfolio Companies

The Capital Calls and Budgeting Requests affect 13 portfolio companies—nine preclinical and four in clinical trials.[240]

The eight preclinical companies—Aethon, Apertor, Deep Apple, Evercrisp, Initial, Marlinspike, Nine Square, and Red Queen—have shown merit in addressing a major unmet therapeutic need. In some instances, initial research and data provided pivot points for the preclinical companies to refocus their efforts on unexpected, more fruitful avenues. ATP personnel, including Harrison and Venture Partner Spiros Liras, Ph.D., testified to these facts, which were further expounded upon by ATP's expert, Robbins Dr. Mark Robbins, Ph.D, J.D.,[241] whose analysis of the preclinical companies, individually and in aggregate, indicated "significant

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[240] *See* JX-1390 (Aethon May 30 Capital Call); JX-1391 (Apertor May 30 Capital Call); JX-1393 (Deep Apple May 30 Capital Call); JX-1394 (Evercrisp May 30 Capital Call); JX-1395 (Initial May 30 Capital Call); JX-1397 (Marlinspike May 30 Capital Call); JX-1398 (Red Queen May 30 Capital Call); JX-1387 (Ascidian May 30 Capital Call); JX-1396 (Marengo May 30 Capital Call); JX-1415 (Replicate June Capital Call). To recap, ATP initially sent a capital call for Replicate on May 30, 2025 for $13 million (JX-1399), but it later issued a revised and superseding capital call for $4 million on June 1. JX-1415. ATP sent the Budgeting Requests for Replicate, Ascidian, Aulos, and Nine Square to Rigmora in a December 24, 2024 email. JX-1079. ATP never sent Rigmora a formal Budgeting Request to increase Marengo's budget. Marengo's management first sought additional money from the Fund in its presentation to Rybolovlev and Bogdanov in Monaco on March 12, 2025. JX-1222, at 147. They requested the Fund commit an additional $75 million to Marengo above what it had already budgeted for the company. *Id.* But Rigmora did not approve the request coming out of the Monaco meetings. Trial Tr. at 97:16-18 (Harrison). Later, on May 19, four days after Bogdanov refused to provide further funding or consider additional budgets unless certain "Early Stage Companies" were wound down, ATP asked Rigmora to discuss (in good faith) and approve a new budget for Marengo. JX-1349. ATP then estimated Marengo's additional funding needs to be $63 million. *Id.*

[241] *See, e.g.,* Trial Tr. at 74:13–20 (Harrison); *id.* at 246:23–247:16 (Liras).

scientific and clinical potential."[242] ATP offered Robbins as an expert on pharmaceutical and biotechnology industry custom and practice to evaluate the scientific and clinical potential of the treatments being developed by the Portfolio Companies.

The four companies in clinical trials—Aulos, Ascidian, Marengo, and Replicate—are similarly promising.[243] ATP has placed each under the direction of a talented group of founders and leaders, including past biotech CEOs who have sold their companies to pharma giants like Bristol Myers Squibb and Amgen for billions of dollars,[244] holders of several patents,[245] and seasoned pharma executives and scientific leaders.[246] The clinical stage companies are all currently engaged in active clinical trials[247] and have generated interest from potential third-party collaborators.[248]

The negative impacts of a funding default for early-stage life sciences companies are severe. These impacts include "[t]alent loss," "[d]elayed, abandoned,

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[242] JX-1573 (Robbins Opening) ¶¶ 23(iv), 38; Trial Tr. at 183:13–23 (Robbins).

[243] Robbins Report ¶¶ 15, 124–159,

[244] *Id.* ¶ 125.

[245] *Id.* ¶¶ 133–134.

[246] *Id.* ¶ 155.

[247] *Id.* ¶¶ 126–128; 137–142; 149–150; 157.

[248] *Id.* ¶ 131 (Aulos' developing partnerships with Pfizer, Regeneron), ¶ 143 (Replicate's partnership with leading Brazilian pharma company, and negotiations with Novo Nordisk), ¶ 152 (Marengo in partnerships with Ipsen and Gilead), ¶ 158 (Ascidian partnership with Roche, and discussions with Lilly, Regeneron, and Bayer).

disrupted R&D," [d]ifficulty in restarting halted or delayed [] trials," "[d]ifficulty attracting future investments or partners, and [n]egative market perception in general."[249] The sudden discontinuation of funding can lead creditors to trigger bankruptcy proceedings and force a sale of the companies for "a fraction of their actual value."[250]

ATP has kept the affected portfolio companies alive during this litigation by scaling down operations with the goal of preserving "critical projects" and "key employees," and trying to operate with a skeleton crew without destroying the company.[251] This has involved "mov[ing] companies [] out of facilities, heavy negotiations with landlords, sales of capital equipment, consolidations, reduction of research programs," and terminating approximately 70% of employees across all companies.[252] One company has been forced to cede platform technology back to the source institution.[253] Despite entering survival mode at great expense to the companies, ATP does not "believe [the creditors] will hold off for much longer" and that the Fund is "likely to lose the assets."[254]

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[249] JX-1572 ("Rao Report") ¶ 67; *see also* Trial Tr. at 60:19–61:10 (Harrison); *id.* at 165:5–21 (Yanchik).

[250] Robbins Report ¶ 162; *see also* Trial Tr. at 165:17–21 (Yanchik).

[251] Trial Tr. at 113:14–114:12 (Harrison); *id.* at 163:21–23 (Yanchik); *id.* at 266:3–7 (Liras).

[252] *Id.* at 113:14–20 (Harrison); *id.* at 162:23–163:6 (Yanchik).

[253] *Id.* at 113:21–114:1 (Harrison).

[254] *Id.* at 163:3–6, 165:17–21 (Yanchik).

Operationally, the companies are in a form of "stasis" and could be revived upon receipt of funding.[255] But the window for revival is closing, because "whenever you stop a research organization, it starts to deteriorate."[256]

II. LEGAL ANALYSIS

In the Pretrial Order and in post-trial briefing, the parties narrowed their disputes to four issues. First, is ATP entitled to specific performance of the Capital Calls under the LPA? Second, did Rigmora breach a duty, implied by common law, to exercise its discretion to approve budgets in good faith?[257] Third, is ATP entitled to a declaration that it did not violate the LPA by bringing this action or that Rigmora is a Defaulting Partner as defined in the LPA? Fourth, is ATP entitled to attorney's fees and expenses incurred in connection with this lawsuit? ATP bears the burden of proof on each of its claims.[258]

A. Capital Calls

The parties' dispute over the Capital Calls centers on two parts of Paragraph 5(a) of the LPA: Paragraph 5(a)(i), which allows the GP to call capital in amounts up to but not "in excess of" the Limited Partners "Contingent

[255] *Id.* at 163:17–165:4 (Yanchik); *see also id.* at 114:2–12 (Harrison).

[256] *Id.* at 164:18–167:2 (Yanchik).

[257] In the Pre-Trial Order, ATP sought a declaration that Rigmora waived or otherwise forfeited its voting and budget approval rights, but dropped this request after trial. *See generally* Dkt. 265 ("ATP Post-Trial Opening Br.").

[258] *See AB Stable VIII LLC v. Maps Hotels & Resorts One LLC*, 2020 WL 7024929, at *49 (Del. Ch. Nov. 30, 2020), *aff'd,* 268 A.3d 198 (Del. 2021).

Subscriptions";[259] and Paragraph 5(a)(ii), which requires that any capital call be for a purpose stated in the LPA.[260] The parties' competing positions raise two sets of issues: Under Paragraph 5(a)(i), were the Capital Calls in excess of Rigmora's unfunded Contingent Subscriptions? Under Paragraph 5(a)(ii), were the Capital Calls for contractually specified purposes? If the first set of issues go ATP's way, the court must also determine whether ATP is entitled to specific performance of the Capital Calls. To obtain specific performance, ATP bears the burden of showing the existence of terms that it seeks to enforce by clear and convincing evidence.[261]

This contract analysis is governed by Cayman law, consistent with the LPA.[262] The parties dispute the LPA's meaning. Under Cayman law, a court interprets a written contract according to "the intention of the parties by reference to what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the

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[259] LPA ¶ 5(a)(i).

[260] LPA ¶ 5(a)(ii).

[261] Which party bears the burden of proof is a procedural question governed by Delaware law, but the nature of the burden is arguably a substantive issue governed by Cayman law. *See In re IBP, Inc. S'holder Litig.*, 789 A.2d 14, 53 (Del. Ch. 2001). Yet Rigmora cited Delaware law on the nature of the burden. *See* Rigmora Post-Trial Br. at 29 (citing *Vill. Prac. Mgmt. Co. v. West*, 342 A.3d 295, 321 (Del. 2025)). And ATP did not brief it, so this decision applies Delaware law.

[262] LPA ¶ 18(g)(i) (stating that the "terms and provisions" of the LPA "shall be construed under the laws of the Cayman Islands"); PTO ¶ 25. The elements to prove a breach are: (1) a valid contract, (2) a breach of that contract, and (3) damages arising from the breach. JX-1588 ("Phillips Report") ¶ 56 (citing *Chitty on Contracts* at [4-001] (35th ed. 2024); *accord Kuroda v. SPJS Hldgs.*, 971 A.2d 872, 883 (Del. Ch. 2009) (reciting the same elements for a claim of breach of contract under Delaware law)).

context to mean."[263] The goal is to "ascertain the objective meaning of the language which the parties have chosen to express their agreement."[264] The court employs "an iterative process by which each suggested interpretation is checked against the provisions of the contract and its commercial consequences are investigated."[265] But "[c]ommercial common sense is only relevant to the extent of how matters would or could have been perceived by the parties, or by reasonable people in the position of the parties, as at the date that the contract was made."[266]

1. Paragraph 5(a)(i) – Funding Commitments

Rigmora argues that Rigmora has committed $2.45 billion on an aggregate basis as the Contingent Subscription and contributed $2.69 billion, and that the Capital Calls are thus necessarily "in excess of" the Contingent Subscription.[267] ATP argues that Rigmora made over $545.5 million in unfunded commitments to the pools and over $2.85 billion in total commitments across all pools, leaving head room for the Capital Calls. ATP also argues that Rigmora's $2.69 billion calculation double-counted pools of funds that were transferred or reallocated, such that Rigmora's

[263] Bloch Report ¶ 23 (quoting *Arnold v. Britton*, [2015] UKSC 36 at [15]).

[264] Bloch Report ¶ 23 (quoting *Wood v. Capita* [2017] UKSC 24 at [10]); Phillips Report ¶ 61 (same).

[265] Bloch Report ¶ 25 (citing *Wood*, [2017] UKSC 24 at [12]).

[266] Bloch Report ¶ 24 (citing *Arnold*, [2015] UKSC at [19]; *see also* Phillips Report ¶ 60 (also citing *Arnold*, [2015] UKSC at [15], [17]–[21]).

[267] *See* Rigmora Post-Trial Br. at 32, 38–40.

actual contribution is $2.3 billion. In all events, therefore, there is head room to meet the Capital Calls.[268]

The parties' dispute on the meaning and application of Paragraph 5(a)(i) thus raises three sub-issues: What is the Contingent Subscription amount, $2.425 billion as Rigmora contends or over $2.85 billion as ATP argues? What has Rigmora contributed to date, $2.65 billion as Rigmora contends or $2.3 billion as ATP argues? And do the Capital Calls of $101,103,759 fall within any delta between the Contingent Subscription and Rigmora's contributions?

a. Rigmora's Contingent Subscription is $2.425 billion.

The parties dispute both how to calculate the Contingent Subscription (in the aggregate by Limited Partner or pool-by-pool) and Rigmora's total commitments. The threshold issue concerning how to calculate the Contingent Subscription is largely beside the point because ATP has not proven that Rigmora committed over $2.85 billion.[269] ATP reaches the $2.85 billion by adding and deducting the amounts reflected in Amendment 20 to the $2.425 in subscription agreements.

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[268] ATP Post-Trial Opening Br. at 8–9, 54–58; ATP Post-Trial Reply Br. at 13–14.

[269] It bears noting that Amendment 13 to the LPA seems to mandate a pool-by-pool approach. Under the heading "Separate Pools," it provided that "all of the Partnership's assets and liabilities shall be divided into two separate pools" and "separate and distinct records shall be maintained for each Pool, and capital contributions, distributions, income, gains, losses and expenses *shall also be accounted on a Pool-by-Pool basis*." JX-15 ("LPA Am. 13") ¶ 17(a) (emphasis added). ATP satisfied its obligation to track the Contingent Subscription amount on a Pool-by-Pool basis by circulating a detailed "tracker" of funded and unfunded commitments each time it issued a capital call. *See, e.g.*, JX-230; *see also* Trial Tr. at 48:19–49:21 (Harrison).

Broken down by Pool, beginning with Pool IV, recall that the parties initially contributed $1.5 billion to Pool IV and Rigmora contributed $1.425 billion of that amount.[270] In Amendment 20, the parties agreed to reduce the Pool IV commitment to the amount already contributed, plus expenses.[271] By Amendment 20, Rigmora had contributed $1,299,840.047.14 to Pool IV.[272] The parties originally anticipated $20 million in expenses but ultimately incurred around $33,351,890.42.[273] Adding

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[270] *See* PTO ¶¶ 26–27; JX-212 at 19 (Blue Horizon $698,250,000 subscription); JX-213 at 19 (Ezbon $726,750,000); JX-216 at 18 (Harrison $75 million subscription); JX-1, Sch. D.

[271] LPA Am. 20 ¶ 24.

[272] *See* JX-221, Tab "Capital Contributions – ATP IV," Cells D163, E163 (stating Ezbon and Blue Horizon contributed $662,918,351.14 and $636,921,696.00 to ATP IV respectively, which combined equals $1,299,840.047.14).

[273] It was $33,351,890.42 and Rigmora's 99.6028% of that amount was $33,219,416.71. *See* JX-224 at 3 (capital call for $320,590 of expenses for Pool IV); JX-382, at 3 (capital call of 4,749,982.91 in expenses for Pool IV); JX-318, at 3 (capital call for $1,960,789.97 in expenses for Pool IV); JX-487 at 3 (capital call for $8,435,798.52 in expenses for Pool IV); JX-568 at 3 (capital call for $4,000,000 in expenses for Pool IV); JX-585 at 3 (capital call for $280,790.62 in expenses for Pool IV); JX-609 at 3 (capital call for $5,000,000 in expenses for Pool IV); JX-652 at 3 (capital call for $5,200,000 in expenses for Pool IV); JX-718 at 3 (capital call for $1,500,000 in expenses for Pool IV); JX-740 at 3 (capital call for $ 368,717.64 in expenses for Pool IV); JX-823 at 3 (capital call for $874,363.01 in expenses for Pool IV); JX-878 at 3 (capital call for $299,903.33 in expenses for Pool IV); JX-1185 at 3 (capital call for $24,533.02 in expenses for Pool IV). The limited partners also received two capital calls in December 2024 seeking funds relating to the ATLS Fee for the first half of 2025, partnership expenses for the second half of 2024, and the 2024 ATVM management fee. JX-1075 at 3; JX-1086 at 5. The calls sought $375,354.80 from Pool IV and about $15 million across all pools. *See id.* Rigmora initially refused to fund those calls. JX-1085. ATP later discovered that it overcharged the ATLS Fee due to an accounting error and it returned $599,225.46. JX-1172. It is unclear how that refund was allocated across the various pools, but later records indicate that the December calls were reconciled to $336,502.41 for Pool IV. *See* JX-1237, Tab "Pool V-4 Total," Cell E152.

Rigmora's share of the fee to the amount contributed by Rigmora equals $1,333,059,463.85.

Pools V-1 and V-2 are straightforward. Rigmora contributed $1,000,000,000 to Pools V-1 and V-2 in September 2020 in connection with Amendment 17.[274]

Pool V-3 requires some math. According to ATP, Rigmora contribute $310 million to Pool V-3 through Amendment 20. ATP relies on new Paragraph 22(b) of Amendment 20, which provides that:

> ATP V-3 shall have capital commitments of $500,000,000, including without limitation (i) the $189,500,000 of capital deemed to have been contributed as provided below, (ii) the $70,853,399 of capital comprising the Prior Budgeted ATP V-3 Follow-on Investments and (iii) approximately $235,000,000 in investments anticipated to be made in new Portfolio Companies . . . .[275]

This language does not expressly reflect an additional $310 million capital commitment. To reach $310 million, ATP subtracts the "deemed" contributions of $189,544,660 from the total commitment of $500 million.[276] ATP ignores the $70,853,399 in previously approved unfunded budgets for Pool V-3 companies and $235 million, which add up to $305.9 million, not $310 million.

Last is Pool Braeburn. According to ATP, Rigmora contributed $189.9 million to Pool Braeburn through Amendment 20 and agreed to contribute capital sufficient

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[274] Trial Tr. at 29:1–19, 41:11–42:14 (Harrison); LPA Am. 17; JX-99; JX-101.

[275] LPA Am. 20 ¶ 22(b).

[276] *Id.* Here is the math: $500,000,000 – $189,544,660 = $310,455,340. Rigmora is responsible for 99.6028% of the capital contributions for Pool V-3. *See id.* So, Rigmora is responsible for $309,222,211.39 of the Pool V-3 commitments, which rounds up to $310 million.

to cover additional expenses, which Pool Braeburn ultimately incurred. ATP relies on new Paragraph 22(b) of Amendment 20, which provides that Pool Braeburn includes "$189,900,000 in unfunded previously approved budgets," as well as "additional securities of Braeburn acquired by the Partnership after the date of Amendment 20," and management fees and expenses discussed in the Amendment.[277] ATP adjusts the $189.9 million based on later events—ATP acquired $30.6 million in additional securities and was allocated $9 million in expenses, bringing the total commitment to $229.5 million.[278] Through Amendment 22, ATP distributed to Rigmora the royalty held in Pool Braeburn and thus Rigmora "no longer had an obligation to fund the remaining amounts on the royalty purchase agreement," which was $21.3 million.[279] ATP therefore "reduced the obligation to Pool Braeburn by that amount, which netted out to a total obligation $208,355,000."[280]

In summary, in a snapshot, here is how ATP builds to the "over $2.85 billion" figure:

Pool	**Rigmora's Commitment**
Pool IV	1,333,059,463.85
Pools V-1/V-2	1,000,000,000
Pool V-3	309,222,211.39
Pool Braeburn	208,335,616.81
Total	2,850,617,292.05

[277] LPA Am. 20 ¶ 21(a).

[278] Engels Dep. Tr. at 94:3–10; JX-1565, Cell G8.

[279] Engels Dep. Tr. at 355:22–356:3, 355:16–355:21.

[280] Engels Dep. Tr. at 356:2–4; ATP Post-Trial Reply Br. at 11, although by the court's math, it nets out to $208,200.

Rigmora takes issue with ATP's interpretation of Amendment 20 as a capital commitment. Rigmora advances three main arguments to that effect: Rigmora first appeals to the commercial context. Rigmora next argues that interpreting Amendment 20 as a subscription agreement is inconsistent with ATP's contemporaneous representations.[281] Rigmora last contends that Amendment 20 does not read like a subscription agreement and is not sufficiently clear and convincing in its terms to be treated like one.[282]

Rigmora's first argument based on the commercial context of Amendment 20 is misguided. Rigmora argues that Amendment 20 "was entered into less than a year after the $1 billion increase in the LPs' Contingent Subscriptions, when the Fund had over $1 billion in uncalled Contingent Subscriptions remaining."[283] According to Rigmora, "there was no need to increase the capital commitment when Amendment 20 was executed, no reason to think the parties did so, and no reason to think they would have done so without following the same formalities used to increase the Contingent Subscriptions a few months earlier."[284]

Rigmora's commercial-context argument, however, ignores the plain text of Amendment 20. As discussed above, on its face, Amendment 20 reflects a minimum in unfunded commitments of approximately $2.814 billion, far more than the $2.425

[281] *Id.* at 35–36.

[282] *Id.* at 36–37.

[283] *Id.* at 37; *see* JX-1237 at 4 (schedule of capital activity).

[284] Rigmora Post-Trial Opening Br. at 37.

billion Rigmora conceded. This argument also ignores that biotech investment was booming in 2021 when the parties entered Amendment 20,[285] Rigmora had not yet entered what Bogdanov would later call a liquidity crisis,[286] Rybolovlev approved all of the budgets at issue in Amendment 20, and Rigmora was ATP's only source of capital.[287] If not Rigmora, who was expected to fund the approved budgets reflected in Amendment 20? This commercial context is *ATP's* strongest point.

Rigmora's second argument based on ATP's contemporaneous communications is neutral. Rigmora is correct that interpreting Amendment 20 as a subscription agreement runs contrary to many of ATP's contemporaneous representations.[288] Before the events that led to this litigation, ATP informed its banks, insurance companies, and portfolio-company landlords that its total committed capital was $2.5 billion, which is equal to Rigmora's $2.425 billion under their subscription agreements and Harrison and his family trust's $75 million.[289] And ATP's website for the Fund still lists its capital commitments as "$2.65 billion" as it has since 2020.[290] But other contemporaneous documents, like ATP's first post-Amendment 20

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[285] *See id.* at 7 ("[T]he biotech market peaked in 2020 and 2021, during the COVID pandemic[.]" (citing Trial Tr. at 402:20–22 (Ehlers))).

[286] *See* JX-446 at 1; Trial Tr. at 51:15–52:19 (Harrison).

[287] LPA Am. 20 ¶ 21.

[288] *See generally* Ehlers Dep. Tr. at 35:10–21.

[289] Trial Tr. at 460:12–461:3, 462:10–24, 463:13–464:16 (Engels); JX-834 (communicating to J.P. Morgan that "ATP has approximately $2.5 billion in committed capital").

[290] JX-128 (2020); JX-2128 (Sept. 8, 2025); *see also* About, Apple Tree Partners, https://www.appletreepartners.com/about (accessed Dec. 4, 2025).

capital call to the limited partners[291] and ATP's own accounting of capital contributions that it sent to Rigmora in March 2025,[292] suggests Rigmora did increase its Contingent Subscription through Amendment 20. These competing contemporaneous communications work neither for nor against either side. They suggest that ATP did not spend a lot of time worrying about the precise amount of Rigmora's total capital commitments in 2022. This is consistent with Harrison's testimony that the parties' enjoyed a collaborative relationship during that period.[293]

Rigmora's last argument based on the language of Amendment 20 is compelling. The parties did not execute any new or amended subscription

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[291] The first capital call issued shortly after the adoption of Amendment 20 shows unfunded capital commitments stood at $1,461,868,810 total across all limited partners and $1,460,556,241.39 for Rigmora alone. JX-224, at 3. This evidence supports ATP's position that Rigmora committed more capital through Amendment 20 as unfunded capital commitments immediately preceding Amendment 20 were $1.067 billion. *See supra* § I. D.

[292] *See* JX-1237; JX-1237, PX-513, Tab "Amendment Summary," Cells G8, N8, U8, AC8 (reflecting cumulative commitments across Pools V-1, V-2, Braeburn, V-3, and IV of 3,203,669,000.00). This accounting did not deduct deemed commitments from neither its contribution tabulations nor its tabulations on commitments, so they had no net effect on the limited partner's unfunded commitments. *See* JX-1237, PX-513, Tab "Pool V-3 Total," Cell B9 (including the $189,544,660 deemed contribution in Pool V-3's contributions); *id.*, Tab "Pool Braeburn Total," Cell B9 (including the $203,669,000 deemed contribution in Pool Braeburn's contribution's calculation); *id.*, Tab "Amendment Summary," Cells G8, N10, U8, AC9, AC11 (listing total capital commitments of $1,000,000,000 billion (Pools V-1 and V-2), $393,569,000 million (Pool Braeburn), $500,000,000 (Pool V-3), and $1,383,360,505.56 (Pool IV) for total commitments of $3,276,929,505.56 across all pools). The total commitments listed for Pools V-3 and Braeburn include the deemed commitments within Amendment 20, meaning their accounting in the capital contributions has no net effect on the amount of Rigmora's unfunded commitments. *See id.*, Tab "Amendment Summary," Cells N9, U11. Total commitments exceeding $3.2 billion indicates Amendment 20 increased Rigmora's Contingent Subscription.

[293] Trial Tr. at 51:21:52:4 (Harrison).

agreements with Amendment 20. And Amendment 20 does not expressly refer to the Contingent Subscriptions.[294] The absence of express language referencing Contingent Subscription stands in contrast to Amendments 17 and 18, which both explicitly refer to "Contingent Subscription."[295] This combination of factors is enough to suggest that the finer details of Rigmora's funding commitments were yet to be ironed out when the parties entered into Amendment 20.

Moreover, Amendment 20 does not make clear the amount of capital that Rigmora was to contribute. Amendment 20 does not expressly state that Rigmora commits to contributing its share of the $310 million to Pool V-3. Rather, ATP implies that number by deducting the "deemed contributions" from the contemplated $500 million.[296] Amendment 20 also does not state that Rigmora will contribute $208 million to Pool Braeburn. Rather, Amendment 20 states that Rigmora commits $189.9 million plus unspecified future expenses.[297]

In the end, ATP's interpretation of Amendment 20 leaves too much to interpretation. ATP must demonstrate the contractual terms that it seeks to specifically enforce by clear and convincing evidence.[298] ATP has not proven an overall Contingent Subscription amount of over $2.85 billion. Thus, regardless of

[294] LPA Am. 20.

[295] LPA Am. 17; LPA Am. 18.

[296] *See* ATP Post-Trial Opening Br. at 10, 13–14.

[297] LPA Am. 20 ¶ 21.

[298] *West*, 342 A.3d at 321.

whether calculated in the aggregate or on a pool-by-pool basis, ATP has proven that Rigmora committed no more than $2.425 billion.

b. Rigmora has contributed no more than $2.3 billion.

Ultimately, ATP need not rely on Amendment 20 to secure the relief it seeks. Rigmora claims to have contributed over $2.69 billion to date, well in excess of the $2.425 billion in undisputed commitments. But the $2.69 billion figure double counts $390 million in "deemed contributions" reallocated through Amendment 20 from Pool IV to Pool V-3 and Pool Braeburn.[299]

Double counting "deemed contributions" of Amendment 20 is inconsistent with the purpose of Amendment 20 as recounted by Rigmora. According Rigmora, the purpose of Amendment 20 was to "reallocat[e] . . . an *existing* commitment from a different pool[.]"[300] Amendment 20 was "not a new commitment."[301] Put differently, the deemed contributions were not new contributions. Moreover, counting the deemed contributions twice against Rigmora's $2.425 billion Contingent Subscription would result in Rigmora committing less than $2.425 billion to the Fund.[302] There is no evidence, either in Amendment 20 or elsewhere, that the parties intended to

[299] LPA Am. 20 ¶¶ 21(b) (stating initial deemed contributions for Pool Braeburn were $203,669,000 for Pool Braeburn and $189,544,660 for Pool V-3, which is $393,213,660; *see also* Rigmora Post-Trial Answering Br. at 38 n. 277, Ex. 1 (Strebulaev) at 2.

[300] Rigmora Post-Trial Br. at 36 (emphasis added).

[301] *Id.*; *see also id.* at 6 ("Amendment 20 created two new pools . . ." and "allocated *existing assets* and liabilities to them . . . ." (emphasis added)).

[302] LPA Am. 20 ¶¶ 21(b), 22(b) (stating initial deemed contributions $203,669,000 for Pool Braeburn and $189,544,660 for Pool V-3, which is $393,213,660 in deemed contributions total).

reduce the total amounts committed to the Fund through Amendment 20. As discussed above, the commercial context indicates the contrary.

Rigmora relies on a series of ATP communications documents to support its double counting theory.[303] Each of those documents were prepared for other purposes. Two of those documents show that ATP tabulated the limited partners' total capital commitments as more than $3.2 billion.[304] These are not figures that Rigmora stands behind.

Reducing Rigmora's $2.69 billion figure to eliminate double counting, Rigmora has contributed $2.3 billion to the Fund.

c. The Capital Calls do not exceed the difference between the Contingent Subscription and Rigmora's contributions.

ATP has proven that Rigmora committed $2.425 billion and contributed $2.3 billion. The difference is $125 million. Given Rigmora's overall contributions, there is sufficient room to fund the Capital Calls of totaling approximately $101.7 million.

2. Paragraph 5(a)(ii) – Funding Purposes

ATP issued the Capital Calls for ten portfolio companies: Aethon, Apertor, Deep Apple, Evercrisp, Initial, Marlinspike, Red Queen, and Replicate of Pools V-1

[303] *See* Rigmora Post-Trial Br. at 39–40.

[304] JX-1237, PX-513, Tab "Amendment Summary," Tab "Amendment Summary," Cells G8, N10, U8, AC9, AC11 (reflecting cumulative commitments across Pools V-1, V-2, Braeburn, V-3, and IV of $3,276,929,505.56), JX-2000, Tab "Amendment Summary," Cells G8, N8, U8, AC8 (same).

and V-2, and Marengo and Ascidian of Pool V-3.[305] ATP issued these calls to provide six months of approved budget to carry forward research plans, partnership fees, and ATLS Fees.[306]

The LPA identifies partnership fees, ATLS Fees, and budgets expenses as appropriate purposes. Subsections 5(a)(ii)(A) through (C) state that "[u]nless otherwise approved by the holders of a majority of the Preferred Units in writing," the GP:

> may only call capital, as of any time, in amounts sufficient to enable the Partnership . . . to (A) pay Partnership . . . expenses then existing or reasonably anticipated to be incurred within the next six-month period, (B) pay other Partnership . . . non-discretionary items (such as taxes and tax distributions) and satisfy other Partnership . . . expenses and obligations incurred in the ordinary course of business, [and] (C) pay the Management Fee for the next 12-month period.[307]

Subsection 5(a)(ii)(E) authorizes the GP to call capital in amounts sufficient to "invest in Projects approved by the holders of a majority of the Preferred Units in writing in accordance with a budget therefor approved by such holders of Preferred Units."[308]

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[305] *See* JX-1387 at 1; JX-1388 at 1; JX-1390 at 1; JX-1391 at 1; JX-1393 at 1; JX-1394 at 1; JX-1395 at 1; JX-1396 at 1; JX-1397 at 1; JX-1398 at 1; JX-1415 at 1; *see also* JX-1622.

[306] Trial Tr. at 109:1–110:24 (Harrison); *see also* LPA Am. 13 ¶ 17(d).

[307] LPA Am. 3 ¶ 5(a)(ii)

[308] *Id.* Amendment 3 originally provided for an ATC board of directors and made certain distinctions depending on whether a project was "being run through ATC" or not. *Id.* at 1–2. Amendment 14 excised ATC, and with it the ATC board of directors, from the LPA. JX-16 at 5 (LPA Am. 14).

Rigmora concedes that the stated purpose of the Capital Calls is proper under the LPA. Aside from Replicate, Rigmora does not dispute that it approved budgets for the calls at issue or that the calls were within the approved budgets. Nor does Rigmora dispute that partnership expenses and ATLS Fees are proper purposes for capital calls or that those expenses were improperly calculated.

Rigmora instead advances three arguments to avoid its payment obligation. First, Rigmora argues that ATP cannot call capital because ATP acted in bad faith.[309] Second, Rigmora argues that the approved budgets called for tranched funding conditioned on milestones set out in investment memoranda, which served as conditions to Rigmora's funding obligations, and which the projects did not achieve.[310] Third, as to Replicate, Rigmora argues that Replicate budget was subject to contingency set out in Amendment 22 that the LPs realize at least $300 million from a sale or financing of their interest in the Braeburn royalty, which has not yet occurred.[311]

a. Bad Faith

Rigmora argues that ATP cannot call capital because it acted in bad faith when making the Capital Calls. The LPA permits the General Partner to call capital only for a purpose enumerated in Paragraph 5(a)(ii).[312] The Cayman Islands' Exempted Limited Partnership ("ELP") Act, as adopted by the LPA, requires the General

[309] Rigmora Post-Trial Br. at 44–47.

[310] *Id.* at 40–43.

[311] *Id.* at 43–44; LPA Am. 22 ¶ 26.

[312] LPA Am. 3 ¶ 5(a)(ii).

Partner to exercise its power to call capital in good faith in accordance with its fiduciary duties—which Cayman courts have held requires it to act in the interests of the Fund's limited partners.[313] Rigmora argues that, as a plaintiff seeking specific performance, ATP must prove by clear and convincing evidence that it satisfied the LPA's requirements for all calls and that they are consistent with the ATP's fiduciary duties under Cayman law.[314]

It is unclear whether Rigmora is correct in interpreting Cayman law to mean that a General Partner must prove fiduciary compliance as a condition to enforcing capital calls. Typically, a party relying on the absence of a condition to avoid a contractual obligation bears the burden of proving its absence.[315] But ATP did not challenge this legal assertion. And the accuracy of Rigmora's legal position does not alter the outcome in any event, because there is no factual basis to question ATP's good faith.

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[313] *See* JX-2019, ELP Act § 19(1) ("A general partner shall act at all times in good faith and . . . in the interests of the exempted limited partnership."); JX-1 at 2 (requiring parties to carry on the limited partnership "in accordance with the provisions of the" ELP Act); *id.* ¶ 18(g)(i) (LPA governed by ELP Act); JX-2073, *Kuwait Ports Authority v Port Link GP Ltd* [2023] 1 CILR 50 at [34(iii)]; JX-2074, *Re Aquapoint LP*, CICA (Civil) Appeal No. 0014 of 2022, [2023], at [67].

[314] Rigmora Post-Trial Opening Br. at 44–47; *see also* Bloch Report ¶ 83.

[315] *See generally S'holder Representative Servs. LLC v. Shire US Hldgs. Inc.*, 2020 WL 6018738, at *17 (Del. Ch. Oct. 12, 2020), *aff'd* 267 A.3d 370 (Del. 2021) (TABLE); *AB Stable VIII LLC v. Maps Hotels & Resorts One LLC*, 2020 WL 7024929, at *48–50 (Del. Ch. Nov. 30, 2020), *aff'd,* 268 A.3d 198 (Del. 2021).

Harrison testified that the Capital Calls were for the purpose of funding six months of operations.[316] ATP considered numerous scenarios, evaluating how much capital to call in order to continue funding operations.[317] Harrison ultimately based the size of the Capital Calls on the portfolio companies' research plans and the partnership's expenses.[318] He excluded his own Management Fee from the Capital Calls, so none of the money would be directed to him.[319] Harrison then realized that ATP overcalled capital for Replicate based on the approved budget and corrected that Capital Call on June 1.[320] Harrison's testimony was highly credible.

To argue bad faith, Rigmora states that ATP's "correspondence demonstrates that the capital calls were made at least in part to 'put pressure on' the [Limited Partners]."[321] Rigmora bases this assertion on a May 14, 2025 email among ATP's outside attorneys.[322] The email states: "The point of making the calls is to put pressure on [Rigmora], so let's put the pressure on [Rigmora]."[323] On its face, this statement is not alarming. Contractual rights can be a source of pressure. That does not mean exercising them is an act of bad faith. Moreover, a single line in a single email among outside counsel does not undermine the extensive evidence

[316] Trial Tr. at 110:12–16 (Harrison).

[317] *Id.* at 152:7–153:14 (Harrison).

[318] *Id.* at 110:17–24 (Harrison).

[319] *Id.* at 111:4–10 (Harrison).

[320] *Id.* at 109:24–110:5 (Harrison).

[321] *Id.* at 45.

[322] Dkt. 269 at 45 (citing JX-2155 at 2).

[323] JX-2155 at 2.

demonstrating Harrison's sincere concerns about the financial health of the portfolio companies.

Rigmora's grab-bag of other arguments similarly fail. Rigmora argues that ATP delayed capital calls to maximize its litigation position.[324] But the evidence does not point to that conclusion. ATP recognized the portfolio companies' urgent need for funding and knew that Rigmora would immediately file suit in the Cayman Islands as soon as ATP issued capital calls.[325] Rigmora describes the calls as improper because ATP did not intend to distribute all the capital called to portfolio companies as required under the LPA.[326] But ATP withheld some capital to ensure that the funds would not be subject to attachment by creditors leaving the companies without funding to pay severance to employees.[327] Rigmora emphasized in briefing how the anticipated amount of capital calls evolved leading up to this lawsuit.[328] But the evidence reflects that ATP ran scenarios and considered calling capital sufficient to fund ongoing work at the portfolio companies for periods of weeks, three months, six months, and the end of calendar year 2025-2026.[329] None of this supports a finding that ATP acted in bad faith.

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[324] Rigmora Post-Trial Opening Br. at 45.

[325] *See* JX-2138 at 1–2.

[326] Rigmora Post-Trial Opening Br. at 45; LPA Am. 3 ¶ 5(a)(ii)(E).

[327] Yanchik Dep. Tr. 218:23–219:22.

[328] Dkt. 269 at 45-47.

[329] Trial Tr. at 152:5–19 (Harrison).

b. Milestones

Rigmora argues that the milestones set out in investment memoranda served as conditions to Rigmora's obligations to fund capital calls. No evidence supports this assertion.

As discussed above,[330] no evidence suggests that anyone intended the performance milestones identified in the investment memoranda to serve as conditions to Rigmora's obligation to fund budgets that it approved. Harrison and Rybolovlev never discussed nor negotiated the milestones.[331] Rigmora lacked the substantive expertise to set or track performance milestones.[332] Only two of the approved budgets contained any express milestones, and they were based on corporate strategy metrics.[333] The fact that certain of the Rigmora-approved budgets contained express milestones suggests that the parties did not intend to condition the other budgets on milestones contained in the investment memoranda. And although the Series A agreements of five companies (Marlinspike, Aethon, Aulos, Braeburn, and Replicate) originally contained milestone conditions, those conditions applied to the Fund's obligation to fund the companies, not the limited partners' obligation meet capital calls.[334]

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[330] *See supra* § I.B.

[331] *Id*. at 33:11–14 (Harrison).

[332] Bogdanov Dep. Tr. at 31:2–9, 45:23–46:10, 46:11–15; Blöchlinger Dep. Tr. at 37:17–25; Yakovlev Dep. Tr. at 30:23–25.

[333] *Id*. at 33:23–34:5 (Harrison); JX-1192 at 2.

[334] *See* JX-2201; Trial Tr. at 140:5–10 (Harrison); *see, e.g.*, JX-1329 at 64, 167, 441, 586.

Moreover, treating milestones in dated investment memoranda as a fixed condition to future funding misaligns the budgeting process with the commercial realities of biotech investing.[335] "[M]any very successful therapeutics have missed development milestones."[336] Apparent "misses" were often successful pivots that increased value. Deep Apple pivoted to obesity and secured a partnership worth up to $812 million with Novo Nordisk.[337] Apertor's pivot led to a "breakthrough publication" demonstrating "incredible" platform value, ultimately leading to delivering clinical candidates.[338] Information regarding portfolio companies' pivots were regularly reported to Rigmora in quarterly reports provided by ATP.[339]

Milestones were informative on many levels to Fund management. But Rigmora did not staff anyone with a scientific background. Rigmora went nearly thirteen years without requesting information about milestones.[340] Its interest in milestones surfaced as a defense strategy in this action, and an unsuccessful one. Rigmora cannot rely on the absence of milestone achievements to avoid its funding commitments.

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[335] Trial Tr. at 105:3–11 (Harrison); *see* JX-1583 ("Robbins Rebuttal") ¶ 26.

[336] Trial Tr. at 189:11–18 (Robbins).

[337] Robbins Rebuttal ¶ 27.

[338] Trial Tr. at 253:13–254:3 (Liras).

[339] *Id.* at 255:13–256:21, 257:2–259:1, 262:8–264:9 (Liras); *see, e.g.*, JX-0560.

[340] Trial Tr. at 332:1–333:2 (Bogdanov).

c. Replicate

Replicate is different. The Replicate budget was approved on February 12, 2025.[341] Replicate was one of the five companies addressed in Amendment 22. It is thus subject to the contingency set out in Amendment 22 stating that the LPs realize at least $300 million from a sale or financing of their interest in the Braeburn royalty.[342] Neither event has occurred. So Rigmora need not meet the call.

ATP advances a factual response to this outcome, but it is somewhat convoluted. According to ATP, when the parties executed Amendment 22 in December 2024, they expected the then-current, unfunded budget amounts for each of the five projects listed in the new Paragraph 26—including Replicate—to last for a matter of weeks. In the case of Replicate, the parties anticipated that the budget would run out in February 2025. Paragraph 26 of Amendment 22 thus called for the discussion of a new budget sufficient to enable Replicate to operate for a period twelve months after that.[343] ATP portrays the financing condition as inconsistent with the dire circumstances under which the parties executed Amendment 22.[344]

But the language of Amendment 22 is plain. It conditions Royalty Financing on budget approval, providing that "[i]f any approval of a new budget is given by the Subject limited Partner, *such approval shall be contingent upon* at least $300 million being realized (including through deemed distributions) by the Subject Limited

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[341] JX-1192.

[342] LPA Am. 22 ¶ 26.

[343] *Id.*

[344] ATP Post-Trial Reply Br. at 27–28; *see also* ATP Post-Trial Opening Br. at 29–31

Partner on a sale or financing of its interest in ATP LLC."[345] At the time, Rigmora indicated that it would not be difficult to obtain the Royalty Financing, and ATP expected that Rigmora would "do and perform, or cause to be done and performed, all such further acts and things . . . to carry out the intent and accomplish the purposes of this Amendment . . . ," including securing Royalty Financing.[346] Whether Rigmora honored this commitment is not before the court. But there is not Royalty Financing, so the Replicate budget is not approved, and ATP may not enforce Capital Calls for Replicate.

3. Specific Performance

A grant of specific performance "is a specialized form of mandatory injunction that requires a party to fulfill its contractual obligations."[347] Specific performance is appropriate when (1) a valid contract exists, (2) the plaintiff is ready, willing, and able to perform, (3) money damages are inadequate, and (4) the balance of equities tips in the plaintiff's favor.[348] To obtain specific performance, a plaintiff must prove these conditions by clear and convincing evidence.[349]

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[345] LPA Am. 22 ¶ 26 (emphasis added).

[346] LPA Am. 22 ¶ Miscellaneous.

[347] *26 Cap. Acq. Corp. v. Tiger Resort Asia Ltd.*, 309 A.3d 434, 464 (Del. Ch. 2023); *see also supra* n.260 (explaining why this decision applies Delaware law on the request for specific performance).

[348] *See Osborn ex rel. Osborn v. Kemp*, 991 A.2d 1153, 1158 (Del. 2010); *AbbVie Endocrine Inc. v. Takeda Pharm. Co. Ltd.*, 2021 WL 4059793, at *6 n.97 (Del. Ch. Sept. 7, 2021) ("It is elementary that the remedy of specific performance is designed to take care of situations where the assessment of money damages is impracticable[.]").

[349] *West*, 342 A.3d at 321.

As discussed above, ATP has proven by clear and convincing evidence that Rigmora must meet Capital Calls within approved portfolio company budgets and the Contingent Subscription with the exception of Replicate.[350] Rigmora must also fund calls issued for Fund expenses falling within those parameters.[351] Excluding Replicate, Rigmora's portion of those calls is $96,960,925.88. ATP also stands ready, willing, and able to perform.

Money damages are inadequate. The LPA sets out deadlines for meeting Capital Calls.[352] And timing matters. As discussed above, the negative impacts of a funding default for early-stage life sciences companies can be fatal.[353] The companies' research could ramp up again upon receipt of funding.[354] But they cannot stay in a holding pattern indefinitely.[355]

Further, a contractual provision stipulating the parties' preference of specific performance favors granting specific performance.[356] It is even more so when the agreement is between "sophisticated entities that bargained at arm's length."[357] In the LPA, sophisticated parties stipulated that damages for funding defaults "cannot

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[350] *See* JX-1 ¶ 5(a)(i).

[351] *See id*.

[352] LPA ¶ 5(a)(iii).

[353] Rao Report ¶ 67.

[354] *Id.* at 163:17–165:4 (Yanchik); *see also id.* at 114:2–12 (Harrison).

[355] *Id*. at 165:5–9, 166:6–167:2 (Yanchik).

[356] *See L-5 Healthcare P'rs, LLC v. Alphatec Hldgs., Inc.*, 2024 WL 3888696, at *7 (Del. Ch. Aug. 21, 2024).

[357] *See id*. (quoting *In re Cellular Tel. P'ship Litig.*, 2021 WL 4438046, at *72 (Del. Ch. Sept. 28, 2021)).

be estimated with reasonable accuracy."[358] This language supports a finding that damages would be inadequate.

Rigmora argues that ATP cannot seek specific performance of the capital calls for Ascidian, Aethon, Evercrisp, or Fund expenses because ATP has already used other Fund proceeds intended for other purposes to invest in the companies.[359] But rediverting funds to those companies was necessary to mitigate harm against them. The fact that ATP did so does not eliminate Rigmora's funding obligations.

On balance, the equities favor ATP. Rigmora has the funds available to meet the Capital Calls.[360] Moreover, the portfolio companies are developing treatments for serious medical conditions, including childhood blindness, various cancers, obesity, and neurodegenerative diseases. The public interest strongly favors preserving potentially life-saving research programs.[361]

For these reasons, ATP is entitled to specific performance of the Capital Calls excluding Replicate, or $96,960,925.88.

B. Budget Approvals

ATP claims that Rigmora breached its implied duties of good faith, honesty, and rationality when reviewing and denying the budgets circulated on December 24

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[358] JX-0001 at 25 (LPA ¶ 5(c)).

[359] Rigmora Post-Trial Br. at 47 (citing JX-2130 ¶¶ 17, 25 (listing payments for Ascidian, Aethon, Replicate, Evercrisp, and Fund expenses); PTO ¶ 64).

[360] Trial Tr. at 473:1–6 (Yakovlev).

[361] *Cf. Morabito v. Harris*, 2002 WL 550117, at *2 (Del. Ch. Mar. 26, 2002); *Bernard Pers. Consultants, Inc. v. Mazarella*, 1990 WL 124969, at *3 (Del. Ch. Aug. 28, 1990).

and for Marengo.[362] ATP does not root its claim in fiduciary obligations, nor could it. Section 19(2) of the ELP Act eliminated any fiduciary obligations, so Rigmora does not owe fiduciary obligations to the Fund.[363]

Rather, ATP's claim is based in contract law. Under English and Cayman common law, which govern this analysis,[364] a court may imply contract terms in one of two scenarios: when "the term must be necessary either to spell out what is so obvious that it goes without saying [the obviousness test] or to give business efficacy to the contract [the business-efficacy test]."[365]

ATP seeks to imply a specific set of obligations—to act honestly, rationally, and in good faith.[366] These implied duties, referred to as "*Braganza* duties" after the

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[362] ATP's claim first identified budgets for Marengo, Ascidian, and Aulos but it has since shifted to the budgets for Marengo, Aulos, Replicate, and Nine Square. *Compare* Compl. ¶ 179, *with* ATP Post-Trial Opening Br. at 66, 73.

[363] ELP Act § 19(2).

[364] LPA ¶ 18(g)(1) (stating that the "terms and provisions" of the LPA "shall be construed under the laws of the Cayman Islands, and Cayman law governs ATP's claim of breach"); PTO ¶ 25. Cayman courts view English cases as persuasive authority when Cayman law does not provide direct guidance. Phillips Report ¶¶ 19–20. Because no Cayman court has decided this issue, this opinion relies upon English authority when available.

[365] *USDAW v. Tesco Stores*, [2024] UKSC 28 at [102], available in the record as JX-2116; *see also Marks & Spencer v. BNP Paribas*, [2015] UKSC 72 at [20], available in the record as JX-2042; *Primeo Fund (In Official Liquidation) v. Bank of Bermuda (Cayman) Ltd.*, [2017] CILR 334 at [211], available in the record as JX-2056; *Cayman Shores v. Registrar of Lands*, [2021] (2) CILR 1 at [65]–[66], available in the record as JX-2120; Bloch Report ¶ 29.

[366] Phillips Report ¶ 75.

eponymous case, apply in certain circumstances when a party exercises a unilaterally conferred discretionary power under a contract.[367]

Braganza involved an employment contract between BP Shipping Ltd. and an employee who died mysteriously on one of its ships.[368] If the employee died by suicide, then BP Shipping had the discretion under the employment contract to deny his widow a contractual death benefit.[369] The company denied the widow the death benefit, and the widow sued for breach of an implied contractual term. The Supreme Court of the United Kingdom held that a party exercising a discretionary control of another's rights has an obligation to act "rationally (as well as in good faith) and consistently with its contractual purpose"[370] when a conflict of interest arises due to that control.[371] The court emphasized that the "conflict is heightened where there is a significant imbalance of power between the contracting parties."[372] To prevent abuse of discretion, the court will ensure the power is exercised in good faith and not arbitrarily, capriciously, or perversely.[373]

According to ATP, a court should imply *Braganza* duties when three factors are present: (1) the existence of a discretionary power granted to one party; (2) that

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[367] *Braganza v. BP Shipping Ltd.*, [2015] UKSC 17, at Headnote, [18]–[19], available in the record as JX-2102.

[368] *Id.*

[369] *Id.* at Headnote, [10]–[11].

[370] *Id.* at Headnote, [30].

[371] *Id.* at Headnote, [18].

[372] *Id.*

[373] *Id.* at Headnote, [30]–[31].

power's potential to harm the other party's interests; and (3) a conflict of interest where the decision-maker could exercise the power to benefit themselves at the other party's expense.[374] It is unclear whether English or Cayman courts apply the three-factor *Braganza* test for which ATP advocates. The case law supplied by the parties does not frame *Braganza* in this manner, nor does either side's expert in Cayman law. And the parties do not join issue on the precise requirements for implying contractual terms generally or *Braganza* duties specifically.[375]

It is clear, however, that contractual context matters in the analysis of whether to imply contractual terms.[376] In an effort to shortcut the analysis, Rigmora argues that a court can never imply *Braganza* duties in this specific context—on a limited partner of a Cayman exempted limited partnership.[377]

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[374] *Id.* at [18], [30].

[375] *See generally* ATP Post-trial Opening Br. at 66-76, Rigmora Post-Trial Br. at 48–60.

[376] *Braganza*, [2015] UKSC 17, at Headnote [31] ("But whatever term may be implied will depend on the terms and the context of the particular contract involved.").

[377] Rigmora Post-Trial Br. at 50–51 (citing *In re Torchlight Fund LP*, FSD 103 of 2015 (RMJ), 25 September 2018, at [1189]–[1190], available in the record as JX-2061). *Torchlight* is remarkable in a few ways. Justice Robin McMillan issued the decision *after* the parties settled the case. JX-2061.0002. He noted that "the Court was invited . . . to withdraw the Petition" in light of the settlement but had "independent discretion to decide whether to deliver its Judgment or not." *Id.* The Justice determined to deliver his Judgment in part because he believed that the two directors of the General Partner were improperly maligned by the allegations, which "the public is entitled to know." *Id.* He viewed issuing his determination a matter of "human rights as much as . . . as matter of commercial law." *Id.* He then issued a 366 page decision.

Rigmora's primary authority does not support a categorical exclusion. Rigmora relies primarily on *Torchlight Fund LP*, where a limited partner of a Cayman exempted limited partnership alleged the general partner owed *Braganza* duties when exercising a discretionary right to send a default notice to the limited partner without first consulting the limited partner.[378] In a brief discussion toward the end of a lengthy analysis, the Cayman court declined to impose *Braganza* duties.[379] The court first noted the relevance of Section 25(1) of the ELP Act, which limits court interference with remedies under partnership agreements.[380] Next, referencing Section 25(1), the court reasoned that:

> It is the view of this Court that those who enter into and participate in complex and sophisticated commercial arrangements must be taken to be fully aware of what they are doing and what the potential consequences may be. Not only are they bound in this case by the LPA but that LPA itself is further grounded in this instance by an express statutory provision [i.e., Section 25(1) of the ELP Act]. Therefore, taking into account the terms and context of this particular contract, the Court rules that the standard of review adopted in the judicial review of administration action [i.e., the implied duty] *does not apply nor does it have any relevance*.[381]

Rigmora interprets this passage to mean that a court can never imply a contractual duty of good faith under Cayman law where an express statutory

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[378] *In re Torchlight Fund LP*, FSD 103 of 2015 (RMJ), 25 September 2018, at [1189]–[1190], available in the record as JX-2061.

[379] *Id.* at [1180], [1182].

[380] *Id.* at [1188].

[381] *Id.* at [1189] (emphasis added).

provision already governs.[382] And that is a fair interpretation of *Torchlight*. But, unlike *Torchlight*, no express provision of the ELP Act governs here. Section 19(2) of the ELP Act eliminates general fiduciary obligations generally.[383] It does not eliminate implied contractual obligations. And the parties cite no statutory provision that governs a limited partner's discretion in approving budgets. *Torchlight*, thus, does not categorically prohibit this court from implying contractual duties of good faith into the LPA.

Torchlight, however, supports Rigmora's position in a more limited way. Fairly read, *Torchlight* stands for the proposition that a court will be reticent to imply *Braganza* duties in the ELP context because the power disparities that motivated *Braganza*—the power's potential to harm the other party's interest—are less present. *Braganza* involved a discretionary right wielded by a large multi-national corporation against its late employee's widow.[384] Other cases implying *Braganza* duties involve discretionary rights wielded by an insurance corporation against an insured.[385] The power disparities between the parties existed both at the time of contracting and at the time the counterparty exercised its discretionary right.[386]

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[382] Rigmora Post-Trial Br. at 51.

[383] ELP Act § 19(2).

[384] *Braganza*, [2015] UKSC 17 at [1189].

[385] *Equitas Ins. Ltd v Municipal Mut. Ins. Ltd* [2019] EWCA Civ [114]–[118], available in the record as JX-2047 (implying a term between insurers).

[386] *Braganza* does not provide clarity on the timing of when a court should assess these factors, and the parties did not specifically address this issue. Generally, "[t]he test for the implication of a *Braganza* duty is one of necessity[.]" *Horlick v Cavaco*, [2022] EWHC 2935 (KB) at [175] (citing *Equitas Ins. Ltd v. Municipal Mut. Ins. Ltd*,

The ELP context is different. As the *Torchlight* court observed: "those who enter into and participate in complex and sophisticated commercial arrangements must be taken to be fully aware of what they are doing and what the potential consequences may be."[387] And that is factually true here—both Rigmora and ATP are highly sophisticated, and the LPA was heavily negotiated. Moreover, the parties cite to no case in which applicable authorities have implied *Braganza* duties in the ELP context. And if a court is unwilling to impose implied contractual obligations on a general partner as in *Torchlight*, then it will be an exceptional case that the court imposes implied obligations on a limited partner.

This case is not the exception. Of the three *Braganza* factors identified by ATP, only two of the three are met. The LPA grants Rigmora the discretion to approve budgets. But the presence of other factors suggests that one cannot imply *Brananza* duties due to the existence of a discretionary right alone. And Rigmora's ability to reject budgets can impede ATP's right to call capital and operate the Fund. But it would be weird to describe the parties as conflicted concerning whether to call capital. It is true that Rigmora's liquidity issues changed its investment strategy. And a need for liquidity can provide a source of conflict in certain circumstances. But at the end

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[2019] EWCA Civ 718 at [150]–[151]). The tests for necessity are the business efficacy and obviousness tests. To satisfy those tests, a court will imply a term "in the way that the parties must have intended or reasonably expected it to work." *Equitas Ins. Ltd*, [2019] EWCA at [151]. This suggests that the court analyzes the *Braganza* factors ex ante. *See also* Bloch Report ¶ 24 (citing *Arnold*, [2015] UKSC at [19]) (explaining a court should interpret a contract "as at the date that the contract was made"). But, again, it is unclear. In this analysis, it does not matter.

[387] *Id.*

of the day, Rigmora owns over 98% of the Fund. Rigmora is thus highly interested in the success of its portfolio companies. And Rybolovlev's family-pharma goal, and desire to replicate his success at Uralkali, meant that he would ultimately consolidate funds behind only some of the portfolio companies and successful therapies. Rigmora's liquidity needs might have hastened that process. This, however, does not seem to be the type of conflict motivating *Braganza* duties.

Because the circumstances do not warrant implying *Braganza* duties, the analysis could end here. But, again, the parties did not neatly join issue on the relevant legal framework, and ATP analyzes the business efficacy and obviousness tests as well the *Braganza* factors. For completeness, so too does this decision.

In *USDAW v. Tesco Stores*, Lord Leggatt expounded on the business-efficacy and obviousness tests.[388] The business-efficacy test involves two steps. The court must first identify the relevant contractual purpose.[389] The court must then ask "whether the implication of a term is necessary to give effect to that purpose and prevent it from being defeated."[390] The implied term cannot conflict with existing provisions, and it must be "strictly necessary."[391]

Under the obviousness test, a court only implies a term if it is "so obvious it goes without saying."[392] The court must assess what reasonable people in the

[388] [2024] UKSC 28 at [106].

[389] *Id.*

[390] *Id.*

[391] *Id.*

[392] *Id.* at [102].

positions of the parties at the time would have agreed.[393] Actual intent does not matter.[394] Regarding detailed commercial contracts, "[a] term should not be implied . . . merely because it appears fair or merely because the court considers the parties would have agreed it if it had been suggested to them . . . [it] is a stringent test."[395]

Neither test is satisfied. Starting with the first step of the business-efficacy test, the LPA's purpose is facilitating investment in "in pharmaceutical medical device and other medically-related companies and business projects."[396] ATP seeks to imply a "good faith, honestly, and rationally" modifier to Rigmora's discretion to approve budgets.[397] Inserting that term, however, is not strictly necessary for effectuating the LPA's purpose because ATP and Rigmora share economic incentives to approve budgets. They relied on the existing provision for years, approving budgets without issue, and the Fund operated without incident. No implication is needed.

The obviousness test also fails. At the time of contracting, Rigmora contributed nearly all the Fund's capital. It thus makes sense that Rigmora secured the absolute discretion to reject budgets and negotiated for the ability to preserve its capital by blocking budgets. It is not so obvious or goes without saying that a reasonable

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[393] *Yoo Design Services v Iliv Realty Pte*, [2021] EWCA Civ 560 at [51], available in the record as JX-2113.

[394] *Id.*

[395] *Id.*

[396] LPA Am. 1 ¶ 1(c).

[397] ATP Post-trial Opening Br. at 66.

potential limited partner would have agreed to constrain its discretion to approve budgets.

Ultimately, none of the relevant tests support implying a good faith term. Because Rigmora had no implied duty to breach, ATP's claim fails.

C. Declaratory Relief

ATP also seeks two forms of declaratory relief: a declaration that ATP's filing of this action does not violate the Exculpation Provision and is consistent with the Discretionary-Action Provision of the LPA, and a declaration that parties have not amended the Global Default Provision.[398]

Declaratory relief "is appropriate only if there is an actual controversy between the parties."[399] The Delaware Supreme Court has articulated four prerequisites for to an "actual controversy":

> (1) It must be a controversy involving the rights or other legal relations of the party seeking declaratory relief; (2) it must be a controversy in which the claim of right or other legal interest is asserted against one who has an interest in contesting the claim; (3) the controversy must be between parties whose interests are real and adverse; (4) the issue involved in the controversy must be ripe for judicial determination.[400]

On the fourth factor specified by the high court, "[a] ripeness determination requires a commonsense assessment of whether the interests of the party seeking immediate

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[398] PTO ¶ 74(f); Dkt. 266, [Proposed] Order and Final Judgment ¶¶ 2(b), 2(d).

[399] *Dana Corp. v. LTV Corp.*, 668 A.2d 752, 755 (Del. Ch. 1995).

[400] *XL Specialty Ins. Co. v. WMI Liquid. Tr.*, 93 A.3d 1208, 1217 (Del. 2014) (quoting *Stroud v. Milliken Enters., Inc.*, 552 A.2d 476, 479–80 (Del. 1989)).

relief outweigh the concerns of the court in postponing review until the question arises in some more concrete and final form."[401] A dispute is ripe if "litigation sooner or later appears to be unavoidable" and "the material facts are static."[402] Ultimately, Delaware's approach to declaratory relief and ripeness leaves the determination to the discretion of the court.[403] "The [c]ourt may . . . properly decline to entertain a declaratory judgment claim where another remedy is available and would be more 'effective or efficient.'"[404]

1. The Exculpation And Discretionary-Action Provisions

ATP seeks a declaratory judgment that ATP's filing of this action was in good faith, falls within the Exculpation Provision, and was authorized under the

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[401] *XL Specialty*, 93 A.3d at 1217 (citation modified); *see also Nask4Innovation Sp. Z.o.o. v. Sellers*, 2022 WL 4127621, at *4 (Del. Ch. Sept. 12, 2022) ("In determining whether a dispute is ripe, the Court must take a practical view of all relevant facts and make a common-sense determination of whether adjudicating a dispute at present is a prudent use of judicial resources.").

[402] *XL Specialty*, 93 A.3d at 1217 (quoting *Julian v. Julian*, 2009 WL 29371212, at *3 (Del. Ch. Sept. 9, 2009)) (citation modified).

[403] *See Stroud v. Milliken Enters., Inc.*, 552 A.2d at 480 ("The reasons for not rendering a hypothetical opinion must be weighed against the benefits to be derived from the rendering of a declaratory judgment. This weighing process requires "the exercise of judicial discretion[.]"); *Horizon Pers. Commc'ns, Inc. v. Sprint Corp.*, 2006 WL 2337592, at *17 (Del. Ch. Aug. 4, 2006) ("The ripeness of a dispute is a matter entrusted to the discretion of the trial court." (quoting *UbiquiTel Inc. v. Sprint Corp.*, 2006 WL 44424, at *2 (Del. Ch. Jan. 4, 2006))) (citation modified).

[404] *Walton v. Walton*, 2025 WL 2555839, at *8 (Del. Ch. Sept. 2, 2025) (quoting *Reylek v. Albence*, 2023 WL 4633411, at *6 (Del. Super. July 19, 2023)); *see also Markusic v. Blum*, 2021 WL 2456637, at *4–5 (Del. Ch. June 16, 2021), *aff'd*, 284 A.3d 1017 (Del. 2022) (declining to issue declaratory judgment where concurrent litigation in another court would sufficiently address the controversy); *Burris v. Cross*, 583 A.2d 1364, 1370–76 (Del. Super. Ct. 1990) (same).

Discretionary-Action Provision.[405] ATP seeks this declaration in part because Rigmora argues in the Cayman Litigation that ATP filed this action in breach of its fiduciary duties.

Rigmora argues that ATP's claim under the Exculpatory Provision is unusual. Exculpatory provisions shield a covered person from liability for covered claims. And there is no ripe claim here, because Rigmora does not argue in this dispute that ATP breached its fiduciary duties.[406]

Rigmora has the better of the argument here; ATP's request for declaratory judgment is not suitable for resolution in this forum. Delaware law governs a gross negligence standard in the Exculpation Provision; but otherwise, Cayman law governs both the Exculpatory Provision and the Discretionary-Action Provision. Further, the underlying dispute around whether ATP's filing of this action constitutes

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[405] Compl. ¶ 196; PTO ¶ 74(f); LPA ¶ 2(g) ("To the fullest extent permitted by law, neither the General Partner nor any of its affiliates shall incur liability . . . provided that in any such case (i) the General Partner's or such affiliate's course of conduct was in good faith and (ii) such course of conduct did not constitute willful fraud, willful misconduct, gross negligence as determined under the laws of the State of Delaware without regard to otherwise governing principles of conflicts of law ("Gross Negligence") or an intentional and material breach of this Agreement on the part of the General Partner[.]"; LPA ¶ 18(g)(iv) ("In determining what action, if any, shall be taken against a Limited Partner in connection with such Limited Partner's breach of this Agreement, the General Partner shall seek to obtain a favorable result (as determined by the General Partner in its sole discretion . . . . To the fullest extent permitted by law, each Limited Partner hereby specifically agrees that, in the event such Limited Partner violates the terms of this Agreement, such Limited Partner shall not be entitled to claim that the Partnership or any of the other Partners are precluded, on the basis of any fiduciary or other duty arising in respect of such Limited Partner's status as such, from seeking any of the remedies permitted under this Agreement or applicable law.").

[406] Rigmora Post-Trial Br. at 61–62.

a breach of its fiduciary duties is central to Rigmora's Winding Up Petition in the Cayman Litigation.[407] As a commonsense matter, this court has little reason to resolve the issue, which was not a core dispute in this litigation.[408] The factual findings in this decision speak for themselves. And Cayman court is well positioned to assess their implications under Cayman law. Commonsense dictates reserving judgment on both of ATP's requests for declaratory relief concerning the Exculpatory and Discretionary-Action Provisions.

2. Global Default Provisions

ATP seeks a declaratory judgment concerning the Global Default Provision, although the nature of the ATP's requested declaration has evolved over the course of this litigation.

In its Complaint, ATP requested a declaration that Rigmora is "in breach of its funding and budget approval obligations sufficient to qualify as a Defaulting Partner."[409] ATP requested similar relief in the Pre-Trial Order.[410] The Writ Injunction, however, prohibits ATP from "taking any steps against [Rigmora] to enforce any purported default provisions" related to the May 30 and June 1 capital calls.[411] At trial, therefore, ATP withdrew any request contrary to the Writ

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[407] JX-1417 ¶ 26; ATP Post-Trial Reply Br. at 44.

[408] *See id.*

[409] *Markusic*, 2021 WL 2456637, at *5.

[410] PTO ¶ 74(a)(iv) (requesting a declaration that Rigmora "breached [its] obligations under the LPA to fund and approve budgets sufficient to qualify as a Defaulting Partner").

[411] JX-1434 ¶ 1. *Compare* Compl. ¶ 183–92, *with* PTO ¶ 74(a)(iv).

Injunction.[412] In post-trial briefing, ATP seeks a far more limited declaration, asking for "an order declaring that the Global Default provision[,]" Paragraph 5(c) of the LPA, "governs defaults" and "ha[s] not been altered or amended."[413]

As currently framed, ATP's request is so narrow as to be undisputed, as Rigmora does not deny that the Global Default Provisions have never been amended.[414] Because there is not dispute between the parties on this point, there is no actual controversy. ATP's request for declaratory relief is not ripe. For that reason, it is dismissed.

D. Attorney's Fees

ATP requested attorney's fees under the "loser pays" principles of Cayman Island laws and the Common Law in the Complaint and in the Pre-Trial Order.[415] The Pre-Trial Order referred the court to ATP's pre-trial brief for a discussion of disputed issues, but ATP's pre-trial brief did not address the issue.[416] Rigmora addressed this issue directly in pre-trial briefing, arguing that the American rule under Delaware law governs the issue of attorney's fees.[417] ATP's post-trial opening brief made no mention of attorneys' fees. ATP did not address this issue until its post-trial reply brief and then did so in a cursory fashion.

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[412] ATP Pre-Trial Br. at 56 n.22.

[413] ATP Post-Trial Opening Br. at 82; Dkt. 266, [Proposed] Order and Final Judgment ¶¶ 2(b), 2(d).

[414] *See* Rigmora Post-Trial Br. at 60.

[415] PTO ¶ 74(g).

[416] *See generally* ATP Post-Trial Opening Br.

[417] Rigmora Post-Trial Br. at 62.

Whether a party has waived an argument by failing to raise it in briefing is a procedural matter, so Delaware law governs whether ATP's request for attorneys' fees has been waived.[418] "It is settled Delaware law that a party waives an argument by not including it in its brief."[419] "[A]n issue not raised in post-trial briefing has been waived, even if it was properly raised pre-trial."[420]

ATP's failure to meaningfully brief the issue of its entitlement to fees under Cayman law until its post-trial reply brief constituted waiver. Thus, to the extent that Cayman law supports awarding ATP its attorney's fees and expenses, which this decision does not address, the claim is denied.

III. CONCLUSION

Excluding the Capital Call for Replicate, Rigmora is ordered to specifically perform its obligation to fund the Capital Calls. ATP is not entitled to specific performance relating to the budgeting approvals. ATP's request for a declaratory judgment concerning the Exculpatory Provision or the Discretionary-Action Provision are held in abeyance. ATP's request for a declaratory judgment concerning the Global

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[418] *See Wheeler v. Wheeler*, 636 A.2d 888, 891 (Del. 1993); *Americas Mining Corp. v. Theriault*, 51 A.3d 1213, 1264 (Del. 2012) (Berger, J., concurring) (unanimously holding that "the motion for reargument is procedurally barred under Delaware law, because the issue raised on reargument was not fully and fairly presented in the Defendants' opening briefs"); *Chaplake Hldgs., LTD. v. Chrysler Corp.*, 766 A.2d 1, 6 (Del. 2001).

[419] *Emerald P'rs v. Berlin*, 2003 WL 21003437, at *43 (Del. Ch. Apr. 28, 2003), *aff'd*, 840 A.2d 641 (Del. 2003).

[420] *Oxbow Carbon & Mins. Hldgs., Inc. v. Crestview-Oxbow Acq., LLC*, 202 A.3d 482, 502 n.77 (Del. 2019); *see also In re IBP, Inc. S'holders Litig.*, 789 A.2d 14, 62 (Del. Ch. 2001).

Default Provision is dismissed. ATP is noted entitled to its attorney's fees under the Cayman law's loser-pays rule. The parties are ordered to submit a form of order or competing forms of order implementing this decision within three business days.

EXHIBIT F

[2023 (1) CILR 50]

KUWAIT PORTS AUTHORITY, PUBLIC INSTITUTION FOR SOCIAL SECURITY and THE PORT FUND L.P. v. PORT LINK GP LIMITED, WILLIAMS, WELLSPRING CAPITAL GROUP INCORPORATED and KGL INVESTMENT COMPANY ASIA

C.A. (Field, Birt and Beatson, JJ.A.) January 20th, 2023

Partnership — exempted limited partnership — derivative action by limited partners — derivative action by limited partner against general partner struck out where exempted limited partnership had no claim against general partner and limited partner had adequate alternative remedy, namely direct claim against general partner for breach of duty

Partnership — exempted limited partnership — derivative action by limited partners — derivative action by limited partner against shareholder of general partner and others not struck out — general partner alleged to be involved in wrongdoing had conflict of interest in relation to whether to institute proceedings

The plaintiffs/respondents brought claims concerning an exempted limited partnership.

The first and second plaintiffs were Kuwaiti state-owned enterprises financed by Kuwaiti public funds. They were two of the eleven limited partners in an exempted limited partnership, The Port Fund L.P. ("TPF"). The first and second plaintiffs had invested US$125m. in TPF, which was almost two-thirds of the total investment. The first defendant/appellant, a Cayman Islands exempted limited company, was the general partner of TPF ("D1" or "the GP"). The second defendant/appellant ("D2") was the sole shareholder of Port Link Holdings USA Inc., which was the sole shareholder of the GP. D2 was the CEO, CFO, President, Vice-President, Treasurer and Secretary of the third defendant/appellant ("D3"), a company incorporated in the United States. D2 was also closely involved in the management of the fourth defendant/appellant ("D4"), a Cayman Islands incorporated company, now in voluntary liquidation, which had provided administrative support to TPF.

The plaintiffs pleaded that in breach of statutory, contractual, common law and fiduciary duties owed by the GP to TPF and the limited partners and pursuant to a conspiracy to injure TPF and the limited partners by

unlawful means, the GP had made very substantial payments using TPF moneys that were not for the benefit of TPF and the limited partners. The plaintiffs alleged that the defendants' wrongdoing had caused TPF and its limited partners losses in excess of US$100m. The plaintiffs claimed to be entitled to bring their claims against the GP alleging systematic unlawful conduct in relation to the assets and affairs of TPF on their own behalf, but in the alternative they also advanced the claims as derivative claims on behalf of TPF. Similarly, the plaintiffs' primary case was that they were entitled to bring claims against D2 and D3 on their own behalf, but they also sought to advance like claims as derivative claims on behalf of TPF. The plaintiffs' claims against D4 were advanced solely on the derivative basis.

The plaintiffs' direct claims against D2 and D3 were for relief under the Fraudulent Dispositions Act (1996 Revision). They claimed that those defendants culpably participated in the improper payments made by the GP and/or dishonestly received such payments or the traceable proceeds thereof. They claimed that D3 was party to an unlawful means conspiracy, dishonestly assisted in a breach of trust/duty by the GP, knowingly procured a breach of the contractual obligations the GP owed to the limited partners and was liable in knowing receipt. The plaintiffs claimed that D2 conspired and dishonestly assisted in the GP's breaches of duty and was in breach of the fiduciary duties to TPF and the GP.

The derivative claims were brought pursuant to s.33(3) of the Exempted Limited Partnership Act ("the ELPA") on the basis that the GP had without cause failed or refused to initiate the proceedings and there was no real prospect of it doing so. Section 33 provided:

"(1) Subject to subsection (3), legal proceedings by or against an exempted limited partnership may be instituted by or against any one or more of the general partners only, and a limited partner shall not be a party to or named in the proceedings.

…

(3) A limited partner may bring an action on behalf of an exempted limited partnership if any one or more of the general partners with authority to do so have, without cause, failed or refused to institute proceedings."

The GP's current directors claimed to have conducted an extensive investigation into the alleged wrongdoing and to have concluded that there was not cause to bring the claims advanced by the plaintiffs as derivative claims. The plaintiffs submitted that the current directors, although not implicated in the defendants' alleged wrongdoing, were not independent and had not investigated matters properly.

The GP applied to strike out the direct and derivative claims against it. It accepted that the pleaded allegations were arguable but contended in relation to the direct claims that it was impermissible for two of eleven limited partners to claim damages from the GP to be paid directly to themselves except by seeking partnership accounts that would require the joinder of the other limited partners. D2–D4 applied to strike out the

derivative claims against them. D2 and D3 did not apply to strike out the direct claims against them but they did not admit that the plaintiffs had standing to bring the claims and maintained that they should have been pursued by way of a partnership account as against the GP.

In the Grand Court, the judge rejected the submission that direct claims by a limited partner could only be vindicated by the taking of partnership accounts. The judge accepted the plaintiffs' submission that the claims advanced were principally direct claims vested in the individual limited partners rather than in TPF and that the taking of partnership accounts was not the only procedural route available to the plaintiffs.

The GP submitted that (a) the application of the partnership accounts rule/principle to limited partnerships was not inconsistent with the provisions of the ELPA and therefore was not disapplied by s.3; (b) the GP relied on authorities which held that claims by partners *inter se* could only be brought in the context of the taking of partnership accounts; (c) there were sound practical reasons for the application of the partnership account rule/principle to Cayman Islands exempted limited partnerships; (d) the judge's holding that the property of an exempted limited partnership was held "on trust for each of the limited partners" was a misreading of s.16(1) of the ELPA which provided that the rights and property of an exempted limited partnership, including all choses in action, were held "by the general partners jointly, upon trust as an asset of the exempted limited partnership in accordance with the terms of the partnership agreement."

The plaintiffs submitted that (a) the reasons given by the judge for concluding that the partnership rule/principle was disapplied by s.3 of the Act and was inconsistent with the scheme of the ELPA were correct; (b) the authorities relied on by the GP emphasized the reciprocity of personal obligation and trust and the mutuality of personal liability in an ordinary partnership, which was absent in a limited partnership; (c) the plaintiffs relied on authority to show that in a partnership dispute it was not always necessary to have a claim for a partnership account at the outset; and (d) because an exempted limited partnership had no separate legal personality, the only sensible construction of s.16(1) of the ELPA was that the general partner of an exempted limited partnership held its assets on trust for all the limited partners. The judge was correct so to hold. Because the general partner owed fiduciary duties to all the limited partners, any breaches of those duties must be enforceable by the limited partners themselves. Where there was a claim against the general partner itself, it could not be only the general partner who could institute proceedings.

The Grand Court did not strike out the plaintiffs' claims. The judge rejected the defendants' submission that, when considering s.33(3), the court had to apply principles derived from cases dealing with derivative claims in other contexts. The judge considered s.33(3) to be ***sui generis***. On appeal, the defendants submitted that the judge erred in stating that the principles applicable in other contexts, such as trusts and companies, were not applicable in relation to the statutory test. The plaintiffs submitted that the judge was correct to hold that s.33(3) "occupies the field" and that there

was no scope or reason to import any "special circumstances" test or other common law or equitable principles that applied to derivative claims in respect of other entities or structures. The GP submitted that, regardless of whether the test in s.33(3) was otherwise met, the derivative claim against the GP should be struck out because, on the judge's finding, TPF had suffered no loss or damage and therefore had no claim of its own to bring. The judge held that s.33(3) required a finding as to whether the GP had failed or refused to institute the proceedings without cause, not the directors at the relevant time. The judge concluded that there was a good arguable case that the GP had a relevant inhibition because it was conflicted in relation to the plaintiffs' claims. Its decision not to bring the claims against D2–D4 was made unsafe by the facts giving rise to its conflict of interest. (The Grand Court judgment is reported at 2022 (1) CILR 12.)

Held, judgment as follows:

(1) The GP's appeal against the refusal of the judge to strike out the plaintiffs' direct claims against it would be dismissed. The differences between ordinary partnerships and exempted limited partnerships meant that it was not appropriate to require that a direct claim by a limited partner against the general partner must always be initially brought by way of a claim for partnership accounts and that it was not necessary to protect the positions of the creditors and other limited partners by requiring this. The scheme of the ELPA with the absence of reciprocity and mutuality of rights and obligations was inconsistent with requiring claims by a limited partner to be brought by taking partnership accounts in proceedings to which all the limited partners were party. The court accepted the submission that because an exempted limited partnership had no separate legal personality the only sensible construction of the words in ELPA s.16(1) was that the general partner of an exempted limited partnership held its assets on trust for all the limited partners. Because a trust also had no separate legal personality, thus making the position similar to the statutory trust created by ELPA s.16(1), the court regarded the position of a claim by a beneficiary of a trust against the trustee as important. The beneficiary of a subsisting trust including a discretionary trust was entitled to bring a claim against the trustee to recover loss suffered by the trustee's breach of trust, but the remedy was for an order to restore to the trust what ought to have been there. The partnership accounts rule/principle was inconsistent with the ELPA and the judge was correct in his conclusion. In proceedings against the GP, a limited partner could recover for loss suffered by the breach of the statutory trust but the remedy would be the restoration of the exempted limited partnership's fund thus compensating the direct losses suffered by all the limited partners. This remedy prevented a limited partner claimant from benefitting alone from any recovery either at the expense of the other limited partners or of the exempted limited partnership's creditors. The problem of multiplicity of actions could be dealt with by robust case management. The court's rejection of the submission that the direct claims were defective in not at the outset joining all partners and seeking

partnership accounts did not mean that the court could not direct that there be such a procedure at a later stage as part of its case management powers if that proved necessary (paras. 53–64).

(2) If D2 and D3 had applied to strike out the plaintiffs' direct claims against them, the court's preliminary view was that the objections raised to the plaintiffs' standing to bring the claims were unfounded. The question was whether, if D2 and D3 were held liable to the plaintiffs for breach of their statutory, equitable and other obligations, it was open to the court to order that those defendants restored the fund rather than paid the plaintiffs. The court's preliminary view was that the plaintiffs had a good arguable case that, where third parties were liable for breaches such as those claimed against D2 and D3, the court could order those defendants to restore the fund rather than pay the plaintiffs and thus avoid the risk of prejudice to other limited partners or creditors. As in the case of a claim against the general partner, the starting point was the position of a claim by a beneficiary of a trust. It was clear that the interest of a beneficiary of a discretionary trust was enforceable against a third party who received trust property which the trustee did not have authority to transfer and the third party knew enough to make it unconscionable to retain the asset for his own benefit. The beneficiary's only right would be to have the asset or its proceeds reinstated to the trustee. Given the analogy between a non-partnership trust, an exempted limited partnership with no separate legal personality and the statutory trust imposed by s.16(1) of the ELPA, it was possible to order third parties such as D2 and D3 to restore the fund where the claim against them succeeded. The analogy rested on the fact that, in cases of knowingly assisting a trustee in a fraudulent and dishonest disposition of trust property, although the third party was not in fact a trustee, he was made liable in equity as if he were a trustee. This reflected the fact that it was the fund which had suffered the loss and an order to restore was the only way in which all beneficiaries' rights could be protected. For these reasons, had D2 and D3 applied to strike out the plaintiffs' direct claims against them, the court's preliminary view was that the objections raised to the plaintiffs' standing to bring the claims were unfounded. It would be for the court hearing the claims to decide whether they were made out on the merits and whether, in the circumstances of this case, an order to restore the fund should be made and, given that the GP would be implicated in the wrongdoing, steps such as placing the assets in escrow, the appointment of a receiver or the taking of partnership accounts were necessary (paras. 65–72).

(3) The legislature had prescribed in s.33(3) of the ELPA when a derivative action could be brought in respect of an exempted limited partnership, *i.e.* "if any one or more of the general partners with authority to do so have, without cause, failed or refused to institute proceedings." Where the legislature established a statutory test for bringing a derivative action in respect of an exempted limited partnership, the courts were duty bound to apply that statutory test. The test could not be replaced by

common law and equitable principles developed in other contexts even if, in the absence of a statutory test, the courts would no doubt have applied those principles to an exempted limited partnership. Nor could those principles form an additional threshold beyond the statutory test. The statutory test was in general and imprecise terms and left open how the test should be applied in practice. However, the expression "without cause" must carry the implication of "good" cause. The court was entitled to have regard to and could derive assistance from the developed principles in other contexts. In particular, given the existence of the statutory trust imposed by s.16(1) of the ELPA, the court was likely to derive assistance from considering whether special circumstances (as established in the contexts of trusts and English limited partnerships) existed. If special circumstances existed, this was likely to assist the court in deciding whether a general partner's decision not to institute proceedings was "without cause." However, the court emphasized that its duty was to apply the statutory test of "without cause"; it was not sufficient simply to consider whether there were special circumstances and, if so, then to allow a claim under s.33(3). If the court decided that the facts would satisfy the special circumstances test, it must nevertheless go on and consider whether they therefore satisfied the "without cause" test in s.33(3). Conversely, the facts of a case might enable the court to find that the general partner's decision was "without cause" without consideration of whether there were special circumstances. The two tests were not to be equated although it was envisaged that consideration of whether there were special circumstances was likely in most cases to be of considerable assistance in determining whether the decision was "without cause" (paras. 94–99).

(4) The court summarized its conclusions in relation to s.33(3): (i) There was no requirement for leave to bring derivative proceedings under s.33(3). A limited partner could simply institute such proceedings. (ii) A limited partner must however plead the facts and matters relied upon as showing that he could bring himself within the requirements of the subsection because this formed an essential part of his cause of action. (iii) If a defendant wished to raise an issue as to the standing of a limited partner to bring such derivative proceedings, he should do so by means of a strike out application or seek the trial of a preliminary issue. (iv) Whichever route was chosen did not affect the test that had to be applied in deciding whether s.33(3) was complied with and whether a limited partner should be permitted to continue with the derivative claim. (v) The decision of the court on such an application or preliminary issue was determinative (subject to appeal). If the court held that the derivative claim could be continued, the limited partner thereafter had the necessary standing to pursue the claim. It was not an issue which was deferred until or revisited at trial (save possibly in the context of costs at the end of the trial). (vi) The court should not conduct a mini trial as to whether the requirements of s.33(3) were satisfied. The court had to reach its decision on the basis of the material before it, which would be more limited than it would be following discovery and trial. (vii) At the hearing, the onus was on the

limited partner to satisfy the court that the requirements of s.33(3) were met. Reference to "onus" was not to be mistaken as a reference to a "burden" in the sense of having to show something on the balance of probabilities. (viii) The essential task for the court at such a hearing was to determine whether the limited partner had failed or refused to bring the relevant proceedings without cause. (ix) In determining this issue, the court was likely to be assisted by consideration of whether special circumstances (as developed in cases concerning trusts, limited partnerships and other entities) existed, but the court's task remained one of applying the statutory test set out in s.33(3). (x) Whilst reference to a "good arguable case" might be a helpful indicator of the level of comfort which the court should have when deciding whether the requirements of s.33(3) were met, the court's task was essentially an evaluative one having regard to the facts as they appeared to the court at that stage of the proceedings from the material before the court and the need to avoid injustice balanced with the need to respect the fact that a derivative action was an exception to the general principle in the ELPA that management (including decisions as to litigation) of an exempted limited partnership was for the general partner not the limited partners. The court should consider, *inter alia*, the strength of the evidence that the general partner had failed or refused to institute proceedings without cause, the strength of the underlying claim that was sought to be brought and the likelihood and nature of any injustice if the derivative claim was not permitted. (xi) The court should reach its decision as to standing by reference to the facts as they appeared at the date of the hearing of the strike out or preliminary issue. (xii) Even where the requirements of s.33(3) were met, the court had a discretion as to whether to permit a derivative claim to continue. One of the factors which was likely to be relevant in exercising that discretion was whether the plaintiff had an alternative remedy (para. 140).

(5) The GP's appeal against the refusal of the judge to strike out the plaintiffs' derivative claims against it would be allowed and the claims would be struck out. A derivative action allowed a party to bring a claim in the name of and on behalf of a second party against a third party. It followed that the second party must have a claim against the third party before the first party could be permitted to bring such a claim derivatively. Section 33(3) presupposed that there was a claim to be brought by the GP on behalf of the partnership. If, as the judge held, the partnership had no claim against the GP, there could be no failure by the GP to bring such a claim without cause. Even if this were wrong, the derivative claim against the GP would not be permitted because the plaintiffs as limited partners had an adequate alternative remedy. A limited partner had the right to claim against a general partner for breach of duty on the part of the general partner. In the event of such a claim succeeding, the appropriate remedy would almost certainly not be an award of equitable compensation to the particular limited partners who had sued but instead an order that the general partner restore the trust fund. In these circumstances, exactly the same would be achieved by a direct claim as would be the case in a

derivative action. In the event of the plaintiffs succeeding in their direct claim, the estate of TPF would be made whole by payment from the GP pursuant to an order for restoration of the trust fund. Success in a derivative action would have the same result. Accordingly, there was simply no need for a derivative action; it would add nothing to the direct claims brought by the limited partners coupled with an order for restoration of the trust fund in the event of such claims succeeding. Therefore, as a matter of discretion, the derivative claim against the GP should not be permitted (paras. 141–151).

(6) The appeals of D2, D3 and D4 against the refusal of the judge to strike out the plaintiffs' derivative claims against them would be dismissed. The GP had a conflict of interest in relation to whether to institute proceedings against D2–D4. On the plaintiffs' case, D1 as the GP was deeply involved in all the alleged wrongdoing, as was D2. D1 had to decide whether to institute proceedings against D2–D4 in circumstances where (i) the essential wrongdoing giving rise to the claims against D2–D4 was that of D1 itself in making the various payments and where it was said to be part of the unlawful means conspiracy to injure TPF involving D2 and D3; (ii) the contemplated proceedings would have to be brought against the beneficial owner of the GP and against two companies in which D2 was deeply and closely involved, namely D3 and D4; and (iii) D1 would also have to consider whether (as general partner) it should sue itself (in its own right) as a co-conspirator in the alleged unlawful means conspiracy. On the face of it, by reason of the obvious and serious conflict of interest, D1 was under an inhibition which would amount to special circumstances in the context of a trust or limited partnership and this inhibition also meant that the failure by D1 to bring proceedings against D2–D4 was without cause for the purposes of s.33(3). The defendants' submissions that this was not the position because (i) the current directors of D1 were wholly independent and were not in office at the time of the alleged wrongdoing on the part of D1, and (ii) the independence of the current directors was fortified by the fact that D2 had given an undertaking that the shareholder of the GP would not exercise any powers so as to remove the current directors or interfere in any way in the exercise of their functions did not overcome the inhibition. In relation to the first point, the judge was correct to focus on the entity which was the general partner rather than the directors for the time being of that entity. Section 33(3) referred to the "general partner" having failed or refused to bring proceedings without cause. The general partner was the legal entity D1. D1 was subject to the conflicts of interest and thus could not be seen to be in a position to take a fair and independent decision about the potential litigation. New directors were not in the same position as a liquidator, who was appointed by and subject to the supervision of the court and therefore clearly independent of the company, its directors and shareholders. The current directors owed a fiduciary duty to act in the best interests of D1. The defendants submitted that because D1 owed fiduciary duties to act in the best interests of the partnership, the current directors therefore had a duty to act in the best

interests of TPF. However, there was certainly the potential for conflict between acting in the best interests of TPF (which might include taking action against D1 as a co-conspirator) and acting in the best interests of D1 (which might be said to include the avoidance of being sued). The undertaking given by D2 was insufficient to overcome the inhibition from which D1 as general partner suffered. The plaintiffs, who alleged that there had been serious wrongdoing by the defendants which had cost TPF over US$100m., would have a justified lack of confidence that a fair and independent decision was taken by D1 as to whether to seek recompense from any one or more of the defendants, even following the appointment of the current directors. There was no doubt that D1 suffered from an inhibition which led to the conclusion that, subject to the exercise of any discretion, it was appropriate for the plaintiffs to bring derivative claims on behalf of TPF pursuant to s.33(3) against D2–D4. As to discretion, the defendants submitted that because the plaintiffs were bringing direct claims against D2 and D3, they had an alternative remedy in respect of those two defendants and there was no need for them to bring a derivative action. However, D2–D4 expressly reserved the right to challenge the plaintiffs' standing to bring such claims. It would be inconsistent with the overriding objective and highly undesirable to run the risk of the court eventually finding against D2 and D3 on the underlying merits of the claims but also finding that the plaintiffs did not have standing for the direct claims or that it could not make an order for restoration of the trust fund in the absence of a derivative claim on behalf of TPF. There was sufficient uncertainty about whether the plaintiffs had direct claims against D2 and D3 or whether the court could order restoration of the trust fund on the success of such claims that, as a matter of discretion, it was just and fair to allow the derivative claims to proceed alongside the direct claims so that they were all heard at the same time. If, following a trial, the direct claims were upheld and the court also held that it could order restoration of the trust fund as a remedy for such claims, there would be no need to make any award on the derivative claims; if, on the other hand, the direct claims were found not to be maintainable or restoration of the trust fund could not be ordered, the derivative claims would be necessary to provide a remedy, assuming that the underlying allegations against the defendants were upheld (paras. 158–170).

(7) The GP's appeal against the refusal of the judge to order the plaintiffs to provide security for costs would be dismissed. The judge erred in proceeding on the basis that there was a presumption arising from comity and common sense that security for costs should not be awarded against the plaintiffs, although each case would be decided on its own facts. When dealing with a security for costs application against a foreign state or foreign state agency that enjoyed good standing in the international community, the court should treat this as a factor in favour of such a plaintiff to be weighed with all the other factors when the court exercised its discretion. The judge also erred in stating that a foreign plaintiff did not have to establish that it had fixed and permanent property within the

jurisdiction. Evidence that a foreign plaintiff had valuable property within the jurisdiction would obviously be of relevance but the significance of this evidence would depend on all the facts of the case, including any evidence as to the permanency of the property and its freedom from encumbrances (or the lack of such evidence) and other evidence tending to show that the plaintiff could be trusted to honour an adverse costs order. The judge's errors played such a significant role in the exercise of his discretion that his decision must be set aside. In the circumstances it was open to the court to exercise the discretion conferred by GCR O.23, r.1(1). The court proceeded on the assumption that the defendants were correct that there would be very real difficulties in enforcing in Kuwait costs orders made against the plaintiffs if their claims against the defendants were dismissed. Although it was a necessary condition for the ordering of security for costs that there was a real risk that an adverse costs order would not be enforced against a foreign plaintiff in his/its home jurisdiction, this was not a sufficient condition for ordering security for costs whatever the other circumstances of the case. Instead, it was open to the court, if there was sufficient evidence to support such a conclusion, to find that there was no real risk that the plaintiff would not honour an adverse costs order and to decline to order security for costs. The present case was such a case. The plaintiffs were agencies of a foreign state, Kuwait, which was of good standing in the international community and enjoyed diplomatic relations with HM Government. Further, a formal letter had been sent to the judge on behalf of the State of Kuwait, among others, confirming that the plaintiffs were wholly owned by the State of Kuwait and attaching letters by the plaintiffs confirming that they would comply with any final and binding costs orders made against them in the proceedings. The letters amounted to a representation intended to be relied on by the Grand Court that the plaintiffs would honour any final and binding costs orders made against them. The letters provided strong support for the conclusion that there was no real risk that such costs orders would not be paid. Further support for this conclusion came from the evidence as to the financial resources of the plaintiffs, which showed that they could be expected to have the ready funds to pay an adverse costs award (paras. 188–217).

Cases cited:

(1) *Ahmad Hamad Algosaibi & Bros. Co.* v. *Saad Invs. Co. Ltd.*, 2017 (2) CILR 602, referred to.
(2) *Autumn Hldgs. Asset Inc.* v. *Renova Resources Private Equity Ltd.*, 2017 (2) CILR 136, referred to.
(3) *Banco Economico S.A.* v. *Allied Leasing & Fin. Corp.*, 1998 CILR 102, considered.
(4) *Barnes* v. *Addy* (1873–74), 9 Ch. App. 244, referred to.
(5) *Barrett* v. *Duckett*, [1995] 1 BCLC 243; [1995] BCC 362, considered.
(6) *Chief Commr. of Stamp Duties* v. *Buckle*, [1998] HCA 4; (1998), 192 CLR 226; 38 NSWLR 574; 151 ALR 1, considered.

(7) *Commr. of State Revenue* v. *Rojoda Pty. Ltd.*, [2020] HCA 7; (2020), 268 CLR 281; 94 ALJR 423; 376 ALR 378, considered.
(8) *Costa Rica (Rep.)* v. *Erlanger* (1876), 3 Ch. D. 62, referred to.
(9) *Cybervest Fund, In re*, 2006 CILR 80, followed.
(10) *Elliott* v. *Cayman Islands Health Serv. Auth.*, 2007 CILR 163, referred to.
(11) *Foss* v. *Harbottle* (1843), 2 Hare 461; 67 E.R. 189, referred to.
(12) *Golstein* v. *Bishop*, [2013] EWHC 881 (Ch); [2014] 1 Ch. 131; [2013] 3 W.L.R. 572; on appeal, [2014] EWCA Civ 10; [2014] 1 Ch. 455; [2014] 2 W.L.R. 1448; [2014] 3 All E.R. 397, considered.
(13) *Henderson PFI Secondary Fund II LLP* v. *Henderson Equity Partners (GP) Ltd.*, [2012] EWHC 3259 (Comm); [2013] 1 Q.B. 934; [2013] 2 W.L.R. 1297; [2013] 3 All E.R. 887; [2012] 2 CLC 905, followed.
(14) *Hugh Stevenson & Sons* v. *Akt. für Cartonnagen-Industrie*, [1918] A.C. 239, referred to.
(15) *Hughes* v. *Colin Richards & Co.*, [2004] EWCA Civ 266; [2004] PNLR 35, referred to.
(16) *Hurst* v. *Bryk*, [2000] UKHL 19; [2002] 1 A.C. 185; [2000] 2 All E.R. 193, referred to.
(17) *Iesini* v. *Westrip Holdings Ltd.*, [2009] EWHC 2526 (Ch); [2010] BCC 420, considered.
(18) *Kleanthous* v. *Paphitis*, [2011] EWHC 2287 (Ch), referred to.
(19) *Knight & Tabernacle, &c., Socy., In re* (1892), 2 Q.B. 613; 62 L.J.Q.B. 33, considered.
(20) *Leyvand* v. *Barasch*, [2000] WL 191256, considered.
(21) *Meyer* v. *Faber (No. 2)*, [1923] 2 Ch. 421, referred to.
(22) *Ministère de la Culture &c. de France* v. *Lielb*, [1981] 1 WLUK 253, considered.
(23) *Ministry of Foreign Affairs (Italy)* v. *Simeone*, [2016] QDC 160, referred to.
(24) *Ninemia Maritime Corp.* v. *Trave Schiffahrts G.m.b.H. und Co. K.G., The Niedersachsen*, [1984] 1 All E.R. 398; [1983] 2 Lloyd's Rep. 600; [1983] Com. L.R. 234, considered.
(25) *PJSC Tatneft* v. *Bogolyubov*, [2019] Costs L.R. 977, referred to.
(26) *Papua New Guinea* v. *Sandline*, [1998] QDC 298, referred to.
(27) *Pisante* v. *Logothetis*, [2020] EWHC 3332 (Comm), referred to.
(28) *Prudential Assur. Co. Ltd.* v. *Newman Indus. Ltd.*, [1982] Ch. 204; [1982] 2 W.L.R. 31; [1982] 1 All E.R. 354, followed.
(29) *Public Trustee* v. *Elder*, [1926] 1 Ch. 776, referred to.
(30) *Roberts* v. *Gill & Co. Solicitors*, [2010] UKSC 22; [2011] 1 A.C. 240; [2010] 2 W.L.R. 1227; [2010] PNLR 30; [2010] WTLR 1223, considered.
(31) *St. John's Trust Co. (PVT) Ltd.* v. *Medlands (PTC) Ltd.*, [2021] CA (Bda) 20 Civ, Bermuda C.A., December 12th, 2021, followed.
(32) *Scully Royalty Ltd.* v. *Raiffeisen Bank Intl. Ltd.*, 2022 (1) CILR 118, referred to.

(33) *Selangor United Rubber Estates Ltd.* v. *Craddock (No. 3)*, [1968] 1 W.L.R. 1555; [1968] 2 All E.R. 1073, referred to.
(34) *Sierra Leone Govt.* v. *Davenport*, [2003] EWHC 1913 (Ch); [2003] All E.R. (D.) 183; 2003 WL 21047383, referred to.
(35) *Smith* v. *Croft (No. 2)*, [1988] Ch. 114; [1987] 3 All E.R. 909; 1987 PCC 209; [1987] 1 FTLR 319, considered.
(36) *Soar* v. *Ashwell*, [1893] 2 Q.B. 390, referred to.
(37) *SPhinX Group, In re*, 2010 (1) CILR 234, referred to.
(38) *Target Hldgs. Ltd.* v. *Redferns*, [1996] A.C. 421; [1995] 3 W.L.R. 352; [1995] 3 All E.R. 785; [1995] CLC 1052; [1995] N.P.C. 136; [1995] 3 LRC 162, considered.
(39) *Tasarruf Mevduati Sigorta Fonu* v. *Wisteria Bay Ltd.*, 2006 CILR 351, considered.
(40) *Top Jet Enterprises Ltd.* v. *Sino Jet Holding Ltd.*, 2018 (1) CILR 18, referred to.
(41) *Waddington Ltd.* v. *Chan Chun Hoo Thomas*, [2008] HKCFA 63; (2008), 11 HKCFAR 370; [2009] 4 HKC 381; [2008] HKCU 1381; [2009] 2 BCLC 82, considered.

Legislation construed:
Exempted Limited Partnership Act (2021 Revision), s.3: The relevant terms of this section are set out at para. 34, fn. 7.
s.16(1): The relevant terms of this subsection are set out at para. 19.
s.32(12): The relevant terms of this subsection are set out at para. 36, fn. 9.
s.33: The relevant terms of this section are set out at para. 20.

Grand Court Rules 1995, O.23, r.1(1): The relevant terms of this subrule are set out at para. 176.
C. Stanley, K.C., P. Tyers-Smith and *T. Wright* for the first appellant;
G. Chapman, K.C., A. Pullinger and *H. Shaw* for the second to fourth appellants;
D. Allison, K.C., J. Fox, O. Green and *H. Clark* for the respondents.

1 **FIELD, J.A.:**

Introduction

This is the judgment of the court to which each member has contributed.

2 There are two appeals before the court. The first is brought by all the appellants from the order made by Parker, J. ("the judge") dismissing their summonses to strike out certain claims in the amended statement of claim[1] ("the ASOC") ("the strike out appeal," reported at 2022 (1) CILR 12). The second appeal is brought by the first appellant against the dismissal of its

1 The defendants' application to strike out those paragraphs of the ASOC that pleaded the criminal convictions in Kuwait of a Ms. Lazareva and a Mr. Dashti was not opposed and the judge so ordered.

summons for security for costs ("the SFC appeal"). Hereinafter, we refer to the appellants as "the defendants" or "D1," "D2," "D3" and "D4" and to the respondents as "the plaintiffs."

The strike out appeal

3 This appeal raises important issues concerned with: (a) the nature of a Cayman Islands exempted limited partnership ("ELP") established under the Exempted Limited Partnership Act (2021 Revision) ("the ELPA"); (b) whether a limited partner of an ELP can sue, independently of any of the other limited partners, alleged wrongdoers, including the ELP's general partner, who are alleged to have been parties to the wrongful misappropriation of the ELP's assets held on trust by the general partner and, if so, what is the appropriate remedy to be granted by the court; and (c) the circumstances in which a limited partner can bring a derivative action under s.33(3) of the ELPA in the name of the ELP against the general partner for breaches of contractual, statutory and fiduciary duty.

4 The ELP in question is The Port Fund L.P. ("TPF") which was registered on March 21st, 2007. It was established as a vehicle for investments in port-related assets around the world. It has one general partner and eleven limited partners including the two plaintiffs, the Kuwait Ports Authority ("KPA"), which it is alleged has invested US$85m. giving it at least a 41% interest in TPF and the Public Institution for Social Security ("PIFSS"), which it is alleged invested US$40m. (giving it a 23.77% interest in TPF). The total invested in TPF by the limited partners was US$188,152,000.

5 The first defendant, Port Link GP Ltd. ("the GP" or "D1"), is a Cayman Islands exempted limited company incorporated on March 8th, 2007. It was appointed the general partner of TPF pursuant to a limited partnership agreement ("the LPA") made on March 21st, 2007 between it and the original limited partners of TPF. The whole of the GP's share capital is held by Port Link Holdings USA Inc. ("PLH"), a Delaware company; and the whole of PLH's share capital is held by the second defendant ("Mr. Williams"). Mr. Williams is also CEO, CFO, President, Vice President, Treasurer and Secretary of the third defendant, Wellspring Capital Group Inc. ("Wellspring"), a company incorporated in the US State of Georgia. Wellspring is owned by the Mark E. Williams Living Trust, the trustees of which are Mr. Williams, his wife, Laura Williams, and his brother, Dylan Williams.

6 TPF's sponsor and placement agent was KGL Investment Co. KSCC, a Kuwaiti company ("KGLI Kuwait"). From September 2007 until 2008, Mr. Williams was KGLI Kuwait's Vice President and he was its Investment Director from 2009 to 2011. He was also a member of TPF's Investment Committee in the years 2009–2013.

7 Pursuant to an agreement with the GP dated June 28th, 2007 ("the IMA"), KGL Investment Cayman Ltd. was appointed TPF's investment manager. In July 2018, KGL Investment Cayman Ltd. changed its name to Emerging Markets PE Management Ltd. ("EMPEML"). The ultimate beneficial owner of EMPEML as at the date of the IMA and until around January 2018 was KGLI Kuwait, which is the 100% shareholder of the fourth defendant ("KGLI Asia"). KGLI Asia is said by the defendants to have provided administrative support to TPF between December 2017 and August 2020 pursuant to an agreement for the provision of such services dated December 1st, 2017 ("the ASA").

8 Briefly put, the plaintiffs plead in the ASOC that assets of TPF worth hundreds of millions of US dollars held on trust by the GP have been misappropriated as part of an unlawful means conspiracy and/or dishonest breaches of trust and fiduciary duty and that each of the defendants has wrongfully participated in some or all of these defalcations, in some cases having knowingly received some or all of the proceeds thereof. Amongst the allegations made against the defendants is a claim that the GP made substantial improper payments using TPF moneys that were not for the benefit of TPF.

9 Two of the other limited partners in TPF, Gulf Investment Corp. ("GIC") and General Retirement and Social Insurance Authority of Qatar ("GRSIA"), who between them it is alleged invested 15.14% of the total alleged investment in TPF, have brought claims against the second and third defendants in the US State of Georgia alleging that those parties are guilty of dishonesty, deliberate breaches of fiduciary and unlawful means conspiracy. GIC and GRSIA have consented to a stay of their claims in the courts of Georgia pending determination of the instant proceedings which they support.

10 The two current directors of the GP ("the FFP directors") are individuals recruited from FFP (Directors) Ltd. Mr. Andrew Childe ("Mr. Childe") was appointed on January 29th, 2020 and Mr. Richard Lewis ("Mr. Lewis") on October 28th, 2020, replacing Mr. Christopher Rowland ("Mr. Rowland") who had been appointed at the same time as was Mr. Childe.

11 The FFP directors have no connection to any of the wrongdoing alleged in the ASOC and describe themselves as "independent directors." In his third affidavit, Mr. Lewis states that, fully cognisant of their fiduciary duties, they have conducted an intensive, forensic investigation into the actions of the GP and the former management team of TPF for the benefit of all the limited partners and not just the plaintiffs. The stated results of the FFP directors' forensic investigation are set out in a series of memoranda issued to the limited partners in an update to the limited partners dated May 29th, 2021, save for their investigations into the DIFC

proceedings claim and the Lazareva lobbying campaign which are respectively dealt with in paras. 300–345 and 346–399 of Mr. Lewis's third affidavit. In their view, there is currently no cause to bring the derivative claims and even if TPF had meritorious claims, it would be necessary to consider whether the claims were worth pursuing on a cost/benefit analysis and, if so, whether TPF was in a position to pursue them or could raise funding to do so, and whether it would be in the best interests of TPF to do so.

12 The plaintiffs plead individual direct claims against the defendants for losses each has suffered as a limited partner in TPF by reason of the defendants' actionable involvement in the wrongful misappropriation of assets held on trust by the GP. Relying on s.33(3) ELPA, they also plead derivative claims against the GP and the other defendants on behalf of TPF in respect of the aforesaid alleged misappropriation of assets.

The direct claims and the applications to strike them out

13 We first consider the direct claims brought against the GP (D1), Mr. Williams (D2), and Wellspring (D3). It is not necessary to consider the plaintiffs' claims against KGLI Asia (D4) for their losses from payments made to that entity under the ASA because the plaintiffs' counsel, Mr. Allison, K.C., accepted that there is no direct claim against D4 (see respondents' skeleton, para. 48).

14 The plaintiffs plead that in breach of the statutory, contractual, common law and fiduciary duties owed by the GP to TPF and the limited partners and pursuant to a conspiracy to injure TPF and the limited partners by unlawful means, the GP made very substantial payments using TPF moneys that were not for the benefit of TPF and the limited partners. These payments were allegedly made to the following five recipients and/or for the following purposes: (i) Apache Asia Ltd. and its related Macau entity, Apache Asia Ltda. ("Apache") which received US$58,528,399 from the GP, of which US$45,850,000 was purportedly for services under an advisory agreement and US$14,550,000 was directed to be paid to KGLI Kuwait; (ii) Wilfredo Placino who received US$2,920,000 purportedly by way of "advisor fees"; (iii) lawyers and lobbyists acting for Ms. Marsha Lazareva (a director of the GP from March 8th, 2007 to May 24th, 2018), and Mr. Saeed Dashti (a director of the GP from April 16th, 2007 to May 24th, 2018); (iv) a group of Kuwaiti service providers, allegedly for services rendered, of which US$14,070,000 was paid to Golden Shahin General & Trading Contracting Co. ("Golden Shahin"), which is part of a group of companies associated with KGLI Kuwait and Mr. Dashti; and (v) Wellspring, which received US$59,990,461.30 ("the Wellspring payment") by way of a payment alleged to be due under a judgment given

in proceedings brought by EMPEML against the GP and TPF in the Dubai International Finance Centre Court ("the DIFCC").

15 The alleged background to (v) is that on November 15th, 2017, US$496,429,767 (representing part of the net proceeds resulting from the sale by the GP of a TPF asset in the Philippines called "Clark City") were transferred to the GP's account with Noor Bank PJSC ("Noor Bank"). The same day, Noor Bank made a suspicious transaction report to the Financial Intelligence Function of the UAE which issued a report to the Dubai Public Prosecutor who successfully moved to freeze the transferred money, an order that remained in place until February 2019. On July 9th, 2018, EMPEML commenced proceedings ("the DIFC proceedings") against the GP and TPF in the DIFCC of First Instance claiming unpaid carry in the sum of US$45,462,000, compound interest on the unpaid carry sum, and unpaid management fees of US$8,106,386 with compound interest thereon at 8% pa. The GP acknowledged service of the claim, submitted to the jurisdiction of the DIFCC and admitted the claim in the sum of US$56,808,005. The DIFCC then entered judgment ordering the GP and TPF to pay US$56,999,978 and, at the request of EMPEML, the GP transferred US$59,990,461.30 to Wellspring in satisfaction of the judgment. The plaintiffs claim, *inter alia*, that this payment was made by the GP in wilful and negligent breach of trust in that EMPEML had no entitlement to the claimed management fees having assigned its rights therein to KGLI Kuwait; there was no contractual right to interest; it was wrong to submit to the jurisdiction of the DIFCC when the law of the Cayman Islands governed the relationship between the GP and EMPEML; and the IMA contained an exclusive jurisdiction clause in favour of the courts of the Cayman Islands. The plaintiffs also allege that the payment made in satisfaction of the DIFCC judgment was made on the advice of the same legal counsel who, to the GP's knowledge, was also advising EMPEML with respect to its entitlement.

16 The plaintiffs' direct claims against D1 and D3 are for relief under the Fraudulent Dispositions Act (1996 Revision) (see ASOC, paras. 179 and 189). They claim that these defendants culpably participated in the aforementioned improper payments made by the GP that are related in paras. 14 and 15 above and/or dishonestly received such payments or the traceable proceeds thereof. They maintain that Wellspring was party to an unlawful means conspiracy, dishonestly assisted in a breach of trust/duty by the GP, knowingly procured a breach of the contractual obligations the GP owes the limited partners, and is liable in knowing receipt for the Wellspring payment, holding the Wellspring payment or its traceable proceeds on constructive trust for TPF. The plaintiffs also claim that Mr. Williams conspired and dishonestly assisted in the GP's breaches of duty and was in breach of his fiduciary duties to TPF and the GP by orchestrating the DIFC proceedings and the Wellspring payment.

17 The GP applied to strike out the direct and the derivative claims against it but not on the ground that they lacked merit. Instead, it accepted that the pleaded allegations were arguable, but contended in relation to the direct claims that it is impermissible for two members of a class of eleven limited partners to claim damages from the GP to be paid directly to themselves except by seeking partnership accounts that would require the joinder of the other limited partners.

18 D2–D4 applied to strike out the derivative claims against them but D2 and D3 did not apply to strike out the direct claims against them. They have not appealed the judge's decision, but do not admit that the plaintiffs have standing to bring the direct claims that they face. Like D1, they maintain that these claims "ought to be pursued by way of a partnership account as against the GP."

The general rule as to who may bring proceedings by or against an ELP

19 Section 16 ELPA provides that all rights or property of an ELP shall be held on trust by the GP as an asset of the ELP and s.33 contains the general rule as to who can bring proceedings by or against an ELP. Section 16(1) reads:

> "Any rights or property of every description of the exempted limited partnership, including all choses in action … shall be held or deemed to be held by the general partner and if more than one then by the general partners jointly, *upon trust as an asset of the exempted limited partnership* in accordance with the terms of the partnership agreement." [Emphasis added.]

20 The material provisions of s.33 are:

> "(1) Subject to subsection (3), legal proceedings by or against an exempted limited partnership may be instituted by or against any one or more of the general partners only, and a limited partner shall not be a party to or named in the proceedings.
>
> (2) If the court considers it just and equitable any person or a general partner shall have the right to join in or otherwise institute proceedings against any one or more of the limited partners who may be liable under section 20(1) or to enforce the return of the contribution, if any, required by section 34(1).
>
> (3) A limited partner may bring an action on behalf of an exempted limited partnership if any one or more of the general partners with authority to do so have, without cause, failed or refused to institute proceedings."

21 It is important to note that, as recognized in paras. 2 and 6 of D2–D4's skeleton argument for the appeal, the effect of ELPA s.33 is that "ordinarily, actions *for and on behalf of an ELP* must by statute be brought by the general partner of that ELP" and "*a claim belonging to a limited partnership must be brought by the GP acting for and on behalf of the ELP*." [Emphasis added.] Sections 33(1) and (3) thus apply only to claims brought by or on behalf of an ELP, that is to derivative claims. They therefore do not apply to direct claims brought by a limited partner in respect of its own right of action against the GP and others.

The judge's decision on the direct claims

22 The judge dealt with direct claims by a limited partner at 2022 (1) CILR 12, paras. 61–65. Before doing so (*ibid.*, at paras. 46–60) he helpfully considered and analysed the characteristics of an ELP, how it differs from an ordinary partnership and a company, and the statutory regime established by the ELPA.

23 He stated (*ibid.*, at paras. 46–47) that the rights and obligations of the limited partners and the general partner (or partners) *inter se* are regulated by the ELPA, the express provisions of which are to prevail where they are inconsistent with the rules of equity and of common law applicable to partnerships as modified by the Partnership Act (2013 Revision). He also referred (*ibid.*, at para. 46) to the provision in s.3 of the ELPA that absent such inconsistency those rules "shall apply to an exempted limited partnership."

(a) *Characteristics of an ELP that differ from those of an ordinary partnership*

24 The judge identified the following characteristics of ELPs which he considered to be important points of distinction from an ordinary partnership, and which create different rights and obligations between the partners to those in an ordinary partnership (*ibid.*, at paras. 46–53):

(1) By ss. 4(2) and 20 of the ELPA, the limited partners in an ELP have limited liability whereas the general partner is liable for all debts and obligations of the ELP (para. 48).

(2) By s.14 of the ELPA limited partners have no active involvement in the business in their capacity as limited partners. The business is carried out by the general partner who enters into all contracts by or on behalf of the ELP (paras. 49 and 52).

(3) Section 19(1) of the ELPA imposes an express duty of good faith on the general partner of an ELP requiring the general partner to act in the interests of the ELP (para. 50).[2]

2 The judge did not mention, but must have been aware, that this statutory duty is subject to any express provisions to the contrary in the partnership agreement.

(4) Whereas in an ordinary partnership, mutual and reciprocal rights and obligations are owed to each other by partners, s.19(2) of the ELPA provides that, unless the partnership agreement provides to the contrary, a limited partner owes no fiduciary duty either to the ELP or to other partners (para. 51).

(b) ***Characteristics of an ELP that differ from those of a company***

25 The judge stated (*ibid.*, at paras. 54–55) that the fundamental legal distinction is that an ELP has no separate legal personality and exists only as its constituent partners and cannot own property in its own right. He stated that the consequence of the ELP not having a separate legal personality is that its general partner holds its rights and property, including choses in action, on trust for each of the partners. Because a limited partnership has no legal personality, the partnership as a whole is not able to enforce the general partner's obligations as trustee.

26 The judge then identified other characteristics of ELPs which he considered to be important points of distinction from those of companies:

(1) The general partner of an ELP owes its duties to all of the individual limited partners whereas the board of directors of a company only owe duties to the company (as the legal entity) and not to its shareholders (paras. 56–57).

(2) Because in the case of a company directors' duties are owed to the company, any breach by them is generally only actionable by or on behalf of the company and not by shareholders, although there are important exceptions where the wrongdoer directors are in control of the company (paras. 57–59).

(3) By s.33(1) of the ELPA, the general partner in an ELP is the only entity who can institute proceedings *on behalf of the partnership*, whereas in the case of a company there are exceptions to the rule in *Foss* v. *Harbottle* (11) where the wrongful directors are in control of the company. The judge stated that (2022 (1) CILR 12, at para. 60):[3]

> "If the limited partners have claims against the GP, it is in practice unworkable for it to bring proceedings against itself for breach of duty. If the GP is the arbiter of whether to bring claims against itself that clearly gives rise to a conflict of interest."

3 In para. 60, the judge does not mention s.33(3) of the ELPA which, as we have seen, permits a limited partner to bring a derivative action: "an action on behalf of an [ELP] if any one or more of the general partners with authority to do so have, without cause, failed or refused to do so."

(c) ***Direct claims by a limited partner***

27 The judge accepted the submissions of counsel for the plaintiffs, Mr. Allison, K.C., based on the characteristics of an ELP which differ from those of an ordinary partnership and a company, in particular that an ELP has no separate legal personality and that a limited partner does not owe fiduciary duties to the ELP or to the other limited partners. He stated that (*ibid.*, at paras. 61–62):

> "[T]he logical consequence of the aforesaid analysis of the nature and characteristics of an ELP is that the GP's obligations must be capable of enforcement by each of the partners to whom it owes duties individually. That is to be contrasted with the situation where directors of a company hold the company's assets and are treated as trustees because they owe fiduciary duties to the company. In that situation they hold the assets for the company, rather than the shareholders.
>
> 62 … [T]he GP of an ELP owes fiduciary duties to each of the limited partners and any breaches are therefore enforceable by the limited partners themselves."

28 The judge then stated (*ibid.*, at para. 63):

> "It follows that where an ELP is alleged to have suffered loss, as in this case, that is the loss of each of the limited partners. There is no distinct or separate loss in respect of 'the partnership' (TPF), which as an entity does not exist at law. The limited partners in enforcing their individual claims do not owe duties to each other: …"[4]

29 He concluded that (*ibid.*, at para. 64):

> "[T]he direct claims in respect of the individual partners' losses are vested in the limited *partners* alone, and are not claims that can be brought on behalf of TPF derivatively, except in the circumstances permitted by s.33(3) of the ELPA where the limited partners who wish to obtain redress for TPF are in effect put in the place of the GP, and bring claims on behalf of TPF."

30 The judge rejected the submission on behalf of the GP and the other defendants that s.16(1) of the ELPA and cll. 3.1 and 3.3 of the LPA prevented such direct claims because the limited partners cannot usurp the function of the GP, who is the only authorized agent of the partnership, here TPF, able to sue. He stated (*ibid.*, at para. 76) that: "the practical difficulty with that submission is that in practice the GP could obviously

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4 The last sentence, stating that, in enforcing their individual claims, limited partners do not owe duties to each other, contains a footnote referring to s.19(2) of the ELPA, on which see para. 24(4) above.

not sue itself and suffers from the conflict of interest" that arises if the GP is the arbiter of whether to bring claims against itself which clearly gives rise to a conflict of interest (see *ibid.*, at para. 60).

(d) ***The Henderson case***

31 The judge considered (*ibid.*, at paras. 66–78) the decision of Cooke, J. in the English Commercial Court in *Henderson PFI Secondary Fund II LLP* v. *Henderson Equity Partners (GP) Ltd.* (13) (hereafter "*Henderson*"). That case concerned the similar but by no means identical UK statutory regime in the Limited Partnerships Act 1907 under which such partnerships also have no legal existence independent of their constituent partners. The focus of *Henderson* was whether limited partners were entitled to pursue derivative claims on behalf of the partnership, and, if so, the consequence of doing so.[5] We therefore primarily consider it when giving our conclusion and reasons about the derivative claim against D1 at paras. 147–148 below. But in considering entitlement to pursue a derivative claim, Cooke, J. also considered whether a limited partner could sue the general partner for "its own loss on its own claim" under the limited partnership agreement ([2012] EWHC 3259 (Comm), at para. 32). He stated that it could because it "has its own contractual or fiduciary claim for its own loss" (*ibid.*, at para. 28).

32 In the present case, the judge stated that Cooke, J. held that:

(i) "each limited partner could in its own individual capacity sue … the general partner, for its own losses in respect of liabilities under the limited partnership agreement" (2022 (1) CILR 12, at para. 69);

(ii) "any claim brought by each limited partner as an individual contractual or fiduciary claim would not involve management of the partnership business" (*ibid.*, at para. 72); and

(iii) "the partnership which consisted of the limited partners and the general partner together, had no form of joint right or claim against the general partner" (*ibid.*, at para. 72).

(e) ***Must direct claims by a limited partner be by seeking an order for partnership accounts?***

33 The judge considered the GP's submission that direct claims by a limited partner can *only* be vindicated by the taking of partnership accounts (*ibid.*, at para. 79ff.). He rejected it and accepted the plaintiffs' submission that the claims advanced were principally direct claims vested in the individual limited partners rather than in TPF (the ELP itself) and that the

5 *I.e.* whether the pursuit of derivative claims constituted taking part in the management of the business of the partnership so that, under s.6(1) of the 1907 Act, claimants doing so would forfeit their limited liability.

taking of partnership accounts was not the only procedural route available to the plaintiffs (*ibid.*, at paras. 86–87).[6]

34 The judge took into account the distinct characteristics of an ELP and the provisions of the ELPA (*ibid.*, at paras. 80–81). He considered that the English authorities on ordinary partnerships which Ms. Stanley submitted were "pellucidly clear" in requiring rights and obligations between partners only to be procedurally adjudicated by the taking of partnership accounts had no direct application to Cayman Islands' ELPs. His reasons were that, unlike ordinary partnerships, under a Cayman Islands' ELP:

(i) there are no reciprocal fiduciary obligations or reciprocal duties between the limited partners unless the LPA provides otherwise (*ibid.*, at para. 84);

(ii) the absence of reciprocal fiduciary obligations between the limited partners means that the joinder of all partners to any proceedings so that the necessary accounting for any monetary claims required by *Public Trustee* v. *Elder* (29) ([1926] 1 Ch. at 789) does not apply to a Cayman Islands' ELP (2022 (1) CILR 12, at para. 82, fn. 18);

(iii) the general partner owes fiduciary and contractual duties directly to the limited partners and those duties are enforceable directly by the limited partners (*ibid.*, at para. 83);

(iv) each limited partner is not, as is the case in an ordinary partnership, jointly and several liable for the partnership's liabilities; referring to ss. 3,[7] 4(3), 16(1) and 19(2) of the ELPA, the judge stated that "The rules of equity and common law applicable to ordinary partnerships are in this respect inconsistent with express provisions of the ELP …" (*ibid.*, at para. 85);

(v) claims against the general partner for a breach of the statutory, equitable, common law or contractual duties owed to the limited partners are vested in the limited partners themselves and may be brought directly (*ibid.*, at para. 87).

The questions before us and the submissions

35 We have stated that D2 and D3 did not apply to strike out the direct claims against them but do not accept that the plaintiffs have standing to bring such claims against them and, although D2 and D3 were not partners, maintain that their direct claims "ought to be pursued by way of a partnership account as against the GP." The result was that the focus of the submissions before us was on the judge's rejection of the application to

6 His summary of the GP's submissions is at para. 32(i)–(ii).

7 "The rules of equity and of common law applicable to partnerships as modified by the Partnership Act (2013 Revision) but excluding ss. 31, 45–54 and 56–57 shall apply to an exempted limited partnership, except where they are inconsistent with the express provisions of this Act."

strike out the direct claims against the GP. Little was said specifically about the direct claims against D2 and D3. Ms. Stanley for D1, accepted in substance, that there are direct claims against the GP. But, supported by Mr. Chapman, she submitted that the judge erred in two respects. The first was his finding that the rule/principle that claims by partners *inter se* can only be brought by the taking of partnership accounts does not apply to a limited partnership. She maintained that the judge erred in holding (*ibid.*, at para. 85) that the application of the rule/principle is inconsistent with the express provisions of the ELPA and that it has therefore been disapplied by s.3 of the ELPA. She submitted that his second error was in holding (*ibid.*, at para. 55) that the GP holds the property of the ELP "on trust for each of the partners." That, she submitted, was a clear misreading of ELPA s.16(1). However, she accepted that before the dissolution of a partnership, although there is jurisdiction to obtain a partnership account, "it is an exceptional jurisdiction to allow an account pre-dissolution."

36 On behalf of the plaintiffs, Mr. Allison submitted that the partnership accounts rule/principle does not apply to ELPs in this jurisdiction, in the same way that it does not apply to limited partnerships in England and Wales.[8] This, he maintained, is because the element of reciprocity of fiduciary duties in an ordinary partnership is absent in an ELP. Moreover, in an ordinary partnership, but not an ELP, all the partners have unlimited liability for the partnership's liabilities, and (subject to contrary agreement) are entitled to take part in the management of the partnership business. Mr. Allison further argued that to apply the rule/principle would be inconsistent with ELPA s.32(12)(c)[9] which makes it clear that partners in an ELP have a right to an account. Here the pleaded claims against the GP and D2 and D3 include claims for accounts and equitable compensation for the plaintiffs' individual losses. Mr. Allison submitted that they are entitled to bring these against the GP because of the GP's position as a fiduciary and statutory trustee and its overarching duty to account. Although less clearly stated, it appears that the basis for the plaintiffs' entitlement to bring direct claims against D2 and D3 is their knowing receipt of TPF's property or moneys which the GP transferred to them in breach of its statutory, equitable and other obligations, and their participation in a conspiracy to cause loss to the plaintiffs by unlawful means. During Ms. Stanley's oral submissions there was some debate as to whether, in a claim by a limited partner against the GP or against a third party, the court could order that the remedy against an unsuccessful defendant should be the restoration of

8 In fact the Limited Partnership Act 2007 applies throughout the UK.

9 "A partnership agreement may provide that, as against any other partner, any assignment or other disposition by a partner of any right, debt or other chose in action arising under a partnership agreement shall confer economic rights only and for the purposes of this section 'economic rights' are … The right to an account for the purpose of ascertaining the amount of share of any of the foregoing …"

the trust fund by analogy with the position where a claim is brought by the beneficiary of a trust: *Target Hldgs. Ltd.* v. *Redferns* (38) (hereafter "*Target* v. *Redferns*"). Ms. Stanley accepted that this was possible in a claim against the GP but did not accept that it was possible in a claim against a third party such as D2 and D3. She stated that the obvious way for a limited partner to make a claim against a third party would not be by a direct claim but, using the trust analogy, by a claim on behalf of the trust. That appears to be a submission that the claim must be a derivative claim and thus subject to the requirements of ELPA s.33(3). Mr. Chapman's written submissions on behalf of D2 and D3, to which we have referred, are to the same effect.

37 In principle, two main questions arise in respect of the direct claims although, in the light of the way the appeal has proceeded, the second does not in fact arise. The first question is whether a direct claim by a limited partner against the general partner must be made by claiming partnership accounts in proceedings to which all the partners are parties as it must in an ordinary partnership. Can a limited partner claim an account against a general partner for breach of fiduciary or other duty without at the outset joining the other partners and, if the breach is established, may a limited partner obtain an order that the general partner restore the fund?

38 The second question is whether the ELP itself, although not a legal entity, also has a claim against the GP or a third party such as D2 and D3 for breach of their fiduciary and other obligations. The judge stated (2022 (1) CILR 12, at para. 63) (set out at para. 29 above) that there is no distinct or separate loss in respect of "the partnership" which does not exist in law as an entity. When dealing with the derivative claims later in this judgment, we state that, for the reasons we give at para. 145 below, we are not to be taken as agreeing that the judge was correct in concluding that the partnership has no claim against the GP. However, absent a respondents' notice in respect of the judge's finding or any submission by the plaintiffs that the judge was wrong, the question is not properly before us. But since it is accepted that a limited partner may have a direct claim against the GP for breach of its fiduciary and other duties, albeit only in the context of partnership accounts, uncertainty as to whether TPF itself also has a claim *qua* ELP does not affect our resolution of the dispute about the plaintiffs' direct claims.

39 There were three limbs to Ms. Stanley's submissions. The first was that the application of the partnership accounts rule/principle to limited partnerships is not inconsistent with the provisions of the ELPA and therefore is not disapplied by s.3. She accepted that there are obvious examples of inconsistency between the rules of equity and common law that apply to ordinary partnerships and the provisions of the ELPA governing limited partnerships. She gave three examples. The first is the disapplication by ELPA ss. 4(2) and 16(2) of the rule that in ordinary

partnerships each partner is liable jointly and severally with the other partners for all partnership liabilities. The second is s.32(11)'s provision that in limited partnerships the rule that a partner cannot assign its partnership interest to a third party without the consent of the other partners does not apply. The third is that, in the case of limited partnerships, the rule in ordinary partnerships that certain events cause a dissolution of the partnership does not apply to the events specified in ELPA s.35(a)(i)–(vi). But she submitted that none of these "shed light on the fundamental question at issue on Grounds 2 and 3, namely whether limited partners are entitled to bring direct claims against the GP." It would appear this may require some reformulation in the light of her acceptance during her oral submissions in response to questions by Birt, J.A. that in a claim by a limited partner against the GP the court could order that the defendant restore the fund and that it is exceptional to obtain partnership accounts whilst the partnership is continuing.

40 As to the meaning of "inconsistent," Ms. Stanley relied on *In re Knight & Tabernacle, &c., Socy.* (19) ([1891] 2 Q.B. at 69). That case concerned a statutory provision that its provisions were to apply except where those provisions were inconsistent with those of another statute. She submitted that this approach applied where, as in the case of s.3 of the ELPA, the question is whether non-statutory rules and principles are inconsistent with the express provisions of a statute and that the partnership accounts rule/principle is not inconsistent with these provisions in the sense used in *Re Knight & Tabernacle.* That case stated that to be "inconsistent," the rule/principle must be so at variance with the machinery and procedure indicated by the statute that, if it is applied, the statute would not work. Ms. Stanley argued that this shows that "inconsistent" means "irreconcilable" rather than "different from," and that there is no such irreconcilability between the partnership accounts rule/principle and the provisions of the ELPA.

41 Ms. Stanley also referred to the judge's statement (2022 (1) CILR 12, at para. 86) that there is "no good reason why the taking of partnership accounts should be the only procedural route available to the plaintiffs to obtain redress under the ELPA." She submitted that the judge thus "accepted that partnership accounts *were* a means of redress available" which showed that there is no irreconcilability or inconsistency between the partnership accounts rule/principle and the provisions of the ELPA.

42 Mr. Allison's response to these submissions was that the reasons given by the judge (*ibid.*, at paras. 82–85) (summarized at para. 34 above) for concluding that the partnership rule/principle was disapplied by ELPA s.3 and is inconsistent with the scheme of the ELPA were correct. As to the scheme of the ELPA, he also submitted that the inconsistency is shown *inter alia* by s.16(1) which makes the GP trustee of an ELP's assets, and

by s.32(11) which permits the assignment of a limited partner's interest without the consent of the other partners, and s.32(12)(c) which gives a limited partner the right to claim an account.

43 The second limb of Ms. Stanley's submissions were the authorities which hold that claims by partners *inter se* can *only* be brought in the context of the taking of partnership accounts. She referred to the statements in *Meyer* v. *Faber (No. 2)* (21) ([1923] 2 Ch. at 439) and *Hurst* v. *Bryk* (16) ([2002] 1 A.C. at 194) respectively that in an action against a co-partner "the only relief which the plaintiff could obtain would be an account" and that "the amount owing to a partner by his fellow partners is recoverable only by the taking of an account in equity after the partnership has been dissolved." Mr. Allison's response was that the cases relied on by Ms. Stanley emphasize the reciprocity of personal obligation and trust and the mutuality of personal liability in an ordinary partnership, and Cooke, J. in *Henderson* (13) ([2012] EWHC 3259 (Comm), at para. 28) emphasized the absence of this in a limited partnership.

44 The third limb of Ms. Stanley's submissions were considerations of "practicality and policy." She maintained that there were sound practical reasons for the application of the partnership account rule/principle to Cayman Islands ELPs. The rule/principle ensures that the creditors of the partnership are paid first before the partners (as they should be) and that all the limited partners will be bound by the outcome. It, she argued, prevents a multiplicity of proceedings with resulting chaos by providing a mechanism for the orderly winding up of the affairs of the ELP.

45 Ms. Stanley submitted that if the partnership accounts rule/principle does not apply "the limited partners would have to bear the additional burden of the costs of the GP dealing with a multiplicity of proceedings, rather than one." There was, she argued, no prejudice to the partners of an ELP by the application of the rule/principle because "claims can all be dealt with in the managed process of the taking of partnership accounts." She relied on the statements in *Public Trustee* v. *Elder* (29) ([1926] Ch. at 784) that all partners needed to be joined "to avoid multiplicity of actions," in *Hugh Stevenson & Sons* v. *Akt. für Cartonnagen-Industrie* (14) ([1918] A.C. at 247) that partners "cannot sue each other excepting for the balance of the account taken in accordance with the principles which the courts of equity apply in working out the results of dissolution," and on "Partnerships, Limited Partnerships and LLPs," 29(1) *Atkins Court Forms*, at para. 15.

46 In his oral submissions, Mr. Allison relied on *Golstein* v. *Bishop* (12) to show that in a partnership dispute it is not always necessary to have a claim for a partnership account at the outset. Mr. Christopher Nugee, Q.C., sitting as a Deputy High Court judge, stated ([2013] EWHC 881 (Ch), at paras. 2 and 24) that factual matters and the merits of the claim in that case, which included a claim for damages for breach of the partnership

agreement,[10] would be determined but that dissolution accounts would be taken at a later stage. In the Court of Appeal, Briggs, L.J., with whom Kay and Sullivan, L.JJ. agreed, recognized that there are remedies other than the taking of a partnership account that might be available for breaches of duty in an ordinary partnership (see [2014] EWCA Civ 10, at para. 11). Ms. Stanley submitted that *Golstein* v. *Bishop* was distinguishable for two reasons. The first was that the point before us did not arise in that case because the parties had agreed to this being dealt with by way of preliminary issue. Secondly, the substance of the partnership rule/principle was satisfied in that case because there were only two partners, and they were both before the court. Notwithstanding the force of those points, the case shows that, even in the case of an ordinary partnership, there is room for flexibility.

47 As to misreading ELPA s.16(1), its material provisions are set out at para. 19 above. It expressly provides that the rights and property of an ELP, including all choses in action are held "*by the general partners jointly, upon trust as an asset of the exempted limited partnership* in accordance with the terms of the partnership agreement." [Emphasis added.] Ms. Stanley compared its wording with the judge's holding (2022 (1) CILR 12, at para. 55) that the property of an ELP is held "*on* trust for each of the limited partners." [Emphasis added.]

48 She submitted that the judge's holding was clearly a misreading of s.16(1). The legislature has directed that the assets are those of "the partnership." Thus, giving full recognition to the fact that whilst an ELP has no independent legal personality, it provided for there to be a first call on the assets by the creditors of limited partnerships and that the limited partners stand behind those creditors. She argued that s.16(1) is consistent with the preservation of the operation of the partnership accounts rule/principle which enables the court to identify the assets of the ELP which are "actually available" for distribution to limited partners after the creditors had been paid.

49 Drawing on the analogy of the position under a non-partnership trust, she also relied on the statements in the decisions of the High Court of Australia in *Chief Commr. of Stamp Duties* v. *Buckle* (6) and *Commr. of State Revenue* v. *Rojoda* (7). In *Buckle's* case the High Court stated ([1998] HCA 4, at para. 48) that:

> "The entitlement of the beneficiaries is confined to so much of those assets as is available after the liabilities in question had been discharged or provision has been made for them."

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10 The Chancery Report omits paras. 178–214 of the judgment which deal with the claim for damages for breach of the partnership agreement but those paragraphs are included in the neutral citation version available on the BAILII website.

In *Rojoda*, the High Court stated that ([2020] HCA 7, at para. 33):

> "unlike a beneficiary of a fixed trust, it was well established that a partner's interest was not an interest in, or in relation to, any specific asset other than an entitlement to the partner's share of the net proceeds from the sale of each asset at the completion of winding up. In other words, the only right that the partners have, both before and after dissolution, in relation to each asset is a right to the account and distribution after sale of the proceeds of that asset—'not to an individual proportion of a specific article, but to an account: the property to be made the most of, and divided.'"

50 In *Buckle's* case, the High Court also stated ([1998] HCA 4, at para. 47) that in aid of the right of a trustee to reimbursement or exoneration for liabilities properly incurred by the trustee in the administration of the trust, "the trustee cannot be compelled to surrender the trust property to the beneficiaries until the claim has been satisfied." It stated that (*ibid.*, at para. 48), until such reimbursement or exoneration, "it is impossible to say what the trust fund is."

51 Mr. Allison submitted that because an ELP has no separate legal personality the only sensible construction of the words in ELPA s.16(1) is that the general partner of an ELP holds its assets on trust for all the limited partners. The judge was correct so to hold. Because the general partner owes fiduciary duties to all the limited partners, any breaches of those duties must be enforceable by the limited partners themselves. Where there is a claim against the general partner itself it cannot be only the general partner who can institute proceedings. The absence of separate legal personality means that, legally, it is the ELP's constituent limited partners who suffer loss directly and the general partner's fiduciary obligations "must be capable of enforcement by the other partners (just as the obligations of any other trustee are enforceable at the suit of the beneficiaries)."

Conclusions on the direct claims

52 We first consider the direct claims brought by the plaintiffs against the GP and then consider the direct claims brought against D2 and D3.

(a) *Direct claims by a limited partner against the GP*

53 There is considerable force in the considerations of "practicality and policy" relied on by Ms. Stanley and the need to protect the positions of the creditors of an ELP and of the other limited partners. But we have concluded that the differences between ordinary partnerships and ELPs mean that it is not appropriate to require that a direct claim by a limited partner against the GP must always be initially brought by way of a claim for partnership accounts and that it is not necessary to protect the positions

of the creditors and of the other limited partners by requiring this. We have so concluded for the following reasons.

54 First, we have borne in mind two related factors based on the wording of the ELPA. One is the inconsistency of the proposition that such a claim must be by way of partnership accounts with the right given to a limited partner under ELPA s.32(12)(c) to claim "an account." The legislature addressed the question and used the word "account" but not the term "partnership account." We agree with Mr. Allison's submission that it is difficult to see a principled justification for refusing a limited partner a claim to "an account" but permitting such a partner to claim "a partnership account" although there are no mutual and reciprocal rights and obligations between limited partners or fiduciary duties. The other is that ELPA s.16(1) provides that the general partner holds or is deemed to hold "[a]ny rights or property of every description of the exempted limited partnership, including all choses in action … ***upon trust as an asset of the exempted limited partnership*** in accordance with the terms of the partnership agreement." [Emphasis added.] That in substance (see para. 56 below), provides that the assets of an ELP are held by the general partner on a statutory trust for the limited partners.

55 Secondly, an ELP does not have the mutuality and reciprocity of obligations that are the hallmark of an ordinary partnership. This is because ELPA s.19(2) provides that, absent express provision in the partnership agreement, the limited partners owe no fiduciary duties. The statements in the cases relied on by Ms. Stanley requiring the claim to be brought by way of a partnership account emphasize the reciprocity and mutuality that exists between conventional partners.

56 We turn to Ms. Stanley's submissions based on s.3 of the ELPA that, absent inconsistency with the rules of equity and of common law applicable to partnerships, those rules "shall apply to an exempted limited partnership" and ***Re Knight & Tabernacle*** (19). We bear in mind the modern purposive approach to statutory interpretation. We consider that, as well as provisions such as ss. 16(1), 19(2) and 32(12)(c), the scheme of the ELPA with the absence of reciprocity and mutuality of rights and obligations is inconsistent with requiring claims by a limited partner to be brought by taking partnership accounts in proceedings to which all the limited partners are party. We accept Mr. Allison's submission that because an ELP has no separate legal personality the only sensible construction of the words in ELPA s.16(1) is that the GP of an ELP holds its assets on trust for all the limited partners. On its own, the judge's use of the phrase "on trust for each of the partners" (2022 (1) CILR 12, at para. 55) may leave some uncertainty as to whether he meant to treat the entitlement of each of the partners as totally individuated, but (***ibid.***, at 61) what he said was

"capable of enforcement by each of the partners to whom [the GP] owes duties individually."

57 Because a trust also has no separate legal personality, thus making the position similar to the statutory trust created by ELPA s.16(1), we also regard the position of a claim by a beneficiary of a trust against the trustee as important. The beneficiary of a subsisting trust including a discretionary trust is entitled to bring a claim against the trustee to recover loss suffered by the trustee's breach of trust, but the remedy is for an order to restore to the trust what ought to have been there: see *Target* v. *Redferns* (38); *Lewin on Trusts*, 20th ed., para. 21–046 (2020) and *Snell's Equity*, 34th ed., paras. 2–003 – 2–004, and 21–046 (2022).

58 In *Target* v. *Redferns* ([1996] A.C. at 436D–E), Lord Browne-Wilkinson stated that the rule developed by equity reflected the fact that while each beneficiary had the right to claim, "no one beneficiary was entitled to the trust property" and there was a "need to compensate all beneficiaries for the breach." He had earlier stated (*ibid.*, at 434C–D) that an order to restore was "the only way in which *all* beneficiaries' rights [could] be protected" [Emphasis added]. The remedy thus ensured that all the beneficiaries' rights were protected and that the beneficiary who issued the proceedings did not steal a march on the others and scoop the pool. There is no inconsistency between such an order and what was stated in *Chief Commrs. of Stamp Duties* v. *Buckle* (6) and *Rojoda* (7) because all that is ordered at that stage is restoration of the fund. Should there be a claim against the ELP, it can then be determined. There is also no inconsistency between such an order and what was said by the High Court of Australia in *Rojoda* about the nature of the partnership trust in an ordinary partnership and the difference between that and that of the beneficiary of a fixed trust because ordering restoration of the fund does not give an individual limited partner an interest in any specific asset.

59 We consider that this approach and remedy is equally applicable in the case of the statutory trust created by s.16(1) ELPA. We have had regard to the two factors based on the wording of the ELPA referred to at paras. 54 and 55 above; the inconsistency of the proposition that such a claim must be by way of a partnership account with the right expressly given to a limited partner under ELPA s.32(12)(c) to claim "an account" and the absence in an ELP of the mutuality and reciprocity of obligations that is the hallmark of an ordinary partnership. Whilst, as Ms. Stanley submitted at paras. 20–25 of her reply skeleton by reference to *Rojoda*, assets held by a partner of an ordinary partnership are also held on trust for the partnership, these factors lead to the conclusion that the partnership accounts rule/principle is inconsistent with the ELPA and the judge was correct in his conclusion. Mr. Allison accepted that it was likely that the plaintiffs could not have as a remedy equitable compensation payable directly to them because that took no account of the other limited partners

and of the ELP's creditors. We have concluded that in proceedings against the GP, a limited partner can recover for loss suffered by the breach of the statutory trust but that the remedy would be the restoration of the ELP's fund thus compensating the direct losses suffered by all the constituent limited partners. We discuss further aspects of ordering the restoration of the fund and its doctrinal underpinning when considering the plaintiffs' direct claims against D2 and D3. The important point is that while the individual partners, like the beneficiaries of a discretionary trust, have a direct claim, if established, the remedy for that claim reflects the fact that no one partner is entitled to all of the fund.

60 This remedy prevents a limited partner claimant from benefitting alone from any recovery either at the expense of the other limited partners or of the ELP's creditors. It thus directly meets the "stealing a march" and "scooping the pool" elements of the practical and policy reasons relied on by Ms. Stanley, the substantive elements of her case for requiring a claim by a limited partner against the GP to be by way of partnership accounts from the outset. As we have stated, *Golstein* v. *Bishop* (12) shows that even in the case of an ordinary partnership there is room for flexibility and that a trial of the merits of the claim may be held before taking a partnership account. It suggests that where there is no prejudice either to the creditors of the partnership or to other third parties it is possible to have a trial of the merits of a claim brought by a partner before a partnership account is taken.

61 We consider that the problem of multiplicity of actions and what Mr. Chapman referred to as an "ungated litigation superhighway" can be dealt with by robust case management. Later claims brought in a single jurisdiction can be stayed or consolidated and ordered to be heard together. Where claims are brought in more than one jurisdiction, stays or anti-suit injunctions can also be used to avoid the problems identified by Ms. Stanley and Mr. Chapman.

62 Mr. Allison's description (see skeleton, at para. 89) of the insistence on the joinder of all the limited partners from the outset as "unedifyingly formalistic" may put it too highly. We, however, consider that insistence that a claim for partnership accounts always be made at the outset reflects an entirely technical procedural approach. In her responses to questions by the court, Ms. Stanley at one stage suggested that the plaintiffs in effect should start again and now seek the taking of partnership accounts and that this either be by the court now directing further pleadings or an inquiry to identify what is being alleged by the limited partners. She argued that the taking of partnership accounts occurs "in a much more court managed process than a fraud trial where anything goes …"

63 Our rejection of the submission that the direct claims are defective in not at the outset joining all partners and seeking partnership accounts does not mean that the court cannot direct that there be such a procedure at a

later stage as part of its case management powers if that proves necessary. If, after the merits of the plaintiffs' claims against the GP have been determined, it appears that an order to restore the fund should be made but that, given the GP's wrongdoing, steps such as placing the assets in escrow, appointing a receiver, or taking partnership accounts are necessary, the court can make appropriate directions. Alternatively, if the plaintiffs so apply, we would allow them now to add a prayer for the taking of partnership accounts to their pleading, but that such accounting should take place only after the resolution of the issues in their current claims and only if, at that time, it appears necessary.

64 In summary, for the reasons we have given, we dismiss the GP's appeal against the judge's refusal to strike out the plaintiffs' direct claims against the GP. The consequence is that the plaintiffs may bring their direct claim against the GP. We wish to make it clear that, in the event of success, the likely remedy would be an order to restore the trust fund rather than equitable compensation payable directly to the relevant limited partner.

(b) ***Direct claims by a limited partner against third parties such as D2 and D3***

65 We have stated that there was no application by D2 and D3 to strike out the direct claims against them on the merits but they submit that the plaintiffs do not have standing to bring the direct claims against them and ought to have brought the claims against the GP seeking the taking of partnership accounts.

66 The question is whether, if D2 and D3 are held liable to the plaintiffs for breach of their statutory, equitable and other obligations, it is open to the court to order that those defendants restore the fund rather than pay the plaintiffs. If the court is not able to order this, there will be a risk of prejudice to the creditors of the ELP and/or to the other limited partners in the ways we have discussed in the context of claims against the GP but concluded it did not exist in that context. Indeed, since different limited partners may bring claims against different third parties, there may be a multiplicity of both plaintiffs and defendants and the risk of chaos referred to by Ms. Stanley and Mr. Chapman might well be greater. That risk would be avoided by a derivative action where the requirements of s.33(3), discussed at paras. 94–98 below, are satisfied.

67 Ms. Stanley submitted that it is not possible to order D2 and D3 to restore the fund and that the only way that TPF would be entitled to anything is if the plaintiffs' claims are made on its behalf and are thus derivative claims. During an exchange primarily about the claims against the GP, it was put to Mr. Allison that against the other defendants he might not be able to get an order restoring the trust. His response was "arguably

not" but it is not altogether clear whether the exchanges related to the direct or the derivative claims against D2 and D3.

68 Since D2 and D3 did not apply to strike out the direct claims against them, strictly the question of whether it is possible for the court to order D2 and D3 to restore the fund is one which falls for determination after the merits of the claims against them have been determined. Although we did not hear full argument on this question, in the light of the points that were made, we consider it appropriate to give our preliminary view on the question. We consider that the plaintiffs have a good arguable case that, where third parties are liable for breaches such as those claimed against D2 and D3, the court may order those defendants to restore the fund rather than pay the plaintiffs and thus avoid the risk of prejudice to other limited partners or creditors.

69 As in the case of a claim against the general partner, the starting point is the position of a claim by a beneficiary of a trust. It is clear that the interest of the beneficiary of a discretionary trust is enforceable against a third party who received trust property which the trustee did not have authority to transfer and the third party knew enough to make it unconscionable to retain the asset for his own benefit: see *Lewin on Trusts*, 20th ed., para. 21–046, at 901 (2020), and *Snell's Equity*, 34th ed., paras. 2–003 – 2–004, at 22–23, and para. 21–046, at 650 (2022).

70 *Snell* also states (*op. cit.*, para. 21–045, at 650) that "the beneficiary's only right would be to have the asset or its proceeds reinstated to the trustee" (to the same effect, see para. 22–005, at 655–656, and para. 30–015, at 845–846). The reason given is that the beneficiary "could not compel the third party to transfer the asset directly to himself since this would give him a greater equitable right against the third party than he had against the trustee …" In para. 2–004, at 22–23 of *Snell*, it is stated that "the third party's duty is to restore the trust asset to the properly appointed trustee" and that this would happen "if the original trust involved continuing duties to manage a fund and if the beneficiary did not have the entire beneficial interest in the trust asset." Nolan, "Equitable Property" (2006) 122 LQR 232, at 242–243 states that the cases on the rights of a beneficiary against the recipients of misapplied trust assets all acknowledge that a recipient is bound to restore the assets and their proceeds to the relevant trustees, or else transfer them at the direction of a beneficiary or beneficiaries who, being absolutely entitled to the assets in equity, may terminate the trust and direct such a transfer. He states (*op. cit.*, at 255) that the cases provide a doctrinal basis for actions to restore the integrity of a pool of assets held in trust, should it be depleted without authority.

71 That doctrinal basis explains why, given the analogy between a non-partnership trust, an ELP with no separate legal personality, and the

statutory trust imposed by s.16(1) of the ELPA, it is possible to order third parties such as D2 and D3 to restore the fund where the claim against them succeeds. The analogy rests on the fact that, in cases of knowingly assisting a trustee in a fraudulent and dishonest disposition of the trust property, although the third party is not in fact a trustee, he is made liable in equity "as if he were" a trustee: *Selangor United Rubber Estates Ltd.* v. *Craddock* (33) ([1968] 1 W.L.R. at 1580 and 1582), citing Lord Esher, M.R. in *Soar* v. *Ashwell* (36) ([1893] 2 Q.B. at 394–395), and Lord Selborne, L.C. in *Barnes* v. *Addy* (4) (9 Ch. App. at 251). This reflects the fact that it is the fund which has suffered the loss and, in the words of Lord Browne-Wilkinson in *Target* v. *Redferns* (38), an order to restore is "the only way in which *all* beneficiaries' rights" could be protected ([1996] A.C. at 434).

72 For these reasons, had D2 and D3 applied to strike out the plaintiffs' direct claims against them, our preliminary view is that the objections raised to the plaintiffs' standing to bring the claims are unfounded. The consequence is that the plaintiffs may bring these claims against D2 and D3. It will be for the court hearing the claims to decide whether they are in fact made out on the merits and, if they are, whether, in the circumstances of this case, an order to restore the fund should be made and, given that the GP would be implicated in the wrongdoing, steps such as placing the assets in escrow, the appointment of a receiver, or the taking of partnership accounts are necessary.

The derivative claims

73 We turn to consider the derivative claims brought against D1 and D2–4. This is the first occasion on which one or more limited partners of a Cayman Islands ELP have sought to bring a derivative claim pursuant to s.33(3) ELPA and accordingly we shall proceed to review the approach adopted by the judge and consider if we can provide any guidance for the future.

74 We begin with a brief discussion of derivative claims generally before turning to consider the interpretation of s.33(3). We shall then consider a number of specific matters of principle raised by the parties before turning to apply our conclusions on the law to the facts of this case.

(a) *Derivative claims in general*

75 The general rule is that the only person who can bring an action against another who has caused injury or damage is the person who has suffered that injury or damage. As the Court of Appeal put it in the leading case of *Prudential Assur. Co. Ltd.* v. *Newman Indus. Ltd.* (28) ([1982] 1 Ch. at 210):

> "A derivative action is an exception to the elementary principle that A cannot, as a general rule, bring an action against B to recover

damages or secure other relief on behalf of C for an injury done by B to C. C is the proper plaintiff because C is the party injured, and, therefore, the person in whom the cause of action is vested. This is sometimes referred to as the rule in *Foss v Harbottle* (1843) 2 Hare 461 when applied to corporations, but it has a wider scope and is fundamental to any rational system of jurisprudence."

76 The court went on to outline an exception to the rule in *Foss* v. *Harbottle* (11) in the following terms (*ibid.*, at 211):

"There is an exception to the rule where what has been done amounts to fraud and the wrongdoers are themselves in control of the company. In this case the rule is relaxed in favour of the aggrieved minority, who are allowed to bring a minority shareholders' action on behalf of themselves and all others. The reason for this is that, if they were denied that right, their grievance could never reach the court because the wrongdoers themselves, being in control, would not allow the company to sue."

77 A further helpful general description of a derivative claim in the context of companies is to be found in the judgment of Lewison, J. in *Iesini* v. *Westrip Hldgs. Ltd.* (17) ([2009] EWHC 2526 (Ch), at para. 73):

"I should begin by saying a little about derivative claims generally. In the first place the new code has replaced the common law derivative action. A derivative claim may 'only' be brought under the [Companies Act 2006]. As section 260 (1) makes clear a derivative claim is one in which the cause of action is vested in the company, but where the claim is brought by a member of the company. This reflects the old law in which a derivative action was an exception to the general principle (known as the rule in *Foss v Harbottle* … that where an injury is done to a company only the company may bring proceedings to redress the wrong. Allied to this principle was the principle that whether a company should bring proceedings to redress a wrong was a matter that was to be decided by the company internally; that is to say by its board of directors, or by a majority of its shareholders if dissatisfied by the board's decision. The court would not second guess a decision made by the company in accordance with its own constitution. The exception to these principles was necessitated where the company's own constitution could not be properly operated. If the wrongdoers were in control of the company (because they were a majority of the shareholders) they would not in practice vote in favour of taking proceedings against themselves, even though the taking of proceedings would be in the company's best interests …"

78 Derivative claims are not restricted to companies. They can also be brought, for example, in connection with trusts and limited partnerships.

79 In relation to trusts, it is well-established that, although in general terms the only person who may bring an action against a third party on behalf of a trust is the trustee, a beneficiary can, in special circumstances, bring a derivative action so as to stand in the place of the trustee. In *Roberts* v. *Gill & Co. Solicitors* (30), Lord Collins of Mapesbury summarized the position as follows ([2011] 1 A.C. 240, at para. 46):

> "The cases go back to the 18th century, and many of them were reviewed in *Hayim v Citibank NA* [1987] AC 730. The special circumstances which were identified in the earliest authorities as justifying a beneficiary's action were fraud on the part of the trustee, or collusion between the trustee and the third party, or the insolvency of the trustee, but it has always been clear that these are merely examples of special circumstances, and that the underlying question is whether the circumstances are sufficiently special to make it just for the beneficiary to have the remedy …"

80 To like effect is the observation of Lord Walker of Gestingthorpe (*ibid.*, at para. 110) (omitting references):

> "There is ample authority, comprehensively reviewed in the judgment of Lord Collins JSC, as to the need for special circumstances before the court will countenance a derivative action. Such actions are now relatively common in cases concerned with mismanaged companies, and in many jurisdictions actions by or on behalf of minority shareholders are now regulated by a statutory code … Derivative actions by beneficiaries under inter vivos trusts or wills are less common … But in all these cases the unifying factor—what has to be special about the circumstances—is that the derivative action is needed to avoid injustice …"

81 A helpful summary of the position in relation to trusts under the law of England and Wales is to be found in *Lewin on Trusts*, 20th ed., at paras. 47–006 and 47–008, at 1024–1026:

> "47–006. However, as an alternative to proceedings brought in the name of trustees, a beneficiary may, sometimes, bring an action in his name on behalf of the trust against a third party. The fact that the action is brought in the name of the beneficiary rather than the name of the trustee does not alter its character. The action is a derivative action in which the beneficiary stands in the place of the trustees and sues in right of the trust, and does not enforce duties owed to him rather than the trustees; a beneficiary can be in no better position than trustees carrying out their duties in a proper manner …

> 47–008. A beneficiary can bring a derivative action only in special circumstances, *for example circumstances which tend to disable the trustees from suing (as where their acts and conduct with reference to the trust fund are impeached), or circumstances rendering it difficult or inconvenient for the trustees to sue, as where there is a conflict between their interest and duty.* Special circumstances are not confined to circumstances of these kinds. The guiding principle is that there must be exceptional circumstances, which embrace a failure, excusable or inexcusable, by the trustees in the performance of a duty to the beneficiaries to protect the trust estate, or to protect the interests of the beneficiaries in the trust estate. The special circumstances relied on must have something to do with the willingness or ability of the trustee or alleged trustees to bring the action." [Emphasis added]

As can be seen from the emphasized passage, circumstances where the trustees are inhibited from suing because their own conduct in relation to the trust is impeached or they are under a conflict of interest are leading examples of "special circumstances."

82 Turning to English limited partnerships, the question of whether and, if so, in what circumstances a limited partner can bring a derivative claim on behalf of the limited partnership arose in *Henderson* (13) referred to above in para. 31. As we have already stated, although by no means identical, there are similarities between an English limited partnership and an ELP. In particular, neither is a separate legal entity and, as in an ELP, the limited partners in an English limited partnership may not take part in the management of the partnership business which is to be left in the exclusive hands of the general partner. Thus, in the ordinary way, a limited partner cannot sue a third party in the name of the limited partnership; such action can only be taken by the general partner.

83 In *Henderson*, a majority of limited partners instituted derivative proceedings on behalf of the partnership against the general partner and the manager of the partnership (who had been appointed as manager by the general partner on behalf of the partnership). The manager was a sister company of the general partner. The claims sought compensation in respect of various alleged breaches of duty by both the general partner and the manager. It was directed that a preliminary issue should be tried as to whether the claimants could bring derivative claims on behalf of the partnership against the general partner and the manager, and it was this issue which came before Cooke, J.

84 For reasons discussed below, Cooke, J. held that the limited partners could not bring a derivative claim against the general partner. However, having referred to *Roberts* v. *Gill* (30) and to the equivalent passage in the 18th edition of *Lewin* (2007) to that referred to at para. 81 above, he held that special circumstances existed which enabled the derivative claim to be

brought against the manager. The special circumstances were that the general partner had an irremediable conflict of interest because it was a sister company of the manager and was therefore not in a position to be seen fairly to determine whether to sue the manager. Cooke, J. therefore allowed the derivative claim against the manager to proceed, but went on to hold that, under the relevant provision of the English statute, the limited partners would lose their limited liability as a consequence.

85 In summary, Cooke, J. applied the "special circumstances" test concerning trusts (as summarized in *Lewin*) to limited partnerships.

86 Although the ability to bring a derivative action in respect of a company is now governed by statute in England and by the Grand Court Rules in this jurisdiction, the principles governing such claims were developed as a matter of common law. Similarly, the requirement of special circumstances in connection with trusts and limited partnerships has been developed entirely by the courts.

87 The position is different in relation to ELPs because of the terms of s.33(3) of the Act and accordingly we turn next to consider the correct interpretation of that provision.

Interpretation of s.33(3) of the ELPA

88 Unlike in the case of trusts or English limited partnerships, the legislature has prescribed in s.33 ELPA when a derivative action may be brought in respect of an ELP. For convenience we repeat the relevant provisions of s.33 at this stage:

> "(1) Subject to subsection (3), legal proceedings by or against an exempted limited partnership may be instituted by or against any one or more of the general partners only, and a limited partner shall not be a party to or named in the proceedings.
>
> (2) …
>
> (3) A limited partner may bring an action on behalf of an exempted limited partnership if any one or more of the general partners with authority to do so have, without cause, failed or refused to institute proceedings."

As can be seen, the key requirement is that the general partner must have "without cause, failed or refused to institute proceedings."

89 Before the Grand Court, the defendants argued that, when considering s.33(3), the court had to apply principles derived from cases dealing with derivative claims in other contexts. The judge rejected this submission. His conclusion is expressed in his judgment (2022 (1) CILR 12, at paras. 98–101):

> "98 The terms of s.33(3) ELPA which allows a limited partner in an ELP to bring proceedings on behalf of the ELP if the general partner has *without cause failed or refused* to do so has no language requiring permission or special circumstances. In my view the principles taken from the common law or equity for bringing derivative claims whether as regards companies, trusts, limited partnerships or associations are not applicable.
>
> 99 In my judgment s.33(3) is *sui generis* and is not subject to the rules relating to permission or for special circumstances for derivative actions in other contexts. I accept Mr. Allison, Q.C.'s submission that to this extent it can be said to 'occupy the field' in the Cayman Islands with respect to ELPs and there is no room for a case-by-case judge led formulation of a common law or equitable test.
>
> 100 I have, in coming to this view, had regard to the principles Ms. Stanley, Q.C. and Mr. Chapman, Q.C. referred me to relating to cases which dealt with failures or refusals to bring claims in other contexts, for example where the board of the company or the trustee had the relevant inhibition which prevented a decision to bring claims. Whilst these principles provide helpful guidance, the company and trusts law cases to which I was referred do not directly apply to the position in this case which involves the application of a specific statutory test for Cayman Islands ELPs.
>
> 101 I note, however, that the common thread running through those cases is that where the authorized decision maker is inhibited, the court may permit, in the interests of justice, derivative claims." [Emphasis in original.]

90 On appeal, the defendants have argued that the judge fell into error in stating (*ibid.*, at paras. 98 and 99) that the principles applicable in other contexts, such as trusts and companies, are not applicable in relation to the statutory test. At para. 68 of her skeleton argument, Ms. Stanley submitted that "without cause" should be interpreted by reference to the well-established tests applied in all other derivative actions. Similarly, at para. 8 of his skeleton argument, Mr. Chapman submitted that the statutory gateway prescribed by s.33 did not oust the ordinary rules of common law and equity. On the contrary, it provided a *further* statutory hurdle or threshold that had to be met, together with those imposed by the common law and equity, before a derivative claim would be permitted. He submitted that this was a fundamental error in the judge's approach.

91 Conversely, in his skeleton argument, Mr. Allison submitted at paras. 124 and 125 that the judge was correct to hold that s.33(3) "occupies the field" and that there was no scope or reason to import any "special circumstances" test or other common law or equitable principles that apply

to derivative claims in respect of other entities or structures. There was no reason to imply any requirements for derivative claims beyond those explicitly mentioned in s.33(3).

92 It seems to us that, during the course of the hearing, both sides rather modified their submissions and were eventually not very far apart in relation to the proper construction of s.33(3). Thus Mr. Chapman (who by agreement with Ms. Stanley presented the main argument on the derivative claims on behalf of all the defendants) conceded that, to the extent that his written submissions had suggested that one imported wholesale the common law and equitable principles on derivative claims, this might go too far. He accepted that one had to apply the statutory test set out in s.33(3), but submitted that this test was consistent with the established principles and that one derived assistance from those principles when construing and applying the statutory test.

93 Similarly, Mr. Allison accepted that, when applying the statutory test and determining whether the failure by the general partner to institute proceedings was "without cause," one could have regard to the principles established in other contexts, such as whether special circumstances existed.

94 In our judgment, in circumstances where the legislature has established a statutory criterion for bringing a derivative action in respect of an ELP, the courts are duty bound to apply that statutory test. The test cannot be replaced by common law and equitable principles developed in other contexts even if, in the absence of a statutory test, the courts would no doubt have applied those principles to an ELP. Nor can those principles form an additional threshold beyond the statutory test, as submitted by Mr. Chapman in his skeleton argument referred to at para. 90 above.

95 The statutory test is in general and imprecise terms and leaves open how the test should be applied in practice. However, we think that the expression "without cause" must carry the implication of "good" cause. The legislature cannot have intended that a decision for ***any*** cause, no matter how inhibited or conflicted the decision-maker, would be sufficient to prevent a derivative action. This is so notwithstanding the fact that, as originally enacted, the legislation referred to "good cause" whereas, in its current form, the word "good" is omitted. No guidance as to the reason for this change is to be found in the legislative materials produced in relation to the revision of the statute and we cannot attribute any significance to the change.

96 In these circumstances, we are of the view that the court is entitled to have regard to and may derive assistance from the developed principles in other contexts. In particular, given the existence of the statutory trust imposed by s.16(1) of the ELPA (namely that the general partner holds the property of the ELP "upon trust as an asset of the exempted limited

partnership in accordance with the terms of the partnership agreement"), the court is likely to derive assistance from considering whether special circumstances (as established in the contexts of trusts and English limited partnerships) exist.

97 If special circumstances exist, this is likely to assist the court in deciding whether a general partner's decision not to institute proceedings is "without cause." Indeed, in opening his oral submissions on appeal, Mr. Allison (rightly in our view) accepted that, if a general partner were under a relevant inhibition or conflict of interest—concepts which emerge strongly from consideration of special circumstances as stated in the emphasized passage from para. 47–008 of *Lewin* quoted at para. 81 above—his decision would necessarily and unavoidably be "without cause."

98 We emphasize, however, that the court's duty is to apply the statutory test of "without cause"; it is not sufficient simply to consider whether there are special circumstances and, if so, then to allow a claim under s.33(3). Consideration of whether there are special circumstances, if it assists at all, is simply a step on the road to determining the statutory test. If the court decides that the facts would satisfy the special circumstances test, it must nevertheless go on and consider whether they therefore satisfy the "without cause" test in s.33(3). Conversely, we do not rule out the possibility of a case in which the facts enable the court to find that the general partner's decision is "without cause" without consideration of whether there are special circumstances. The two tests are not to be equated, although we envisage that consideration of whether there are special circumstances is likely in most cases to be of considerable assistance in determining whether the decision is "without cause." Indeed, it was common ground before us that a decision by a decision-maker which is made under a relevant inhibition will be a decision "without cause."

99 Although there is some ambiguity and possible inconsistency between paras. 98 and 99 of the judge's judgment on the one hand and para. 100 on the other, we do not see the judge's decision on this aspect as being essentially any different from our own. Paragraphs 98 and 99, when read in context, simply state that the court's duty is to apply the statutory test, not the common law and equitable principles, but para. 100 goes on to explain that, although they are not directly applicable, these principles provide helpful guidance. The fact that such helpful guidance may be obtained is emphasized by the fact that, when he goes on to consider the application of the statutory test to the facts of this case, the judge concentrates exclusively on the fact that, in his view, the GP was subject to an inhibition because of its conflict of interest. Inhibition is not a word which appears in s.33 but, as the judge correctly states at para. 101 of his judgment, it is a concept which is a common thread in the cases which

allows the court to permit derivative claims in other contexts in the interests of justice.

100 Having expressed our view as to the correct interpretation of s.33(3), we turn next to consider a number of supplementary points which were argued before us in relation to the statutory test.

Procedure for determining the statutory test

101 Unlike in the case of companies, there is no requirement under s.33 for a limited partner to seek leave from the court to bring derivative proceedings under s.33(3). It follows that a limited partner is free to commence derivative proceedings without leave.

102 In this respect, the position is the same as derivative claims in respect of companies prior to the introduction by statute and/or rules of court of a requirement for leave and is the same as it remains in respect of trusts and English limited partnerships. But, despite the historical lack of a requirement for leave in respect of companies, it was established as long ago as 1982 in *Prudential* (28) that the question of whether a plaintiff should be permitted to bring a derivative action on behalf of a company should be determined at an early stage rather than left until trial. In *Prudential,* the defendant applied by summons to have heard as a preliminary issue whether the plaintiff was entitled to maintain the derivative action. The judge dismissed the summons on the ground that it was more convenient to decide the issue after the action had been heard. The Court of Appeal was very critical of this decision saying ([1982] Ch. at 221):

> "First, as we have already said, we have no doubt whatever that Vinelott J. erred in dismissing the summons of May 10, 1979. He ought to have determined as a preliminary issue whether the plaintiffs were entitled to sue on behalf of Newman by bringing a derivative action. It cannot have been right to have subjected the company to a 30-day action (as it was then estimated to be) in order to enable him to decide whether the plaintiffs were entitled in law to subject the company to a 30-day action. Such an approach defeats the whole purpose of the rule in *Foss v. Harbottle* and sanctions the very mischief that the rule is designed to prevent."

103 Following *Prudential*, it has been the practice that a plaintiff's standing to bring a derivative action is determined at an early stage in the proceedings rather than the issue being left to trial, with all the disadvantages which that course would bring as described in *Prudential.* Where there is a leave requirement (*e.g.* for companies) the issue is dealt with on the application for leave. Where there is no requirement to obtain leave, the matter is traditionally dealt with on an application by the defendant to strike out the proceedings on the ground of a lack of standing

on the part of the plaintiff or by the court ordering, at the request of the defendant, the trial of a preliminary issue as to whether the plaintiff has the necessary standing to bring a derivative action.

104 The practice was conveniently summarized by Chadwick, P. in this court in the case of *Autumn Hldgs. Asset Inc.* v. *Renova Resources Private Equity Ltd.* (2) (2017 (2) CILR 136, at para. 26), where he quoted with approval from the judgment of Ribeiro, P.J. in the Hong Kong Final Court of Appeal in the case of *Waddington Ltd.* v. *Chan Chun Hoo Thomas* (41) where that learned judge said ([2009] 2 BCLC 82, at paras. 13–14):

> "[13] … Procedurally, there is no requirement at common law for a person seeking to sue derivatively first to obtain the leave of the court …
>
> [14] The time honoured practice at common law is for the plaintiff to issue proceedings 'on behalf of himself and the other shareholders other than the defendants', naming the company on whose behalf the proceedings are brought as one of the defendants. A challenge to the plaintiff's locus generally takes the form of an application by the relevant defendants to strike out the claim or to have the court determine as a preliminary issue that the plaintiff has no locus to sue on the company's behalf."

105 In our judgment, this is also the appropriate procedure to be followed in relation to proceedings brought under s.33(3). The subsection is clear that a limited partner may only *bring* a derivative claim if the general partner has refused or failed to do so without cause. It is therefore necessary for the court to decide at an early stage of the proceedings whether the limited partner can indeed bring himself within s.33(3) and therefore "bring" the claim. For the reasons set out so graphically in *Prudential* (28), this is not a matter which should normally be left until trial. We agree therefore that a defendant wishing to challenge the right of a limited partner to have instituted proceedings on behalf of an ELP pursuant to s.33(3) should do so either by applying to strike out the proceedings on the ground of a lack of standing (as was done in this case) or by applying for the court to direct the trial of a preliminary issue as to the limited partner's ability to bring himself within subs. (3).

106 The question then arises as to the approach which the court should adopt on such an application. In the first place, it is clear that the outcome cannot depend on which of the two courses a defendant chooses to follow. The court's approach must therefore be the same whether there is a strike out application or the trial of a preliminary issue.

107 The judge held that, as this was a strike out application, the normal approach on such an application should be adopted, with the result that the defendants had to show that it was certain that, at trial, the plaintiffs would

fail to bring themselves within the terms of s.33(3); see *Hughes* v. *Colin Richards & Co.* (15), cited with approval in *In re SPhinX Group* (37) (2010 (1) CILR 234, at para. 37). The burden lay upon the defendants to show this and there was no burden on the plaintiffs to show that they came within s.33(3). If there was an arguable case that at trial the plaintiffs would be able to satisfy the requirements of that subsection, that was sufficient to enable the case to proceed.[11] It would only be at trial that it would be finally resolved whether the plaintiffs had brought themselves within s.33(3).[12] Although at times the judge used slightly inconsistent language about his approach,[13] we are satisfied that he essentially applied the test we have just described and which he spelt out at 2022 (1) CILR 12, para. 33. Mr. Allison submitted that the judge had followed the right approach.

108 Mr. Chapman, on the other hand, submitted that this was the wrong approach. In his submission, the onus lay upon the plaintiffs to satisfy the court that they came within s.33(3), *i.e.* that the GP had refused or failed to institute proceedings without cause.

109 In other contexts, the onus lies upon a plaintiff to satisfy the court that he should be permitted to bring a derivative action. Thus in *Prudential* (28), after the passage cited above, the Court of Appeal went on to say ([1982] 1 Ch. at 221–222):

> "… [W]e do not think that the right to bring a derivative action should be decided as a preliminary issue upon the hypothesis that all the allegations in the statement of claim of 'fraud' and 'control' are facts, as they would be on the trial of a preliminary point of law. In our view, whatever may be the properly defined boundaries of the exception to the rule, the plaintiff ought at least to be required before proceeding with his action to establish a prima facie case (i) that the company is entitled to the relief claimed, and (ii) that the action falls within the proper boundaries of the exception to the rule in *Foss v. Harbottle.*"

This approach has been followed in this jurisdiction in relation to companies; see *Top Jet Enterprises Ltd.* v. *Sino Jet Holding Ltd.* (40) (2018 (1) CILR 18, at para. 29, *per* Segal, J.).

110 It is not entirely clear what standard the Court of Appeal in *Prudential* was intending to set by referring to a plaintiff "at least" being required to establish a "prima facie" case that he falls within the exception to the rule in *Foss* v. *Harbottle* (11). Some assistance can be derived from

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11 2022 (1) CILR 12, paras. 33, 119, 123.
12 2022 (1) CILR 12, paras. 33(ii), 138.
13 Thus at 2022 (1) CILR 12, para. 102 the judge refers to "good arguable case" and paras. 106 and 136 might be said to suggest that he was in fact making a clear finding that D1 had failed without cause to bring proceedings rather than that it was simply arguable.

the subsequent judgment of Knox, J. in *Smith* v. *Croft (No. 2)* (35) ([1988] Ch. at 138–139), approved in *Top Jet* (2018 (1) CILR 18, at para. 30) as follows:

> "My conclusion is that it is the question stated by the Court of Appeal that has to be decided as a preliminary matter, that it is a special form of procedure concerned with giving sensible operation to the rule in *Foss v Harbottle* … and which is concerned with avoiding the Scylla and Charybdis, on the hand of having a preliminary issue which effectively requires one to try the whole action where the rules serves no useful purpose, and on the other side of the strait, of assuming that everything the plaintiffs allege is necessarily correct as a matter of fact, which is of course the technique the court adopts when it has was called a strict demurrer. The Court of Appeal has laid down a halfway house for this very special type of case, one in which the legal issues in this particular case are sufficiently well defined for the parties to be able to argue them."

In other words, the approach should be a halfway house between a strike out application and a full trial.

111 When pressed during the hearing as to what he thought the Court of Appeal meant by a *prima facie* case, Mr. Allison suggested that it meant a good arguable case and that was in fact an expression the judge used at para. 102 of his judgment, despite his references (see para. 107 above) to mere arguability being the test. This court recently had occasion to consider what was meant by the expression "good arguable case" in *Scully Royalty Ltd.* v. *Raiffeisen Bank Intl. Ltd.* (32) (2022 (1) CILR 118, at paras. 47–52). In particular, the court approved the observation of Mustill, J. in *Ninemia Maritime Corp.* v. *Trave Schiffahrts G.m.b.H. und Co., The Niedersachsen* (24) ([1983] 2 Lloyd's Rep. at 605) where he said:

> "I consider that the right course is to adopt the test of a good arguable case, in the sense of a case which is more than barely capable of serious argument, and yet not necessarily one which the Judge believes to have a better than 50 per cent chance of success."

112 During the hearing, the court invited counsel to ascertain whether recent English decisions in relation to derivative actions offered any assistance as to the standard to be applied when considering whether the grounds for permitting a derivative action had been made out. However, counsel's researches were unable to come up with anything of significant assistance.

113 Mr. Chapman referred us to the decision of the English Court of Appeal in *Barrett* v. *Duckett* (5), which was decided before the requirement for leave in relation to companies was introduced by statute. This was a case where B & D each held a 50% shareholding in a company. B instituted

a derivative action against D and others on behalf of the company alleging wrongdoing by D and others, D being the sole director of the company. The defendants applied to strike out the claim on the basis that it was not a proper case for a derivative action. In the course of his judgment, Peter Gibson, L.J. sought ([1995] 1 BCLC at 249) to summarize the principles in relation to derivative actions concerning companies in the following terms (omitting passages not relevant for our purposes):

> "The general principles governing actions in respect of wrongs done to a company or irregularities in the conduct of its affairs are not in dispute:
>
> 1. The proper plaintiff is prima facie the company.
>
> 2. …
>
> 3. There are however recognised exceptions, one of which is where the wrongdoer has control which is or would be exercised to prevent a proper action being brought against the wrongdoer: in such a case the shareholder may bring a derivative action (his rights being derived from the company) on behalf of the company.
>
> 4. When a challenge is made to the right claimed by a shareholder to bring a derivative action on behalf of the company, it is the duty of the court to decide as a preliminary issue the question whether or not the plaintiff should be allowed to sue in that capacity.
>
> 5. In taking that decision it is not enough for the court to say that there is no plain and obvious case for striking out; it is for the shareholder to establish to the satisfaction of the court that he should be allowed to sue on behalf of the company.
>
> 6. …"

114 Mr. Chapman relied in particular on the second part of 5 above, namely that it is for the shareholder to establish to the satisfaction of the court that he should be allowed to sue on behalf of the company. He submitted not simply that this places the onus on the shareholder, which we accept, but that it means that the shareholder must establish his ability to sue on the balance of probabilities. He says that *Barrett* changed the test set out in *Prudential* (28), with its reference to a *prima facie* case.

115 We are unable to place such weight on the decision in *Barrett*. Peter Gibson, L.J. was simply recording general principles, which were not in dispute. We do not think that it assists on how a shareholder satisfies the court that he should be allowed to sue on behalf the company. What is made clear, however, in the first part of 5 above is that the court should not apply the normal strike out test. It is therefore inconsistent with the approach which the judge adopted in the present case.

116 It is perhaps of note that the relevant provisions of the English Companies Act set out a number of factors which the court should consider when deciding whether it should allow a derivative action, but the matter is ultimately left to the court as a matter of evaluation. In our judgment, that approach is consistent with the observation of Lord Collins ("the underlying question is whether the circumstances are sufficiently special to make it just for the beneficiary to have the remedy") and Lord Walker ("the unifying factor—what has to be special about the circumstances—is that the derivative action is needed to avoid injustice") in *Roberts* v. *Gill* (30) quoted above in relation to special circumstances.

117 It is clear that, whether the matter is being considered on a strike out application or on the trial of a preliminary issue, the court should not hold a mini trial in order to decide whether the criterion in s.33(3) is met. However, it should, as in the present case, permit the parties to adduce affidavit evidence on the topic. Ultimately, the court must then reach a view on the material provided to it.

118 Whilst reference to a "good arguable case" may in some cases be a helpful criterion, in our judgment the task is ultimately an evaluative one. The court must decide, on the basis of the material before it, whether the likelihood of the general partner having failed or refused to institute proceedings without cause is sufficient to lead the court to conclude that a derivative action should be permitted in the interests of justice. In reaching this evaluative conclusion, the court will no doubt have regard, *inter alia*, to the strength of the evidence that the general partner has failed or refused to institute proceedings without cause, the strength of the underlying claim which is sought to be brought and the likelihood and nature of any injustice if the derivative claim is not permitted.

119 For these reasons, we respectfully disagree with the judge that, because this was a strike out application, the burden was on the defendants and he only had to consider whether it was merely arguable that the plaintiffs met the statutory criterion in s.33(3). That was to set the bar too low. It follows that, as Mr. Chapman submitted, he erred in this respect.

120 However, we have before us the same affidavit evidence that was before the judge and accordingly we propose to reach our own decision, applying the approach we have just described.

Timing

121 As occurred in this case, and as will invariably be the position, given that there is no requirement for leave before commencing an action in reliance on s.33(3), the hearing of a strike-out application or a preliminary issue as to whether the claim falls within s.33(3) will take place at some point after the action is begun. The question then arises as to whether the

court should assess compliance with s.33(3) by reference to the facts at the time of commencement of the action or as at the date of the hearing of the strike out or preliminary issue.

122 The judge held (2022 (1) CILR 12, at paras. 127–128) that the question of whether the general partner had failed or refused to bring a claim without cause was to be judged on the relevant facts as they were at the time the proceedings were commenced.

123 The plaintiffs support the judge's decision. They point out that the words "failed or refused" in s.33(3) are in the past tense, which suggests that the relevant failure or refusal must have taken place before the date of institution of the derivative claim.

124 We do not agree with the judge's decision on this point, essentially for the reasons advanced by Mr. Chapman. The plaintiffs' approach would require the court to ignore anything that has happened between the institution of the proceedings and the hearing of the relevant strike out application/preliminary issue. This could lead to highly unsatisfactory results. Thus, suppose that, after the institution of the proceedings, a new general partner was appointed with completely separate ownership, so there was no longer any question of an inhibition or conflict of interest. Suppose further that the new general partner has reviewed the alleged claim and decided in good faith on commercial grounds to maintain the decision of the former general partner not to institute proceedings against the alleged wrongdoer.

125 In our judgment, the legislature cannot have intended that the court should allow a derivative claim to proceed in circumstances where, as at the date of the hearing of the strike out or preliminary issue, the requirements of s.33(3) are not met because, for example, any inhibition of the general partner has disappeared. In our judgment, the natural meaning of s.33(3) is that the court should consider the issue of whether the requirements of the subsection are met by reference to the facts as they are at the time of the hearing of the strike out or preliminary issue. Mr. Allison submitted that the court could surmount any difficulty which his construction of s.33(3) might cause by taking any change of circumstances into account when considering whether to exercise its discretion to allow the derivative claim to proceed. However, we do not see that as a satisfactory solution, nor is it in our view consistent with the natural meaning of s.33(3).

126 Whilst by no means determinative—because the legislation is not the same—we note that in England and Wales, in the context of derivative actions for companies, the court does take into account events which have occurred between the institution of the proceedings and the hearing before the court as to whether the derivative action should be allowed to proceed: see, for example, the decision of Newey, J. in *Kleanthous* v. *Paphitis* (18), where the judge placed great weight on the fact that, since the institution

of the proceedings, the company had appointed a special committee of independent directors which had decided that the company should not bring or continue the claim which the plaintiff was seeking to bring derivatively.

127 In our judgment therefore, a judge hearing a strike out application or preliminary issue in relation to an ELP should consider whether the test in s.33(3) is met by reference to the facts as they appear at the time of the relevant hearing.

Pleading

128 In relation to the derivative claim against D1, para. 25 of the ASOC pleads:

> "In the alternative, if and to the extent that the claims set out in this Statement of Claim (or any of them) are properly regarded as and/or must be brought as derivative claims on behalf of TPF, the Plaintiffs will contend that Port Link has without cause failed to initiate proceedings on behalf of TPF against itself (and there is no real prospect of it doing so) such that the requirements of section 33(3) of the Exempted Limited Partnership Act (2020 Revision) (the 'ELP Act') are satisfied, such that the Plaintiffs should be permitted to prosecute the relevant claims on behalf of and in the name of TPF."

129 In relation to the derivative claims against D2, D3 and D4, para. 25B of the ASOC pleads:

> "The balance of the claims against Mr Williams and Wellspring and the claim against KGLI Asia are brought by the Plaintiffs as derivative claims on behalf of TPF in circumstances where Port Link has without cause failed to initiate proceedings on behalf of TPF against those parties and there is no real prospect of it doing so. Not only did Port Link fail to commence such claims; as described in paragraph 4 above, it deliberately withheld from the Limited Partners the information upon which the claims are based. In the premises, the requirements of section 33(3) of the ELP Act are satisfied such that the Plaintiffs should be permitted to prosecute these claims on behalf of and in the name of TPF."

130 The judge held (2022 (1) CILR 12, at para. 127) that para. 25B of the ASOC was sufficient to enable the defendants to understand the gist of the case, which had also been factually set out in the detailed evidence filed in the strike out applications.

131 That conclusion was criticized by Mr. Chapman. He submitted that it was necessary for a limited partner to plead the facts and matters relied upon as allowing the limited partner to bring a derivative claim pursuant to

s.33(3) and that the particulars in this case were wholly inadequate to serve that purpose. Thus, there was no pleading of the facts and matters relied upon to show that D1 as general partner was under an inhibition or suffered from a conflict of interest.

132 Mr. Allison, on the other hand, submitted that the facts and matters relied upon emerged with sufficient clarity from the detailed allegations of wrongdoing against D1 and the other defendants set out in the ASOC.

133 In our judgment, the ASOC was inadequately pleaded in this respect. In *Roberts* v. *Gill* (30), Lord Walker, in relation to a derivative claim on the grounds of special circumstances concerning an estate or trust, said this (2011] 1 A.C. 240, at para. 103):

> "So while he need not obtain prior leave from the court, he must plead the special circumstances entitling him to the court's indulgence. Those special circumstances are part of his cause of action."

134 In our judgment, the position is analogous in cases brought pursuant to s.33(3). There is no requirement for leave but a limited partner may only bring a claim where the general partner has failed or refused to bring proceedings without cause. The failure or refusal without cause is part of the cause of action brought by the limited partner and must therefore be pleaded. In our judgment, it is not sufficient simply to plead the wording of s.33(3) as was done by the plaintiffs in this case. A limited partner must plead the facts and matters relied upon as showing that he comes within the provisions of s.33(3).

135 What is relied upon by the plaintiffs in this case is that D1 as general partner is under a clear inhibition arising from its conflict of interest. The facts and matters relied upon as showing that this was so should therefore have been pleaded. Accordingly, we differ from the judge's assessment that the pleading was adequate. However, we are satisfied that no prejudice has been caused to the defendants by this failure. As the judge correctly stated, the points of issue emerge very clearly from the evidence filed during the strike out applications and it is clear that the defendants knew the case which they had to meet. We therefore decline to decide this case on a technical pleading point, although we emphasize, for the future, that simply pleading that a claim is brought pursuant to s.33(3) is not sufficient and that a plaintiff must plead the facts and matters relied upon as showing that he falls within the subsection.

Need for a request to sue

136 It is common ground that the plaintiffs in this case did not request or demand that D1 as general partner bring proceedings against D2–D4. Mr. Chapman submits that there must be such a request before a general partner

can be said to have failed or refused to bring such proceedings. We agree that the word "refused" implies the existence of a request. However, this is not so in relation to the word "failed." A general partner can be said to have "failed" to bring proceedings if he simply has not brought such proceedings.

137 Whilst it will often be the case that, before instituting derivative proceedings under s.33(3), a limited partner will have requested the general partner to institute the relevant proceedings, it is not a necessary pre-condition that he has done so. In this case, it is perfectly apparent from the evidence that D1 has not brought the relevant proceedings and has no intention of doing so. As outlined earlier, it has reached a decision not to institute proceedings even following the change in the board of directors by the appointment of the FFP directors. The requirement of s.33(3) that the general partner has failed to bring proceedings on behalf of TPF has obviously been satisfied.

Discretion

138 It is well established in other contexts that the court has a discretion whether or not to allow a derivative claim even where the relevant ground for the bringing of such an action (*e.g.* an exception to the rule in *Foss* v. *Harbottle* (11) in the case of companies and "special circumstances" in the case of trusts or limited partnerships) is met. Although there is no reference to the existence of a discretion in s.33(3) itself, the judge considered that he had such a discretion and it was common ground before us that there is such a discretion.

139 Thus, even if it be satisfied that a plaintiff can bring himself within s.33(3), the court may in its discretion decide that he should not be permitted to continue the derivative claim. One relevant factor in the exercise of this discretion is likely to be whether the plaintiff has an alternative remedy, so that a derivative action is not required in order to avoid injustice.

Summary

140 Pulling the threads of the above discussion together, we would attempt to summarize our conclusions in relation to s.33(3) as follows:

(i) There is no requirement for leave to bring derivative proceedings under s.33(3). A limited partner may simply institute such proceedings.

(ii) A limited partner must however plead the facts and matters relied upon as showing that he can bring himself within the requirements of the subsection because this forms an essential part of his cause of action.

(iii) If a defendant wishes to raise an issue as to the standing of a limited partner to bring such derivative proceedings, he should do so by means of a strike out application or seek the trial of a preliminary issue.

(iv) Whichever of these routes is chosen does not affect the test which has to be applied in deciding whether s.33(3) is complied with and whether a limited partner should be permitted to continue with the derivative claim.

(v) The decision of the court on such an application or preliminary issue is determinative (subject to appeal). If the court holds that the derivative claim may be continued, the limited partner thereafter has the necessary standing to pursue the claim. It is not an issue which is deferred until or revisited at trial (save possibly in the context of costs at the end of the trial).

(vi) The court should not conduct a mini trial as to whether the requirements of s.33(3) are satisfied. The court has to reach its decision on the basis of the material before it, which will be more limited than it will be following discovery and trial.

(vii) At the hearing, the onus is on the limited partner to satisfy the court that the requirements of s.33(3) are met. Reference to "onus" is not to be mistaken as a reference to a "burden" in the sense of having to show something on the balance of probabilities.

(viii) The essential task for the court at such a hearing is to determine whether the limited partner has brought himself within the terms of s.33(3), namely that the general partner has failed or refused to bring the relevant proceedings without cause.

(ix) In determining this issue, the court is likely to be assisted by consideration of whether special circumstances (as developed in cases concerning trusts, limited partnerships and other entities) exist, but the court's task remains one of applying the statutory test set out in s.33(3).

(x) Whilst reference to a "good arguable case" may be a helpful indicator of the level of comfort which the court should have when deciding whether the requirements of s.33(3) are met, the court's task is essentially an evaluative one having regard to the facts as they appear to the court at that stage of the proceedings from the material before the court and the need to avoid injustice balanced with the need to respect the fact that a derivative action is an exception to the general principle in the ELPA that management (including decisions as to litigation) of an ELP is for the general partner, not the limited partners. As stated at para. 118 above, the court should consider, ***inter alia***, the strength of the evidence that the general partner has failed or refused to institute proceedings without cause, the strength of the underlying claim which is sought to be brought and the likelihood and nature of any injustice if the derivative claim is not permitted.

(xi) The court should reach its decision as to standing by reference to the facts as they appear at the date of the hearing of the strike out or preliminary issue.

(xii) Even where the requirements of s.33(3) are met, the court has a discretion as to whether to permit a derivative claim to continue. One of the factors which is likely to be relevant in exercising that discretion is whether the plaintiff has an alternative remedy.

Application to the facts

(a) ***The claim against D1***

141 It is to be recalled that, as described at para. 75 above, a derivative action allows a party to bring a claim in the name of and on behalf of a second party against a third party for loss and damage caused to the second party. It follows that the second party must have a claim against the third party before the first party can be permitted to bring such a claim derivatively.

142 Ms. Stanley submits that, regardless of whether the test in s.33(3) is otherwise met (*i.e.* that D1 is subject to an inhibition which makes its decision in relation to potential proceedings one which is without cause), there is a more fundamental reason why the derivative claim against D1 should be struck out, namely that, on the judge's finding, the ELP has suffered no loss or damage and therefore has no claim of its own to bring.

143 The judge said (2022 (1) CILR 12, at para. 63):

> "It follows that where an ELP is alleged to have suffered loss, as in this case, that is the loss of each of the limited partners. There is no distinct or separate loss in respect of 'the partnership' (TPF), which as an entity does not exist at law."

144 To similar effect is the decision of Cooke, J. in *Henderson* (13) in relation to limited partnerships ([2012] EWHC 3259 (Comm), at paras. 28–32). Thus at para. 28 he said:

> "The Partnership, unlike a limited company, does not possess a corporate legal personality. Like an ordinary partnership under the Partnership Act, 'the Partnership' is simply a convenient way of referring to the body of partners as a whole. In my judgment therefore, no difficulty arises for a Limited Partner's claim against the General Partner, regardless of whether or not removal and substitution of the General Partner is possible. The claim to be made against the General Partner is that of the individual Limited Partners and is not a Partnership Asset. Each Limited Partner has its own contractual or fiduciary claim for its own loss, where the inter-relationship with the General Partner is governed by the RPA. *The Partnership, which*

> *consists of the Limited Partners and the General Partner together has no form of joint right or claim against the General Partner, as the claimants suggest.*" [Emphasis added.]

145 We are not to be taken as agreeing that this is correct. As already stated, s.16(1) of the Act provides that the general partner will hold the assets of the ELP upon trust. In the case of a trust, whilst a beneficiary undoubtedly has a direct claim against the trustee for breach of trust, the appropriate remedy (as discussed above by reference to *Target* v. *Redferns* (38)) is for an order that the trustee restore the trust fund to what it would have been had the breach not been committed. Such a claim may be brought by one or more beneficiaries, but a successor trustee will often bring such a claim against a former trustee for breach of trust on behalf of the trust as a whole and will hold any sums recovered from the former trustee upon the terms of the trust. Thus, even though like an ELP, a trust is not a separate legal entity, it can properly be said that the trust as well as a beneficiary has a claim against a trustee for breach of trust and that such a claim can be considered as an asset of the trust. It seems to us strongly arguable that the position is the same in relation to an ELP, particularly given that the general partner is also a trustee.

146 However, there has been no respondents' notice in respect of the above finding of the judge and indeed the plaintiffs have not sought to argue that the judge was wrong in this respect. What they say is that the judge was correct in what he said (2022 (1) CILR 12, at para. 64) where, immediately following the passage quoted above in para. 143 above from para. 63, he said:

> "64 I therefore find that the direct claims in respect of the individual partners' losses are vested in the limited *partners* alone, and are not claims that can be brought on behalf of TPF derivatively, except in the circumstances permitted by s.33(3) of the ELPA where the limited partners who wish to obtain redress for TPF are in effect put in the place of the GP, and bring claims on behalf of TPF." [Emphasis in original.]

147 With respect to the learned judge we cannot accept that s.33(3) permits a claim in such circumstances. The subsection presupposes that there is a claim to be brought by the general partner on behalf of the partnership. If, as the judge held, the partnership has no claim against the general partner, there can be no failure by the general partner to bring such a claim without cause.

148 Even if we are wrong on this point, there is a second reason for not permitting the derivative claim against D1 as a matter of discretion; that is because the plaintiffs as limited partners have an adequate alternative remedy.

149 As we have held earlier in this judgment, a limited partner has the right to claim against a general partner for breach of duty on the part of the general partner. In the event of such a claim succeeding, the appropriate remedy will almost certainly not be an award of equitable compensation to the particular limited partners who have sued (thereby potentially causing difficulties in relation to those who have not also joined in the action and in respect of creditors of the ELP), but instead an order that the general partner restore the trust fund as outlined in *Target* v. *Redferns*.

150 In these circumstances, exactly the same will be achieved by a direct claim as would be the case in a derivative action. In the event of the plaintiffs succeeding in their direct claim, the estate of the ELP will be made whole by payment from the general partner pursuant to an order for restoration of the trust fund. Success in a derivative action would have the same result. Accordingly, there is simply no need for a derivative action; it would add nothing to the direct claims brought by the limited partners coupled with an order for restoration of the trust fund in the event of such claims succeeding. Indeed, during oral argument, Mr. Allison accepted that, if the plaintiffs have a valid direct claim against D1 for which restoration of the trust fund can be awarded, there would be no need for the derivative action. In those circumstances, we conclude that, as a matter of discretion, the derivative claim against D1 should not be permitted.

151 Accordingly, for both of the above reasons, we strike out the derivative claim of the plaintiffs against D1.

(b) ***The claims against D2–D4***

152 We have described the claims brought against the various defendants at paras. 13–16 above. The relevant features for present purposes can be summarized as follows:

(i) The plaintiffs invested some 65% of the total amount invested in TPF.

(ii) Other limited partners, who invested 15.14%, have instituted broadly similar claims against D2 and D3 in the State of Georgia, USA. Thus a total of 80.3% by value of limited partners are litigating on the basis of alleged serious wrongdoing on the part of the GP.

(iii) Of the remaining 19.7% (by value), 14% are associated with the GP.

(iv) The plaintiffs allege that D1 as the general partner has been guilty of wrongdoing which has caused TPF loss said to be well in excess of US$100m.

(v) The claims against D1 essentially allege that, in breach of its fiduciary, contractual and other duties, it acted contrary to the interests of TPF and the limited partners by making substantial payments, using TPF's moneys, that were not for the benefit of TPF and/or the limited partners.

Amongst these is the alleged sham settlement of the DIFC proceedings brought against it in the DIFCC as a result of which the Wellspring payment of US$59,990,461.30 was paid to D3. The ASOC alleges that D1 conspired with, amongst others, D2 (Mr. Williams) and D3 (Wellspring) to cause loss to TPF and/or the limited partners by unlawful means in relation to the DIFC proceedings and the Wellspring payment.

(vi) The claims against D2 are that he orchestrated the DIFC proceedings and the Wellspring payment and was accordingly party to the above conspiracy. It is further alleged that he dishonestly assisted in D1's breach of trust/fiduciary duty, knowingly procured D1 to breach its contractual duties and was in breach of fiduciary duties he owed to TPF and/or D1.

(vii) The claims against D3 are for knowing receipt of the Wellspring payment, conspiracy in relation to the Wellspring payment and the DIFC proceedings and for repayment of the Wellspring payment pursuant to s.4 of the Fraudulent Dispositions Act (1996 Revision).

(viii) The claim against D4 is for knowing receipt in respect of a number of payments said to have been made to it in breach of trust and/or fiduciary duty by D1 as general partner.

153 The judge held (2022 (1) CILR 12, at para. 106) that s.33(3) required a finding as to whether the GP (*i.e.* the relevant corporate entity) has failed or refused to institute the proceedings without cause, not the directors at the relevant time. He concluded (*ibid.*, at para. 102) that there was a good arguable case that D1 had and still has a relevant inhibition because it is conflicted in relation to the plaintiffs' claims. Its decision not to bring the claims against D2–D4 was infected and made unsafe by the facts giving rise to its conflict of interest.

154 The underlying facts in relation to the inhibition were not disputed before us and would appear to be as follows:

(i) Mr. Williams, D2, is the sole shareholder of PLH, a Delaware company, which in turn is the sole shareholder of D1. Thus Mr. Williams is the sole ultimate beneficial owner of the general partner of TPF. He was the investment director of TPF's sponsor and placement agent from 2009–2011 and a member of the Investment Committee of TPF from 2009–2013.

(ii) On January 23rd, 2020, he was appointed as the authorized representative of D1 in relation to proceedings against D1 by certain limited partners (including the first plaintiff) pursuant to s.22 of the ELPA seeking disclosure of full information regarding the state of the business and financial condition of TPF. The resolution conferred full authority on Mr. Williams to take all necessary actions in relation to the s.22 proceedings. The application of the limited partners under s.22 was opposed by D1 at a time when the FFP directors were in post and eventually Parker, J. ruled against D1 and ordered it to make disclosure. Thereafter, D1 sought to

appeal that decision but the appeal was eventually compromised and D1 agreed to provide the necessary information.

(iii) Mr. Williams is the CEO, CFO, President, Vice-President, Treasurer and Secretary of D3, Wellspring. The company is owned by the Mark E. Williams Living Trust, of which Mr. Williams, his wife and brother are the trustees. The ASOC pleads that it is to be inferred that the beneficiaries are also Mr. Williams' family.

(iv) D4, KGLI Asia is a company incorporated in the Cayman Islands and Mr. Williams was its CEO from January 1st, 2012.

155 As can be seen therefore, Mr. Williams is the ultimate beneficial owner of the GP and has very close connections with Wellspring and KGLI Asia.

156 In considering whether D1 as the general partner would be under an inhibition in relation to the taking of proceedings against D2–D4, it is useful to refer to the case of *Henderson* (13). The facts of that case are summarized at paras. 83–84 above. Certain limited partners of an English limited partnership sought to bring a derivative action against, *inter alia*, the manager, who had been appointed by the general partner and was a sister company of the general partner.

157 Cooke, J. held ([2012] EWHC 3259 (Comm), at para. 59) that as a result the general partner had an irreconcilable conflict of interest in relation to whether to institute proceedings against the manager and this constituted "special circumstances" which therefore justified the limited partners being able to bring a derivative claim. In coming to that conclusion, he held that (i) the ability (which was not straightforward) under the limited partnership agreement for the limited partners to remove and replace the general partner, and (ii) the ability of the limited partners to sue the general partner for wrongly failing to institute proceedings against the manager, were not satisfactory alternative remedies so as to refuse the limited partners the ability to bring a derivative claim.

158 We respectfully agree with the decision of Cooke, J. in *Henderson.* In our judgment there is a similar conflict of interest in the present case. On the plaintiffs' case, D1 as the general partner was deeply involved in all the alleged wrongdoing, as was Mr. Williams. D1 has to decide whether to institute proceedings against D2–D4 in circumstances where:

(i) The essential wrongdoing giving rise to the claims against D2–D4 was that of D1 itself in making the various payments and where it is said to be part of the unlawful means conspiracy to injure TPF involving Mr. Williams and Wellspring.

(ii) The contemplated proceedings would have to be brought against the beneficial owner of the GP and against two companies in which Mr.

Williams is deeply and closely involved, namely Wellspring and KGLI Asia.

(iii) D1 would also have to consider whether (as general partner) it should sue itself (in its own right) as a co-conspirator in the alleged unlawful means conspiracy.

159 On the face of it, by reason of the obvious and serious conflict of interest, D1 is under an inhibition which would amount to special circumstances in the context of a trust or limited partnership and this inhibition also means that the failure by D1 to bring proceedings against D2–D4 is without cause for the purposes of s.33(3).

160 However, the defendants say that this is not the position for two associated reasons. First, they point out that the present directors of D1, namely the FFP directors, are wholly independent and were not in office at the time of the alleged wrongdoing on the part of D1. They do not therefore suffer from any conflict of interest. They are in a position to bring an independent and impartial view to bear on whether claims should be brought against D2–D4 and in this respect are in the same position as a liquidator of a company who has to decide whether to bring a claim against former directors or other parties for injury caused to a company. The defendants point out that, as summarized in the third affidavit of Mr. Lewis, the FFP directors have reviewed the position thoroughly with the benefit of legal advice and have concluded that the interests of TPF are best served by not instituting any claims against D2–D4 for the reasons there set out.

161 It is clear, submit the defendants, that the court must give great weight to the commercial judgment of those who have responsibility for the management of the relevant entity under the constitutive documents; see for example the observation of the Lewison, J. in *Iesini* (17) quoted at para. 77 above.

162 Secondly, they submit that the independence of the FFP directors is fortified by the fact that Mr. Williams has given an undertaking that the shareholder of the GP will not exercise any powers so as to remove the FFP directors or interfere in any way in the exercise of their functions. Thus, submit the defendants, the FFP directors are, and are seen to be, free to act independently.

163 In our judgment, these submissions do not overcome the inhibition referred to earlier. In relation to the first point, the judge was in our view correct to focus on the entity which is the general partner rather than the directors for the time being of that entity. Section 33(3) refers to the "general partner" having failed or refused to bring proceedings without cause. The general partner is the legal entity D1. D1 is subject to the conflicts of interest we have summarized above and thus cannot be seen to be in a position to take a fair and independent decision about the potential

litigation. New directors are not in the same position as a liquidator, who is appointed by and subject to the supervision of the court and therefore clearly is and is seen to be independent of the company, its directors and shareholders. The FFP directors owe a fiduciary duty to act in the best interests of D1. The defendants submitted that because D1 owes fiduciary duties to act in the best interests of the partnership, the FFP directors therefore have a duty to act in the best interests of TPF. However, there is certainly the potential for conflict between acting in the best interests of TPF (which might include taking action against D1 as a co-conspirator) and acting in the best interests of D1 (which might be said to include the avoidance of being sued).

164 In connection with the undertaking, we were referred to the case of *St. John's Trust Co. (PVT) Ltd.* v. *Medlands (PTC) Ltd.* (31) ("***B Trust***"), a decision of the Court of Appeal of Bermuda. That was a case which involved a number of issues but for present purposes it is sufficient to say that one of the issues before that court was whether it would be appropriate to reappoint St. John's Trust Co. (PVT) Ltd. ("SJTC") as trustee of the B Trust. SJTC was wholly owned by a company, Cabarita, which was in turn wholly owned by a Mr. T. Mr. T was said to have misappropriated funds from the B Trust and there were ongoing proceedings against him in this respect.

165 Mr. T had appointed two independent directors of SJTC and, before the Bermuda Court of Appeal, he proffered an undertaking not to interfere with the appointment of these two individuals. Despite this, the Bermuda Court of Appeal held ([2021] CA (Bda) 20 Civ, at para. 62) that it was clearly not appropriate for SJTC to be trustee. It would be contrary to the interests of the beneficiaries for Mr. T to have any control or influence over the B Trust. This would be possible, despite his undertaking, by reason of his ownership of Cabarita which owned SJTC. The undertaking did not meet the fundamental issue of Mr. T's potential influence.

166 Mr. Chapman sought to distinguish ***B Trust*** on three grounds. First, he pointed out that Mr. Williams is only an ***indirect*** beneficial owner of D1, but that was also the case in ***B Trust*** as Mr. T owned Cabarita which owned SJTC. Secondly, he referred to the undertaking by Mr. Williams not to interfere. However, an undertaking was also given by Mr. T in ***B Trust*** and this did not persuade the Bermuda Court of Appeal that his potential influence was thereby negated. Thirdly, he submitted that ***B Trust*** was concerned with whether there might be interference in the future by Mr. T whereas the present case was concerned with a decision (namely not to issue proceedings) which had already been taken. However, we do not see that this is a significant point of difference. The fact is that the decision as to whether to institute proceedings on behalf of TPF involved consideration by the GP of whether to sue itself as an alleged co-conspirator and whether

to sue its beneficial owner and two closely linked companies in circumstances where the claims were said to arise on the basis of the wrongdoing of the GP and its beneficial owner.

167 We find the reasoning of the Court of Appeal of Bermuda to be persuasive. In our judgment, the undertaking given by Mr. Williams is insufficient to overcome the inhibition from which D1 as general partner suffers. If one stands back and considers how it would appear to the plaintiffs (who allege that there has been serious wrongdoing by D1–D4 which has cost TPF over US$100m.) for the decision as to whether to seek recompense from any one or more of D1–D4 to be left in the hands of D1, they would have no confidence that a fair and independent decision had been taken, even following the appointment of the FFP directors. In our judgment, they would be justified in this lack of confidence. There is no doubt in our view that D1 was and is suffering from an inhibition which leads to the conclusion that, subject to the exercise of any discretion, it is appropriate for the plaintiffs to bring derivative claims on behalf of TPF pursuant to s.33(3) against D2–D4.

168 Given our decision to uphold the judge's conclusion that it is the position of D1 as the general partner which must be considered in relation to any inhibition rather than the position of the directors from time to time, it is not necessary for us to address his finding about the position of the FFP directors. Suffice it to say that, if we had found it necessary to do so, we would have considered that the judge was entitled to reach the conclusions which he did in this respect.

169 As to discretion, the defendants submit that, because the plaintiffs are bringing direct claims against D2 and D3, they have an alternative remedy in respect of those two defendants and there is no need for them to bring a derivative action. They point out that they have not sought to strike out the direct claims against D2 and D3. That is so, but it is of note that footnote 10 at para. 15 of the skeleton argument of D2–D4 states:

> "For the avoidance of doubt, [D2–D4] do not admit that the Respondents, in particular KPA, have standing to bring the direct claims, and expressly reserve the right to challenge the Respondents' standing to bring such claims, including on the basis of a lack of authority in the case of KPA."

170 As stated at para. 67 above, Ms. Stanley asserted in oral argument that the only way to get the proceeds of any successful claim against D2 and D3 into TPF is by way of a derivative claim. Furthermore, despite the defendants' explanation, submitted in response to the draft of this judgment, that footnote 10 was only intended to cover the KPA lack of authority point and the partnership accounting point, the fact remains that the footnote expressly reserves the right to challenge the plaintiffs' standing to bring the direct claims in general terms and the KPA point is

merely mentioned by way of inclusion as a ground of challenge. We bear in mind the overriding objective and, in our view, it would be inconsistent with that objective and highly undesirable to run the risk of the court eventually finding against D2 and D3 on the underlying merits of the claims but finding that the plaintiffs did not have standing for the direct claims or that it could not make an order for restoration of the trust fund in the absence of a derivative claim on behalf of TPF. The existence of an alternative remedy is a matter to be taken into account when determining whether to allow a derivative claim to proceed although its existence is not conclusive of the matter; see *Henderson* (13) ([2012] EWHC 3259 (Comm), at para. 39). In our judgment, whilst we have expressed certain preliminary views at paras. 65–72 above, in the light of the above matters there is sufficient uncertainty about whether the plaintiffs have direct claims against D2 and D3 or whether the court could order restoration of the trust fund on the success of such claims that, as a matter of discretion, it is just and fair to allow the derivative claims to proceed alongside the direct claims so that they are all heard at the same time. If, following a trial, the direct claims are upheld and the court also holds that it can order restoration of the trust fund as a remedy for such claims, then there will be no need to make any award on the derivative claims; if on the other hand the direct claims are found not to be maintainable or restoration of the trust fund cannot be ordered, the derivative claims will be necessary to provide a remedy, assuming that the underlying allegations against the defendants are upheld.

171 We add by way of postscript, that both sides sought to raise arguments based on the position of the Cayman Islands as a leading centre for the establishment of investment funds. Thus the defendants argued that, by setting the bar for derivative actions too low, the judge had rendered it less likely that promoters of investment funds in the form of ELPs would choose the Cayman Islands as the location of their funds because of the comparatively easy exposure to derivative claims.

172 Conversely, the plaintiffs argued that it was important for the reputation of the Cayman Islands as a centre for investment funds that persons who have invested in ELPs should have a remedy when the general partner is alleged to have been guilty of wrongdoing and that a derivative action is the only remedy in such circumstances. It should not therefore be too difficult to bring such an action.

173 Whilst noting these arguments, we have not decided this case by reference to the arguments' respective merits, which are more matters for the legislature. We have confined ourselves to construing s.33(3) in the light of the words used against the background of the law on derivative claims generally.

Summary of conclusions reached on the derivative claims

174 In respect of D1, for the reasons which we have given above, we allow the appeal to the extent of striking out the plaintiffs' derivative claims against it.

175 In relation to the derivative claims against D2–D4, we dismiss the appeals brought by these defendants, with the consequence that the plaintiffs may bring those claims under s.33(3).

The SFC appeal

176 At the hearing below, the GP (D1) applied for security of costs ("SFC") in the sum of US$5,536,025.50 and the sum sought by D2–D4 was US$2,720,000. It is and was common ground that the plaintiffs are both Kuwait state-owned enterprises ordinarily resident out of the jurisdiction and accordingly the judge had jurisdiction to exercise the discretion conferred on the court by GCR O.23 r.1(1), which reads in relevant part:

> "Where, on the application of a defendant to an action or other proceedings it appears to the Court—
>
> (a) that the plaintiff is ordinarily resident out of the jurisdiction …
>
> then if, having regard to all the circumstances of the case, the Court thinks it just to do so, it may order the plaintiff to give such security for the defendant's costs of the action or other proceedings as it thinks just."

177 Briefly summarized, the defendants' case was that there were substantial obstacles to the enforcement in Kuwait of an adverse costs order since there was no treaty between Kuwait and the Cayman Islands for the mutual enforcement of judgments and as a matter of Kuwaiti law even a judgment of the Kuwaiti courts was incapable of enforcement against the plaintiffs because they were state entities.

178 In dismissing the SFC applications, the judge began by setting out the legal principles he found to be applicable. He then analysed the principles and applied them to the case before him and then proceeded to give the reasons for his decision. The key elements of this part of his judgment can be summarized as follows:

The applicable principles

179 (i) There is no presumption that the court will ordinarily require a foreign plaintiff to give SFC; rather the discretion "is to be exercised on a case-by-case basis, as the rule states, having regard to all the circumstances

of the case"; see *In re Cybervest Fund* (9) (2006 CILR 80, at para. 24, *per* Smellie, C.J.) (para. 149).

(ii) The court should follow the guidance on the interpretation of O.23 r.1(1) provided by the following passage in the judgment of Smellie, C.J. in *Tasarruf Mevduati Sigorta Fonu* v. *Wisteria Bay Ltd.* (39) (2006 CILR 351, at para. 14) (para. 150):

> "There is no hard and fast rule that every foreign plaintiff must be required to put up security. The matter is one, as already stated, of discretion to be exercised in every case. All the circumstances will be considered including the means and ability of the plaintiff to pay and even, in an appropriate case, the relative strength or weakness of the case for each side provided those factors are clearly discernable from the evidence. See, for these propositions, the leading case of *Sir Lindsay Parkinson & Co. Ltd.* v. *Triplan Ltd.* …"

(iii) The court's discretion must be exercised impartially and must not be exercised discriminately; see *e.g. Ahmad Hamad Algosaibi & Bros. Co. Ltd.* v. *Saad Invs. Co. Ltd.* (1) (2017 (2) CILR 602, at para. 21) (para. 151).

(iv) The merits of the case will only be relevant if: (i) either party can clearly demonstrate a strong probability of success, or (ii) the court is considering a summary judgment application at the same time (para. 152).

Analysis and application of the principles to this case

(v) In this case, the merits could not be properly determined at this stage (para. 153).

(vi) The issue to be decided was whether the defendants had shown there are objectively justified grounds for concluding that there are obstacles or burdens to the enforcement of a costs order against the plaintiffs, such that there is a real risk of non-enforcement and whether, if there are such real risks, it is just in the circumstances to order security and if so, on what terms (para. 154). (This proposition, like principle (iii) above, is based on *AHAB* v. *Saad*, where Smellie, C.J. stated (2017 (2) CILR 602, at paras. 15–16):

> "… the focal concern of the modern case law is not to ensure that a plaintiff is seldom required to provide security or that orders for security are only exceptionally made but to ensure that such orders are not imposed in an arbitrary or discriminatory manner. Accordingly, the making of such orders against a non-resident plaintiff would be appropriate, and may now be justified, not simply on the discriminatory basis of the plaintiff's foreign status but because real risks of unenforceability are shown 'on objectively justified

> grounds' to exist: *per* Gloster, L.J. in her *dictum* cited above from *Bestfort* …, applying the *dictum* of Mance, L.J. from *Nasser* …
>
> 16 This approach dictated by the modern cases is aimed at addressing not only basic tenets of fairness but more particularly, the requirements of the Constitutional Bill of Rights where, in s.16, it is mandated that 'government shall not treat any person in a discriminatory manner in respect of the rights under this Part of the Constitution'—the most directly operative here being that right to a fair and public trial guaranteed by s.7 which states that 'Everyone has the right to a fair and public hearing in the determination of his or her legal rights and obligations by an independent and impartial court within a reasonable time.'"

(vii) Where the plaintiff is a foreign government or state agency, there is a presumption that SFC should not be awarded, although each case will turn on its own facts. The presumption arises from comity and common sense and may be displaced by the evidence; see *Tasarruf* (39) (2006 CILR 351, at para. 22) (para. 156).

(viii) As Smellie, C.J. observed in *Tasarruf*, the only modern reported case in which SFC had been ordered against a foreign government was *Sierra Leone Govt.* v. *Davenport* (34) where the circumstances were exceptional in that Sierra Leone had recently emerged from a civil war (para. 157).

(ix) PIFSS (the second plaintiff) was the subject of the SFC application determined in *Cybervest* (9), where PIFSS was petitioning as a shareholder for the winding up of a Cayman incorporated investment fund. In giving judgment in this case, Smellie, C.J. noted that PIFSS had "immensely valuable assets to be regarded as being within the jurisdiction" and so if PIFSS failed to pay an order for costs it would be open to the applicant to seek recourse. The SFC application was dismissed on the grounds that: (a) PIFSS's very valuable shareholding in the fund was to be treated as assets within the jurisdiction; and (b) PIFSS was (2006 CILR 80, at para. 27):

> "a state agency of a foreign government of undoubted resources and enjoying a high reputation in the global financial and commercial community. This is relevant insofar as it would tend to negate any concern that the plaintiff would be unlikely to obey an order for costs made in favour of the respondent."

(x) Security will not be required of a foreign plaintiff who has substantial assets within the jurisdiction: see *Cybervest* (*ibid.*, at para. 25) (para. 160).

(xi) Where any liability for costs on the plaintiffs' part will inevitably be joint and several, security will not be required if at least one plaintiff has substantial assets within the jurisdiction (para. 160).

(xii) A foreign plaintiff does not have the burden of establishing that it has fixed and permanent property within the jurisdiction (para. 161). See the following extract from the judgment of Lightman, J. in *Leyvand* v. *Amnon Barasch* (20) ([2000] WL 191256, at para. 6):

> "The common sense principle applies that the existence of assets within the jurisdiction, their fixity and performance, are among a number of potentially relevant factors, their importance depending on the particular facts of the case. The Court will not infer the existence of a real risk that assets within this country will be dissipated or shipped abroad to avoid their being available to satisfy a judgement for costs unless there is a reason to question the probity of the claimant: there is no such reason in this case. If there is a reason to question the claimant's probity, the character of his property within the jurisdiction is relevant in assessing the risk: the risk may be greater if the property is cash or immediately realisable or transportable, and less if fixed and permanent."

(xiii) Undertakings given by a plaintiff that it will not raise any of the potential defences in their home jurisdiction should an award of costs be made against it would be very persuasive evidence in any court in the plaintiff's home jurisdiction (para. 162). See Sanderson, Ag. J. in *Elliott* v. *Cayman Islands Health Serv. Auth.* (10) (2007 CILR 163, at para. 18).

The judge's reasons why, on the application of the foregoing principles, the SFC application would be refused

(xiv) The plaintiffs are both wholly owned by, and are the agents of, the State of Kuwait. There is therefore on the decided cases a rebuttable presumption that security for costs should not be ordered (see *Tasarruf* (39) (2006 CILR 351, at para. 23)). This presumption has not been rebutted on the evidence adduced. The plaintiffs appeared to have ready access to funds and would be able to satisfy any adverse costs order in a timely manner (paras. 164–166).

(xv) KPA is an internationally recognized commercial organization and relies on its international reputation to do business. Its profit for the financial year 2020–2021 was KWD56,450,000 (about US$187,522,553 based on the exchange rate on August 9th, 2021). The Director General of KPA has confirmed that it has sufficient resources to meet any costs order made against it in these proceedings, and will comply with any such costs orders in a timely fashion, a position that has been reconfirmed by the Kuwaiti Department for Legal Advice and Legislation ("DLAL"). In addition, KPA has provided a written undertaking to this effect to the court on May 27th, 2021 (paras. 167–169).

(xvi) PIFSS is a public institution which administers Kuwait's pension fund for all Kuwaiti citizens in the workforce, both in public and private sectors. It operates independently from the State of Kuwait and has its own budget and board of directors. It has a global investment asset portfolio worth approximately US$133.7bn. (as at March 31st, 2021). Its profit for the period March 2020 to December was US$18.9bn. An officer in PIFSS's Compliance and Government Department had confirmed that PIFSS had sufficient resources to meet any costs order made in these proceedings and will comply with any such orders in a timely fashion. PIFSS has provided a written undertaking to this effect to the court. In addition, PIFSS has been party to several sets of proceedings before the Cayman Islands courts and has never failed to comply with any costs order (paras. 170–172).

(xvii) It would be clearly detrimental to PIFSS's ongoing commercial reputation and business to be in breach of an order of the Cayman Islands courts (para. 173).

(xviii) Accordingly, after a careful consideration of the evidence, the presumption against ordering security against agents of a foreign state has not been rebutted. Accordingly, it would not be just to grant the SFC applications against the plaintiffs (para. 174).

(xix) It is well established that security will not be ordered against a foreign plaintiff who has substantial assets within the jurisdiction (see *Cybervest* (9)) and PIFSS is such a plaintiff by reason of its interest valued at €35,074,942 as a March 31st, 2021 in the Jermyn Street Commercial Real Estate Fund ("the Jermyn Street Fund"), of which PIFSS is a limited partner (paras. 175–176).

(xx) There is no reason to doubt the probity of PIFSS, which is an agent of the State of Kuwait and familiar with conducting international litigation (including in the Cayman Islands) (para. 177).

(xxi) There is no reason to conclude that PIFSS's interest in the Jermyn Street Fund is encumbered, or not amenable to enforcement if necessary, and no reason to conclude that PIFSS would dispose of or otherwise encumber its interest to attempt to defeat an order as to costs (para. 177).

(xxii) Accordingly, since PIFSS has sufficient assets within the jurisdiction to cover any costs order that is made against the plaintiffs (in respect of which they would be jointly and severally liable), and in circumstances where both plaintiffs have given written undertakings to the court, it would not be just to require the plaintiffs to pay security for costs (even if they were not agents of the State of Kuwait) (para. 178).

(xxiii) In light of the correspondence between Campbells (for D2–D4) and Ogier (for the plaintiffs) there was no basis to form the view that PIFSS would seek to frustrate the enforcement of a cost order against it by

disposing of its interest in the Jermyn Street Fund, even if it were able to do so (para. 179).

(xxiv) The enforceability of Cayman Islands judgments in Kuwait does not therefore arise for determination (para. 189).

The case advanced by the GP (D1)

180 (i) By reason of the errors made by the judge in reaching his decision to refuse to order SFC, his decision should be set aside and the SFC summons remitted to another judge of the Grand Court or alternatively the judge himself.

(ii) Although the discretion under GCR O.23, r.1(a) is at large, it can only be properly exercised when *all* of the circumstances are taken into account, and this the judge failed to do because he did not consider the obstacles of enforcement in Kuwait. Instead, he appears to have been satisfied that the plaintiffs could and would pay adverse costs order without question and the defendants had not proved otherwise.

(iii) The judge erred in principle in proceeding on the basis that there was a presumption that a foreign government or state agency will not be ordered to provide security for costs unless the applicant "rebuts" the presumption. The authorities the judge relied for the presumption—*Cybervest* (9) and *Tasarruf* (39)—laid down no such principle. Instead, Smellie, C.J. in the former case decided it on the basis that the court had a wide discretion which fell to be exercised on a case-by-case basis and in the latter case, Smellie, C.J. highlighted that it was all a matter of discretion taking into account all the circumstances. The true ratio was that the court does not apply the rules for SFC differently depending on whether the plaintiff is a state or an individual but on the basis that all plaintiffs who seek to engage the court's jurisdiction must play by the same rules. This, after all, is the position in England (see *Sierra Leone (Govt.)* v. *Davenport* (34)) and in Australia (see *e.g. Papua New Guinea* v. *Sandline* (26) ([1998] QDC 298, *per* Andrews, J.) and *Ministry of Foreign Affairs (Italy)* v. *Simeone* (23)).

(iv) Where there is joint and several liability between plaintiffs for costs and one of them is in the jurisdiction, it is the practice not to make a SFC order against the plaintiff who is resident outside the jurisdiction if it is inevitably to be inferred by the court that there will be joint liability for costs between the plaintiffs. Assuming that this practice can apply to a situation where both plaintiffs are outside the jurisdiction but one has substantial assets within the jurisdiction, D1 submits that there were no sufficient grounds for the judge to have concluded that the plaintiffs would be jointly and severally liable for the costs. Indeed, D1 pleads a defence against KPA that it commenced and carried on its claims against them

without due authority, and ratification of these acts is not possible under Kuwaiti law.

(v) The judge erred in taking into account the confirmation from the Director General of KPA, Mr. Al-Sabah, which was related to Mr. Florent, who in turn related it in para. 18 of his third affidavit, that KPA had sufficient resources to meet a costs order made against it in these proceedings, and would comply with any such costs order in a timely fashion. Mr. Florent's third affidavit was sworn on August 27th, 2021 but Mr. Al Sabah had been suspended from the position of Director General of KPA by the Minister of Commerce and Industry on October 24th, 2021 pending investigations of "violations" attributed to him. The expert evidence before the judge was that during his suspension Mr. Al-Sabah was not authorized to represent KPA in any capacity or exercise any powers on behalf of KPA.

(vi) The judge erred in treating the letters he called "undertakings" to pay an adverse costs order as if they were indeed "undertakings" when they were merely "comfort letters" since they contained the words, "Without prejudice to the exercise of KPA's legal rights" and stated "*we confirm* that KPA will comply with any final and binding costs orders …" Even if the letters had contained express undertakings on behalf of the plaintiffs to pay an adverse costs order, the judge should have considered whether there remained a significant risk that such a costs order would not be paid and gone on to find that there was such a risk because the undertaking could only be enforced by committal or sequestration proceedings in the jurisdiction and such an order would not be enforceable in any other court. Nor was it clear that the comfort letters would be enforced by the courts of Kuwait.

(vii) The judge erred in placing reliance on the evidence given in Mr. Florent's third affidavit to the effect that PIFSS had never failed to comply with any costs order made in proceedings before the courts of the Cayman Islands when there was no evidence that any adverse costs order had ever been made against PIFSS in any Cayman Island proceedings. What the judge should have done was to require production of examples of Cayman Islands costs orders that had been honoured by PIFSS.

(viii) The judge made the following errors in giving the weight he did to PIFSS's assets within the jurisdiction:

(a) He stated that the plaintiff does not have the burden of establishing that it has fixed and permanent property within the jurisdiction when that burden in fact lay upon the plaintiffs and he should have taken note of the fact that PIFSS's interest in the Jermyn Street Fund was not of a fixed or permanent nature but was in the nature of a receivable in the event that a distribution were to be made and/or the Fund were wound up.

(b) He was wrong to consider whether there was any reason to doubt the probity of PIFSS when the question to be considered was whether there was a real risk that the assets in the jurisdiction may not be available if and when a case of enforcement arises; see Butcher, J. in *PJSC Tatneft* v. *Bogolyubov* (25) ([2019] Costs L.R. 977, at para. 49) and Henshaw, J. in *Pisante* v. *Logothetis* (27) ([2020] EWHC 3332 (Comm), at paras. 65–66).

Discussion and decision

181 We deal first with D1's submission that the judge erred in proceeding on the basis there was a presumption that a foreign government or state agency will not be ordered to provide security for costs unless the applicant "rebuts" the presumption.

182 The principal authority relied on by the judge for the aforesaid presumption was *Tasarruf* (39). Here, as related in Smellie, C.J.'s judgment (2006 CILR 351, at paras. 2–3), in that case, the plaintiff was a Turkish state entity authorized by statute to recover deficiencies in the accounts of insolvent banks by, among other things, the seizure and sale of the assets of their managers, shareholders or auditors. This authorization was given as part of a regulatory scheme to protect depositors against bank failure. In March 2004, the plaintiff seized in Turkish waters two motor yachts registered in the Cayman Islands Shipping Registry in the names of the corporate defendants. These yachts were said to belong to the controlling shareholders of a leading Turkish bank now in the administration of the plaintiff. In December 2004, the plaintiff brought an action in the Grand Court to prevent the completion of registration of mortgages for amounts in excess of their total value, granted against each vessel in favour of the third defendant in person.

183 On the question whether the plaintiff should be ordered to provide SFC, in *Tasarruf* the Chief Justice said that the fundamental question was whether an agency of a friendly foreign state, enjoying good standing in the international community and which has invoked the jurisdiction of this court, should be required to put up security for a defendant's costs of the action (*ibid.*, at para. 14). In earlier times there had been a practice that a foreign plaintiff should be ordered to provide SFC[14] but given the changes to the Rules since then and the discretionary nature of the exercise requiring the court to consider all the circumstances, a modern and different approach where the plaintiff is a foreign state, was discernible from the judgments in *Banco Economico S.A.* v. *Allied Leasing & Fin. Corp.* (3) and *Ministère de la Culture &c. de France* v. *Lielb* (22) ([1981] 1 WLUK 253, at paras. 16–18). This modern principle (*ibid.*, at para. 22) was—

14 See *e.g. Costa Rica (Republic)* v. *Erlanger* (8).

> "that where the plaintiff is the government (or a state agency) of a foreign state enjoying good standing in the international community (in particular from this court's point of view, enjoying diplomatic relations with H.M. Government) it should be assumed as a matter of comity and common sense, in the absence of anything to the contrary, that it will honour its obligations for costs made against it. Nonetheless, as the question remains one to be decided on a case by case basis in the discretion of the court, an order for security for costs could undoubtedly be made against a foreign state in appropriate circumstances."

184 In *Banco Economico S.A.* v. *Allied Leasing & Fin. Corp.* (3), the plaintiff, a Brazilian bank, itself in liquidation and under the control of a liquidator appointed by the Brazilian Government, petitioned for the winding up of the respondent. Mr. Justice Smellie (as he then was) was of the *prima facie* view that there was merit in the petition (1998 CILR at 112–113) and he concluded:

> "that the proper balance is struck when account is taken of the consideration that the petitioner is now under the control of a liquidator who is appointed by the Brazilian Government. Even in the ordinary case, the fact of insolvency will not by itself dictate an order for security. When the entity is a large bank, as the petitioner is, any such presumption becomes even less appropriate as grounds for ordering security for costs: see *Dartmouth Harbour Commrs.* v. *Mayor of Dartmouth Hardness* … and the notes in 1 *The Supreme Court Practice 1997*, para. 23/1–3/13, at 412.
>
> Although Ms. Collins (who argued the aspect of the matter for the petitioner) had no instructions to give an undertaking as to costs, I have nothing at all before me to support any suggestion that the Brazilian Government would not ensure that its obligations for costs (to be incurred if its appointed officer proves unsuccessful before this court) would not be honoured. In the interest of comity, I would consider that any presumptions would arise in favour of such obligations being met and not the other way around. The rule in the *Dartmouth Harbour Commrs.* case applies, *a fortiori*, to the present circumstances."

185 As related at para. 179 (ix) above, *Cybervest* (9) concerned a petition to wind up a fund incorporated in the Cayman Islands presented by PIFSS which faced a SFC application. In his judgment, Smellie, C.J. said (2006 CILR 80, at paras. 22–24):

> "The wording of [O.23, r.1(1)] plainly reveals the wide discretion to be exercised in the making of an order.

> 23 The wording does not admit any judicial policy that would mandate the making of an order simply because the plaintiff is a foreign plaintiff; the requirement that the plaintiff is ordinarily resident outside the jurisdiction is simply a pre-condition to the making of an order under the particular O.23, r.1(1)(a). It is a precondition just like those stipulated in (b)–(d), the other sub-rules, which are aimed at plaintiffs who may not ordinarily reside out of the jurisdiction …
>
> 24 … I would simply add that discretion is to be exercised on a case-by-case basis, as the rule states, having regard to all the circumstances of the case."

186 After noting the significant fact that PIFSS had immensely valuable assets (its shares in the fund PIFSS was seeking to have wound up) that were to be regarded as being within the jurisdiction, Smellie, C.J. went on to say (*ibid.*, at para. 27):

> "Another circumstance, of some weight, is the fact that the petitioner is a state agency of a foreign government of undoubted resources and enjoying a high reputation in the global financial and commercial community. This is relevant insofar as it would tend to negate any concern that the plaintiff would be unlikely to obey an order for costs made in favour of the respondent. To my mind, it also addresses the concern raised by Mr. Farrow, that efforts to enforce an order in Kuwait, if it ever came to that, could be met with a plea of state immunity."

187 The judge supported his statement in his judgment (2022 (1) CILR 12, at para. 165) that there was a rebuttable presumption that SFC should not be ordered by reason of the plaintiffs being the agent of, and wholly owned by, the State of Kuwait by footnote 28 which reads "*TMSF* v. *Wisteria Bay Ltd.* … (2006 CILR 351, at para. 23)." However, it is clear that the paragraph of the judgment in *Tasarruf* (39) to which the judge intended to refer was para. 22 which reads:

> "Taken together, there is a common practical principle to be discerned from these last cited three cases which is that where the plaintiff is the government (or a state agency) of a foreign state enjoying good standing in the international community (in particular from this court's point of view, enjoying diplomatic relations with H.M. Government) *it should be assumed* as a matter of comity and common sense, *in the absence of anything to the contrary*, that it will honour its obligations for costs made against it. Nonetheless, as the question remains one to be decided on a case by case basis in the discretion of the court, an order for security for costs could undoubtedly be made

against a foreign state in appropriate circumstances." [Emphasis added.]

188 It was no doubt in light of the emphasized words in this passage that the judge expressed himself as he did in para. 165 of his judgment. In our view, with respect to the judge, the Chief Justice is not to be taken here as laying down a principle based on a presumption that was to prevail unless it was rebutted. We say this having regard to the words used in the following sentence in the quoted passage that stress that the court is exercising a broad discretion on a case-by-case basis. It follows, in our opinion, that the judge erred in law in proceeding as he did on the basis that there was a presumption arising from comity and common sense that security for costs should not be awarded against the plaintiffs, although each case will be decided on its own facts.

189 In our opinion, the approach of the court when dealing with an SFC application against a foreign state or foreign state agency that enjoys good standing in the international community should be that it can treat this as a factor in favour of such of a plaintiff to go into the scales but on the basis that it is just one amongst all the other factors that must be weighed by the court when exercising the discretion conferred upon it.

190 We also accept Ms. Stanley's submission that the judge erred in stating that a foreign plaintiff does not have the burden of establishing that it has fixed and permanent property within the jurisdiction. The judge supported this statement by citing Lightman, J.'s *dictum* in *Leyvand* v. *Barasch* (20) that the court will not infer a real risk that assets within the jurisdiction will be dissipated or moved abroad in the absence of a question over the plaintiff's probity. Whilst the judge clearly intended this statement to apply to a situation where the evidence showed that a foreign plaintiff had property within the jurisdiction but there was nothing or very little about the property's permanency or freedom from encumbrances, we find it to have been too broadly expressed. Evidence that a foreign plaintiff has valuable property within the jurisdiction will obviously be of relevance but the significance of this evidence will depend on all the facts of the case, including any evidence as to the permanency of the property and its freedom from encumbrances (or the lack of such evidence) and other evidence tending to show that the plaintiff can be trusted to honour an adverse costs order. We also respectfully disagree with Lightman, J.'s *dictum* in *Leyland* v. *Barasch.* In our view, the approach adopted by Butcher, J. in *PJSC Tatneft* v. *Bogolyubov* (25) ([2019] Costs L.R. 977, at para. 49) and Henshaw, J. in *Pisante* v. *Logothetis* (27) ([2020] EWHC 3332 (Comm), at para. 65): "the question is not whether a lack of probity has been shown, but whether there is a real risk that the assets in a Contracting State may no longer be available if and when an asset enforcement arises," is to be preferred.

191 We turn to Ms. Stanley's submission challenging the finding by the judge (2022 (1) CILR 12, at para. 178) that, if the plaintiffs' claims against the defendants all fail, there will be a costs order in respect of which KPA and PIFSS will be jointly and severally liable, the latter having substantial assets within the jurisdiction. Ms. Stanley's submission is based on the contention now pleaded in para. 12 of D1's defence that KPA's claim is a nullity because it was not authorized by the Chairman of KPA, who, as a matter of Kuwaiti law (having regard to KPA's constitution) is the only officer of KPA who can authorize the bringing of claims by the company and who has no authority to delegate this power or to ratify an earlier unauthorized issue of proceedings.

192 D1's defence and counterclaim to KPA's claim was served and filed on January 31st, 2022, over three months after the hearing below. In her skeleton argument for this appeal, Ms. Stanley submits that:

> "As recorded in the evidence [the fourth affidavit of Mr. Lewis] and then set out in the GP's Defence at [12], there is a major factual dispute in this case as between KPA and the Appellants as to whether these proceedings have been commenced and continued on behalf of KPA with its authority (there being no power under Kuwaiti law to ratify proceedings if brought without authority.)"

193 Attention was first drawn to the significance of the plaintiffs being joint and several debtors under an adverse costs order in para. 20 of Mr. Florent's third affidavit, dated August 27th, 2021, where he deposed that he had alerted PIFSS to the possibility that, owing to the joint and several nature of costs orders in the Cayman Islands, it was possible that PIFSS would be required to satisfy any costs order that may be made in these proceedings in full from its own resources.

194 In paras. 42–47 of his fourth affidavit, dated September 17th, 2021, Mr. Lewis deposed that the FFP directors had been sent an opinion of Mr. Omar Al Qahtani of the Turkey office of Al Tamimi & Co. ("the Al Tamimi opinion") stating that only the Chairman of KPA had authority to approve the issuance of proceedings by KPA and this authority was not capable of being delegated; nor could an unauthorized issuance of proceedings be ratified by the KPA's Chairman. Reference was also made to the suspension of Mr. Al Sabah on August 24th, 2021 from his position as Director General KPA.

195 Curious as to how this lack of authority contention was deployed below, the court has perused the skeleton arguments relied on before the judge and the transcript of the oral submissions advanced below by Ms. Stanley for D1, Mr. Chapman for D2–D3 and Mr. Allison for the plaintiffs.

196 In para. 245 of his skeleton argument for the hearing below, Mr. Allison contended that PIFSS had sufficient assets within the jurisdiction

to cover any costs order that might be made against the plaintiffs in respect of which they would be jointly and severally liable.

197 Mr. Chapman did not contend in either his skeleton argument or his oral opening submissions that one of the consequences of the Tamimi opinion was that it was not inevitable that if the plaintiffs' claims were dismissed they would both be jointly and severally liable for the costs of the proceedings.

198 Ms. Stanley also did not contend in her skeleton argument or in her opening or closing submissions that, in light of the Tamimi opinion, KPA's claim was a nullity so that it could not be said that it was inevitable that if KPA's and PIFSS's respective claims were dismissed, the plaintiffs would be jointly and severally liable for the costs of the proceedings. Instead, she contended that the effect of the Tamimi opinion was that it undermined the plaintiffs' contention that an adverse costs order would be enforceable in Kuwait and undermined KPA's reliance on assurances given by KPA's Director General, Mr. Al Sabah, both before and after he was suspended from that office, that KPA would honour any costs order made against it.

199 In his oral submissions in reply, Mr. Allison observed that the defendants had not taken the point that it was only one of the plaintiffs, PIFSS, that had assets within the jurisdiction and contended that, even if it had been taken, as Mr. Florent explained in para. 30 of his third affidavit, PIFSS was well aware of the joint and several nature of costs orders so that it may have to pay the whole sum from its own resources. Mr. Allison also submitted that the "lack of authority issue" was not a live issue in the proceedings before the court because there had been no application to strike out KPA's claim on that basis or to seek the determination of a preliminary issue.

200 In the course of his reply submissions made ahead of Ms. Stanley's reply submissions, Mr. Chapman accepted that, if the plaintiffs' claims were dismissed, the likely costs order would be a joint and several one, subject to the possibility that PIFSS might well argue that joint and several liability should not apply if KPA's claim was found to have been brought without authority.

201 Whilst Ms. Stanley had expressly adopted Mr. Chapman's opening oral submissions when she made her own opening oral submissions, she did not adopt the same course when she delivered her oral closing submissions, in the course of which she said she was going to deal just with the Al Tamimi/authority/suspension point and the point she wished to make was not the lack of authority to commence KPA's proceedings but the suspension of Mr. Al Sabah as Director General of KPA and the resulting loss of his authority to provide information to Mr. Florent upon which Mr. Florent had purported to rely in advancing KPA's case.

202 In our judgment, since the point now taken by D1[15] as to the impact of the lack of authority contention on what the judge said (2022 (1) CILR 12, at para. 178) was not taken on behalf of D1 below, when it plainly could have been, it is not open to D1 to take the point in this appeal in support of D1's case that the judge's decision refusing the defendants' SFC applications should be set aside.

203 In our judgment, the errors of the judge identified in paras. 188 and 190 above played such a significant role in the exercise of his discretion (see *e.g.* paras. 155, 165, 166 and 176) that his decision must be set aside.

204 In these circumstances, it is open to us to exercise the discretion conferred by GCR O.23, r.1(1) and since we have before us all the evidence and the parties' skeleton arguments that were before the judge and the transcript of the oral submissions the judge heard on the SFC issue, we propose to decide whether SFC should or should not be ordered against each of the plaintiffs.

205 We proceed on the assumption that the defendants are correct in their submission that there would be very real difficulties indeed in enforcing in Kuwait costs orders made against the plaintiffs if their claims against the defendants are dismissed.

206 Although it is a necessary condition for the ordering of SFC that there is a real risk that an adverse costs order would not be enforced against the postulated foreign plaintiff in his/its home jurisdiction, this is not a sufficient condition for ordering SFC whatever the other circumstances of the case. Instead, it is open to the court, if there is sufficient evidence to support such a conclusion, to find that there is no real risk that the plaintiff will not honour an adverse costs order and for this reason to decline to order SFC. In our judgment, this is such a case having regard to the following matters.

207 As is common ground, the plaintiffs are agencies of a foreign state, Kuwait, which is of good standing in the international community and enjoys diplomatic relations with HM Government. Further, as related above, an instrumentality of the State of Kuwait, the DLAL, acting by the Head of its International Arbitration and Litigation Sector, sent a formal letter to the judge on behalf not only of KPA and PIFSS but also the State of Kuwait that reads in relevant part:

> "Dear Sirs.
>
> Cause No. FSD 236 of 2020 (RPJ)—(1) Kuwait Ports Authority and (2) The Public institution for Social Security v (1) Port Link GP Ltd.,

15 See para. 180(iv) above.

(2) Mark Eric Williams, (3) Wellspring Capital Group, Inc and (4) KGL Investment Company Asia (the 'Proceedings')

I am the Head of the International Arbitration and Litigation Sector for the Department of Legal Advice and Legislation (the 'Department') of the State of Kuwait.

One of the responsibilities of the Department is to act as legal adviser to the State of Kuwait as well as to certain State entities and/or incarnations of the State. In particular, the Department currently advises and represents each of the Kuwait Ports Authority ('KPA') and The Public Institution for Social Security ('PIFSS') in connection with the Proceedings.

I hereby confirm, on behalf of the Department, that KPA and PIFSS are wholly owned by the State of Kuwait and bring to your attention the attached letters, duly signed by authorised representatives of KPA and PIFSS confirming that they will comply with any final and binding costs orders made against them in the Proceedings ('Costs Orders').

We respectfully request, on behalf of KPA and PIFSS [and the State of Kuwait][16] that the Grand Court take these letters into consideration in determining whether or not KPA and/or PIFSS should be required to provide security for costs in the Proceedings."

208 The letters (also addressed to the judge) that were sent with the DLAL letter on behalf of PIFSS and KPA were in common form. In relevant part, they read:

"Dear Sirs

We refer to the abovementioned Proceedings before the Grand Court of the Cayman Islands, in which Kuwait Ports Authority ('KPA') [PIFSS] is a Plaintiff.

Without prejudice to the exercise of KPA's [PIFSS's] legal rights, including without limitation its right to appeal, or to seek leave to appeal, any decision of the Grand Court, we confirm that KPA will comply with any final and binding costs order(s) made against KPA in the course of the Proceedings ('Costs Orders').

Yours faithfully"

209 The KPA letter is signed by Mr. Al Sabah in his capacity as KPA's Director General. The letter is dated May 27th, 2021, which was at least

16 The brackets do not signify that the words they contain were not part of the original letter: they were.

two months before Mr. Al Sabah was suspended from this office on August 24th, 2021.

210 Ms. Stanley criticizes the judge for placing the reliance he did on these letters. Focusing on the words, "Without prejudice to the exercise of KPA's [PIFSS's] legal rights, including without limitation to its right to appeal, or to seek leave to appeal, any decision of the Grand Court," she submits that the letters were merely "comfort letters" and further contends that the judge should have found there remained a significant risk that an adverse costs order would not be paid because the confirmation expressed in the letters could only be enforced by committal or sequestration proceedings in the jurisdiction and such an order would not be enforceable in any other court; nor was it clear that the comfort letters would be enforced by the courts of Kuwait.

211 We do not accept these criticisms. In our judgment, the three letters amount to a representation intended to be relied on by the Grand Court that the plaintiffs would honour any final and binding costs order made against them and we regard the letters as providing strong support for the conclusion that there is no real risk that such costs orders would not be paid. We say this because we have no doubt that the State of Kuwait and its agencies, KPA and PIFSS, would suffer very significant reputational damage if the plaintiffs were to depart from the confirmations given in the letters. Also, further support for this "no real risk" conclusion comes from the evidence as to the financial resources of the plaintiffs that shows that each could be expected to have the ready funds to honour an adverse costs award.

212 As related by the judge, the unchallenged evidence is that PIFSS, which administers independently Kuwait's pension fund for all Kuwaiti citizens in the workforce, had a global investment asset portfolio worth approximately US$133.7bn. as at March 31st, 2021 and earned a profit for the period March 2020 to December 2020 of US$18.9bn. Included in these assets is its investment in the Jermyn Street Fund, a Cayman Islands ELP, which was valued at €35,074,942 as at March 31st, 2021. It is true that PIFSS is likely to be entitled to redeem this investment under the partnership agreement and to do so without publicity but there are no reasons to think that PIFSS would set about redeeming its investment and transferring the proceeds out of the jurisdiction to avoid having to satisfy a costs order: accordingly its existence provides reassurance that PIFSS is going to have amply sufficient resources over at least the next five to six years to meet an adverse costs order should its claims against the defendants be dismissed.

213 When setting out KPA's financial details that are recorded in para. 179(xv) above when relating his reasons why the SFC applications should be dismissed, the judge was relying on the evidence given in Mr. Florent's

third affidavit which was based in part on information that had come from Mr. Al Sabah. Ms. Stanley submits that this evidence was and is inadmissible because it is hearsay and Mr. Florent's third affidavit was sworn on August 27th, 2021 after Mr. Al Sabah was suspended on August 24th, 2021. We are not impressed by this submission. Even assuming that the information from Mr. Al Sabah was provided to Mr. Florent after Mr. Al Sabah had been suspended (which we think unlikely), Mr. Al Sabah would have been in a position to provide reliable figures showing that KPA's profit for the financial year 2020–2021 was KWD56,450,000, the equivalent to c.US$187,522,553 (based on a foreign exchange currency conversion of KWD1: US$3.32 as at August 9th, 2021). Further, Mr. Florent exhibits a public announcement made by KPA on April 4th, 2021 that KPA's profit for the financial year 2020–2021 was KWD56,450,000.

214 Apart from its interest in the assets held on trust for it and TPF by the GP, KPA has no assets within the jurisdiction but it is clear to us from the level of profit earned by KPA for the year 2020–2021 that it is extremely likely to have ample resources to honour an adverse costs order over the next five to six years.

215 It was argued below by the defendants that the plaintiffs could not be trusted to honour an adverse costs order on two particular grounds: the attempts by the Attorney General of Kuwait to obtain the moneys that had been paid into the account held at the Noor Bank that were part of the proceeds from the sale of Clark City, TPF's asset in the Philippines; and the manner in which the defendants had conducted the proceedings, including the bringing of proceedings against Walkers, the defendants' previous attorneys, the bringing of derivative claims for proceeds that would be paid to the plaintiffs and the plaintiffs' alleged refusal to compromise the SFC issue. These contentions are not advanced by Ms. Stanley. Had they been, they would have found no favour with the court.

216 For the reasons given in paras. 205–215 above, we find that there is no real risk that the plaintiffs will not honour their confirmations that they will pay any final and binding costs order made against them and accordingly we order that the plaintiffs should not be ordered to provide security for costs.

217 It follows that D1's appeal against the judge's refusal to order SFC must be and is dismissed.

Summary of conclusions

218 We would summarize our conclusions as follows:

(i) D1's appeal against the refusal of the judge to strike out the plaintiffs' direct claims against D1 is dismissed.

(ii) D1's appeal against the refusal of the judge to strike out the plaintiffs' derivative claims against D1 is allowed and the claims are struck out.

(iii) The appeals of D2, D3 and D4 against the refusal of the judge to strike out the plaintiffs' derivative claims against them are dismissed.

(iv) The appeal of D1 against the refusal of the judge to order the plaintiffs to provide security for costs is dismissed.

219 Our preliminary view as to costs is:

(i) There should be no order as to costs in respect of D1's strike out appeal. Although D1 succeeded in having the derivative claim against it struck out, it did not succeed on its argument that the plaintiffs' claims were misconceived because they were not in the form of an application for partnership accounts.

(ii) D2, D3 and D4 should pay the costs of their strike out appeals.

(iii) D1 should pay the costs of its SFC appeal.

(iv) The parties are at liberty to contend for different costs orders than those set out in (i)–(iii) but they must serve (concise) written submissions in support thereof within 10 days of the issuance of this judgment.

220 **BIRT, J.A.:** I agree.

221 **BEATSON, J.A.:** I also agree.

Judgment accordingly.

Attorneys: *Kobre & Kim* for the first appellant; *Campbells LLP* for the second to fourth appellants; *Ogier* for the respondents.

EXHIBIT G

EFiled: Sep 16 2025 03:38PM EDT
Transaction ID 77090203
Case No. 2025-0607-KSJM

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

ATP III GP, LTD., in its capacity as General Partner of ATP Life Science Ventures, L.P.,	)	
Plaintiff,	)	
v.	)	C.A. No. 2025-0607-KSJM
RIGMORA BIOTECH INVESTOR ONE LP and RIGMORA BIOTECH INVESTOR TWO LP,	)	**REDACTED PUBLIC VERSION EFILED: September 16, 2025**
Defendants.	)	

STIPULATION AND [PROPOSED] PRE-TRIAL ORDER

Pursuant to Court of Chancery Rule 16(c), and subject to the approval of the Court, Plaintiff ATP III GP, Ltd. ("ATP" or "Plaintiff"), in its capacity as general partner of ATP Life Science Ventures, L.P. (the "Fund"), and Defendants Rigmora Biotech Investor One LP and Rigmora Biotech Investor Two LP (collectively, "Rigmora" or "Defendants"), by and through their undersigned counsel, jointly submit this Stipulation and [Proposed] Pre-Trial Order (the "Pre-Trial Order"). Plaintiff and Defendants (each a "Party," and together the "Parties") reserve the right to modify this Pre-Trial Order by agreement with approval of the Court.

I. NATURE OF THE ACTION AND PROCEDURAL HISTORY

1. This action arises from a dispute regarding the First Amended and Restated Limited Partnership Agreement of ATP Life Science Ventures dated November 1, 2012, as amended (the "LPA," Dkt. 29). *See* Complaint, Dkt. 1.

2. On May 30, ATP filed its Verified Complaint, along with a Motion to Expedite Proceedings. Dkt. 1.

3. On June 9, 2025, Defendants filed a Motion to Stay Proceedings (Dkt. 10) and a Motion to Dismiss (Dkt. 11).

4. The Parties completed briefing on ATP's Motion to Expedite on June 12, 2025, and the Court heard argument on the motion on June 13, 2025. Pl. Reply ISO Mot. to Expedite, Dkt. 28; June 13, 2025 Hr'g Tr., Dkt. 31. The Court granted expedition but stayed discovery pending a determination of the Defendants' Motion to Stay Proceedings. June 13, 2025 Hr'g Tr. at 43:8-43:22.

5. The Parties completed briefing on Defendants' Motion to Stay Proceedings on June 24, 2025, and the Court heard argument on the motion on June 27, 2025. Defs. Reply ISO Mot. To Stay, Dkt. 40; June 27, 2025 Hr'g Tr. Dkt., 45. The Court denied the motion. June 27, 2025 Hr'g Tr. at 52:5-52:18.

6. On July 7, 2025, the Court entered the Parties' Stipulation and Order Governing Case Schedule. Dkt. 54.

7. On July 7, 2025, Defendants filed their Answer. Dkt. 57.

8. The Parties conducted written and document discovery and depositions, including expert depositions.

9. A pre-trial conference is presently scheduled for September 11, 2025, at 3:15 p.m. Dkt. 54.

10. A two-day trial is currently scheduled for September 18 and 19, 2025, beginning at 9:15 a.m. ET in Wilmington, Delaware. *Id*.

11. A related dispute between the Parties is pending in the Grand Court of the Cayman Islands, pursuant to a writ filed by Defendants on June 2, 2025 and a petition filed by Defendants on June 6, 2025. JX-1416, Writ of Summons, Cause No. FSD 2025-0146; JX-1417, Winding Up Petition, Cause No. FSD 2025-0151. The Grand Court of the Cayman Islands has scheduled a trial in those proceedings starting on January 12, 2026.

II. UNDISPUTED FACTS

12. The facts set forth below have been admitted or stipulated as true and require no proof. The inclusion of any fact herein is not an admission or acknowledgment of its relevance to any issue in this action. The Parties reserve all rights with respect to any legal or factual dispute other than those specifically addressed in this Stipulation. The undisputed facts are as follows:

A. The Parties

13. Plaintiff ATP III GP, Ltd. ("ATP") is a Cayman Islands exempted company, designated as the general partner of Apple Tree Partners Life Sciences Ventures, L.P., a Cayman Islands exempted limited partnership (the "Fund").

14. The Fund invests in companies pursuing biopharmaceutical research. Ans. ¶ 29.

15. ATP is owned and controlled by Dr. Seth Harrison. Compl. ¶ 2.

16. Dr. Harrison and a trust created for Dr. Harrison's children, Les Pommes LLC, are both limited partners in the Fund. Ans. ¶ 44.

17. Defendants Rigmora Biotech Investor One LP and Rigmora Biotech Investor Two LP are both limited partnerships organized under the laws of the British Virgin Islands. Ans. ¶¶ 18-19.

18. Defendants are limited partners in the Fund and the successors-in-interest to Blue Horizon Enterprise Ltd. and Ezbon International Ltd.[1] Ans. ¶ 21.

19. Rigmora Holdings Ltd. ("Rigmora Holdings") is a limited partner of each of the Defendants.

20. Defendants are ultimately owned by the family trust of Dr. Dmitry Rybolovlev (the "Trust"). Ans. ¶ 20.

[1] Any reference herein to "Defendants" includes reference to their predecessors-in-interest, if applicable.

21. Dr. Rybolovlev is a Russian-born Cypriot national who made his fortune in Russia. Ans. ¶ 96.

B. The Limited Partnership Agreement and Subsequent Amendments

22. In 2010, Dr. Rybolovlev and Dr. Harrison met and subsequently discussed forming the Fund. Ans. ¶ 26.

23. On October 29, 2012, the Parties entered into a limited partnership agreement to create the Fund as an exempted limited partnership under Cayman law, with ATP as the general partner, and Defendants as limited partners. JX-1. The Fund was originally named Apple Tree Partners IV, L.P. *See* JX-1. On November 27, 2020, the name of the Fund was changed to ATP Life Science Ventures, L.P. pursuant to Amendment No. 19 (*infra* ¶ 32).

24. On November 1, 2012, the Parties entered into the First Amended and Restated Limited Partnership Agreement (as amended, the "LPA"). JX-1.

25. The LPA is governed by Cayman Law. JX-1, Paragraph 18(g)(i).

26. On November 1, 2012, Defendants entered into Subscription Agreements with the Fund, with a total Contingent Subscription amount of [redacted]. JX-212, 213.

27. On November 1, 2012, Dr. Harrison entered into a Subscription Agreement with the Fund, with a total Contingent Subscription of [redacted]. JX-216.

28. Between 2012 and 2020, Amendment Nos. 1 through 16 to the LPA were executed.

29. On September 2, 2020, Amendment No. 17 to the LPA was executed. JX-89.

30. On September 20, 2020, Defendants and the Fund executed Amendment No. 1 to Defendants' Subscription Agreements, which increased the total amount of Defendants' Contingent Subscriptions by [redacted] to [redacted]. JX-99, 101; Ans. ¶ 36.

31. On November 5, 2020, Amendment No. 18 to the LPA was executed. JX-126.

32. On November 27, 2020, Amendment No. 19 to the LPA was executed. JX-132.

33. On December 31, 2020, Dr. Harrison transferred certain percentages of his interests in the Fund to his discretionary trust Les Pommes LLC, along with rights and obligations under the LPA and Dr. Harrison's Subscription Agreement. JX-157.

34. On June 21, 2021, Amendment No. 20 to the LPA was executed. JX-222.

35. On December 5, 2022, Amendment No. 21 to the LPA was executed. JX-480.

36. On July 10, 2024, the Defendants received transfers of the limited partner interests held by their predecessors-in-interest Blue Horizon and Ezbon along with rights and obligations under the LPA and Subscription Agreements. JX-1048.

37. On December 20, 2024, Amendment No. 22 to the LPA was executed. JX-1068.

38. Since the execution of Amendment No. 22 to the LPA, Braeburn, Plaintiff, and Rigmora Holdings have not entered into a royalty financing transaction.

39. The LPA has not been amended since Amendment No. 22.

C. The Thirteen Portfolio Companies

40. The Fund has invested in the following thirteen companies, among others: Aethon Therapeutics ("Aethon"), Apertor Pharmaceuticals ("Apertor"), Ascidian Therapeutics ("Ascidian"), Aulos Bioscience ("Aulos"), Deep Apple Therapeutics ("Deep Apple"), Evercrisp Biosciences ("Evercrisp"), Initial Therapeutics ("Initial"), Marengo Therapeutics ("Marengo"), Marlinspike Therapeutics ("Marlinspike"), Nereid Therapeutics ("Nereid"), Nine Square Therapeutics ("Nine Square"), Red Queen Therapeutics ("Red Queen"), and Replicate Biosciences ("Replicate," collectively the "Portfolio Companies"). Compl. ¶ 9.

41. In correspondence, dated May 15, 2025 and from time to time thereafter, Defendants and Plaintiff referred to Aethon Therapeutics, Apertor Pharmaceuticals, Deep Apple Therapeutics, Evercrisp Biosciences, Initial Therapeutics, Marlinspike Therapeutics, and Red Queen Therapeutics as the seven "Early Stage Companies."

D. Fund Operations Between 2020 and 2024

42. Between 2020 and 2022, the Fund proposed initial investments in twelve of the thirteen Portfolio Companies. Ans. ¶ 64.

43. Prior to each investment, Plaintiff and Defendants had detailed discussions regarding the budget for each proposed Portfolio Company. Ans. ¶ 31.

44. Following discussions, Defendants approved initial investments in Ascidian in March 2020; Initial, Nereid, and Nine Square in May 2020; Aulos and Apertor in October 2020; Replicate in January 2021; Evercrisp in July 2021; Red Queen in September 2021; Deep Apple in November 2021; Marlinspike in December 2021; and Aethon in December 2022.

45. Plaintiff provided quarterly reports to the Defendants. Ans. ¶ 144.

46. The Fund has had multiple "exits" creating certain revenue and returns on investment. Defendants received certain distributions from the Fund relating to investments in Stoke Therapeutics, Akero Therapeutics, and Syntimmune, Inc. Ans. ¶¶ 60, 71. The Fund has distributed approximately [redacted] to the

Defendants.

47. The Fund's most valuable current asset is its investment in Braeburn Pharmaceuticals, Inc. ("Braeburn"). Braeburn is a pharmaceutical company founded in 2012 to develop and commercialize pharmaceutical products designed to address opioid use disorder. Braeburn is currently engaged in a commercial launch of the company's flagship product, Brixadi. Ans. ¶ 68.

48. Braeburn's likelihood of achieving commercial success was uncertain for many years. Ans. ¶ 69.

49. Brixadi faced regulatory delays, but ultimately received FDA Approval for marketing in the United States in June 2023. Ans. ¶¶ 73, 91.

50. In 2023, Braeburn entered into a Loan and Security Agreement with Hercules Capital. Ans. ¶ 91.

E. Braeburn Litigation

51. On September 28, 2023, Defendants requested distribution of the net assets of the Fund's investment in Braeburn pursuant to Amendment No. 20. Ans. ¶ 92.

52. Plaintiff refused Defendants' 2023 request for distribution of the net assets of the Fund's investment in Braeburn. Ans. ¶ 94.

53. On July 30, 2024, Defendants renewed their request for distribution of the net assets of the Fund's investment in Braeburn. Ans. ¶ 98.

54. On August 2, 2024, Defendants filed an originating summons in the Grand Court of the Cayman Islands (the "Braeburn Action"), seeking a ruling that Amendment No. 20 required Plaintiff to make the requested distribution. Ans. ¶ 106.

55. On December 20, 2024, the Parties settled the Braeburn Action which was contingent on the Parties executing Amendment No. 22. Ans. ¶ 100.

56. Also on December 20, 2024, the Parties entered into Amendment No. 22 to the LPA.

F. 2025

57. In January 2025, Defendants paid a [redacted] capital call for Replicate. Ans. ¶ 119. In January 2025, Defendants also paid a [redacted] capital call for Aulos, a [redacted] capital call for Deep Apple, a [redacted] capital call for Evercrisp, a [redacted] capital call Marlinspike, and a [redacted] capital call for Nine Square.

58. In February 2025, Defendants approved an [redacted] increase in the budget for Replicate contingent on certain conditions. Ans. ¶ 120.

59. In February 2025, Defendants paid a [redacted] capital call for Replicate, a [redacted] capital call for Marlinspike, and an approximately [redacted] capital call for certain expenses.

60. In March 2025, Defendants paid a [redacted] capital call for Red Queen.

61. In April 2025, Defendants paid a [redacted] capital call for Deep Apple, a [redacted] capital call for Initial, and a [redacted] capital call for Nine Square.

62. In April 2025, Dr. Harrison sent a spreadsheet to Defendants modelling reallocation of budgeted amounts from the Early Stage Companies to Aulos, Ascidian, and Marengo. Ans. ¶ 125.

63. On May 6, 2025, Plaintiff made capital calls for Apertor and Initial in the amounts of [redacted] and [redacted] respectively (the "May 6 Capital Calls"). Ans. ¶ 131. Defendants paid the May 6 Capital Calls and Plaintiff acknowledged receipt of the funds on May 22, 2025. Ans. ¶ 147.

64. On May 30, at approximately 11:36pm EDT, Plaintiff sent capital calls for ten Portfolio Companies and for certain expenses. JX-1387, 1388, 1390-1399.

65. On May 30, at approximately 11:44pm EDT, Plaintiff filed the Verified Complaint.

66. The total amount of the capital calls sent by Plaintiff on May 30, 2025 was US [redacted].

67. On June 1, 2025, Plaintiff sent Defendants an amended capital call for Replicate, lowering the amount called from US [redacted] to US [redacted].

68. Following the June 1 revision, the total amount of the capital calls initially dated as of May 30, 2025 is US [redacted].

III. ISSUES OF FACT AND LAW TO BE LITIGATED AT TRIAL

A. ATP's Issues of Fact and Law

69. On May 30, 2025, Plaintiff filed its Verified Complaint seeking, among other relief, an order of specific performance that Defendants must comply with their obligations under the LPA to provide funding to the Early-Stage Companies.

70. ATP respectfully refers the Court to its Pre-Trial Brief, to be filed in accordance with the Scheduling Order, for ATP's statement of the issues of fact it intends to establish at trial and statements of legal issues to be tried.

B. Defendants' Issues of Fact and Law

71. Defendants deny that Plaintiff is entitled to the relief sought in its Complaint, any order of specific performance, or to any relief at all.

72. Defendants respectfully refer the Court to their Pre-Trial Brief, to be filed in accordance with the Scheduling Order, for their statement of the issues of fact they intend to establish at trial and statements of legal issues to be tried.

73. Defendants respectfully reserve the right to revisit the Pre-Trial Order or to seek to modify it for good cause shown upon resolution of the outstanding disputes over Plaintiff's withholding of documents subject to Defendants' motions to compel.

IV. STATEMENT OF RELIEF SOUGHT

A. Plaintiff

74. Plaintiff requests the following relief:

a. Declaring that Defendants have:

(i) breached the LPA by refusing to consider budgets and have waived their rights to approve budgets;

(ii) breached the LPA by preemptively refusing to respond to capital calls relating to approved budgets;

(iii) breached the LPA by refusing to pay the May 30th Capital Calls;

(iv) breached their obligations under the LPA to fund and approve budgets sufficient to qualify as a Defaulting Partner; and

(v) breached their Common Law duties to exercise its discretion in approving budgets in a rational and good faith manner.

b. Declaring that Defendants waived or otherwise forfeited its voting and budget approval rights and that it "shall not have the right to vote on

or grant or withhold consent or approval with respect to any matter except as required by law" on any further matters arising under the LPA pursuant to Section 18(f) of the LPA;

c. Ordering Defendants to specifically perform their obligations to approve budgets in good faith, if the Court does not find Defendants waived their right to consider budgets.

d. Ordering Defendants to specifically perform their obligations to fund capital calls for the Early-Stage Companies.

e. Enjoining Defendants from interfering with Plaintiff in the exercise of its discretion over the Fund, upon deeming Defendants a Defaulting Partner.

f. Declaring that ATP's filing of this action on behalf of the Fund is (i) not an act taken in bad faith; (ii) not an instance of willful fraud, willful misconduct, or gross negligence; nor (iii) an intentional and material breach of the LPA; and/or (iv) is consistent with ATP's rights and obligations as set forth in LPA ¶ 18(g)(iv).

g. Awarding Defendants to reimburse Plaintiff for its fees, costs, and expenses under the "loser pays" principles of Cayman Island laws and common law.

h. Awarding Plaintiff pre-judgment and post-judgment

interest.

i. Awarding Plaintiff such other, further, and different relief as this Court deems just and proper under the circumstances.

B. Defendants

75. Defendants deny that Plaintiff is entitled to the relief sought in its Complaint, any order of specific performance, or to any relief at all.

V. AMENDMENTS TO THE PLEADINGS

76. Plaintiff ATP respectfully moves, pursuant to Court of Chancery Rule 15(b), for leave to conform the pleadings in its Verified Complaint to the evidence by adding a claim for Breach of Contract for Defendants' failure to pay the May 30 Capital Calls as required by Paragraph 5(a) of the LPA. This additional claim is the maturation of a portion of the anticipatory breach claim forming the basis of Count II of the Verified Complaint.

77. Specifically, in its Verified Complaint, ATP asserts a claim for Anticipatory Breach of the LPA. Compl. ¶¶ 165-175. In Count II, ATP alleges, *inter alia*, that Defendants have repudiated their obligations under the LPA in their May 15 Email where they disavowed any outstanding capital commitment to the Fund, including for the Early Stage Companies that have approved budgets. Compl. ¶ 170. As such, Defendants had anticipatorily breached their obligations to respond

to capital calls. Since the filing of the Complaint, Defendants have followed through with their threats.

78. Shortly before filing the Complaint, ATP issued its May 30 Capital Calls to the Defendants. The May 30 Capital Calls called capital for Pre-clinical Companies with approved budgets, and each of the May 30 Capital Calls was within the amount of the approved budget for the subject portfolio company. In response to the May 30 Capital Calls, Defendants were required to provide the requested capital by June 13, 2025[2]. Defendants failed to do so.

79. As such, Defendants have breached their obligations under the LPA. ATP requests the Court allow it to conform its pleadings to these recent facts that will be put forward at trial as evidence of Defendants' breach.

80. The Court has "discretion to allow the pleadings to be amended to reflect any new issues not asserted in the pleadings so long as the responding party is not prejudiced by its admission." *Norberg v. Security Storage Co.*, 2000 WL 1375868, at *5 (Del. Ch. Sept. 19, 2000); *see also Bellanca Corp. v. Bellanca*, 169 A.2d 620, 622 (Del. 1961) (permitting Rule 15(b) amendment to add quasi-contractual theories of recovery in addition to breach of contract claim where evidence relevant to the claims overlapped and therefore no prejudice existed). "A

[2] With the exception of Replicate for which a revised capital call issued on May 31, 2025 and thus capital was required by June 16, 2025.

party may move to amend the pleadings to conform to the evidence and to raise an unpled issue." Ct. Ch. R. 15(b) .

81. "The party opposing the amendment has the burden of showing that the amendment would be prejudicial to that party's defense." *Taplin v. Schuitemaker*, 2019 WL 126981, at *5 (Del. Super. Jan. 7, 2019) (citation omitted).

82. Defendants cannot meet that burden because they do not suffer any prejudice. Defendants were on notice of this claim. In fact, Defendants were so aware of the possibility they could be found in breach of the LPA that they filed the Cayman's Writ Proceedings seeking to invalidate the May 30 Capital Calls *mere days after receiving them*. *Supra* ¶ 11

83. In addition, Defendants have been expressly aware of Plaintiff's view that the May 30 Capital Calls form a basis for this action since at least June 13, 2025, when Plaintiff first asserted that the May 30 Capital calls "should necessarily be determined by the court seised of these matters, the Court of Chancery in the State of Delaware, before the Grand Court [of the Cayman Islands] is asked to determine" the Winding-Up Petition. Again, in response to Defendants' asserted position in its June 24 Letter that there was not an entire overlap between the Delaware proceedings and the Cayman proceedings due to, inter alia, the lack of any express reference to the May 30 Capital Calls in the Delaware complaint, Plaintiff responded its Petition to Stay the Writ Proceeding that the relief sought in this Action "is broad enough to

determine whether [Defendants are] obliged to meet" the May 30 Capital Calls (*see* First Affidavit of Seth Harrison, JX-940), making clear that Plaintiff considered the May 30 Capital Calls to be at-issue in this action.

84. Further, both Parties had the opportunity to take discovery on this issue including asking questions about the May 30 Capital Calls during each of the Parties' 30(b)(6) witness depositions. *See* Transcript of the August 12, 2025 Deposition of Dr. Seth Harrison at 394:9-396:22 and Transcript of the August 8, 2025 Deposition of Yuri Bogdanov at 270:14-274:19.

85. As such, Defendants face no prejudice. Further, the Court should allow Plaintiff to amend its Verified Complaint and litigate both its anticipatory and actual breach claims together in order to promote judicial efficiency. *See Agilent Technologies, Inc. v. Kirkland*, 2009 WL 119865 (Del. Ch. Jan. 20 2009) (deciding a motion to amend in favor of "notions of judicial efficiency that seek to limit the number of separate occasions on which a court must consider a matter."). Given the Court's liberal standard for amending pleadings, Plaintiff respectfully requests the Court allow it to conform its pleadings to these new events that are the natural continuation of its original claims.

86. **Defendants' Position:** On June 27, 2025, this Court denied Defendants' motion to stay, leaving only 83 days before the start of trial for Defendants to take discovery and prepare for trial. Plaintiff waited 63 of those days—and after the close

of fact discovery and the exchange of expert reports—to raise a claim that it purports to have known about weeks before the denial of the motion to stay. That is exactly the type of strategy that this Court protects parties against.

87. As an initial matter, Delaware law is clear that, although Court of Chancery Rule 15(a) provides that "leave [to amend] shall be freely given when justice so requires," the Court may deny leave "if there is a showing of substantial prejudice, bad faith, dilatory motive, or repeated failures to cure by prior amendment." *OptimisCorp v. Waite*, 2015 WL 357675, at *2-3 (Del. Ch. Jan. 28, 2015); *cf. Martinez v. E.I. DuPont de Nemours & Co.*, 2012 WL 4479164, at *2 (Del. Super. Ct. Sept. 21, 2012) ("Where a movant has no valid explanation for his delay, and the facts upon which the proposed amendments are based were known long in advance of the motion, it is entirely proper for the Court, in its discretion, to deny the motion.").

88. Plaintiff cites Court of Chancery Rule 15(b), which does not apply. Rule 15(b) governs "Amendments During and After Trial," but trial does not start until September 18.

89. The proposed amendment would be futile because the capital calls were invalid from the start and exceed Defendants' obligations to provide capital.

90. But the real issue is prejudice and Plaintiff's strategic decision to withhold this new claim until the very end of the case. In a different expedited action,

then-Vice Chancellor Strine reacted adversely to a plaintiff trying to add pre-trial a new claim that the plaintiff effectively knew about from the outset, where he rejected the amendment request on (among others) the following grounds: "that you could have raised the claim, that you didn't do it until right before trial after everybody had already written their briefs and everybody had taken their discovery and everybody is focused on what they had; and that that kind of tactic produces prejudice when you're asking people to operate on a short schedule like you've asked for." *Yucaipa Am. Alliance Fund II, L.P. v. Riggio*, C.A. No. 5465-VCS, at 31 (Del. Ch. July 6, 2010) (TRANSCRIPT); *see also id.* at 29-30 ("And I think that since the beginning of this lawsuit you've been fully aware that there would be a management slate and that it would be approved by the nominating committee, if not the full board, perhaps by both; that you had plenty of time to raise this in your briefs; that you let all the discovery go forward. . . . When you file an affidavit from all the attorneys swearing under oath that the first time that you believed there would be a management slate of Barnes & Noble, that the first time there would be a management slate, you learned that last Thursday? You all swear under oath, every member of your team. . . . And you do that, I'll grant your motion to amend . . . .").

VI. LIST OF WITNESSES

A. Plaintiff

91. Plaintiff expects to call the following witnesses live at trial:

a. Seth Harrison, M.D.

b. Joseph Yanchik

c. Spiros Liras, Ph.D.

d. Yuri Bogdanov

e. Michael Bloch, KC

f. Mark Robbins, Ph.D., J.D.

g. Mohan Rao, Ph.D.

92. Plaintiff further reserves the right to call by deposition at trial any witness to the extent permitted under applicable rules, by order of the Court, or by agreement of the Parties.

B. Defendants

93. Defendants expect to call the following witnesses live at trial:

a. Seth Harrison, M.D.

b. Dmitry Rybolovlev, M.D.

c. Yuri Bogdanov

d. Alexey Yakovlev

e. Mark Phillips KC

f. Dr. Ilonna Rimm, MD, Ph.D, CFA

g. Ilya A. Strebulaev, Ph.D

h. Paul Da Silva Jardine

i. William Engels[3]

j. Michael Ehlers[4]

94. Defendants further reserve the right to call by deposition at trial any witness to the extent permitted under applicable rules, by order of the Court, or by agreement of the Parties

C. Reservation Of Rights

95. The Parties reserve the right to (a) rely upon the testimony of any witness(es) identified by or called by any other Party; (b) call any witness(es) on any other Party's witness list; (c) call or introduce testimony from any witness(es) necessary for impeachment or rebuttal purposes, if previously deposed ; (d) to call custodians of records solely for the purpose of establishing the foundational facts necessary to admit into evidence any exhibit whose admissibility any Party challenges; (e) to call by deposition a witness listed as appearing live except to the extent such witness appears on the other Party's will call list and such testimony is not used for impeachment; and (f) object to any trial testimony offered by any witness(es) not identified in this Pre-Trial Order.

[3] Plaintiff has taken the position that Mr. Engels is not within Plaintiff's control and will not be produced at trial. Defendants' position is that they do not have sufficient information to accept Plaintiff's position. The Parties agree that Defendants will present Mr. Engels' testimony by deposition.

[4] Plaintiff has taken the position that Dr. Ehlers is not within Plaintiff's control and will not be produced at trial. Defendants disagree with that assertion. The Parties agree that Defendants will present Dr. Ehlers' testimony by deposition.

VII. WITNESS ORDER

96. Plaintiff will provide its proposed order of witnesses to Defendants by September 14, 2025 at 5:00pm. Defendants will provide their proposed order of witnesses to Plaintiff by September 15, 2025 at 5:00 p.m., reflecting the Parties' good faith belief regarding the witnesses they will call and examine at the two-day trial. The Parties will meet and confer and work in good faith to schedule those witnesses after taking into account witness availability.

97. Each Party shall promptly notify the opposing Party of any changes to their respective witness order and, in any event, by the day before the witness is set to testify.

98. The Parties may narrow their witness lists up to and including the time of trial. If a Party removes from its witness list any witness that it controls after the date of submission of this Pre-Trial Order, such Party still must make such witness available for the opposing Party to call at trial. Each Party reserves the right to call any witness solely as a rebuttal witness, if such witness was previously deposed.

99. Each Party reserves its right upon a showing of good cause to supplement its witness list up to and including the time of trial, and each Party reserves the right to object to any such attempt to supplement.

100. Each Party will make any witness that is under its control available to testify at trial on the date scheduled without the need for a subpoena.

VIII. DEPOSITION TESTIMONY

101. On or before September 17, 2025, Plaintiff shall lodge copies of all deposition transcripts for each deposition taken by any Party in this action. The lodging or any other presentation of deposition testimony with the Court is without prejudice to any Party's objection to the admissibility of such testimony.

102. Any Party may use the deposition testimony taken in this case in connection with trial, including pre-trial briefing and post-trial briefing (if any). Deposition testimony shall be admitted into evidence to the extent it is cited in the Parties' pre- and post-trial briefs or is used at trial (if any), as if it were given at trial. Subject to Court of Chancery Rule 32, the admissibility of deposition testimony cited in the Parties' briefs shall be subject to the Court's determination of any evidentiary objection made by a Party as if the deponent—were testifying—live at trial. Unless resolved at or before trial, objections to particular testimony (unless resolved at or before trial) will be addressed in the Parties' post-trial briefs.

103. For the avoidance of doubt, Defendants do not agree to any use of deposition testimony in a manner that is inconsistent with Court of Chancery Rule 32(a).

104. The Parties shall not exchange deposition designations, counter-designations, or reply designations. Each Party reserves any and all objections to the admissibility of deposition testimony. In addition, any Party shall remain free to

address the weight, if any, the Court should place on any such deposition testimony that is admitted.

105. If any Party intends to read or play deposition testimony during the trial of a witness (other than for the purpose of impeachment), such Party shall identify the testimony to be presented to opposing counsel no later than 10:00 a.m. ET on September 16, 2025. The noticed Party may cross-designate testimony and provide such cross-designations to the noticing Party by 10:00 a.m. ET on September 17, 2025. The noticing Party may then provide the noticed Party with additional designations within 8 hours, only as needed for completeness. Further designations must be limited to those needed for completeness and must be provided within two hours.

106. Deposition clips (including designations and counter-designations) for a given witness will be played sequentially as the testimony was given in the deposition.

107. A Party may use non-argumentative introductory language as transitions in advance of presenting a video deposition at trial. The Parties shall exchange such language at the time they provide the other Parties with notice of the specific videotaped designations of the testimony to be preceded by such language. The Parties shall meet and confer regarding any language any Party deems argumentative, and the Parties reserve all rights regarding any introductory language.

IX. STIPULATIONS REGARDING WITNESSES

108. Fact witnesses shall not be called more than once, except to the extent they are called in rebuttal. Any Party reserves the right to call its own witnesses for rebuttal. Each Party may use the testimony of any witness (whether on direct or cross examination) presented by the other Party in the Party's case in chief in order to avoid the necessity of calling the same witness more than once.

109. When a witness testifies, the Party controlling the witness shall present any direct examination of such witness first. Other Parties may then cross-examine without limitation to the scope of the direct examination, except that cross-examination of witnesses called in a Party's rebuttal case shall be limited to the scope of the direct examination in such rebuttal case. Re-direct examination will be limited to the scope of the cross-examination, and re-cross examination will be limited to the scope of the re-direct examination.

110. Except for purposes of impeachment or upon a showing that good cause exists to supplement the Exhibit List, the Parties' examinations of a witness shall be limited to the documents appearing on the JX List at the beginning of the examination of that witness. For avoidance of doubt, should the examination of a witness carry over to the next day, the Parties agree that they are unable to conduct an examination of the witness on exhibits added after the commencement of the

witness's examination, except for purposes of impeachment or upon a showing that good cause exists.

111. Fact witnesses will be sequestered until their testimony is complete; provided, however, such sequestration does not apply to one testifying corporate representative designated by Plaintiff and one testifying corporate representative designated by Defendants. Expert witnesses need not be sequestered during trial.

X. TRIAL AND TRIAL RECORD

112. The Parties shall submit an initial exhibit list of chronological Joint Trial Exhibits (the "Exhibit List," attached hereto as Exhibit A) to the Court on September 5, 2025, and an up-to-date list of Joint Trial Exhibits to the Court by 9:00 a.m. on September 18, 2025. Each of the Parties reserves the right to use at trial any exhibit from the Exhibit List identified by any Party. The Exhibit List will assign each exhibit a unique "JX" number. The Exhibit List will identify each exhibit by date (where available) and Bates number (where available), provide a brief description of the document, and list the occasions (if any) on which the document was marked as a deposition exhibit. All trial exhibits shall be pre-marked with a unique JX stamp on the first page (e.g. "JX-1) and pagination stamps (e.g., "JX-1.0001," "JX-1.0002," etc.) on each page of each exhibit. The party designating a document as a trial exhibit shall redact from such document individuals' social security numbers and similar personal identifying information, including from tax

returns designated as trial exhibits. Such redactions of personal data will also be consistent with the requirements of the General Data Protection Regulation ("GDPR").

113. The Parties will make a good faith effort to include all exhibits on the final Joint Exhibit List provided to the Court at the start of trial. Nevertheless, the Parties may supplement the Exhibit List through and including the close of trial, provided that the opportunity to object shall be provided to the other Party with respect to any supplemental exhibit, with each side reserving the right to object to any supplemental exhibits. The Party supplementing the Exhibit List shall simultaneously provide to the other Party copies of the exhibit(s) to be added to the Exhibit List. The Parties shall also coordinate to update the Court's exhibit list, tabbed binders, and thumb drives to reflect additions to the Exhibit List.

114. The Parties will provide certified translations of all exhibits on the exhibit list that contain foreign language communications. Each Party seeking to admit each foreign language exhibit will bear its own cost of obtaining the certified translation for that exhibit. Any objections to a certified translation must be made promptly and no later than 8:00 p.m. EDT on September 12, or within twenty-four (24) hours for any exhibit added to the Joint Exhibit List thereafter. Any dispute over a certified translation will be resolved by the Parties' jointly selected interpreter promptly.

115. The Parties reserve the right to raise evidentiary objections at trial concerning specific documents and testimony depending on the reason or basis for which the document or testimony is offered. The merits of any evidentiary objection, unless resolved at or before trial, will be addressed in the Parties' post-trial briefs, and the Court may determine after trial, in light of such briefing, that any exhibit is ultimately inadmissible. Unless an objection to a proposed trial exhibit has been noted on the Exhibit List or raised at the pre-trial conference, at trial, or in post-trial briefing, all exhibits that were used at trial or used in trial briefing shall be deemed admitted into evidence without objection. Notwithstanding the foregoing, the Parties are not prohibited from raising additional objections to specific exhibits that are first used in post-trial briefing.

116. Any document on the Exhibit List not used at trial or cited in any pre-trial or post-trial brief shall not be considered admitted in evidence or part of the record. After trial and post hearing briefing is complete, the Parties will identify all documents that were used in pre-trial briefing, at trial, or in post-trial briefing to identify the agreed-upon set of documents admitted into evidence and the complete trial record.

117. Each Party reserves the right to offer into evidence any documents not on the Exhibit List for the purposes of impeachment, subject to the Delaware Rules of Evidence. Each Party further reserves the right to introduce into evidence

documents not on the Exhibit List in rebuttal to any evidence introduced by any other Party, subject to the Delaware Rules of Evidence. Absent a showing of good cause, all exhibits must be included on the Exhibit List by the close of trial.

118. The Parties shall prepare binders containing the exhibits from the Exhibit List and provide the Court with two sets of binders, which will be delivered to the Court on or before the first day of trial. For any Excel files or other documents presented only in native format, the exhibit binder submitted to the court shall contain a slip sheet stating, "Produced in Native." Plaintiff will also provide the Court with three thumb drives containing electronic copies of the exhibits (including any documents presented only in native format) in searchable form. Plaintiff shall be responsible for arranging the printing, marking/labeling, binding, and tabbing of the Joint Exhibits provided to the Court, and shall provide Defendants opportunities to review and comment on such items prior to providing to the Court; however, the Parties shall share evenly the costs associated therewith.

119. Demonstrative exhibits need not appear on the Exhibit List. The Parties shall exchange any demonstrative exhibit(s) by 8:00 p.m. EDT the day before the trial day on which those exhibit(s) will be used. The opposing Party shall make a good faith effort to advise of any objection to the demonstrative by 11:00 p.m. EDT. and will in any event advise of any objection before trial begins the following day. If a demonstrative exhibit is prepared in response to testimony that was given for the

first time at trial, however, it shall be provided to counsel for the opposing Party at the earliest practicable time. This shall not be construed as a limitation on a Party's right to create demonstrative exhibits during the course of testimony at trial; nor shall it require the advance exchange of exhibits that are merely excerpts, enlargements, or highlights of trial exhibits. The Parties reserve the right to object to any demonstrative exhibit(s).

XI. TRIAL LOGISTICS

120. The Court has currently allotted two days for trial beginning on September 18, 2025 at 9:15 a.m. at The Leonard L. Williams Justice Center in Wilmington, Delaware.

121. The Parties have agreed to divide trial time equally, with Plaintiff having one-half and Defendants having the other half of the calculable trial time. Unless otherwise ordered by the Court, each Party will be charged with all the time its counsel spends questioning a witness, whether on direct examination, cross-examination, redirect examination, or otherwise. The time used to play video of depositions shall be charged against the designating or counter-designating Party for the time associated with such designations or counter-designations. For witnesses requiring translators, the Party taking testimony from the witness will be charged with all the time expended for translation during that testimony.

122. Unless otherwise ordered by the Court, time spent addressing in-trial motions or evidentiary issues shall be split equally between each side. Time used by the Court or by either Party addressing the Court's questions will be split equally between each side. Each Party shall have the burden of monitoring its own use of time for direct and cross-examination, and all other purposes.

123. The reports of all expert witnesses, and the deposition transcripts of such experts, shall be lodged with the Court and treated as if such reports and depositions constitute in-Court testimony. Nothing in this paragraph precludes a Party from calling one of its own experts to testify during the trial. Objections to the admissibility of expert reports and deposition testimony shall be resolved in the same manner set forth above for other deposition testimony. Without limiting the foregoing, ATP respectfully objects to, and reserves the right to challenge, the admissibility of any part of the expert report or rebuttal expert report of Mark Phillips, KC, to the extent they seek to improperly make conclusions of facts and law or opine on the hypothetical actions of a Cayman Court. Without limiting the foregoing, as set forth further herein, Defendants respectfully submit that the grounds that ATP advances to exclude certain portions of the expert report and rebuttal report of Mark Phillips, KC are meritless. To the extent the Court agrees with Plaintiff about the admissibility of those portions Phillips' reports, Defendants respectfully submit that the equivalent portions of the expert and rebuttal reports of Michael Bloch, KC must

be excluded as well because Mr. Bloch's testimony presents the same issues about which ATP complains. ATP disputes that Mr. Bloch's testimony presents the same deficiencies as Mr. Phillips'.

XII. EVIDENTIARY ISSUES REQUIRING RESOLUTION

124. Pursuant to Paragraph 11 of the Stipulation and Order Governing Case Schedule (Dkt. 54), the Parties are to address Motions *in limine* in this Order.

125. The Parties identify the following disputes which the Parties intend to address at the pre-trial conference.

A. Motion to Exclude Certain Testimony of Mark Phillips, KC

126. **Plaintiff's Position:** The Court should exclude the testimony of Mark Phillips, KC, including his expert and rebuttal reports, to the extent that Phillips: i) opines on what a Cayman Court would do; ii) seeks to provide legal conclusions on contractual interpretation; and iii) applies conclusions or assumptions. "Expert testimony is admissible only if relevant and reliable," *Scottoline v. Women First, LLC*, 2025 WL 1707364, at *4 (Del. June 18, 2025), and Mr. Phillips' testimony is neither relevant nor reliable.

127. The Court should also exclude Mr. Phillips' rebuttal report to the extent it exceeds the scope of the report to which it purports to rebut.

128. ***Mr. Phillips is Not Qualified to Predict the Actions of a Cayman Court.*** Throughout his reports, Mr. Phillips improperly states his "opinion that a Cayman

court would be likely to reach" certain conclusions. Report ¶ 18. Mr. Phillips opines on what provisions of the LPA a Cayman Court would consider, what facts the Cayman Court would assess, and how the Cayman Court would decide specific issues. *See* Report ¶¶ 18, 88, 92, 105, 108, 112-115, 117-120, 122, 129, 142, 143, 145, 150, 154, 159, 160, 164-165, 171-173; Rebuttal Report ¶¶ 17, 33, 35. This type of testimony is irrelevant and improper.

129. Despite this emphasis on predicting the decisions of the Cayman courts, Mr. Phillips is not qualified to speak on behalf of or regarding the Cayman Courts. Even assuming Mr. Phillips is qualified to opine on the principles and foundations of English law that influence Cayman law—as Plaintiff's expert is—predicting the behavior and outcomes of a particular judicial body require different sets of knowledge, and is akin to a social science determination rather than an explanation of the law. Mr. Phillips is an English lawyer whose extensive career has been in English courts. *See* Report ¶¶ 2-12. While Mr. Phillips has litigated in Cayman Courts, he is not a sitting Cayman judge weighing the evidence. His assumption of that role is improper and unhelpful.

130. ***A Hypothetical Analysis of a Cayman Court is Irrelevant.*** While the LPA is largely governed by Cayman law, it specifically provides that both Cayman and Delaware Courts are proper fora. In this Delaware forum, it is the Delaware Court's responsibility to determine how Cayman law applies to the disputed issues.

See *Kostolany v. Davis*, 1995 WL 662683, at *2 (Del. Ch. Nov. 7, 1995) ("The court's determination of foreign law is treated as a ruling on a question of law."). Delaware Courts have extensive experience applying foreign law. The Court need not consider an expert's speculation about how a Cayman Court would rule because that is not at issue in this case. *See* Del. R. Evid. 702(a) (an expert can testify only if "the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue).

131. ***Mr. Phillips' Opinions Concerning Cayman Courts and His Final Determinations of Law are Unreliable.*** Mr. Phillips also offers no bases for predictions of the Cayman Court; indeed, he does not cite to Cayman trial records to support his opinion. His conclusions are *ipse dixit*, as he has not explained how or why he knows "what a Cayman Court would do."

132. Rather, Mr. Phillips' opinion of what a Cayman Court would decide is an improper "backdoor way" to express his own conclusions of the law based on Defendants' view of the facts. *See In re Columbia Pipeline Grp. Merger Litig.*, 2022 WL 2902769, at *1-2 (Del. Ch. July 14, 2022) ("An expert cannot displace the court's role by offering conclusions of law or purporting to make specific factual findings."). Delaware Courts do not rely on experts' legal interpretations of parties' contractual obligations. *Mine Safety Appliances Co. v. AIU Insur. Co.*, 2015 WL 5818071, at *2 (Del. Super. Aug. 4, 2025) (citations omitted).

133. Mr. Phillips' report purports to conclude, as a definitive matter, the scope of the parties' obligations under the LPA and the permissibility of their disputed conduct. This is not his job. Delaware Courts have specifically held that the "[i]nterpretation of the Company's internal governing documents is a matter exclusively for the Court." *In re Walt Disney Co. Deriv. Litig.*, 907 A.2d 693, 741 (Del. Ch. 2005) (finding expert reports provided little benefit where they opined on "core issues" or were based on experts' factual determinations with which the Court disagreed).

134. Without citing to any Cayman (or English) precedent, Mr. Phillips attempts to walk the Court through what a Cayman Court "might" do or, more accurately, what he would do if he were the Cayman Court.

135. Some examples are as follows:

- Without citing precedent, Mr. Phillips concludes that [redacted]. *See* Report ¶ 105. Instead of citing to any related Cayman (or English) Court precedent, Mr. Phillips simply interprets the contract for the Court based on his reading of the provision. *Id.* ([redacted]).
- Mr. Phillips further concludes that [redacted] based on his own assumptions and assessment of the "[redacted]." Report at 112-115. To that extent, without

any precedent, he postures hypothetical legal questions the Court "might" consider. *See Id.* ("[redacted]").

- Without citing any precedent, Mr. Phillips opines that, [redacted]. Report at ¶¶ 118-120. ("[redacted]").
- With regards to "[redacted]," Mr. Phillips opines—without even his own explanation or interpretation—that the [redacted] Report ¶ 122 ([redacted]").
- Mr. Phillips opines, without explanation, that [redacted] Rebuttal ¶ 33.

136. To reach his conclusions of law, Mr. Phillips also just assumes numerous disputed facts as true, including but not limited to the following:

- The Defendants' role in the limited partnership—which he defines as [redacted]. *See*

Report ¶ 88. Mr. Phillips uses this factual assumption to conclude that [redacted] *Id.*

- [redacted]. Report ¶ 113. And as such, the [redacted] *Id.* 114.
- The total capital contributed by Rigmora was over [redacted] when the May 15 Email was sent. Rebuttal ¶ 36.

137. Mr. Phillips' opinions are not based on a view of the record or even *any* documents of discovery cited besides the pertinent contracts themselves and the Complaint. So not only is the scope of the opinion a reach beyond that appropriate and relevant for a foreign law expert, but also the final conclusions are unreliable as *ipse dixit*. The Court should exclude such testimony. While the Court has broad discretion in considering evidence related to foreign law under Del. Ch. 44.1, even a foreign law expert's opinion is meant to inform and assist the Court, not to supplant the Court's role on the basis of untested and uncited facts.

138. Further, the Court should exclude Mr. Phillips' rebuttal report and testimony to the extent that it exceeds the scope of Michael Bloch, KC's report. Mr. Phillips uses his rebuttal report to elaborate on numerous opinions that he made in his own report, and are not proper to rehash or supplement in rebuttal. See Rebuttal ¶¶ 15-22.

139. **Defendants' Position:** Defendants oppose Plaintiff's motion to exclude

certain testimony from Mark Phillips KC. Plaintiff badly understates Mr. Phillips' experience; incorrectly suggests that his reports of over one hundred pages, citing dozens of authorities, fail to "cite precedent"; and seeks to improperly disqualify core testimony based on the faulty assumption that an expert in foreign law should not opine as to the content of that same foreign law as such experts (including Plaintiff's expert, Mr. Bloch) routinely do. In doing so, Plaintiff ignores Rule 44.1's broad mandate allowing judges to review "any relevant material or source" on foreign law, Ct. Ch. R. 44.1, and its motion should be rejected.

140. ***Mr. Phillips is Undisputedly Qualified to Provide Expertise on Cayman Contract Law.*** Mr. Phillips is an exceedingly experienced King's Counsel in the United Kingdom with extensive experience practicing in Cayman courts, including handling the longest trial (12 months) in the history of Cayman courts. *See* Phillips Report ¶ 5. Plaintiff's expert, Mr. Bloch, refers to him as an "eminent King's Counsel." Bloch Rebuttal ¶ 3. Plaintiff does not (and cannot) seriously attack his credentials. Like Plaintiff's expert, he is an English lawyer who has litigated in the Cayman courts, and that he is "not a sitting Cayman judge" is beside the point. Courts "should not impose overly rigorous requirements of expertise; more generalized qualifications suffice." *Allscripts Healthcare, LLC v. Andor Health, LLC*, 2022 WL 3021560, at *2 (D. Del. July 29, 2022) (citations and alterations omitted). Mr. Phillips more than clears that bar.

141. ***Mr. Phillips' Opinions Are Extensively Grounded In Precedent.*** Mr. Phillips wrote 121 pages, citing 74 relevant authorities to ground his analysis, across two expert reports. *See* Phillips Report ¶¶ 1-173; Phillips Rebuttal ¶¶ 1-41. He also reviewed all of the parties' agreements. Indeed, Plaintiff's expert "agree[d] with much of what [Mr. Phillips] says as regards exempt limited partnerships, the principles of contractual interpretation, and the implication of contractual terms." Bloch Rebuttal ¶ 3.

142. Against this backdrop, Plaintiff's suggestion that Mr. Phillips' conclusions are made "[w]ithout citing precedent" is meritless. Mr. Phillips spent dozens of pages outlining the applicable principles of interpretation under Cayman law in his opening report alone. *See, e.g.*, Phillips Report ¶¶ 19-52 (law applicable to exempted limited partnerships); ¶¶ 53-65 (principles by which contracts, including partnership agreements, are interpreted under Cayman law); ¶¶ 66-83 (duties owed by the general partner of an exempted limited partnership, and limits on duties of limited partners); ¶¶ 89-90 (the general requirements for exempted limited partnerships under Cayman law regarding capital contributions and commitments); ¶¶ 94-99 (limitations on enforcement of penalty clauses). He describes in great detail the relevant Cayman and UK statutes, Cayman and UK court decisions, and other commentaries. *See id., e.g.*, Phillips Report ¶¶ 19-99. Only then does he identify the terms at issue, and how those principles of contract and

statute might apply as a matter of Cayman law. Phillips Report ¶¶ 100-65. He of course does not restate or recite all of his prior discussion in doing so (which would stretch his reports to hundreds of pages each), but it is that authority that supports his expert opinion. That is consistent with the approach of Mr. Bloch. Bloch Dep. Tr. at 234:5-21 (describing his conclusions on the contract as a "summary" of his analysis).

143. ***The Court Has Broad Discretion to Review the Testimony of Foreign Law Experts.*** Plaintiff's motion fails to even acknowledge the particular rules that apply to foreign law experts, which recognize that the role they play and the testimony they offer differ in meaningful ways from other experts. Plaintiffs ignore those rules to rely on arguments and cases that apply to other types of expert testimony and are wholly irrelevant to that of Mr. Phillips, as an expert in foreign law.

144. The standard for foreign law experts is more generous than Plaintiff acknowledges. For foreign law experts, Delaware Rule of Evidence 702's standard is substantially broadened by Court of Chancery Rule 44.1, which allows courts to "consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under Rule 43." As the Delaware Supreme Court has recently explained, Rule 44.1 gives trial judges "wide latitude in determining what evidence to consider and in what form." *Germaninvestments AG v. Allomet*

Corp., 225 A.3d 316, 333 (Del. 2020). Plaintiff's attempt to cabin the Court's discretion conflicts with the Court's mandate to "make the process of determining alien law identical with the method of ascertaining domestic law to the extent that it is possible to do so." *Animal Sci. Prods., Inc. v. Hebei Welcome Pharm. Co. Ltd.*, 585 U.S. 33, 42 (2018) (quoting Wright & Miller § 2444, at 338–342.).[5]

145. None of the cases that Plaintiff relies on address the role of foreign law experts, none consider the scope of Rule 44.1, and, as a result, none support their motion to exclude portions of Mr. Phillips' testimony. *See Scottoline v. Women First, LLC*, 2025 WL 1707364, at *5–6 (Del. June 18, 2025) (pediatric neurology expert opining in medical malpractice suit); *In re Columbia Pipeline Grp. Merger Litig.*, 2022 WL 2902769, at *1-2 (Del. Ch. July 14, 2022) ("expert on M&A negotiations" offering opinion in merger litigation); *Mine Safety Appliances Co. v. AIU Insur. Co.*, 2015 WL 5818071 (Del. Super. Ct. Aug. 4, 2015) (experts opining regarding insurance); *In re Walt Disney Co. Deriv. Litig.*, 907 A.2d 693, 741 (Del. Ch. 2005) (expert opining on "core issues in this case—whether the defendants breached their fiduciary duties as they exist *under Delaware law*" (emphasis added)).[6]

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[5] Delaware courts follow the U.S. Supreme Court's interpretations of expert admissibility. *See Bowen v. E.I. DuPont de Nemours & Co.*, 906 A.2d 787, 794 (Del. 2006) (noting the Delaware Supreme Court has "expressly adopted" the "United States Supreme Court's interpretations of F.R.E. 702 in *Daubert* and *Kumho* . . . as correct interpretations of D.R.E. 702").

[6] The only case Plaintiff relies on that *does* engage with foreign law stands for the

146. Rather, Delaware precedent regarding foreign law expert testimony recognizes that the foreign law expert's role is to help the Court understand the complexities of a foreign legal scheme and provide the Court with the tools to appropriately apply the law to the case. *See Saudi Basic Indus. Corp. v. Mobil Yanbu Petrochemical Co.*, 866 A.2d 1, 33 (Del. 2005) (making conclusions as to expert credibility in deciding which interpretation of Saudi law to apply to the case). Mr. Phillips was retained, like Mr. Bloch, to opine on Cayman law and appropriately did so throughout his report. That he did so by reference to Cayman courts, consistent with their practice and his own, Phillips Dep. Tr. at 34:2-35:9, is not disqualifying.

147. Plaintiff's suggestion that Mr. Phillips may try to supplant this Court's role is unfounded. As Mr. Phillips testified at his deposition, his report and contemplated testimony seek to assist this Court in its analysis of Cayman law, not supplant the role of the Court in Delaware in applying that law to the claims and facts at issue. Phillips Dep. Tr. at 100:23-101:3 ("[redacted]"); 318:16-18 ("[redacted]

unremarkable proposition that "[t]he court's determination of foreign law is treated as a ruling on a question of law." *Kostolany v. Davis*, 1995 WL 662683, at *2 (Del. Ch. Nov. 7, 1995). The Court in *Kostolany* did not exclude expert testimony on foreign law and merely utilized competing foreign law expert reports to reach a conclusion on the law.

[redacted]

[redacted].”); *see CertiSign Holding, Inc. v. Kulikovsky*, 2018 WL 2938311, at *22, n.232 (Del. Ch. June 7, 2018) (denying plaintiff’s motion *in limine* to exclude foreign law expert’s rebuttal report where the expert “was not purporting to address Delaware choice of law principles or to tell this Court how to apply them” and the court “view[ed] her opinions as addressing Brazilian law only and [] considered them solely in that context”); *Germaninvestments AG*, 225 A.3d at 336 (finding error not to have a foreign law expert identify and explain foreign law issues “*based on the facts and nuances in the case*”) (emphasis added).

148. ***Mr. Phillips’ Opinions Are Otherwise Admissible.*** Plaintiff relies on a series of mischaracterizations and irrelevant excerpts in an attempt to bolster its “conclusions” that (i) Mr. Phillips assumes Defendants’ view of disputed facts; (ii) Mr. Phillips’ reports included conclusions about how to interpret obligations of the LPA under Cayman law; (iii) Mr. Phillips relied on speculation as to what a Cayman court would likely do; and (iv) Mr. Phillips’ rebuttal was out of scope. None of its arguments warrants exclusion and on every single point, Mr. Phillips was consistent with Plaintiff’s own expert.

149. ***First***, as to Mr. Phillips’ assumption of facts, Mr. Phillips did not take a position as to the facts of this case. Mr. Phillips merely assumed certain facts were true for the sake of his analysis, as is customary in expert reports across broad subject

matter. Phillips Report ¶¶ 112-115, 118-120; *see also* Bloch Report ¶ 75; Bloch Rebuttal ¶¶ 53, 72.

150. ***Second***, as to his interpretations of the LPA under Cayman law, Mr. Phillips was applying Cayman contractual interpretation principles to inform the kinds of questions that the Cayman court might ask when reading the LPA. This common form of foreign law analysis is entirely appropriate and Mr. Phillips' objective and technically sound methodology is consistent with the approach to which Mr. Bloch adhered and testified. *See, e.g.*, Bloch Report ¶¶ 65-66; Bloch Dep. Tr. at 239:10-241:12.

151. ***Third***, as to Mr. Phillips' application of Cayman law to the contracts (wrongly labeled by Plaintiff as "speculation"), that is precisely the analysis "based upon the facts and nuances in the case" expected of a foreign law expert. *Germaninvestments*, 225 A.3d at 336. It is also exactly what Mr. Bloch testified to at his deposition. Bloch Dep. Tr. at 158:5-14; 179:24-180:8; 232:25-235:21. It is up to the Court to decide whether it agrees with each expert's analysis and to give each opinion the weight it is owed.

152. ***Finally***, Plaintiff's argument that Mr. Phillips' rebuttal exceeded the scope of Mr. Bloch's report has no merit. Mr. Phillips' rebuttal highlighted the omissions in Mr. Bloch's report to the extent it fails to address (as Mr. Bloch acknowledges) whether Defendants had an outstanding Capital Commitment and

disregards the parties' Subscription Agreements. Phillips Rebuttal ¶¶ 15-22; Bloch Report ¶ 79. It is entirely proper for a rebuttal report to point out that the other expert's analysis is incomplete.

153. In sum, Plaintiff's arguments amount to nothing more than complaining about the standard analysis from a foreign law expert, much of which precisely mirrors its own expert's analysis. *See, e.g.*, Bloch Rebuttal ¶¶ 12 (agreeing with Mr. Phillips both "[redacted]" and "[redacted]"), 18 ("[redacted]"); 38 ("[redacted]"); 70 (agreeing with Mr. Phillips "[redacted]"). Plaintiff's arguments thus cannot serve as a basis for exclusion.

154. ***An Expert's Legal Opinion Goes to Weight, Not Admissibility.*** Even if the Court were to determine that parts of Mr. Phillips' opinion were improper, the Court is well equipped to make those determinations and should not exclude the entire opinion. Instead, the Court may consider how much weight to give the expert's opinion. *See CertiSign*, 2018 WL 293831, at *22 n.232 (considering expert's analysis of foreign law and declining to grant a motion *in limine* to exclude the expert's report and testimony). This is especially true in the context of a bench trial, because the Court's "gatekeeper" obligation in analyzing the admissibility of expert testimony "predominantly operates in cases that will be tried before a jury." *In re Del. Pub. Sch. Litig.*, 239 A.3d 451, 501 (Del. Ch. 2020). Without a jury, there is little need to exclude expert testimony.

155. ***Based on Plaintiff's Own Analysis, Mr. Bloch's Testimony Should Be Excluded At Trial.*** Defendants' view is that the Court should consider both parties' Cayman law experts. Should the Court grant Plaintiff's request to exclude Mr. Phillips, however, Defendants respectfully request that Mr. Bloch also be excluded.

156. Mr. Bloch engages in exactly the type of analysis that Plaintiff complains is improper. For example,

- Mr. Bloch provided a specific interpretation of Amendment 22 that implied a duty of good faith in the budget approval provisions. Bloch

Report ¶¶ 65-71.

- Mr. Bloch provided five separate factual scenarios related to this case and drew conclusions about how the law (e.g., the application of implied terms) would apply to each scenario. Bloch Report ¶¶ 72-87.
- Mr. Bloch offers an interpretation of a May 15, 2025 email from Mr. Bogdanov as contravening the LPA, stating that it "[redacted]" Bloch Report ¶¶ 88-94 (emphasis added).

B. The Parties Dispute Whether the Court Should Exclude Testimony Regarding Settlement Communications

157. **Plaintiff's Position:** Plaintiff objects to the use of any document or communications that was used or sent for the purpose of settlement, including but not limited to all communications sent "Without Prejudice" by the Parties. Under Delaware Rule of Evidence 408, settlement communications are not admissible to "prove or disprove the validity" of a claim. Under Cayman law, marking a documents or communications as "Without Prejudice" is the equivalent of marking communications for settlement under Rule 408. As such, Plaintiff requests the Court exclude any evidence or testimony regarding settlement communications, including

those marked "Without Prejudice."

158. **Defendants' Position:** Defendants agree that *settlement* communications may only be used by the parties consistent with Delaware Rule of Evidence 408, but oppose Plaintiff's overbroad attempt to bar the admission of *all* "without prejudice" documents for *any* purpose. This issue should be addressed document by document, because (i) not every document marked "without prejudice" is a settlement communication protected by Rule 408 and (ii) Rule 408 only bars the use of protected documents to "prove or disprove the validity or amount of a disputed claim." D.R.E. 408. All of the communications Plaintiff seeks to exclude predate the complaint or any threat of litigation and were business communications, and are thus outside the scope of Rule 408's protections. Further, given the purpose-specific use prohibition in Rule 408, Plaintiff's request is premature. Finally, Plaintiff has itself attached a "without prejudice" document to its own complaint. Dkt. 1, Compl. Ex. 9; *see also Buck v. Viking Hldg. Mgt. Co. LLC*, 2024 WL 639391, at *4 n.41 (rejecting exclusion, given party's use of a Rule 408 document).

XIII. PRE-TRIAL CONFERENCE

159. A pre-trial teleconference has been scheduled for September 11, 2025, at 3:15 p.m.

XIV. POST-TRIAL BRIEFING AND ARGUMENT

160. The Parties will discuss with the Court regarding its preference for post-trial briefing at the Pre-Trial Conference.

A. Plaintiff's Position

161. Plaintiff proposes simultaneous opening brief by 11:59 p.m. on September 23, 2025 and simultaneous answering briefs by noon on September 26, 2025, with no further briefing. Plaintiff respectfully requests entry of a final order as soon as possible because the Portfolio Companies are [redacted] due to the lack of funding at issue here. Each additional day that Defendants fail to provide funding for the Portfolio Companies, including answering the May 30 Capital Calls, threatens the Portfolio Companies and [redacted] and their development of numerous cutting-edge medical technologies.

B. Defendants' Position

162. Defendants agree that the schedule for post-trial briefing can be addressed at the pre-trial conference, but dispute Plaintiff's proposed schedule. Plaintiff may file its opening post-trial brief on any schedule it prefers; Defendants will file their answering post-trial brief 14 calendar days later; and Plaintiff may file its reply post-trial brief within five calendar days. The Parties can promptly reach out to the Court to schedule post-trial argument.

163. To the extent the Court finds any facts regarding the Portfolio Companies' performance relevant to these claims, they will show on the one hand, that the Portfolio Companies' lack of success or need for funding was not due to any breach by the Defendants but rather to the Portfolio Companies' own failure to perform (as Plaintiff had admitted before filing suit) or to Plaintiff's own overreaching and mismanagement, and on the other, that a number of Portfolio Companies have been able to achieve what appear to be lucrative deals even in the few weeks since the Complaint was filed. Just last week Replicate reportedly inked a research deal with Novo Nordisk for up to $550 million in funding; *see* https://www.appletreepartners.com/news/540.

164. First, the preferred post-trial briefing in this Court proceeds sequentially, with opening, answering, and reply briefs. As Vice Chancellor Laster has explained, Plaintiff's suggested simultaneous post-trial briefing is "less helpful" to the Court: "When addressing the legal issues in the case, the parties' post-trial briefs were less helpful than they could have been. . . . The parties also engaged in simultaneous post-trial briefing, with each filing an opening post-trial brief and an answering post-trial brief. As often happens when this sequence is used, the parties did not clearly engage with each other's arguments. This decision attempts to grapple with the result." *HOMF II Inv. Corp. v. Alternberg*, 2020 WL 2529806, at *25 (Del. Ch. May 19, 2020).

165. Second, Plaintiff bears the burden in this action, and it should be required to set forth its position on the evidence after trial in an opening post-trial brief, to which Defendants have a fair chance to respond. *Cf. CompoSecure, L.L.C. v. CardUX, LLC*, 2018 WL 660178, at *22 n. 283 (Del. Ch. Feb. 1, 2018) (instructing the parties to proceed based on burden of proof "to provide a framework for post-trial briefing" and noting that "[t]his approach facilitated a seriatim briefing schedule"), *aff'd in part, rev'd in part and remanded*, 206 A.3d 807 (Del. 2018).

XV. AMENDMENT OF PRE-TRIAL ORDER

166. This Pre-Trial Order may be amended upon application to the Court by any Party for good cause shown or by agreement of the Parties with approval of the Court.

/s/ Michael A. Barlow

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Dated: September 5, 2025

SO ORDERED this ___ day of _____, 2025.

_____
The Hon. Kathaleen St. Jude McCormick

EXHIBIT H

ND COURT OF THE CAYMAN ISLANDS

FINANCIAL SERVICES DIVISION

CAUSE NO: FSD 151 OF 2025 (JAJ)

IN THE MATTER OF THE EXEMPTED LIMITED PARTNERSHIP ACT (2025 REVISION), THE COMPANIES ACT (2025 REVISION) AND THE PARTNERSHIP ACT (2025 REVISION)

AND IN THE MATTER OF ATP LIFE SCIENCE VENTURES, L.P.

AMENDED WINDING UP PETITION

To the Grand Court

The humble petition of Unicorn Biotech Ventures One Ltd (in its capacity as general partner of Rigmora Biotech Investor One LP ("**RBI One**")) and Unicorn Biotech Ventures Two Ltd (in its capacity as general partner of Rigmora Biotech Investor Two LP ("**RBI Two**")) shows that:

A. Introduction

1. This is the amended petition of Unicorn Biotech Ventures One Ltd (in its capacity as general partner of RBI One) and Unicorn Biotech Ventures Two Ltd (in its capacity as general partner of RBI Two) (together, the "**Petitioners**"), each with its registered office at 3076 Sir Francis Drake's Highway, PO Box 3463, Road Town, Tortola, British Virgin Islands.

2. The Petitioners present this Petition against (i) ATP Life Science Ventures, L.P. (formerly named Apple Tree Partners IV, L.P.) (the "**Partnership**") and (ii) ATP III GP, Ltd. (the "**GP**") in its capacity as the general partner of the Partnership, for the winding up of the Partnership pursuant to Section 36(3) of the Exempted Limited Partnership Act (2025 Revision) (the "**ELP Act**") and Section 92(e) of the Companies Act (2025 Revision) (the "**Companies Act**"), and/or in the alternative pursuant to section 35 of the Partnership Act (2025 Revision).

This **WINDING UP PETITION** was presented by Campbells LLP, Attorneys for the Petitioners, whose address for service is that of its Attorneys at Floor 4, Willow House, Cricket Square, George Town, Cayman Islands, KY1-9010 (ref: PDK/JFI/19135-44991).

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3. The Petition is presented because, as described in detail below, there has been continued serious mismanagement and a lack of probity in the conduct of the affairs of the Partnership by the GP. The GP is a Cayman Islands exempted company with registration number 252582 and its registered office at Maples Corporate Services Limited, PO Box 309, Ugland House, South Church Street, George Town, Grand Cayman, KY1-1104, Cayman Islands.

4. As a result of the GP's mismanagement and lack of probity, there is a justifiable loss of trust and confidence in the GP's ability to manage the Partnership's affairs in the best interests of the Partnership as a whole. In particular:

   a. The GP has issued capital call notices on 30 May 2025 and 1 June 2025 (the "**Disputed Capital Calls**") in violation of the LPA seeking to compel the contribution of over USD 100 million in additional capital in excess of maximum subscription commitments ~~and~~ in breach of the terms of the LPA, and in breach of its fiduciary duties to act in the interests of the Partnership as a whole.

   b. The GP ~~has~~ launched proceedings in Delaware (the "**Delaware Proceedings**") seeking to compel the Petitioners to provide vast sums of further funding to the Partnership, in breach of the express provisions of the LPA (defined in paragraph 16 below) whilst simultaneously seeking to apply a penal default charge in order to confiscate 50% of the Petitioners' interest in the Partnership, in order to take control of the Partnership and billions of dollars of the Petitioners' assets.

   b1. The GP has knowingly misled the Petitioners into contributing capital to the Partnership through making false representations as to the purposes for which that capital was required and / or would be used.

   b2. The GP has misappropriated and dissipated Partnership assets.

   b3. The GP has made improper denials regarding the breakdown in the relationship between it and the Petitioners.

   b.4 The GP has failed to act in the manner of a reasonably competent general partner in its management of the affairs of the Partnership, including by failing to maintain a list

of partners and a register of partners in breach of the Partnership's constitutional documents and ELP Act and by taking inconsistent positions as to the extent of the Petitioners' capital commitments to the Partnership.

c. The GP has also improperly charged its expenses to the portfolio companies and failed to provide necessary information to the Petitioners in a timely manner or at all, including to enable the Petitioners to determine whether to approve further budgets for portfolio companies or to scrutinise expenses which appear to have been improperly charged to the Partnership.

d. The GP also has a conflict of interest and/or has been acting in breach of its fiduciary duties to act in the best interests of the limited partners as a whole, as it has been acting in the interests of the portfolio companies and / or in its own interests and / or for the improper purpose of placing pressure on the Petitioners ~~by exposing the Partnership to open-ended, binding commitments thereto and~~ in seeking to compel the Petitioners to provide further funding to the portfolio companies against their wishes and in breach of the LPA.

5. In all the circumstances, the substratum of the Partnership has also been lost, and there is a need for independent investigation into the Partnership's affairs.

B. The Partnership

6. The Partnership is a Cayman Islands exempted limited partnership established pursuant to the ELP Act and registered on 29 October 2012. The registered office of the Partnership is at Maples Corporate Services Limited, P.O. Box 309, Ugland House, Grand Cayman, KY1-1104, Cayman Islands.

7. The Partnership was formed following discussions between Dr Seth Harrison ("**Dr Harrison**") and Dr Dmitry Rybolovlev ("**Dr Rybolovlev**") concerning the formation of a vehicle to make investments in the life science industry using capital provided from entities owned by the Rybolovlev family trust (the "**Trust**"). Dr Rybolovlev is a highly successful businessman of Cypriot nationality and settlor of the Trust.

8. Upon the Partnership's formation, its limited partners were Blue Horizon Enterprise Ltd ("**Blue Horizon"**) Ezbon International Ltd ("**Ezbon**") and Dr Harrison. Blue Horizon and Ezbon are special purpose vehicles ultimately owned and controlled by the Trust.

9. The GP is part of a life sciences venture capital firm called Apple Tree Partners ("**ATP**"), which operates out of the United States. Dr Harrison is the founder and managing director of ATP. ATP has no meaningful business interests or capital under management other than that belonging to the Partnership. Apple Tree Life Sciences, Inc. ("**ATLS**") serves as a management company for the Partnership and an annual fee is paid to it in connection with certain Partnership expenses. ATLS is a wholly-owned subsidiary of the Partnership.

10. The Petitioners are limited partners of the Partnership. Unicorn Biotech Ventures One Limited and Unicorn Biotech Ventures Two Limited are the sole general partners of RBI One and RBI Two, respectively. The sole limited partner of both RBI One and RBI Two is Rigmora Holdings Ltd ("**Rigmora Holdings**"). Rigmora Holdings is a holding company for the Trust and also acts as an advisor to the trustees of the Trust.

11. As of June 2025, the contingent subscriptions of the Petitioners total US$2.425 billion (US$1,188,250,000.00 for RBI One and US$1,236,750,000.00 for RBI Two), and the total capital contributions of the Petitioners are in excess of US$2.6 billion, which represents c. 9~~8~~% of all capital contributions made to the Partnership.

12. The Petitioners became limited partners of the Partnership as of 30 June 2024 by respectively taking over the limited partner positions of the two former limited partners, Blue Horizon and Ezbon.

13. ~~The Petitioners are the only limited partners of the Partnership not affiliated with the GP.~~ The other limited partners are Dr Harrison and Les Pommes LLC ("**Les Pommes**") and 12 former or present employees of ATLS. Les Pommes is a discretionary family trust for Dr Harrison's daughters. ~~Ms Anna Batarina (an employee of ATP) is a carry holder and ultimately has an economic interest in the Partnership. The GP has claimed that various other employees of ATP are also limited partners of the Partnership. However, none of those persons are parties to the LPA (as defined below) and none of those individuals have ever contributed any capital to the Partnership. The Petitioners do not accept that they are in fact legitimate limited partners.~~

14. The Partnership has been built almost exclusively using capital belonging to the Petitioners. As of June 2025, c. 9~~8~~% of the US$2.7 billion invested into the Partnership was capital contributed by the Petitioners. The remaining US$53.8m of capital has been contributed by Dr Harrison and Les Pommes, funded substantially by way of a loan from Ezbon.[1] No other limited partner has contributed any capital to the Partnership.

15. The principal purpose of the Partnership is to achieve returns on its capital by investing in pharmaceutical, life science, medical device and other medically-related companies and business projects.

Structure of the Partnership

16. The limited partners of the Partnership, and the GP are parties to a limited partnership agreement ("**LPA**"), the initial version of which was dated 29 October 2012. The LPA was restated on 1 November 2012 and has been amended a further 22 times since then: on 1 January 2014, 15 August 2014, 1 September 2014, 1 April 2015, 11 May 2015, 31 December 2015, 31 May 2017, 9 August 2017, 22 December 2017, 1 July 2018, 26 October 2018, 1 December 2018, 4 February 2019, 17 April 2019, 10 July 2019, 1 February 2020, 9 September 2020, 5 November 2020, 27 November 2020, 21 June 2021, 5 December 2022 and 20 December 2024. Each of the amendments has been undertaken by way of a separate amendment agreement (each referred to herein as "Amendment X" where X represents the number of the amendment following the execution of the 1 November 2012 restated LPA).

17. Upon incorporation, the Partnership had a conventional fund structure consisting of a single set of assets and liabilities participated in by all limited partners. However, by way of subsequent amendments starting with Amendment 13 (executed on 4 February 2019) the structure of the Partnership was changed to consist of separate investment "pools" each of which "*to the maximum extent possible*" consisted of its own set of assets and liabilities.

18. Prior to the transfer of the limited partner interests in June 2024, Blue Horizon and Ezbon together were the "Subject Limited Partner" under the LPA and the holder of the majority of

[1] The capital contributed to the Partnership by Dr Harrison was mostly made up of US$52.6m in capital that he had borrowed from Ezbon of which US$24.8 was repaid in cash (out of capital distributed by the Partnership to the GP), and the remaining US$27.8m was repaid by transferring part of his limited partner interests in the Partnership to Ezbon (as recorded in Paragraph 6(c) of Amendment No. 14 of the LPA).

"Preferred Units" in the Partnership. Following the transfer of the limited partner interests, the Petitioners became the "Subject Limited Partner" and the holder of the majority of "Preferred Units" in the Partnership for the purposes of the LPA.

19. The LPA (as amended) provides, materially:

a. Paragraph 5(a)(i) provides that each limited partner shall contribute to the Partnership an amount equal to but not in excess of the total amount of its "Contingent Subscription" specified in the "List of Partners". The amount of each limited partner's Contingent Subscription is in turn determined by the individual subscription agreement entered into between that limited partner and the Partnership (the "**Subscription Agreements**") (Clause 1(e)).

b. Paragraph 5(a)(ii) provides that the GP may only call capital for the purposes specified therein unless otherwise approved by holders of a majority of the Preferred Units in writing. In particular, Paragraph 5(a)(ii)(E) provides that the GP may only "*invest in Projects approved by the holders of a majority of the Preferred Units in writing in accordance with a budget therefor approved by such holders of Preferred Units*".

c. Paragraph 5(a)(ii) also provides, materially: *"… in the case of a capital call pursuant to clause (D) or (E) of the preceding sentence that is made on a basis accelerated from that set forth in an approved Project budget, the General Partner (a) represents in writing to the Partners that it has a good faith belief that the Project (or portion thereof covered by such budget) will be completed within the aggregate amount budgeted therefor and (b) provided the Board or the holders of the Preferred Units, as the case may be, with a reasonably detailed and diligenced presentation supporting such representation; provided, however, that no approval by the Board or the holders of Preferred Units shall be required with respect to organizational expenses of the Partnership and its related entities.*"

d. Schedule C to the LPA (as amended by Amendment 2) provides, materially: "[t]*he General Partner will issue a financial report to the holders of the Preferred Units at least every calendar quarter* […] *This financial report will cover all entities within the*

Partnership structure, and will include Project income and expenses and operating costs along with at least the following:

- *Profit and loss and cash flow statements, in total and by major Project, showing actual versus budgeted results for the quarter* […] *then ended and including explanations of major variances to budget* […]
- *Detailed budget by major Project by quarter* […] *for the next twelve months* […]
- *Summary budget by major Project for each of the following two years, including operating income and expenses, and other items affecting cash flow*.

In addition, the General Partner will present a schedule showing anticipated capital calls for the next four quarters and subsequent two years, reconciled to the detailed and summary cash flow budgets".

e. Paragraph 20 (e)(ii) provides that the GP "*shall prepare, for each calendar year of the Partnership in advance of such year, a budget for the annual fee to be paid by the Partnership to ATLS (the 'ATLS Fee'). Such budget shall be presented to the Subject Limited Partner for approval no later than December 1 of the prior year … The Limited Partners shall make capital contributions to the Partnership to fund the ATLS Fee semi-annually in advance and the Management Fee annually in advance, in each case, as required by the General Partner, from time to time, in accordance with the Agreement. The amount of the ATLS Fee may also be modified from time to time by mutual agreement of the General Partner and the Subject Limited Partner. For the avoidance of doubt, the ATLS Fee shall be in addition to the Management Fee*".

f. Amendment 9, section 11 provides: "*ATLS shall pay the following expenses of the Partnership from the ATLS Fee: (i) except as set forth in Section 12, below, all compensation and benefits for employees (except to the extent paid from the Management Fee), (ii) all facilities and related overhead expenses, including rent, utilities, charges assessed by the lessor, property and general liability insurance, and communications, including phone and internet, (iii) office supplies and equipment, information technology support and software, (iv) publications, dues and charitable contributions, (v) public relations, marketing and advertising expenses, (vi) travel and*

(vii) capital expenditures, including for furniture, fixtures, computers and other equipment, in each case, except as expressly provided in the following sentence."

20. The Petitioners are the holders of a majority of the "Preferred Units". The GP is therefore required to obtain the Petitioners' approval for any budget for investments in "Projects".

21. The Petitioners' total contingent subscriptions for the purposes of Paragraph 5(a) of the LPA is US$2.425 billion (the "**Contingent Subscriptions**"). In particular:

    a. Pursuant to a subscription agreement between Ezbon and the Partnership dated 1 November 2012, Ezbon agreed that the amount of its contingent subscriptions would be US$726,750,000 (the "**Ezbon Subscription Agreement**").

    b. Pursuant to a subscription agreement between Blue Horizon and the Partnership dated 1 November 2012, Blue Horizon agreed that the amount of its contingent subscriptions would be US$698,250,000 (the "**Blue Horizon Subscription Agreement**").

    c. On 20 September 2020:

        i. Ezbon executed an amendment to the Ezbon Subscription Agreement which increased its contingent subscription by US$510,000,000 to US$1,236,750,000; and

        ii. Blue Horizon executed any amendment to the Blue Horizon Subscription Agreement which increased its contingent subscription by US$490,000,000 to US$1,188,250,000,

        (the "**Subscription Amendments**").

    d. Other than the subscription agreements identified above (the "**Subscription Agreements**") no other subscription agreements have been entered into by Ezbon, Blue Horizon or the Petitioners.

22. The Subscription Amendments were executed in the context of an amendment to the LPA executed on or around 9 September 2020 ("**Amendment 17**").

    a. Amendment 17 increased the number of "pools" from 2 to 3 (referred to in Amendment 17 as "Pool A", "Pool B" and "Pool C" by inserting paragraph 20(a) into the LPA).

    b. Paragraph 20(a) of the LPA envisaged that the Subject Limited Partners would have total contingent subscriptions in excess of those committed to under the Ezbon and Blue Horizon Subscription Agreements.

    c. The Subscription Amendments were entered into shortly after Amendment 17 was executed to increase the Subject Limited Partners total contingent subscriptions in the manner contemplated by Paragraph 20(a) of the LPA.

23. By or on around 14 December 2023, the entirety of the Contingent Subscriptions had been paid out pursuant to capital calls made by the GP under Paragraph 5(a)(ii) of the LPA. Since then, neither the Petitioners (nor their predecessors) have been obliged to contribute further capital to the Partnership under Paragraph 5(a) of the LPA.

24. Further capital contributions totalling US$242 million have since been made by the Petitioners (or their predecessors), without any obligation to do so. As noted above, to date the total capital contributed by the Petitioners to the Partnership is in excess of US$2.6 billion, comprising approximately 9~~8~~% of all capital contributions made to the Partnership.

C. Ground 1: Justifiable and irretrievable loss of trust and confidence

25. The Petitioners have justifiably and irretrievably lost all trust and confidence in the GP's ability to manage the Partnership's affairs in the best interests of the Partnership as a whole.

26. The GP has seriously mismanaged the Partnership, acted in a manner calculated to prejudice the Petitioners and demonstrated a lack of probity in the conduct of its affairs by:

    a. Improperly (and in breach of duty) issuing ~~capital calls on 30 May 2025~~ the Disputed Capital Calls totalling over US$100 million ~~(the "**May 2025 Capital Calls**")~~. The ~~May 2025~~ Disputed Capital Calls were not made for proper purposes. They were made for

improper purposes of placing commercial pressure on the Petitioners: (a) in circumstances where they are not obliged to make further capital contributions; and (b) in the context of a break-down of the relationship between the Petitioners. Further, the ~~May 2025~~ Disputed Capital Calls were not made bona fide in the best interests of the Partnership as a whole (principally, the Petitioners) but were instead made in the interests of the GP and / or Dr Harrison and / or the portfolio companies. The Petitioners have brought separate proceedings in the Grand Court of the Cayman Islands by way of writ dated 2 June 2025 to establish (amongst other things) that they are not obliged to pay the ~~May 2025~~ Disputed Capital Calls (the "**Writ Proceedings**").

b. Issuing the Delaware Proceedings ~~(defined in paragraph 39(b) below)~~, and making numerous unfounded and untruthful allegations therein, in order to take control of the Partnership;

c. Improperly seeking to impose a penal default charge on the Petitioners. In the Delaware Proceedings the GP alleged~~s~~ that it was ~~it is~~ entitled to take 50% of the Petitioners' interest in the Partnership (the GP estimates the Partnership to be worth approximately US$4 billion) and to reallocate those assets to the other ~~limited partners~~ holders of "preferred units" (i.e. to Dr Harrison and his family trust, Les Pommes). In other words, Dr Harrison, acting via the GP, ~~has~~ commenced proceedings in Delaware in which he sought ~~seeks~~ to take billions of dollars of assets from the Petitioners and transfer those assets to himself (in circumstances where he has contributed minimal capital into the Partnership and where the clear wording of the LPA does not entitle him to take such action, see paragraphs 40-41 below).

d. Seeking to compel the Petitioners to make further contributions to the portfolio companies and has sought to make accelerated capital calls and unbudgeted capital calls without complying with its obligations under the LPA. By issuing the Delaware Proceedings the GP is acting in breach of its fiduciary duties to act in good faith in the interests of the Partnership as a whole and is clearly acting out of self-interest, and has not exercised its powers for a proper purpose.

d1. Knowingly misleading the Petitioners into contributing capital to the Partnership through making false representations as to the purposes for which that capital was required and / or would be used.

d2. Misappropriating and dissipating Partnership assets.

d3. Making improper denials regarding the breakdown in the relationship between it and the Petitioners.

d4. Failing to act in the manner of a reasonably competent general partner in its management of the affairs of the Partnership, including by failing to maintain a list of partners and a register of partners in breach of the Partnership's constitutional documents and ELP Act and by taking inconsistent positions as to the extent of the Petitioners' capital commitments to the Partnership.

e. Improperly charging its expenses to the portfolio companies held by the Partnership.

f. Failing to provide necessary information to the Petitioners in a timely manner or at all, including to enable the Petitioners to determine whether to approve further budgets for portfolio companies or to scrutinise expenses which appear to have been improperly charged to the Partnership.

g. Failing to act in the best interests of the limited partners as a ~~whole by exposing the Partnership to open-ended, binding commitments to the portfolio companies and~~ in seeking to compel the Petitioners to provide further funding to the portfolio companies against their wishes and in breach of the LPA. In this regard, the GP's decision making (through Dr Harrison (as the controlling mind and will of the GP, and a director of many of the portfolio companies owned by the Partnership)) is infected by a conflict of interest.

Background to loss of trust and confidence

27. As set out above, the Partnership was formed following discussions between Dr Harrison and Dr Rybolovlev to make investments in the life science industry using capital provided from entities owned by the Trust. It was agreed at the outset that the limited partners would have a substantial degree of oversight as to how capital is invested, by their ability to review and elect whether to approve budgets for investments required to be presented by the GP. As also set out above, the GP is part of ATP, which has no meaningful business interests or capital

under management other than that belonging to the Partnership and which was founded and is managed by Dr Harrison.

28. From around 2021, the GP started to improperly charge the employee costs of ATP investment professionals to the Partnership's portfolio companies (see paragraphs 53 to 56 below).

29. In September 2023, following a series of disagreements between the limited partners and the GP, the Petitioners' predecessors, Ezbon and Blue Horizon, made a request to the GP pursuant to their rights under the LPA for the distribution of assets in the "Pool Braeburn" investment pool. The "Pool Braeburn" investment pool is funded solely by capital contributed by the Subject Limited Partner. Upon the formation of "Pool Braeburn" (pursuant to Amendment 20 of the LPA), the Subject Limited Partner was granted a right (under paragraph 21(d) of the LPA) to require the Partnership to distribute the assets within that pool on demand. The Subject Limited Partner subsequently demanded the distribution of assets in Pool Braeburn.

30. The GP improperly refused to comply with this request. In doing so, the GP asserted that it was entitled and bound to retain the Braeburn assets within the Partnership to ensure Ezbon and Blue Horizon would continue contributing capital to the Partnership. That was not a proper basis for the GP to refuse to comply with the distribution request. The GP also claimed that compliance with the distribution request would impact the GP's ability to obtain third party funding, which would in turn impact the financial position of the Partnership. As a consequence of the GP's threats that the financial position of the Partnership would be affected, Ezbon and Blue Horizon agreed not to pursue the distribution request.

31. In July 2024, the Petitioners made another request to the GP under the LPA for the distribution of assets in Pool Braeburn. The GP failed to comply, and the Petitioners issued proceedings in the Grand Court of the Cayman Islands seeking a declaration that the GP must distribute the Braeburn assets in accordance with the distribution request (the "**Braeburn Proceedings**").

32. In those proceedings, the GP claimed that it was unable to distribute the Braeburn assets to the Petitioners including because Braeburn Inc, one of the major assets within Pool Braeburn (and of the Partnership as a whole), had an "internal policy" prohibiting the transfer of ownership of the company from the Partnership to the Petitioners. The GP contended that the "internal policies" of Braeburn Inc included whatever the Braeburn Inc board considered was in Braeburn Inc's best interests to occur. That was not a proper basis for refusing to comply with the distribution request. The GP also contended that such a transfer would also

trigger an event of default under a loan agreement between Braeburn Inc and a third party, which would have a significant knock-on negative impact on the Partnership. At the relevant time, the Partnership was the sole shareholder and Dr Harrison was the chairman of the board of directors of Braeburn Inc. He exercised significant influence over the other directors and members of senior management. It is therefore inconceivable to think that Dr Harrison would not have been involved in implementing the aforesaid arrangements.

33. The parties entered into a settlement agreement in respect of the Braeburn Proceedings on 20 December 2024 (the "**Settlement Agreement**"), which provided, amongst other things, that the GP would use commercially reasonable efforts to remove or mitigate any contractual blocks or economic costs that may inhibit the distribution of the Braeburn assets to the Petitioners. Clause 5.1 of the Settlement Agreement:

    a. required the parties to bear their own legal costs and disbursements in respect of the proceedings and the Settlement Agreement, (notwithstanding any provision of the LPA which may provide otherwise); and

    b. expressly provided that the GP would not charge the Partnership or the portfolio companies for its legal costs and disbursements incurred in relation to the proceedings and the Settlement Agreement.

34. However, the relationship between the GP and the Petitioners has since continued to deteriorate substantially to a state of complete breakdown and there has now been a complete loss of any trust and confidence of the Petitioners in the GP's operation and management of the Partnership.

35. The catalyst for this loss of trust and confidence was the GP's behaviour in regards to seven (7) early-stage portfolio companies: (1) Deep Apple Therapeutics, Inc~~,~~ ("**Deep Apple**"), (2) Apertor Pharmaceuticals, Inc., (3) Evercrisp Biosciences, Inc., (4) Marlinspike Therapeutics, Inc~~,~~ ("**Marlinspike**"), (5) Red Queen Therapeutics, Inc., (6) Aethon Therapeutics, Inc. and (7) Initial Therapeutics, Inc. ("**Initial**") (the "**Early-Stage Companies**").

36. Dr Harrison is a director of each of the Early-Stage Companies. The GP has insisted on continuing to invest the Partnership's capital into the Early-Stage Companies even though the Petitioners consider them to be hopeless investments. The GP has also failed to adhere to the

milestones in the agreed budgets for the Early-Stage Companies and is seeking to call capital for these companies in breach of the LPA. Further and in addition, by virtue of the relief he seeks in the Delaware Proceedings, he is seeking capital on an accelerated basis in breach of the LPA.

37. The Petitioners maintain that they are not obliged to fund the Early-Stage Companies:

    a. First, the Partnership's limited partners' capital commitments are determined by the terms of the LPA, such that they are not required to make capital commitments to the Partnership which exceed their Contingent Subscription amount as set out in the Subscription Agreements (see paragraph 21 above). The Contingent Subscription amount is set out in the applicable Subscription Agreement(s). The Petitioners' total Contingent Subscription is US$2.425 billion, and they cannot be *required* to fund above that commitment. The GP's position is that the limited partners' capital commitments to the Partnership can be and have been increased above the Contingent Subscription amount through Amendments 17, 18 and 20 to the LPA. That is wrong. None of those amendment increased the Contingent Subscription amounts.

    b. Second, and in any event, under Paragraph 5(a)(ii) of the LPA, the GP may only invest in projects approved by the Petitioners "*in accordance with a budget therefor approved*" by the Petitioners. The budgets approved by the Petitioners provide for investments to be made into the Early-Stage Companies in certain specified amounts, subject to meeting certain specified milestones. The milestones under those respective budgets have not been met and no further capital commitment has been approved, in writing, by the Petitioners. The GP is also now seeking to call capital on an accelerated basis contrary to what is provided for in the budgets. The GP is not permitted to call for further capital absent written approval by the Petitioners, which the Petitioners have not provided. The GP's position is that the Petitioners have waived or forfeited their right to approve budgets and that, in any event, the GP is entitled to continue calling for capital irrespective of whether the milestones in an agreed budget have been complied with and regardless of whether it is calling capital on an accelerated basis to the budgets. There has however been no such waiver or forfeit and there is no such entitlement on the part of the GP.

38. The ongoing disagreement between the parties regarding budgeting issues resulted in Mr Yuri Bogdanov (CIO of Rigmora Holdings) emailing the GP on 15 May 2025. In that email, the Petitioners reiterated their position that they were not obliged to fund the Early-Stage Companies and that it was not in the best interests of the Partnership for further funding to be allocated to the Early-Stage Companies. In the same email, the Petitioners asked the GP to clarify its position, stating "*if you disagree with the above and consider that [the Petitioners are] obliged to contribute further capital to the Early-Stage Companies then please respond with a detailed explanation of your position. [The Petitioners] of course intend to comply with the requirements of the LPA and will be cooperative if you can demonstrate the LPA allows you to call further capital in regards to the Early-Stage Companies*" (the "**15 May Email**"). The GP did not respond to the 15 May Email, has refused to provide the requested information on the new budgets, and has accelerated capital calls when compared to forecasts sent shortly before issuing the said capital calls.

39. Rather than seek to consensually resolve the issues concerning the Early-Stage Companies and other budget issues that were being discussed between the parties, on 30 May 2025:

    a. The GP issued the ~~May 2025~~ Disputed Capital Calls purportedly requiring the limited partners to contribute US$109,960,926.00 million of capital to the Partnership by 13 June 2025 (save for a capital call made in respect of Replicate which is due on 17 June 2025); and

    b. The GP peremptorily issued a complaint against the Petitioners in the Delaware Court of Chancery seeking specific performance and equitable and declaratory relief in respect of the GP's and the limited partners' rights and obligations in respect of the Partnership (the "**Delaware Complaint**" and the "**Delaware Proceedings**"). The GP did not refer to the ~~May 2025~~ Disputed Capital Calls in the Delaware Proceedings.

40. In the Delaware Proceedings, the GP alleges that the 15 May Email amounts to an anticipatory breach of the LPA and/or a repudiation of "*the [Petitioners'] obligation to respond to capital calls*", the GP ~~seeks~~ had also sought specific performance to compel the limited partners to contribute up to US$545 million to the Partnership, whilst simultaneously contending that by reason of the 15 May Email the GP was entitled to apply a default charge to confiscate 50% of the limited partners' interest in the Partnership (the **"Default Charge"**), block their voting powers and remove their budget approval rights. The GP had also sought ~~seeks~~ to avoid

complying with the contractual default process which includes provisions enabling the Petitioners to remedy any such default (i.e. by payment) on the basis that it would be "*futile*" to do so (see paragraph 171 of the Delaware Complaint). In other words, the GP ~~seeks~~ had sought an order whereby the Petitioners must provide the Partnership with further capital of up to US$545 million (which it is alleged is the Petitioners' total unfunded capital commitment) ~~and nevertheless maintains~~ whilst maintaining that it can also issue a default charge against the Petitioners and confiscate billions of dollars of the Petitioners' assets even if they provide the capital sought.

41. As set out further below the Delaware Complaint and the ~~May 2025~~ Disputed Capital Calls ~~are~~ had evidently been designed to enable the GP to compel the Petitioners to contribute vast sums of further funding to the portfolio companies whilst engineering a default in order to impose a default charge to confiscate 50% of the Petitioners' interests in the Partnership (in the approximate sum of US$2 billion), which would fall to be redistributed to the ~~remaining limited partners~~ other holders of "preferred units" (i.e., Dr Harrison and his family trust) thereby allowing Dr Harrison to take control of the Partnership, notwithstanding the fact that he has contributed less than c. ~~12~~% of the Partnership's capital. The GP's intentions were laid bare in paragraph 192 of the Delaware Complaint, which states that the GP seeks an order preventing the Petitioners from "*interfering with [the GP] in the exercise of its discretion over the Fund once [the Petitioners are] deemed to be a Defaulting Partner*".

42. No GP acting reasonably and in good faith in the interests of Partnership would have commenced these proceedings in these circumstances.

43. Moreover, there was no proper basis for the GP's purported position. The 15 May Email is self-evidently not an anticipatory or repudiatory breach given that it said in terms that the Petitioners will comply with the terms of the LPA if the GP explains why it is entitled to call for further capital under the LPA. ~~For the avoidance of any doubt, the Petitioners do not accept that~~ In addition, the LPA does not entitle~~s~~ the GP to confiscate assets as alleged. The LPA is clear that the default charge enables the GP to reduce the number of preferred units and investor common units of a defaulting partner. Apart from Pool ATP IV, assets are not distributed by reference to the number of units held by a Limited Partner and are instead distributed in accordance with the specific distribution provisions for each pool as set out in the LPA.

43A The issuing of the Delaware Proceedings and the Disputed Capital Calls were the culmination of a long-term and highly choreographed strategy designed to place illegitimate pressure on the Petitioners to contribute further capital to the Partnership and to manufacture a situation where the GP could default the Petitioners (the "**Default Strategy**"). The existence of the Default Strategy falls to be inferred from the following matters:

a. The fact that the GP had instructed its US attorneys, Quinn Emanuel Urquhart & Sullivan ("**Quinn Emanuel**") to start work on a complaint against the Petitioners in Delaware by August 2024 (at the latest), many months before the 15 May Email had been sent.

b. The timing and size of the Disputed Capital Calls, which were not issued for proper purposes or *intra vires* under the LPA but were deliberately inflated and made for the improper purposes alleged at paragraphs [44A]-[44D] below.

c. The fact that in the Delaware Proceedings, the GP had improperly claimed to be entitled immediately to impose a Default Charge on the Petitioners without any need to serve a Default Notice on the Petitioners as required by paragraph 5(a) (see paragraph [40] above).

d. The fact that in the Delaware Proceedings, the GP had wrongly claimed that by imposing a Default Charge on the Petitioners it was entitled to strip the Petitioners of 50% of their economic interests in the Partnership and reallocate those interests to other partners (i.e. primarily to Dr Harrison and his family trust (see paragraph [43] above).

e. The fact that on 29 April 2025, the GP provided a funding plan to the Petitioners in which the GP proposed to reallocate funding away from the Early-Stage Companies (the "**April Funding Plan**"), only to withdraw that proposal when the Petitioners indicated that they were agreeable to it. In particular:

    i. At a meeting on 9 May 2025 attended by principals of the GP and the Petitioners, and during a call attended by principals and lawyers of the GP and the Petitioners on 13 May 2025, the Petitioners indicated that they were agreeable to the proposed reallocation of budgets, consistent with their

position that no further capital should be provided to the Early-Stage Companies as their future prospects were weak.

ii. However, during the call on 13 May 2025 Dr Harrison withdrew the reallocation proposal (despite considering it to be in the best interests of the Partnership).

iii. It is to be inferred from the forgoing that the GP made the reallocation proposal in the expectation that the Petitioners would not agree to it, and use their refusal as a basis for commencing proceedings against them in Delaware.

f. The fact that, since at the commencement of the Delaware Proceedings at the latest (and the Petitioners infer from before that date), the GP has (without notice to the Petitioners) approached at least 26 potential investors with a view to selling Partnership assets (portfolio companies) to them and / or transferring some or all of those assets (portfolio companies) to a new fund or funds managed by the GP. As recently as 4 October 2025, the GP (without notice to the Petitioners) sent a "Portfolio Lift-out Opportunity" presentation to at least 9 such entities (the "**October Presentation**"), offering an opportunity to "*take over a restructured, mature, stage-diversified portfolio biotech portfolio*".

43B. It is further inferred from the forgoing that the 15 May Email was used by the GP in bad faith as a pretext for implementing the Default Strategy.

43C. On 5 September 2025, shortly before the trial of the Delaware Proceedings was due to commence, the GP amended the relief sought in those proceedings. Following those amendments, the GP:

g. Abandoned its claim to be entitled to relief based solely on the 15 May Email.

h. Abandoned its claim for specific performance requiring the Petitioners s to contribute US$588.5m to the Partnership.

i. Abandoned its claim seeking an order permitting it to impose a Default Charge against all of the Petitioners' interests in the Partnership.

j. Sought a declaration that the Petitioners had breached the LPA by refusing to pay the Disputed Capital Calls.

k. Sought a declaration that the Petitioners had breached their obligations under the LPA to fund and approve budgets sufficient to qualify as a "Defaulting Partner".

l. Sought specific performance of the Petitioners alleged obligations to fund capital calls for the Early-Stage companies.

(the "**Amended Relief**")

43D. The Petitioners will rely on the fact that the GP had sought, and then abandoned, the extreme and unjustified relief originally pleaded in the Delaware Proceedings as demonstrating that the GP had improperly, and in breach of its fiduciary obligations, commenced the Delaware Proceedings to exert illegitimate pressure on them.

43E. Further, in seeking the Amended Relief in the Delaware Proceedings, the GP has acted in breach of the terms of an injunction issued by the Grand Court on 20 June 2025 and continued at a return date hearing on 1 August 2025 (the "**Writ Injunction**"). In those circumstances, any judgment obtained in favour of the GP in the Delaware Proceedings is not entitled to recognition in the Cayman Islands as being contrary to public policy. In particular:

a. By seeking a declaration that by reason of non-payment of the Disputed Capital Calls the Petitioners have breached their obligations under the LPA "*sufficient to qualify as a defaulting partner*" the GP is in breach of paragraph 1(a) of the Writ Injunction, which restrains it from "*taking any steps to designate, deem or treat [the Petitioners] as a "Defaulting Partner"…arising out of or in relation to the…non-payment of the [Disputed Capital Calls]".*

b. By seeking an order for specific performance of the alleged obligation to fund the Disputed Capital Calls, the GP is in breach of paragraphs 1(a) and / or (b) of the Writ Injunction. In particular, under paragraph 5(c)(iv) of the LPA the GP is only permitted to commence a lawsuit to collect an unpaid capital contribution upon a limited partner becoming a "Defaulting Partner". In commencing proceedings in Delaware seeking specific performance of the Petitioners' alleged obligation to fund the Disputed Capital

Calls, the GP is therefore either: (a) treating or taking steps to treat the Petitioners as a Defaulting Partner in relation to the non-payment of the Disputed Capital Calls or (b) acting in breach of paragraph 5(c)(iv) of the LPA.

c. By seeking an order which deems the Petitioners to have waived their rights to approve budgets, the GP is in breach of paragraph 1(a) of the Writ Injunction in that it is taking a step to designate, deem or treat the Petitioners as a Defaulting Partner by claiming that they have lost their rights to approve budgets under paragraph 18(f) of the LPA on the basis that they have not satisfied the Disputed Capital Calls.

Mismanagement / prejudicial conduct / lack of probity in the conduct of the Partnership's affairs

44. The GP has mismanaged the Partnership, acted prejudicially to the interests of the limited partners and demonstrated a serious lack of probity in the conduct of the Partnership's affairs, as detailed below.

Improper issuing of the Disputed Capital Calls

44A. In determining whether, and in what amount, to exercise its powers to call capital under the LPA, the GP is required to (a) act in good faith and in the interests of the Partnership; and (b) exercise its powers for proper purposes.

44B. In circumstances where the Petitioners have contributed approximately 98% of the capital invested into the Partnership and are the principal economic owners of the Partnership, the GP is required to have regard to the interests of the Petitioners when discharging its duty to act in good faith to act in the interests of the Partnership.

44C. The Disputed Capital Calls were made by the GP in breach of its fiduciary duties to (a) act in good faith and in the interests of the Partnership and (b) exercise its powers for proper purposes. In particular:

a. The Disputed Capital Calls were not made in good faith in the interests of the Partnership but were made by the GP principally in the interests of Dr Harrison and / or Les Pommes for the improper purposes of enabling the GP to impose a Default Charge on the Petitioners which, on the GP's case, would enable it to redistribute 50% of the their

economic interests in the Partnership to the other holders of "preferred units" (principally, Mr Harrison and Les Pommes).

b. Further or in the alternative, the Disputed Capital Calls were not made in good faith in the interests of the Partnership but were made for the improper purpose of placing commercial pressure on the Petitioners to contribute further capital to the Partnership in the context of an ongoing dispute with the GP over the extent of their obligation to do so.

c. Further or in the alternative, the Disputed Capital Calls in respect of the Portfolio Companies were not made for the proper purposes of meeting any genuine or immediate funding need on the part of the Portfolio Companies in the amounts sought under the Disputed Capital Calls.

d. Further or in the alternative, the GP did not genuinely believe that it was in the best interests of the Partnership to allocate further funding to the Early-Stage Companies either in the amounts sought under the relevant Disputed Capital Calls, or at all.

44D. The breaches pleaded in paragraph [44C] above are evident from the following matters:

a. The fact that the GP is conflicted in its decision making in relation to the funding of the Portfolio Companies and the issuing of the Disputed Capital Calls by reason of: (a) the enormous economic benefits which Dr Harrison claims to be entitled to by imposing a Default Charge on the Petitioners; (b) Dr Harrison being the sole director of the GP and a director of each of the Portfolio Companies; and (c) Dr Harrison having carried interest entitlements in the investment pools containing the Early Stage Companies in circumstances where Dr Harrison has not contributed any capital to those pools.

b. The fact that the Disputed Capital Calls were all made on the same day and were issued by the GP without the GP first responding to the Petitioners' request, made in the 15 May Email, for the GP to provide an explanation of the basis on which the GP considered that they were obliged to contribute further capital to the Early-Stage Companies.

c. The size of the Disputed Capital Calls (in excess of US$101m), being far in excess of the amounts that the GP represented would be required:

   i. In the April Funding Plan provided to the Petitioners by the GP on 29 April 2025. The April Funding Plan stated that US$16.7m of funding was required in respect of the portfolio companies in Q2 2025.

   ii. In a spreadsheet which Dr Harrison (on behalf of the GP) circulated to Daniel Finkelman, Joseph Yanchik, and William Engels on 15 May 2025 (the "**15 May Spreadsheet**"). The 15 May Spreadsheet indicated that capital calls totalling US$19.5m would be made in respect of the portfolio companies.

   iii. In the October Presentation, which represented that a sum of US$50m would be sufficient to meet the funding needs of five Early-Stage Companies (Nereid Therapeutics Incorporated ("**Nereid**"), Marlinspike, Initial, Apertor Pharmaceuticals ("**Apertor**") and Nine Square Incorporated ("**Nine Square**") over a period of 36 months.

d. The fact that the Disputed Capital Calls were made in the context of a break-down of the relationship between the Petitioners and the GP and an ongoing dispute between the Petitioners and the GP over the extent of their Contingent Subscriptions into the Partnership.

e. The fact that the Disputed Capital Calls were the culmination of a long-term and highly choreographed Default Strategy against the Petitioners.

f. The fact that the Disputed Capital Calls were made by the GP minutes before the commencement of the Delaware Proceedings.

g. The fact that the Disputed Capital Calls included a capital call of US$7.5m in respect of Apertor in circumstances where:

   i. At the time of the capital call, Dr Harrison knew that that the Partnership was holding a capital contribution of US$1.6m made by the Petitioners in respect of Apertor on 21 May 2025.

ii. At the time of the capital call, Dr Harrison had been informed by Dr Liras (on behalf of the Apertor board) in emails dated 1 May 2025, 27 May 2025 and 30 May 2025 that Apertor was going to be wound up.

iii. At the time of the capital call, Dr Harrison had been informed by Dr Liras (on behalf of the Apertor board) in an email dated 30 May 2025 that US$850,000 was required to wind up Apertor.

iv. Apertor has in fact received the funds that were required to complete an orderly shutdown.

v. In the premises, when making the Disputed Capital Call in respect of Apertor, the GP knew that Apertor did not have any genuine commercial need for US$7.5m.

h. The fact that the Disputed Capital Calls included a capital call of US$9m in respect of Deep Apple in circumstances where:

i. At the time of that capital call, Dr Harrison had been informed by Dr Liras in an email dated 20 May 2025 that: a deal for third party funding was imminent; once that funding was received, Deep Apple had no need for additional funds and Deep Apple had sufficient funding to see it through to August 2025.

ii. Deep Apple announced a concluded funding deal with a third party called Novo Nordisk on 11 June 2025 pursuant to which it was eligible to receive up to US$812 million in payments, including an upfront payment of US$32.5 million.

iii. The GP has not withdrawn the Disputed Capital Call in respect of Deep Apple.

iv. In the premises, it is to be inferred that the GP's decision to make the Disputed Capital Call in respect of Deep Apple was not based on a genuine or good faith assessment of the funding requirements of Deep Apple.

i. The fact that the Disputed Capital Calls included US$47.8m in respect of the Early-Stage companies in circumstances where:

i. On 4 April 2025, Dr Harrison sent an email to Ms Anna Batarina (an employee of ATP at that time) stating that the reallocation of capital away from the Early-Stage Companies "*is the right business decision for the portfolio in ANY financing context*".

ii. The GP had proposed to reallocate capital away from the Early-Stage Companies in the April Funding Plan.

iii. In the premises, it is to be inferred the GP did not genuinely believe that it was in the best interests of the Partnership to continue to allocate further funding to the Early-Stage Companies either in the amounts sought under the relevant Disputed Capital Calls, or at all.

The Delaware Proceedings

45. As set out above, rather than seeking to reach a consensual solution with the Petitioners, the GP issued the Delaware Proceedings in an improper attempt to persuade the Delaware Court to compel the Petitioners to provide further funding for the portfolio companies, and/or to engineer a default to enable the GP to confiscate 50% of the Petitioners' interest in the Partnership.

46. In the Delaware Complaint, the GP has made a number of extremely serious allegations that the Petitioners are concertedly acting to undermine the position of the ~~Early-Stage Companies~~ portfolio companies to enable them to gain personal control over those companies (or some of them), outside of the Partnership. By way of example, the Delaware Complaint states:

a. "*…the Defendants' [have engaged in] premeditated financial destruction of* [REDACTED] *Delaware portfolio companies*" (paragraph 1);

b. "[the Defendants have] *arbitrarily and irrationally refusing to approve new budgets for* [REDACTED] *portfolio companies* [REDACTED]*, but whose initial funding has run out*" (paragraph 1);

c. "*The Family Office LP is now destroying these companies and the value ATP has created in the Fund. If not stopped at once, the Family Office LP will starve* [REDACTED] *of the financing needed to fund their respective missions*." (paragraph 6);

d. "*The Family Office LP's stated goal is to drive* [REDACTED] *portfolio into the ground so that the Family Office LP will no longer need to fund it, and then negotiate new terms and budgets only on* [REDACTED] *companies (if any) that they choose…The Family Office LP also appears to be positioning itself to cherry pick the Fund's clinical assets out of the rubble, using Family Office owned investment vehicles outside of the Fund's capital tree and contractual obligations. This scheme appears intended to ensure that the Family Office can evade its commitments…*" (paragraph 7);

e. "*Over the past eighteen months, the Family Office LP had hid its predatory intentions by feigning a willingness to meet reduced capital calls for* [REDACTED] *companies and negotiate new budgets for* [REDACTED] *companies.*" (paragraph 12);

f. "*These were different times in the working relationship between ATP and the Family Office LP, before the Family Office LP sought to rely on irrational pretexts to minimize its capital contributions to the Fund while eyeing select assets for future exploitation outside of the Fund*." (paragraph 69);

g. "*…the Family Office LP has capriciously withheld budget approvals, reduced approved budgets, cautioned emphatically against capital calls that provided anything more than "drip" financing*…" (paragraph 77);

h. "*…the Family Office LP has not only refused to discuss new budgets in good faith, but unleashed a new strategy to destroy* [the Partnership]." (paragraph 121); and

i. "*The* [Partnership] *has no adequate remedy at law for the violence the Family Office LP has inflicted on these companies*." (paragraph 150).

47. These allegations made by the GP in the Delaware Complaint are untruthful and wholly unfounded. The Petitioners have paid out the entirety of their Contingent Subscription so they are not obliged to contribute further capital. Further and in the alternative, the Petitioners, as the holders of the majority of the Preferred Units, are entitled to refuse to invest more of their capital into particular projects if the relevant budgets and associated milestones have not

been adhered to. In respect of certain of the Early-Stage Companies, the ~~May 2025~~ Disputed Capital Calls are not in accordance with the approved budgets. The Early-Stage Companies have to date failed to meet any, or sufficient, milestones specified in the investment memoranda attached to the approved budgets and the Petitioners have formed the view that the relevant portfolio companies are not viable investments. It would plainly be illogical and irrational for the Petitioners, as the limited partners of the Partnership with a c. 9~~8~~% stake in the Partnership's assets, to deliberately seek to "starve" otherwise viable portfolio companies, which have to date been funded exclusively by their capital contributions. Insofar as new budgets are concerned, the Petitioners have sought further information from the GP in order to assess the financial performance and merits of the proposed budgets but the GP has refused to provide the information sought.

48. The GP's pursuit of the Default Strategy and / or the Delaware Proceedings and the unfounded, incendiary and wholly inappropriate allegations made therein evidence the GP's serious lack of probity and demonstrate its improper management of the affairs of the Partnership. Those matters give rise to a justifiable loss of trust and confidence in the management of the GP by the Petitioners.

49. The Delaware Proceedings had ~~have~~ also evidently been brought for an improper purpose (including as part of the Default Strategy), to enable the GP to compel the Petitioners to contribute up to US$545 million of further funding to the Partnership in complete disregard of the provisions of the LPA, such funding being substantially in excess of the Petitioners' Contingent Subscriptions, including US$331.3 million for which the GP has not presented any budget to the Petitioners for approval (let alone obtained such approval) (~~see paragraph 51 below~~). The GP had also simultaneously ~~seeks~~ sought to engineer a default in order to impose a default charge on the Petitioners to confiscate 50% of their interests in the Partnership and thereby take control of the Partnership and billions of dollars of the Petitioners' assets, which would fall to be redistributed to Dr Harrison and his family. The GP also wishes to remove the Petitioners' right to approve new budgets so as to obtain control without the need for the Petitioners' approval of such budgets.

49A As pleaded in paragraph 43C above, the GP amended the relief sought in the Delaware Proceedings shortly before the trial of those proceedings was due to commence. However, the Petitioners will say that:

a. the relief originally pleaded in the Delaware Proceedings was wholly unjustified;

b. the relief originally pleaded in the Delaware Proceedings was included for improper purposes of exerting economic pressure on the Petitioners; and

c. the fact that it had been sought by the GP evidences the GP's serious lack of probity, its improper management of the affairs of the Partnership and gives rise to a justifiable loss of trust and confidence in its management of the Partnership's affairs.

49B Further, the GP's conduct in the Delaware Proceedings has given rise to a justifiable loss of trust and confidence. In particular:

d. On 17 September 2025, the Petitioners issued a summons for the appointment of joint provisional liquidators over the Partnership (the "**JPL Summons**").

e. On 19 September 2025, the GP filed an emergency motion in Delaware seeking an anti-suit injunction preventing the Petitioners from pursuing the JPL Summons pending the outcome of the Delaware Proceedings (the "**Anti-Suit Injunction Motion**").

f. The Anti-Suit Injunction Motion was brought and pursued by the GP in breach of paragraph 18(g)(vi) of the LPA and / or in a manner that was vexatious and oppressive to the Petitioners and / or an unconscionable interference with the Cayman's Court's exclusive winding up jurisdiction. In support of these allegations, the Petitioners rely on the facts and maters set out at sub paragraphs (g)-(k) below.

g. Pursuant to paragraph 18(g)(vi) of the LPA, the GP contractually agreed to submit to the jurisdiction of the Cayman Court in respect of (among other matters) the JPL Summons. In breach of that contractual agreement, the GP sought by its Anti-Suit Motion to prevent the Petitioners from pursuing the JPLS summons. As a result of that breach and the other vexatious, oppressive and unconscionable conduct particularised at sub-paragraphs (h)-(k) below, it was not possible to move the JPL Summons at the hearing fixed for that purpose by the Cayman Court.

h. The GP moved the Anti-Suit Injunction Motion at a hearing before the Delaware Court on 19 September 2025 (the "**September Hearing**") at which it misrepresented to the

Delaware Court the effect of the PL Summons, and the Petitioners; conduct in connection with it, giving rise to a justifiable lack of trust and confidence. In particular:

i. The GP represented in a brief presented to the Delaware Court that in a letter sent to Walkers by Campbells on the 17 September 2025, the Petitioners had stated that "*unless ATP agrees by 10 am on September 19, to certain undertakings, it will seek emergency and expedited ex parte appointment of PLs from the Cayman Court*". Campbells' letter said no such thing. Instead, it requested for the GP to give certain undertakings pending an *inter partes* hearing of the PL Summons (which the letter proposed should occur on 31 October 2025), failing which the Petitioners "*will be forced to seek urgent relief without further notice to protect our clients' position until the PL Application is resolved*".

ii. The GP represented in a brief presented to the Delaware Court that the PL Summons was a "*frontal attack on this [Delaware] Court's jurisdiction and an attempt to circumvent this Court's orders expediting this action and denying Rigmora's Motion to Stay in favour of the later filed Cayman Proceedings that Rigmora previously lost*". That was untrue. The appointment of JPLs would not have interfered with the Delaware's Court's jurisdiction in any way.

iii. The GP represented in a brief presented to the Delaware Court that a PL under Cayman law is similar to a bankruptcy trustee under U.S. law "*Except here, the trustee would be hand-selected by Rigmora, which has a demonstrated purpose of starving the portfolio Companies*". That submission was false, in particular because it failed to acknowledge that a provisional liquidator is an officer of the Cayman Court, obliged to act independently in the best interests of the Partnership.,

iv. The GP represented in a brief presented to the Delaware Court that "*Rigmora appears to view a trial in Delaware as an unacceptable risk, and is attempting to mitigate that risk by displacing ATP as the Fund's general partner before trial as soon as possible*". That was false. The PL Summons: did not seek any orders removing ATP as the Fund's general partner and sought to appoint

provisional liquidators with a limited mandate which *did not include* taking over the conduct of the Delaware Proceedings.

v. The GP represented during submissions at the September Hearing that the JPL Summons would "*deprive this Court of the opportunity to fully adjudicate and remediate the breaches of contract that we have been litigating in this court since May*". That was untrue. The appointment of PLs would not have deprived the Delaware Court with the opportunity to fully adjudicate the issues before it.

vi. The GP represented during submissions at the September Hearing that if provisional liquidators were appointed in circumstances where the Delaware Court order the Rigmora LPs to fund US$215m of approved budgets, the PLs "*could send [the $215m] right back to Rigmora, instead of where it is supposed to go, which is in furtherance of the Fund's objectives*". That submission misrepresented the independence of provisional liquidators, and their obligation to act in the interests of the Partnership.

i. At a hearing in the Cayman Islands on 3 October 2025, the Cayman Court directed that the PL Summons be heard on 3-4 November 2025. On 13 October 2025 the GP signed a consent order agreeing that the PL Summons should be listed for a hearing on 3-4 November 2025.

j. Three days later (on 16 and 17 October 2025) the GP informed the Delaware Court of its intention to further pursue the Anti-Suit Injunction (which had been adjourned at the September Hearing) which it did by reply brief dated 19 October 2025. As an alternative, the GP suggested at the end of the trial of the Delaware Proceedings that the Delaware Court produce a judgment on the Delaware Proceedings in advance of 3–4 November 2025, or shortly thereafter, despite the Delaware Judge's indication of the difficulties she would have in producing a coherent judgment within that compressed period.

k. In the circumstances, faced with the risk of the Anti-Suit Injunction sought by the GP or the issuance as its request of a judgment on the Delaware Proceedings on a timescale so compressed as to prejudice the Delaware Court in fairly disposing of those proceedings and/or the Petitioners' in having fair opportunity to present its

case in those proceedings, the Petitioners had no realistic option but to seek to leave withdraw the JPL Summons.

Wilful and persistent breaches of the LPA

~~50. In the Delaware Complaint, the GP seeks specific performance to compel the limited partners to immediately fund prior approved but unfunded budgets in response to capital calls as and when they are received (see paragraph 14 of the Delaware Complaint). This amounts to an accelerated capital call, but the GP has wholly failed to comply with the requirements in clause 5(a)(ii) of the LPA (see paragraph 19(c) above) by providing any written assurances and/or diligenced presentation that the relevant project(s) will be completed within the aggregate amount budgeted therefor, and instead seeks to compel the Petitioners to meet accelerated capital calls in the absence of these assurances, by court order.~~

~~51. The GP also seeks specific performance to compel the Petitioners to provide further funding of up to US$331.3 million (see paragraph 164 of the Delaware Complaint). No budgets have been provided by the GP or approved by the Petitioners in respect of any such funding (which the GP accepts - see paragraph 5 of the Delaware Complaint). Indeed, the GP has not provided any information to the Petitioners about the intended use of the further funding, merely asserting in the Delaware Complaint that its use is "*including for those companies specifically named in Amendment No. 22 – Ascidian, Aulos, Nine Square, Nereid and Replicate*". This falls far short of the formal budget proposals which are required to be presented to the Petitioners for approval under the LPA, which budgets serve the further purpose of enabling the Petitioners to ensure that their capital is being applied in a proper manner.~~

52. In the Delaware Proceedings, the GP has sought ~~seeks~~ to circumvent the express provisions of the LPA in the Delaware Proceedings, to compel the Petitioners to provide vast sums of further funding, without specifying what those funds are to be used for and denying the Petitioners any oversight over how their funds are applied, contending that the Petitioners have "waived" or "forfeited" their right to approve budgets. The GP's attempts to obtain funding to be applied entirely at its own discretion without any oversight by the Petitioners demonstrates a serious lack of probity and mismanagement and has caused the Petitioners to lose trust and confidence in the GP's ability to manage the Partnership.

The GP has knowingly misled the Petitioners into contributing capital to the Partnership

52A. The GP has knowingly misled the Petitioners into contributing capital to the Partnership through making false representations as to the purposes for which that capital was required and / or would be used.

52B. The GP issued a capital call notice dated 15 January 2025 of US$1.6m in respect of Marlinspike (the "**Marlinspike January Call**"). By making the Marlinspike January Call, the GP represented that that the capital was being requested for, and would be used to meet, Marlinspike's funding requirements.

52C. The Petitioners paid the Marlinspike January Call by agreeing that the US$1.6m could be reallocated to Marlinspike from funds the Petitioners paid in respect of a 16 January 2025 capital call for Nine Square. In doing so, the Petitioners understood that the capital was being requested for, and would be used to meet, Marlinspike's funding requirements. Further, under the LPA the GP was not permitted to use the proceeds of the Marlinspike January Call other than for the purposes of meeting Marlinspike's funding requirements.

52D. On 3 February 2025, the GP issued a capital call notice of US$400,000 in respect of Marlinspike (the "**Marlinspike February Call**", together with the Marlinspike January Call the "**Marlinspike Calls**"). By making the Marlinspike February Call, the GP represented that the capital was being requested for, and would be used to meet, Marlinspike's funding requirements.

52E. On 13 February 2025 the Petitioners arranged for payment of the Marlinspike February Call, which the GP had received by the next day. In doing so, the Petitioners understood that the capital was being requested for, and would be used to meet, Marlinspike's funding requirements. Further, under the LPA the GP was not permitted to use the proceeds of the Marlinspike February Call other than for the purposes of meeting Marlinspike's funding requirements.

52F. In fact, contrary to the representations made by the GP and unknown to the Petitioners and in breach of the LPA, the GP did not intend to use and did not use the proceeds from the Marlinspike Calls to meet Marlinspike's funding requirements.

52G. Instead, the GP procured that the proceeds from the Marlinspike Calls were transferred to another portfolio company Nereid. In particular:

a. On 27 March 2025, Mr Finkelman on behalf of the GP sent an email to Willam Engels (CFO at ATP) and Jonathan Ravski (Accounting Manager at ATP) instructing them to wire US$1m of the proceeds from the Marlinspike Calls to Marlinspike "*but let them know that it is going right out the door to Nereid*".

b. On 27 March 2025, Mr Ravski emailed the accounting department at Marlinspike explaining that "*We have wired $1m under the Series A Agreement. Please note that these funds are to be used as a loan to Nereid as per discussions that took place*".

c. On 27 March 2025, the operator of Marlinspike's accounting mailbox responded saying "*this is the first we're hearing of this*".

d. On 28 March 2025, Marlinspike transferred US$1m as a loan to Nereid ("**Nereid Loan**").

52H. As at the date of the Marlinspike Calls and Nereid Loan, no approved budget was in place in respect of Nereid. In those circumstances, the GP was not permitted to call capital for Nereid from the Petitioners under paragraph 5(a)(ii) of the LPA. Paragraph 19(b) above is repeated.

52I. In the premises:

a. The representations referred to at paragraphs 52B and 52D above were knowingly false, in that the GP did not intend to use the proceeds from the Marlinspike Calls to meet the funding requirements of Marlinspike. Instead, the GP intended to use the proceeds (or a substantial portion thereof) to meet the funding requirements of Nereid (thereby circumventing the LPA's requirement that capital can only be called for a portfolio company in accordance with an approved budget).

b. The Petitioners were misled into contributing capital to the Partnership by the knowingly false representations of the GP.

c. Further, the GP breached the terms of the LPA by procuring for the proceeds of the Marlinspike Calls to be used other than for the purposes of meeting Marlinspike's funding requirements.

d. The GP's conduct has given rise to a justifiable loss of trust and confidence in its management of the Partnership's affairs.

Misappropriations / dissipations of assets

52J. Between 31 July 2025 and 8 August 2025 the Partnership received three payments totalling US$62,776,352.48 (the "**Q3 2025 Receipts**"). In particular:

a. A payment of US$20,035,952.54 on 31 July 2025.

b. A payment of US$41,736,871.3 on 1 August 2025.

c. A payment of US$13,528.64 on 8 August 2025.

52K. Between 4 August 2025 and 27 August 2025, the GP caused US$39,306,044 of the Q3 2025 Receipts to be paid away from the Partnership (the "**Q3 2025 Payments**"). In particular:

a. On 4 August 2025, US$20 million was transferred to the client account of the GP's US attorneys at Quinn Emanuel.

b. On 4 August 2025, US$8,906,044 was paid directly to ATLS in respect of alleged management fees.

c. Between 11 August 2025 and 27 August 2025 US$10.4m was paid to (or on account of) various portfolio companies.

52L. The GP did not disclose the existence of the Q3 2025 Receipts or the Q3 2025 Payments to the Petitioners. The Petitioners only became aware of their existence in September 2025 in correspondence prompted by answers given during the deposition of the GP's witnesses in the Delaware Proceedings.

52M. The Q3 2025 Receipts included a sum of US$41,736,871.3 received from Braeburn on 1 August 2025 (the "**Braeburn Prepayment**"). The circumstances in which the Braeburn Prepayment came to be received by the Partnership evidences the GP's serious lack of probity and gives

rise to a justifiable loss of trust and confidence in its management of the Partnership. In particular:

a. The Braeburn Prepayment represented an early repayment of sums owed to the Partnership under certain convertible loan notes issued by Braeburn between October 2020 and August 2023 (the "**Braeburn Notes**").

b. The Braeburn Notes were not due to be repaid until March 2029 and earned the Partnership interest at 8% per annum.

c. Despite this, the GP approached Braeburn on dates unknown to offer a 10% discount on the principal owed under the Braeburn Notes in return for early repayment.

d. The Braeburn Prepayment was not in the best interests of the Partnership since it has resulted in the Partnership forgoing both capital and interest on the Braeburn Notes.

e. In procuring the Partnership to offer and accept the Braeburn Prepayment, the GP acted in breach of its fiduciary duties to act *bona fides* in the best interests of Partnership. It is to be inferred (including from the Q3 2025 Payments) that the Braeburn Prepayment was improperly procured by the GP at least in part for the purposes of funding its illegitimate litigation campaign against the Petitioners.

52N. Further, in making the Q3 2025 Payments, the GP has demonstrated a serious lack of probity and has improperly managed the affairs of the Partnership so as to give rise to a justifiable loss and confidence in the GP's management of the Partnership. In particular:

a. The Braeburn Notes were assets held in Pool Braeburn (being "debt securities" of Braeburn owned by the Partnership within the meaning of paragraph 21(a) of the LPA). As such, the GP was required to distribute the proceeds of the Braeburn Prepayment to the Petitioners in accordance with Paragraph 21(d) of the LPA. The Braeburn Prepayment was not available to be applied by the GP for any other purpose. Despite this, the GP improperly and in breach of the LPA funded the Q3 2025 Payments from the proceeds of the Braeburn Prepayment.

b. The GP's entitlement to deal with the remainder of the Q3 2025 Receipts is governed by paragraph 8(c) of the LPA (as amended pursuant to Amended 4 dated 1 April 2015). Paragraph 8(c) of the LPA provides that:

"The General Partner shall cause the Partnership to distribute in cash to the Partners, promptly from time to time, any amounts held by the Partnership which remain after the Partnership has made, or established reserves to make, tax distributions and Tracking Unit distributions which are required by Paragraphs 8(a) and (b), respectively, except to the extent that the General Partner reasonably determines that such amounts may be necessary for paying Partnership and Intermediary expenses, liabilities and other obligations (including investments in Projects consistent with the applicable budgets) and establishing reserves therefor, in each case in accordance with Budgets approved by the Board or as provided for in this Agreement in the case of the Management Fee and indemnification obligations, or as otherwise determined by the General Partner with the prior consent of the holders of a majority of the Preferred Units."

c. Under paragraph 8(c) of the LPA, the GP was only permitted to apply the Q3 2025 Receipts towards investments in projects in a manner "*consistent with the applicable budgets"* or with the prior consent of the Petitioners as the holders of a majority of the Preferred Units.

d. In breach of the LPA, the GP used the Q3 2025 Receipts to make payments to portfolio companies where no approved budget exists and without the prior consent of the Petitioners. Those payments were improper, ought not to have been made and have dissipated the Partnership's assets. In particular:

i. On 11 August 2025, the GP transferred US$2 million from the Q3 2025 Receipts to the portfolio company Aethon Therapeutics ("**Aethon**"). The approved budget in place in respect of Aethon incorporates funding milestones that have not been met. As such, the payment to Aethon was not "consistent with" the applicable budget and the Petitioners did not consent to the payment. While the GP disputes, in the Writ Proceedings, that the budget in respect of Aethon is conditional upon funding milestones being

met, the GP has nevertheless demonstrated a serious lack of probity in making the payment to Aethon pending the resolution of that dispute.

ii. On 14 August 2025, the GP transferred US$150,000 from the Q3 2025 Receipts to the portfolio company Nine Square and US$250,000 from the Q3 2025 Receipts to the portfolio company Nereid. There were no approved budgets in respect of Nine Square or Nereid and the Petitioners did not consent to those payments.

iii. On 21 August 2025, the GP transferred US$1.5 million from the Q3 2025 Receipts to the portfolio company Replicate Biosciences ("**Replicate**"). Under paragraph 26 of the LPA, the Petitioners' approval of a budget in respect of Replicate was expressly contingent upon "*at least $300 million being realised (including through deemed distributions) by [the Petitioners] on a sale or financing of its interest in ATP LLC*" (the "**Realisation Condition**"). The Realisation Condition has not been met. Accordingly, the payment to Replicate was not "in accordance with" an applicable budget within the meaning of paragraph 8(c) of the LPA, and the Petitioners did not consent to that payment.

iv. On 22 August 2025, the GP transferred US$100,000 from the Q3 2025 Receipts to the law firm Wilson Sonsini Goodrich & Rosati ("**Wilson Sonsini**") on account of Marlinspike, in discharge of legal fees owed by Marlinspike. The approved budget in place in respect of Marlinspike incorporates funding milestones that have not been met. As such, the payment to Marlinspike was not "consistent with" the applicable budget and the Petitioners did not consent to the payment. While the GP disputes, in the Writ Proceedings, that the budget in respect of Marlinspike is conditional upon funding milestones being met, the GP has nevertheless demonstrated a serious lack of probity in making the payment to Marlinspike pending the resolution of that dispute.

e. The GP has also acted with a serious lack of probity in continuing to seek to compel the Petitioners to pay the full amount of the Disputed Capital Calls following payment of the Q3 2025 Receipts to the portfolio companies (including, in addition to those

identified above, a payment of US$6m from the Q3 2025 Receipts to Ascidian on 11 August 2025 (being the full amount of the Disputed Capital Call in respect of Ascidian).

f. On 4 August 2025, the GP transferred US$20 million from the Partnership's bank accounts to Quinn Emanuel's client account in the US as a "reserve" to be available to discharge legal fees owed to Quinn Emanuel and Walkers. In causing that payment to be made, the GP has acted with a serious lack of probity in that: (a) legal costs incurred by the GP in connection with the proceedings in Delaware and the Cayman Islands are not properly incurred on behalf of the Partnership; (b) alternatively, the sum of $20 million is not a reasonable amount to incur on behalf of the Partnership in connection with the ongoing disputes; and (c) in any event, the GP ought to have retained that sum in the Partnership's own bank accounts and there was no proper justification for the GP to have caused it to be transferred away from the Partnership pending the outcome of the Petition.

52O. Further, the GP's failure to disclose the existence of the Q3 2025 Receipts and failure to seek validation orders under s.99 of the ELP Act evidences the GP's serious lack of probity and gives rise to a justifiable loss of trust and confidence in its management of the Partnership. In particular:

a. At the hearing of the return date for the Writ Injunction on 1 August 2025, the GP sought to vary the Writ Injunction in reliance upon the Third Affirmation of Dr Harrison dated 21 July 2025 ("**Harrison 3**").

b. In Harrison 3:

i. Dr Harrison asserted (at [125]) that: "*the Injunction Order would instead bring an immediate and ongoing halt to the Partnership's funding of the portfolio companies for the entire period the injunction Order remains in place*".

ii. Dr Harisson asserted, in support of the GP's application for fortification of the Petitioners' undertaking in damages, that "*Ascidian is presently being starved of the requisite funding to achieve [its] goals as a result of the Family Office's refusal to meet capital calls (including the 30 May Capital Calls) and approve budgets*".

c. By the time of the return date in respect of the Writ Injunction on 1 August 2025:

i. the GP and Dr Harrison knew that the Partnership had just received (or was about to receive) circ.US$62m;

ii. the GP and Dr Harrison intended to use those recently received (or imminently to be received) funds for the purposes of providing funding to the portfolio companies; and

iii. without prejudice to the generality of (ii) above, the GP and Dr Harrison intended to pay US$6m of those funds to Ascidian (being the full amount of the Disputed Capital Call in respect of that company).

d. By reason of the matters referred to in paragraph [52O(c)] above, the evidence referred to in paragraph [52O(b)] above was inaccurate and misleading to the knowledge of the GP and Dr Harrison.

e. In the premises, the GP demonstrated a serious lack of probity, giving rise to a justifiable loss of trust and confidence, by: (a) failing to correct the inaccurate and misleading evidence placed before the Court on 1 August 2025 and (b) continuing to rely on that evidence to seek a variation of the Writ Injunction on 1 August 2025.

Improper denials

52P. The GP has denied that the relationship between the GP and the Petitioners has deteriorated substantially and denied that there has been a breakdown of trust and confidence between it and the Petitioners, including:

a. At paragraph 47 of its Defence to the Petition.

b. At paragraph 75(e) of its Defence to the Petition.

c. At [18(c)(xi)] of a skeleton argument filed on behalf of the GP for the hearing of the return date of the Writ Injunction, which claimed that: "*The Family Office commenced the present hostilities on 15 May 2025 by repudiating its funding commitments to the Partnership*".

d. At the hearing of the return date of the Writ Injunction on 1 August 2025, when the GP's leading counsel submitted to the Court that: (i) in May 2025 the GP was "*in good faith, still operating under the assumption that the relationship was working well*" and (ii) that any breakdown in the relationship between the parties "*stems from my learned friend's clients' actions in May this year when it decided unilaterally not to pay the capital calls or approve budgets*".

52Q. Those denials and statements were untrue and improperly made. The GP has been exploring ways to commence litigation against the Petitioners and manufacture a situation where it can default the Petitioners for many months. Paragraph 43A above is repeated. In those circumstances:

a. The GP has been aware of a serious deterioration in the relationship between it and the Petitioners for months before May 2025. The GP did not and does not honestly believe otherwise.

b. In May 2025, the GP was not operating under the assumption that the relationship between it and the Petitioners was working well. The GP did not and does not honestly believe otherwise.

c. The GP knew that the breakdown in the relationship between the parties did not stem from the Petitioners' failure to pay the Disputed Capital Calls. The GP did not and does not honestly believe otherwise.

52R. The GP's improper denials of the existence and extent of deterioration of the relationship between it and the Petitioners, evidence the GP's serious lack of probity, demonstrate its improper management of the affairs of the Partnership and has given rise to a justifiable loss of trust and confidence in its ability to manage the Partnership.

Failure to maintain records in the manner of a reasonably competent general partner

52S. The GP has failed to act in the manner of a reasonably competent general partner in its management of the affairs of the Partnership by failing to maintain a list of partners and register of partners, giving rise to a justifiable loss of trust and confidence in its ability to manage the Partnership. In particular:

a. Under paragraph 16(b) of the LPA, the GP is required "*at all times*" to maintain a list containing the names, addresses and subscriptions of the limited partners of the Partnership (the "**List of Partners**").

b. Under section 29(1) of the ELP Act, the GP is required to maintain "*a register of limited partners which shall contain the name and address of each partner of the exempted limited partnership, the date on which a person became a limited partner and the date on which a person ceased to be a limited partner*" (the "**Register of Partners**"). Under section 29(6) of the ELP Act it is a criminal offence for a general partner to fail to comply with its obligation to maintain a Register of Partners.

c. In breach of paragraph 16(b), the GP has failed to maintain a List of Partners.

d. In breach of section 29(1) of the ELP Act, the GP has failed to maintain a Register of Partners.

52T. The GP has failed to act in the manner of a reasonably competent general partner in its management of the affairs of the Partnership by failing to maintain a consistent position as regards the extent of the Petitioners' Contingent Subscriptions, giving rise to a justifiable loss of trust and confidence in its ability to manage the Partnership. In particular:

a. A reasonably competent general partner is required to maintain accurate internal records of the extent of each limited partner's Contingent Subscriptions and undrawn Contingent Subscriptions.

b. Following the agreement of Amendment 20 in June 2021, the GP has presented 10 different figures to explain the extent of the Petitioners' Contingent Subscriptions in respect of the Partnership, ranging from US$2.5bn to US$2.946bn. It is to be inferred that the GP has failed to maintain any, or any accurate or satisfactory, records of the Petitioners' Contingent Subscriptions in respect of the Partnership.

c. Since May 2025 the GP has presented 13 different explanations of the size of the Petitioners' undrawn Contingent Subscriptions ranging from US$494,119,277 to US$590,736,444. It is to be inferred that the GP has failed to maintain any, or any accurate

or satisfactory, records of the Petitioners' undrawn Contingent Subscriptions in respect of the Partnership.

Recharging costs to the portfolio companies

53. Pursuant to Paragraph 20(e)(ii) of the LPA (as amended by Amendment 20) and Section 10 of Amendment 9 (as amended by Amendments 10 and 17), ATLS receives an annual fee (the "**ATLS Fee**") payable during the term of the Partnership which is funded by capital contributions of limited partners holding preferred units. The ATLS Fee is required to be applied towards certain expenses of the Partnership incurred in managing the Partnership, including compensation and benefits for employees, and facilities and related overhead expenses (Section 11 of Amendment 9). Pursuant to Paragraph 20(e)(ii) of the LPA (as amended by Amendment 20), the GP is required to prepare a yearly budget for the ATLS Fee which is presented to the "Subject Limited Partner" (i.e. the Petitioners) no later than 1 December on the previous year. The Petitioners then have sole authority to either approve or reject the ATLS Fee budget. In the event a budget for the ATLS Fee is not approved in a calendar year, the approved budget for such year will be the most recently approved budget (subject to some exceptions in relation to extraordinary, non-recurring expenses).

54. However, since 2021, the GP has improperly charged the employee costs of ATP investment professionals to the Partnership's portfolio companies, which costs ought to be covered by the ATLS Fee approved by the Petitioners. In particular:

    a. The Partnership's consolidated financial statements for the years ended 2023 and 2024 show that the Partnership's expenses exceeded the capital calls paid by the limited partners. To fund the gap between Partnership's expenses and capital calls paid (principally by the Petitioners), the GP received investment income, comprising: (i) interest income; and (ii) service revenue from affiliated entities.

    b. The Petitioners understand that the revenue in (ii) above comprises support service costs illegitimately charged to portfolio companies in breach of the LPA.[2]

[2] "Service revenue from affiliated entities" is described in the notes to the Partnership's consolidated financial statements as "*ATLS, ATLS (UK), and ATPR provide administrative, technical and strategic consulting services to other entities within the Partnership group and the Partnership's portfolio companies. Revenue from services provided to the entities within the consolidated group are eliminated upon consolidation. Services*

c. Dr Harrison confirmed by email dated 8 December 2023 that "*ATP employees [are] filling critical roles at certain Portfolio Companies*" and "*those Portfolio Companies* [are] *reimbursing ATP for a portion of the employment costs incurred for those employees*". Dr Harrison also provided the Petitioners with a report from Price Waterhouse and Cooper dated 17 March 2023 (the "**PwC Report**") which confirmed that ATLS had entered into a services arrangement with the portfolio companies for the purposes of charging the portfolio companies costs associated with the provision of management and scientific research and advisory services.[3]

d. Further, the proposed, unapproved ATLS Fee budgets prepared by the GP for 2021 through 2025 included a credit for "*Investment Professionals – Portfolio Reimbursement*".

e. In December 2023, the Petitioners raised with Dr Harrison that the proposed ATLS Fee budgets for 2024 purported to assign costs which ought properly to be covered by the ATLS Fee, in breach of the LPA. Dr Harrison responded, stating that he disagreed but provided no reasons. The budget for the 2024 ATLS Fee was not agreed.

f. The GP's charging of ATP employee costs to the Partnership's portfolio companies is a breach of Paragraph 20(e)(ii) of the LPA (as amended by Amendments 10 and 17) and Section 10 of Amendment 9 (as amended by Amendments 10 and 17). Further or in the alternative, the GP's recharging of expenses to the Partnership's portfolio companies is a breach of Paragraph 8 of the LPA (as amended), as it deprives the Petitioners of income they would have received via the distribution mechanisms in the LPA.

55. The Petitioners are also concerned that the GP has been inappropriately incurring travel expenses for investment professionals which appear to be exorbitant. In particular, the ATLS Fee Budgets for 2024 and 2025 respectively budget for travel for investment professionals at US$690,000 for 2024 and US$625,000 for 2025.

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provided may include internal costs, such as employee expenses and certain overhead expenses, and external costs incurred from third party providers."

[3] For the avoidance of doubt, the PwC Report was a transfer pricing study, which estimated an arm's length range of returns applicable to the provision of certain support services by ATLS to the Partnership's portfolio companies. The PwC Report did not concern whether the assignment of such costs to the Partnership's portfolio companies was permissible under terms of the LPA.

56. The GP's recharging of expenses to the Partnership's portfolio companies, and charging exorbitant travel expenses, demonstrates a serious lack of probity and mismanagement. The charging of expenses to the portfolio companies also gives rise to a serious conflict of interest (see further below), which has resulted in the Petitioners' loss of trust and confidence in the GP.

Failure to provide information

57. The GP has failed or refused to provide the Petitioners with information about the operation of the Partnership that would otherwise enable the Petitioners to assess the financial position of the clinical stage companies in order to determine whether new budgets ought to be approved, and to determine whether those managing the Partnership are acting in accordance with their duties. In particular:

    a. The GP refused to provide sufficient information or answer the Petitioners' questions about the budget and future plans of Aulos Bioscience Inc. and Ascidian Therapeutics Inc.

    b. The GP refused or failed to provide sufficient information or answer the Petitioners' questions about the budget and future plans of Replicate, which is developing self-replicating RNA immunotherapies. The GP is not entitled to call for capital in respect of Replicate because it has not complied with the various conditions that must be met before capital can be called under the current budget. Paragraph 26 of the LPA (introduced by Amendment 22) provides that any budget approved by the Petitioners for Replicate after the execution of Amendment 22 will be contingent upon certain realisations being achieved (through deemed distributions) by the Petitioners on a sale or financing of its interest in the entity formerly known as ATP Life Science Sub LLC , now known as BBN Life Science Sub LLC, (the "**Royalty Refinancing**"). Such realisations have not been realised (including through deemed distributions) by the Petitioners. Despite this, the GP now contends and seeks an order from the Delaware Court confirming that the Petitioners have waived or forfeited their right to approve budgets (see paragraphs 23, 163 and 191 of the Delaware Complaint), in a further and altogether more ambitious attempt to deny the Petitioners access to information about the financial position of the portfolio companies. Separately, the GP contends

that Paragraph 26 of the LPA (as amended by Amendment 22) required the Petitioners to pursue Royalty Financing in short order (see paragraph 122 of the Delaware Complaint).

c. The GP refused or failed to provide supporting information or an explanation as to why the capital call notice issued on 7 February 2025 in respect of uncalled Partnership expenses for the second half of 2024 was reduced from the previous call (and it falls to be inferred that the reduction was because the GP's legal expenses had been improperly charged to the Partnership – see further paragraph 65 below).

d. The GP has also failed to provide any further information about legal expenses charged to the Partnership in 2024 (see further paragraph 65 below).

e. The GP has failed to respond to requests for information regarding the purportedly binding nature of obligations purportedly owed by limited partners in their personal capacity to third parties, and of obligations owed by the Partnership to the portfolio companies (see further paragraph 63 below). The GP has also failed to provide copies of documentation evidencing such obligations, including the investment management agreements entered into between the Partnership and the portfolio companies.

f. The GP has failed or refused to respond to requests for information about the basis on which it contends that the limited partners are required to continue to fund the portfolio companies, notwithstanding those companies' failure to hit milestones or adhere to business plans set out in the agreed budgets. Rather than provide this information, the GP instead seeks to rely on the Petitioners' requests as an anticipatory breach of the LPA in the Delaware Complaint (see paragraph 170 of the Delaware Complaint).

58. The Petitioners have at all material times been entitled to information which enables them to determine whether the GP is acting in accordance with its duties and obligations, including the books, records, accounts and assets of the Partnership (see Clause 16(b)-(c) of the LPA, and section 22 of the ELP Act). The Petitioners are also entitled to receive (and the GP is obliged to provide) financial reports at least every calendar quarter in respect of all entities within the Partnership structure, which must include individual project income, expenses and operating costs, and must show actual versus budgeted results for the relevant period and

explain any major variances to the budget (see Schedule C to the LPA). The GP has not only denied the Petitioners their rights to this information but seeks to permanently deprive the Petitioners of their rights in the Delaware Proceedings. Even the limited information provided by the GP to the Petitioners confirms that the GP has committed serious breaches of duty which has resulted in the Petitioners' loss of trust and confidence in the GP.

Conflicts of interest and/or breach of fiduciary duty to act in good faith in the interests of the Partnership

59. The GP has a conflict of interest and/or has breached its fiduciary duties to act in good faith in the interests of the Partnership.

~~*Improperly issuing capital calls*~~

~~*60.* The GP's issuance of capital calls of over US$100 million on 30 May 2025 to be paid by 13 June 2025/17 June 2025 (i.e. the May 2025 Capital Calls - which are not referenced in the Delaware Proceedings) amounts to a further breach of the GP's duty to act in good faith in the interests of the Partnership. The May 2025 Capital Calls were not issued for proper purposes or *intra vires* under the LPA, as it is evident from the timing of the capital calls, coinciding with the issue of the Delaware Complaint, that the capital calls are part of the GP's litigation strategy to apply improper pressure to the Petitioners through threats of default and/or its broader strategy to take control of the Partnership. The scale and nature of the May 2025 Capital Calls is also inconsistent with the funding scenario prepared by the GP on 30 April 2025 in which the GP proposed to cut the budgets for the Early-Stage Companies so as to commit only $1 million to one Early-Stage Company (Red Queen) as part of an orderly winding down of those companies. It can be inferred that the GP does not consider that the Early-Stage Companies are viable investments and/or worthy of deploying significant capital given the terms of that funding proposal. Notwithstanding, the GP has called $47.8 million in capital for Early-Stage Companies pursuant to the May 2025 Capital Calls.~~

~~*Attempt to compel the limited partners to provide further funding to the portfolio companies*~~

~~61. As set out above, the Delaware Proceedings have been designed to attempt to persuade the Delaware Court to compel the Petitioners to provide further funding for the portfolio~~

~~companies and/or to engineer a default to enable the GP to confiscate 50% of the Petitioners' interest in the Partnership. In particular, the GP seeks in the Delaware Complaint, amongst other things, "*a declaratory judgment that [the Petitioners are] currently in material breach of [their] contractual duties under the LPA and [have] waived [their] right to approve budgets*" (paragraph 163) or alternatively, specific performance requiring the Petitioners to fund capital calls in excess of the level of their Contingent Subscription and compelling the Petitioners to consider further budgets (paragraph 164). The GP also seeks a declaratory judgment that the Petitioners are in breach of their funding and budget approval obligations, and an order that the GP is entitled to impose a default charge against the Petitioners' interests in the Partnership or the investment pools to which its purported default relates (paragraphs 188-190).~~

62. The Petitioners' continued funding of ~~portfolio companies~~ the Early Stage Companies is in the interests of those companies, the GP and its employees, and ATP (not in the interests of the Partnership~~'s~~). The portfolio companies are co-founded and managed by executives from the GP, including by Dr Harrison himself, (see paragraph 32 of the Delaware Complaint) who would remain employed thereby, and the GP would be able to continue charging the portfolio companies for expenses which ought to be covered by the ATLS Fee. ATP, of which Dr Harrison is founder and Managing Director, is also wholly dependent on the continued funding of the Partnership (and ATP's continued involvement therein) as ATP has no meaningful business interests or capital under management other than that belonging to the Partnership, which has been almost entirely contributed by the Petitioners. Further, Dr Harrison is a director of each of the portfolio companies and owes fiduciary duties to them. It is in the interests of the portfolio companies (many of which are said, by the GP, to be in a state of financial distress) to obtain as much funding from the Partnership as possible but it is not necessarily in the interests of the Partnership to continue to provide such funding. The GP has a demonstrable conflict of interest, as a result of which the Petitioners have lost trust and confidence in its ability to manage the Partnership.

62A. Further, the GP has: (a) denied that it is subject to any conflict of interest (including at [76] of its Defence to the Petition); (b) failed to take any steps to manage that conflict, including when considering whether and in what amount to call capital from the Petitioners in May 2025; and (b) refused to accept the Petitioners' proposal on 3 July 2025 for the appointment of an independent conflict director. Those denials and failures have given rise to a further justifiable loss of trust and confidence in the GP's ability to manage the Partnership.

Exposure of the Partnership to binding and open-ended funding commitments to loss-making portfolio companies

63. The GP has also unjustifiably exposed the Partnership to open-ended funding commitments in respect of the portfolio companies. In particular, the Delaware Complaint says as follows:

a. The Complaint refers at paragraph 85 to a letter sent by Dr Harrison to the Petitioners on 29 November 2022 in which he stated that: *"a default by [a limited partner] in respect of a particular pool would put the Fund as a whole in breach of its obligations to its counterparties and expose the Fund as a whole to damages"*; and

b. The Complaint states at paragraph 143:

"The contention that the Family Office LP's consent is required before capital can be called where there have been changes in milestones or "business plans" also has no support in the language of the LPA or the parties' course of dealings. Nor could it, ***because ATP's funding commitments to the individual portfolio companies are defined by binding funding agreements. ATP's agreements with portfolio companies often include an initial share purchase investment, plus (i) an option for ATP to purchase additional shares on the same terms, and (ii) obligations for ATP to purchase additional shares at the request of the company board. Those additional share purchase obligations may or may not be tied to the company achieving certain milestones.*** *For example, the Series A Preferred Stock Purchase Agreement executed between ATP and portfolio company* [REDACTED] *on December 6, 2021 included (a) an initial* [REDACTED] *investment by ATP and (b) an obligation for ATP to purchase up to* [REDACTED] *in additional shares at the request of the* [REDACTED] *board. Only a portion of the obligation was tied to the completion of certain company milestones. That obligation requires ATP to invest as much as* [REDACTED] *in* [REDACTED]*. To date, ATP has invested* [REDACTED] *in* [REDACTED]*, which is short of ATP's total potential obligation to the company under the agreement.* ***Should the additional funding obligations become due, then the Family Office LP's refusal to meet a*** [REDACTED] ***capital call would cause ATP to breach its agreement with the portfolio company.***" (emphasis added)

64. As set out above, the continued funding of the portfolio companies is in the interests of the portfolio companies, the GP (and ATP), not the Partnership and the limited partners. The GP has also failed to provide information to the Petitioners about the Partnership's purportedly binding commitments to fund the portfolio companies, notwithstanding the Petitioners' requests that it do so (see paragraph 57 above). The GP's apparent decision to commit the Partnership to unconditional funding commitments unnecessarily exposes the Partnership to potential claims and is a fetter of the Petitioners' discretion to approve budgets, and the GP's

~~subsequent lack of probity has justifiably caused the Petitioner to lose trust and confidence in the GP.~~

Charging personal legal expenses to the Partnership

65. The ~~petitioners are also concerned that the~~ GP's personal legal expenses have been improperly charged to the Partnership and ATLS (as a wholly-owned subsidiary of the Partnership), ~~which also comprises a~~ in breach of the Settlement Agreement and LPA. This falls to be inferred from the following matters:

    a. The expense report exhibited to the GP's December 2024 capital call notice dated 12 December 2024 included a line item for "Legal Expenses for Partnership". Mr Bogdanov queried these expenses in an email to Dr Harrison dated 23 December 2024, saying "[o]*ne item, '**Legal Expenses for Partnership**,' stands out as significantly higher compared to previous years (USD 1.9 million versus USD 0.56 million in H2 2023)*".

    b. On 20 December 2024, Patrik Blochlinger, the Chief Legal Officer of Rigmora Holdings, emailed Daniel Finkelman (the General Counsel of Apple Tree Partners) to request details of the legal expenses, stating that he believed the GP's legal expenses of the Braeburn Proceedings had erroneously been charged to the Partnership.

    c. Mr Finkelman responded on 23 December 2024, stating that the invoices had been reviewed, and that the GP had discovered that one invoice in the amount of US$30,692.50 was inadvertently paid by the Partnership when it should have been allocated to the GP. Mr Finkelman noted that this had been corrected and a revised capital call for fund expenses was issued. Mr Finkelman noted, however, that the GP wished to discuss with the Petitioners the "*allocation*" of various expenses incurred by the GP in relation to the Braeburn Proceedings.

    d. Several further requests were made for and on behalf of the Petitioners for an explanation as to the Partnership's significantly higher legal expenses in 2024, together with supporting invoices and narratives from the relevant law firms.

e. Dr Harrison confirmed on 29 December 2024 that the GP would review the relevant expenses. However, the GP has refused to provide the Petitioners with underlying invoices and narratives on grounds of privilege. The GP agreed to reduce some legal expenses. Nevertheless, the Petitioners consider the legal expenses to be excessive. It falls to be inferred that the invoices and narratives concern legal expenses incurred by the GP in relation to the Braeburn Proceedings, which expenses cannot be charged to the Partnership. The GP's lack of probity and conflict of interest has resulted in the Petitioners' loss of trust and confidence in the GP.

f. The expense report exhibited to one of the GP's ~~May 2025~~ Disputed Capital Calls indicates that "Legal Expenses for Partnership" for January – May 2025 are US$7.86 million. These legal expenses are significantly higher than in prior periods and the Petitioners infer that the GP has sought to include legal costs in connection with the Delaware Proceedings and/or any other anticipated litigation costs in connection with the dispute between the GP and the Petitioners.

65A. Further, the GP caused legal invoices for Quinn Emanuel, Wachtell, Lipton, Rosen & Katz ("**WLRK**"), Walkers, Maples Group and Ms Sue Prevezer KC relating to the Braeburn Proceedings to be paid in breach of: (i) clause 5.1 of the Settlement Agreement, which required the GP to pay its legal costs in relation to the Braeburn Proceedings and the Settlement Agreement using its own money and not to use money belonging to the Partnership (including money held by subsidiaries of the Partnership); and/or (ii) Paragraph 20(e)(ii) of the LPA, which only permits ATLS to spend money in accordance with approved or deemed approved budgets for the ATLS Fee:

Quinn Emanuel

a. Legal invoices totalling c. $800,000 were issued by Quinn Emanuel between September 2024 and April 2025 in respect of a matter called "*Delaware Factual Investigation and Potential Claims*". The Partnership's general ledgers for 2024 and 2025 reveal these invoices were paid out of the Partnership's assets. The (unredacted) narratives for these invoices further reveal that time was spent on work in connection with the Braeburn Proceedings.

b. A further four invoices totalling c. $472,000 were issued by Quinn Emanuel between September to December 2024 in connection with a matter called "*Cayman Litigation*". The invoices contained the following description: "*For professional services through* [date] *in connection with assisting Cayman counsel in the defense of an action brought by the Limited Partners of ATPLSV seeking a court order requiring the distribution of the assets of Braeburn*" (i.e. the Braeburn Proceedings). The 2024 general ledger for ATLS reveal that all four invoices were paid for by ATLS.

WLRK

c. Six invoices were issued by WLRK between December 2024 – May 2025. Five of these invoices (totalling $1.356m) were charged to the Partnership, whilst one invoice (totalling $400,000) was charged to ATLS. Fee narratives have not been disclosed for WLRK's work during the aforementioned period, but as WLRK was heavily involved in negotiating the Settlement Agreement in late 2024 it is inferred that this work was in connection with the Braeburn Proceedings and the Settlement Agreement.

Walkers

d. In November and December 2024, Walkers issued two invoices for work performed in respect of a matter called *"Advice Regarding Potential Claims by ATP Against Rigmora".* The November 2024 invoice (totalling $28,929.24) was paid by the Partnership, whilst the December 2024 invoice (totalling $34,612.68) was paid by ATLS.

e. Between November 2024 to January 2025, Walkers issued three invoices (totalling $750,121.25) in connection with a matter called "*Claim by Rigmora Funds Against ATP*". It falls to be inferred that this matter related to Walkers' representation of the GP in the Braeburn Proceedings. The (unredacted) narratives for these invoices reveal that time was spent on tasks related to the Braeburn Proceedings and the Settlement Agreement. All three invoices were paid by ATLS.

Maples

f. In September and October 2024, Maples (the GP's former Cayman attorneys in the Braeburn Proceedings) issued two invoices in connection with a matter titled "*Dispute with Unicorn Biotech Ventures One Ltd and Dispute with Unicorn Biotech Ventures Two Ltd*". The invoices were paid by ATLS and totalled $426,169.96.

Sue Prevezer KC

g. In October 2024, Sue Prevezer KC issued one invoice (totalling £54,611) for work performed in September 2024. The fee narratives are redacted for privilege, but the invoice was issued in connection with work on "*ATP III GP LTD*" and was paid by ATLS.

h. In November 2024, Sue Prevezer KC issued three invoices (totaling £205,812.18) in connection with work on *"FSD 236 OF 2024: UNICORN V ATP CAYMAN PROCEEDINGS"* (i.e. the Braeburn Proceedings). These invoices were paid by ATLS.

D. Ground 2: Loss of substratum

66. Given the GP's stated intention to pursue an investment strategy which involves the continued funding of the portfolio companies against the wishes and to the detriment of the Petitioners and without complying with the express provisions of the LPA to obtain limited partners' approval for budgets for investments, and the GP's evident intention to confiscate 50% of the Petitioners' interests in the Partnership and take control thereof, the substratum of the Partnership has been lost. The Partnership is no longer being run in accordance with the reasonable expectations of the limited partners or in accordance with the LPA.

E. Ground 3: Need for an independent investigation into the Partnership's affairs

67. For all of the reasons set out in Ground 1, there is evidently a need for a proper, independent investigation into the Partnership's affairs.

Conclusion

68. For the reasons set out above, it is respectfully submitted that it is just and equitable that the Partnership be wound up.

Nomination of Joint Official Liquidators

69. The Petitioners nominate **Mr Alexander Lawson** and **Mr Barry Lynch** of Alvarez & Marsal Cayman Islands Limited, Flagship Building, PO Box 2507, 2nd Floor, 142 Seafarers Way, George Town, Grand Cayman KY1-1104, Cayman Islands for appointment as joint official liquidators of the Partnership.

YOUR PETITIONERS THEREFORE HUMBLY PRAY THAT:

1. The Partnership be wound up pursuant to Section 36(3) of the ELP Act and Section 92(e) of the Companies Act, and/or pursuant to section 35 of the Partnership Act (2025 Revision).

2. Mr Alexander Lawson and Mr Barry Lynch of Alvarez & Marsal Cayman Islands Limited, Flagship Building, PO Box 2507, 2nd Floor, 142 Seafarers Way, George Town, Grand Cayman KY1-1104, Cayman Islands be appointed as Joint Official Liquidators of the Partnership (the "**JOLs**") with such powers as the Court deems necessary for the orderly winding up of the Partnership.

3. All rights or property of every description of the Partnership, including all choses in action, held or deemed to be held by the GP shall vest in the JOLs without the requirement for further formalities and shall be held by the JOLs in accordance with the law.

4. The JOLs' powers are exercisable to the exclusion of the GP and the GP shall forthwith have no authority or power to act in relation to the Partnership or its property or affairs other than at the direction of and/or with the written consent of the JOLs.

5. The JOLs shall have leave to apply under section 36(3)(g) of the ELP Act for further orders and directions.

6. The Petitioners' costs of and incidental to the Petition shall be paid forthwith out of the assets of the Partnership as an expense of the liquidation.

7. Such further or other relief as this Honourable Court deems fit.

Dated this 6th day of June 2025

Amended 20 November 2025

Campbells LLP

_____

Campbells LLP
Attorneys-at-Law for the Petitioners

NOTE: This Amended Petition is intended to be served on the Partnership and the GP at Walkers (Cayman) LLP, 190 Elgin Avenue, George Town, Grand Cayman, KY1-9001, Cayman Islands. ~~Maples Corporate Services Limited, PO Box 309, Ugland House, South Church Street, George Town, Grand Cayman, KY1 1104, Cayman Islands.~~

NOTICE OF HEARING

TAKE NOTICE THAT the hearing of this petition will take place at the Law Courts, George Town, Grand Cayman, on 12 January 2026 at 10.00 am/pm.

Any correspondence or communication with the Court relating to the hearing of this petition should be addressed to the Registrar of the Financial Services Division of the Grand Court at PO Box 495, Grand Cayman, KY1-1106, telephone 345 949 4296.

EXHIBIT I

A T P

About
Team
Portfolio
ATP R&D
News
Locations
Contact

Seth L. Harrison, MD
Marie-Therese Afif
Anna Batarina, CFA
Paul Eisenberg, MD
Daniel Finkelman
Sally Jacob
Paul Da Silva Jardine, PhD
Neena Kadaba, PhD
Spiros Liras, PhD

Seth Harrison is founder and managing partner of ATP (Apple Tree Partners). Seth began investing in life sciences in 1991 as a venture partner at Sevin Rosen Funds and went on to be a general partner at Oak Investment Partners before starting ATP in 1999. Some of his earlier investments include Aileron Therapeutics, Akero Therapeutics, ArQule, Coelacanth, Corvidia Therapeutics, Cyrano Sciences, Gloucester Pharmaceuticals, HeartWare International, Informed Access, SGX Pharmaceuticals, Stoke Therapeutics, Syntimmune, Tendyne, Ultracision, and ViroPharma.

Seth currently serves on the boards of Akero Therapeutics and Stoke Therapeutics as well as the boards of all portfolio companies created within ATP's current fund to date. From 2002 to 2010, he was a member of the board of the International Partnership for Microbicides, a nonprofit product development partnership focused on women's health and HIV prevention. Seth received an AB from Princeton University and an MD and MBA

Stephanie Maiocco, PhD

Mark Mitchnick, MD

Vern Norviel

John F. Reilly, PhD

Aileen Salares, CFA

Brian Vash

Joseph A. Yanchik III

Eva Zhou

both from Columbia University, and completed a surgery internship at the Presbyterian Hospital in the City of New York.

Board Responsibilities

Aethon Therapeutics
Akero Therapeutics
Apertor Pharmaceuticals
Ascidian Therapeutics
Aulos Bioscience
Braeburn
Deep Apple Therapeutics
Evercrisp Biosciences
Galvanize Therapeutics
Initial Therapeutics
Marengo Therapeutics
Marlinspike Therapeutics
Nereid Therapeutics
Nine Square Therapeutics
Red Queen Therapeutics
Replicate Bioscience
Stoke Therapeutics

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A T P

Apple Tree Partners®

EXHIBIT J

Entire Exhibit Filed Under Seal

EXHIBIT K

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

ATP III GP, LTD., in its capacity as General Partner of ATP Life Science Ventures, L.P.,	:	
Plaintiff,	:	
v	:	C. A. No. 2025-0607-KSJM
RIGMORA BIOTECH INVESTOR ONE LP and RIGMORA BIOTECH INVESTOR TWO LP,	:	
Defendants.	:	

- - -

Chancery Courtroom 12B
Leonard L. Williams Justice Center
500 North King Street
Wilmington, Delaware
Thursday, October 16, 2025
9:15 a.m.

- - -

BEFORE: HON. KATHALEEN St.J. McCORMICK, Chancellor

- - -

REDACTED TRIAL TRANSCRIPT - VOLUME I

APPEARANCES:

MICHAEL A. BARLOW, ESQ.
SHANNON M. DOUGHTY, ESQ.
Quinn Emanuel Urquhart & Sullivan, LLP
-and-
ANDREW M. BERDON, ESQ.
RACHEL E. EPSTEIN, ESQ.
KATHRYN D. BONACORSI, ESQ.
JONATHAN M. ACEVEDO, ESQ.
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HANNAH E. DAWSON, ESQ.
of the Massachusetts Bar
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-and-
GARRETT B. MORITZ, ESQ.
ROGER S. STRONACH, ESQ.
A. GAGE WHIRLEY, ESQ.
Ross Aronstam & Moritz LLP
for Plaintiff

Appearances Cont'd ...

APPEARANCES CONT'D:

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Debevoise & Plimpton LLP
for Defendants

ALSO PRESENT:

STEVE LAGUTIN, Russian Interpreter

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THE COURT: Good morning.

ATTORNEY BARLOW: Your Honor, good morning. Mike Barlow on behalf of plaintiff, ATP III GP. I rise for a brief set of introductions. I'd like to introduce just a few people right now. We'll have a larger cast of characters throughout the day.

THE COURT: It seems like we have a large cast of characters today.

ATTORNEY BARLOW: To keep it all straight, we'll start with Mr. Andrew Berdon, Rachel Epstein. And of course the Court knows Garrett Moritz.

ATTORNEY MORITZ: Good morning, Your Honor.

ATTORNEY BARLOW: Point of order, would you like us to break at 10:45 today under the typical schedule?

THE COURT: Yes. So I owe you time over the course of the next couple of days. And I was going to propose that we go 15 minutes late today -- if our court reporters allow it -- and start 15 minutes early tomorrow. And that will give us some flexibility at the end of the day.

As you may be aware, I had a

preexisting commitment beginning at noon tomorrow, and I'll have to break at noon tomorrow. But I think we can make the time up easy enough.

ATTORNEY BARLOW: Thank you, Your Honor.

THE COURT: Thank you.

ATTORNEY ROHRBACHER: Good morning, Your Honor. Blake Rohrbacher, Richards Layton & Finger, for the Rigmora defendants. I'll start with introductions at the counsel table. Shannon Selden from Debevoise & Plimpton, Zach Saltzman, Lucy Sundelson. Back table as well, William Taft, Natascha Born, Sarah Wolf from Debevoise & Plimpton. And, Your Honor, Leslie Trzonkowski and Daniel White from my office. Our corporate designee Alexey Yakovlev is here.

And one housekeeping matter. The interpreter, Steve Lagutin, is here. We don't anticipate needing his services for the morning session, but we will need to figure out where he sits because we will need a microphone for him.

So that can be an after-lunch problem, but I wanted to raise it, and we can sort that out.

THE COURT: Thank you for raising it.

We'll figure it out between now and then.

ATTORNEY ROHRBACHER: Thank you.

THE COURT: Are there any housekeeping matters we should attend to?

ATTORNEY BERDON: Thank you, Your Honor. Andrew Berdon for ATP III GP, Limited, as general partner of ATP Life Science Ventures.

Your Honor, there's a pending motion to maintain the status quo. We served our opening brief September 19th, I believe. And the defendants served an opposition on October 3. In the interim, we've tried to reach an agreement, both as to the language of an interim order here, as well as to obviate the need for a motion for PLs in the Cayman Islands.

Yesterday afternoon, our proposal to appoint a special manager to oversee and work with ATP in the interim period was rejected. And so we would propose to put in our reply brief perhaps Sunday evening. So we'll have that fully briefed, and we can deal with any need for an argument for that next week.

THE COURT: Any objection?

ATTORNEY SELDEN: No, Your Honor. Sunday evening works for the reply for us.

THE COURT: All right. That's the plan. Thank you.

Shall we call our first witness?

ATTORNEY BERDON: Yes, Your Honor. The plaintiffs call Dr. Seth Harrison.

SETH HARRISON, having first been duly affirmed, was examined and testified as follows:

ATTORNEY BERDON: May it please the Court.

THE COURT: Yes.

DIRECT EXAMINATION

BY ATTORNEY BERDON:

Q. Good morning. Would you please introduce yourself to the Court.

A. My name is Seth Harrison. I'm managing general partner of Apple Tree Partners.

Q. And what is Apple Tree Partners?

A. Apple Tree Partners is a life sciences venture capital firm.

Q. And where is ATP based?

A. In New York, Boston, and the Bay Area.

Q. Can you briefly describe your educational background for the Court.

A. Yes. I went to Princeton, then

Columbia medical school. I did a year of surgery at the Presbyterian Hospital in New York City. And then I have an MBA from the Columbia Graduate School of Business.

Q. What was your work experience after you left medicine?

A. Business school.

Q. Your work experience after business school.

A. Yes. I started work immediately in a venture fund. I did a brief internship at Merck, learned that I preferred startups and founding companies. And I went to a larger venture fund as a venture partner, founded companies, they were successful. I became a general partner at Oak Investment Partners.

Into the late '90s I decided to do nothing but internet. I spun out my life sciences portfolio in 1999 in the first synthetic secondary with institutional backers to form Apple Tree Partners I.

Q. Who were your first institutional backers for Apple Tree Partners I?

A. Landmark Partners, Goldman Sachs,

Liechtenstein Global Trust, VenCap, an insurance company. I forget all of them.

Q. And what is your role at ATP?

A. I'm a managing partner.

Q. Did there come a time in your time at ATP where you were introduced to Dr. Dmitry Rybolovlev?

A. Yes.

Q. What were the circumstances of that?

A. It was 2010, in the late summer, and a major biotech analyst on Wall Street, I think he worked for Merrill Lynch at the time. He sent an email saying one of the oligarchs would like to learn about biotech, would you be interested?

Q. Did you and Dr. Rybolovlev reach an agreement where you would manage money for him?

A. Yes. We met first in October of that year, and then we had multiple meetings afterwards, long meetings. And, yes, we did come to such an agreement.

Q. And what was the first amount that you were asked to manage for Dr. Rybolovlev?

A. 100 million, U.S.

Q. And did that amount of capital get

increased at some point?

A. Yes. Originally he was interested in my managing a billion and a half dollars for him. I preferred to walk before we ran, and suggested the 100 million. And after about eight or nine months, we met again, and I suggested -- we agreed that we roll the 100 million into a larger facility. The 100 million was in a fund called Apple Tree III, and the larger facility became Apple Tree Partners IV, L.P.

Q. And when you increased the amount of the investment to $1.5 billion, was there a change to the agreements between yourself and Dr. Rybolovlev?

A. Yes, there was a new LPA.

ATTORNEY BERDON: Marco, can you please pull up JX 0001.

Q. If you could turn in your binder, Doctor, or you can look at the screen.

Dr. Harrison, do you recognize what's been marked as JX 1?

A. Yes. That's the ATP IV LPA, the first page.

Q. And when this document was first executed, what was the form of Dr. Rybolovlev's

representation in the L.P.?

A. Form of his ...

Q. Withdrawn.

What were the names of the investors who contributed on behalf of Dr. Rybolovlev?

A. He had two BVI investors called Ezbon and Blue Horizon.

Q. And were they limited partners?

A. Yes.

Q. Were there other limited partners of the fund?

A. Yes.

Q. Who else was a limited partner of the fund at the time of its initiation?

A. Myself.

Q. And did you contribute capital to the fund?

A. Yes.

Q. How much?

A. 54 million.

Q. And are you still a limited partner of the fund?

A. Yes.

Q. And do you still own 100 percent of

that 54 million contribution?

A. No.

Q. Who does?

A. I gifted approximately 55 percent of that to a trust for my children called Les Pommes.

Q. Who negotiated the limited partnership agreement, the LPA, on behalf of ATP?

A. Myself and Dan Finkelman, who is now or general counsel, who was at the time in the fund's practice at Proskauer.

Q. And who negotiated on behalf of Dr. Rybolovlev?

A. Dmitry himself, and his CIO at the time, named Mikhail Sazonov.

Q. Generally speaking, how does the LPA work in terms of making investments?

A. We have a concept called budgets, which I suggested. The reason I suggested it is that I understood that if I were going to give someone a billion and a half dollars, I wouldn't want to give it as an entire lump sum. I'd want some control over it. And yet, my going-in fundamental concern was to be able to remain autonomous as an entrepreneur.

So I suggested to Dmitry that we

create budgets for every project. And he could approve any budget he wanted, any project he wanted. But once a budget was approved to fund a project within that envelope of money, I would call like a GP.

Q. When you say "call like a GP," what does that mean?

A. Call capital discretionarily within a budget approved for a given project.

Q. And based on your understanding under the terms of the LPA, who controls the actual business of the fund and its investments?

A. The general partner.

ATTORNEY BERDON: Marco, can we pull up Section 2(b). Thank you.

Q. Dr. Harrison, do you recognize the portion of the LPA that's in front of you?

A. Yes.

Q. And is this the section of the LPA that you understand to vest control of the business of the fund with the GP?

A. Yes.

Q. So, Dr. Harrison, can you just explain the process by which budgets are presented and perhaps approved.

A. Yes. Typically, I and my team would develop an interest or an idea for a new project that would generally take the form of a new company eventually. We would vet it internally. After a certain point, it would come to a level where we were interested enough so that I would bring it up in a Zoom call or an in-person meeting -- which, there were many with Dmitry -- and we would discuss it briefly and give him a heads-up that in some two to three months' time, at our next meeting, we would talk about it in depth seeking his approval.

Q. We'll come back to the actual execution of particular budgets later.

But who participated in the substantive discussions with Dr. Rybolovlev about the founding of the companies that we're here to speak about today?

A. It was myself, Dmitry, his then-CIO. The CIOs changed over the years. Initially it was Mikhail Sazonov, then it was Anna Batarina, then it was Anna Kolonchina. Typically that was it. On rare occasions we would have members from the ATP management team there. But I believe it was not typically to discuss budget proposals.

Q. Does the LPA have a set of provisions that you understand control when capital can be called?

A. Yes.

Q. And do you have a general recollection of what part of the LPA governs the ability to call capital?

A. Section 5, is it?

Q. Do you know, was Section 5 amended during the course of the parties' dealings together?

A. I believe so.

Q. And would you understand -- do you recall which amendment has the changes that currently govern?

A. Is it 3?

Q. Let's take a look.

ATTORNEY BERDON: Can we pull up JX 4, please. And, Marco, can we take a look at the full first page, please.

Q. Dr. Harrison, taking a look at the first page of Amendment 3, does that refresh your recollection as to whether --

A. Yes.

Q. -- it amended Section 5?

A. Yes, it does.

ATTORNEY BERDON: And let's turn to the next page, Marco. And can we blow up -- yes.

Q. Dr. Harrison, is, to the best of your understanding, paragraph 5(a)(ii), as set forth in Amendment 3, the most recent iteration of Section 5?

A. Yes, with the exception that certain entities have -- are no longer in existence that are referred to in the paragraph.

Q. Okay. So let's just briefly talk about that.

What's the name of that entity that is out?

A. ATC, which stands for -- or stood for Apple Tree Consolidated.

Q. At the time of Amendment 3, what was the function of ATC supposed to be?

A. The function of ATC had been to be the holding company through which the fund made all project investments. Because Dmitry's original goal, and a goal that remained intact until our most recent meetings, was to build a family-owned pharma company using a venture capital frame or apparatus.

Q. So were references to ATC subsequently

removed from the contract by amendment?

A. Yes, I believe so.

Q. Was ATC ever formed?

A. No, it wasn't.

Q. Was there ever a board comprised of representatives of Rigmora and representatives of ATP that controlled the budgeting process?

A. There was a board called for, but it was never constituted and never met.

Q. And so can you explain to me how, in practice, capital got called by ATP.

A. Well, there would be an approved budget, and then we would send a capital call and the capital call would be paid. There was a certain formalization in how the capital calls were written and laid out. But that was generally how it worked.

Q. And, categorically, what types of subject matter could be the subject of a call that would require financing?

A. There would be calls for approved budgets, projects that were approved in budgets. There would be calls for management fees. And there were two management companies -- or are two management companies, Apple Tree Venture Management and Apple

Tree Life Sciences, Inc. There were calls for fund costs, all laid out in the LPA. And there were calls for incubation expenses. And there may have been one or two other categories.

Q. But those are generally set forth in Section 5, as amended?

A. Yes, they are.

Q. Were provisions built in to the LPA to deal with the situation where a limited partner defaulted on a capital call?

A. Yes.

Q. And, generally speaking, do you know where those were dealt with in the agreement?

A. I don't recall the exact paragraph, no. I'm sorry.

Q. You think it was in Section 5, though?

A. Yes.

ATTORNEY BERDON: Marco, can we pull up section -- well, JX 1 at 23, please.

Q. Dr. Harrison, I'm showing you on the screen here Section 5(c) of the LPA.

Do you recognize it?

A. I do, yes.

Q. And is this at least a portion of the

section of the LPA that deals with defaults on contributions?

A. Yes.

ATTORNEY BERDON: Marco, can we go down to (iv), please.

Q. Dr. Harrison, what are the GP's rights, to the best of your understanding, in the event of a default on a capital call by an LP?

A. Well, they are listed here. The GP might impose a default charge. The GP might help the defaulting partner in selling its interest to potentially a substitute limited partner. The GP might accept a late contribution at his discretion. And the GP has essentially the right to sue.

Q. And did you and Dr. Rybolovlev specifically discuss and negotiate the default provisions that we're talking about?

A. Yes.

Q. And, in particular, do you recall which parts of the default provisions you talked about with him?

A. The entirety of the default provision.

Q. Including the ability of the general partner to impose a default charge?

A. Yes, absolutely. I would say that would have been -- that was his focus, and we discussed that explicitly.

Q. And did you have a position that you expressed to Dr. Rybolovlev about the importance of that provision to you?

A. Yes.

Q. And why was the ability of the general partner to have certain enumerated rights in the event of a default important to you?

A. I explained to Dmitry that we were about to embark upon a fund that would be funded essentially for the most part by a single LP, single-point financing. And this introduced a structural risk that I appreciated but that, more importantly, any counterparty that the fund would ever deal with would appreciate -- every founder, every CEO, every hire at the fund, any counterparty.

And that we just couldn't do business. It would be highly unlikely that we would be able to even start business unless we had such a remedy -- which, of course, we would hope we would never use, but needed to be structurally in place. And, in fact, was typical for every venture fund that I've ever been

associated with or that I know of.

Q. Was there a limitation imposed on the size of the default charge that could be imposed?

A. Well, it has to be discretionary and it has to be proportionate to the default. But I think the limit is 50 percent.

Q. In addition to Amendment 3, has the LPA been amended by the parties?

A. Yes.

Q. Including Amendment 3, how many times?

A. 22.

Q. During the course of the negotiation and execution of those 22 amendments, were the default provisions of the agreement ever changed?

A. No.

Q. In addition to the rights enumerated in Section 5, is there another effect if a default is -- if a partner is found to be a defaulting partner under the agreement?

ATTORNEY SELDEN: Objection, Your Honor. It calls for a legal conclusion.

THE COURT: You can testify to your understanding of this agreement that you negotiated, if you have one.

THE WITNESS: Thank you.

ATTORNEY BERDON: I'll make my questions to that effect.

BY ATTORNEY BERDON:

Q. To the best of your understanding, Dr. Harrison, is there another effect if a limited partner is declared to be a defaulting partner?

A. Yes. The defaulting partner loses its votes to direct anything in the partnership per the LPA. And this was critical because the entire point of the partnership, the fund, is to fund its portfolio. And if there were a default, particularly from a single source, funding source, it would be imperative and an emergency that we find substitute capital.

So having full control to do so was what the entirety of the default provisions allowed and what we negotiated for.

Q. And is there a specific section of the agreement, to the best of your understanding, that deals with voting rights?

A. Yes, but I'm afraid I don't know the number.

Q. Let's see if we can refresh your

recollection.

ATTORNEY BERDON: Can we go to, Marco, JX 1 at 74, please.

Q. Taking a look at what's before you, Dr. Harrison, does it refresh your recollection?

A. Yes.

Q. And is this the provision that you are talking about that discusses voting rights?

A. Yes, it is.

Q. Taking a look at the last sentence -- and it's got two parts -- can you explain to the Court your understanding of what that means.

A. My understanding of what that means is that if a partner is declared a defaulting partner, they have no control over the fund.

Q. Dr. Harrison, at the time of the execution of the LPA, was there a subscription agreement also signed at that point?

A. Yes.

Q. And to the best of your recollection, what was the sum total of the subscriptions that were executed by Rigmora?

A. By -- approximately 1.425 billion.

ATTORNEY BERDON: I'd like to pull up

JX 212, please.

Q. Dr. Harrison, do you recognize what's been marked as JX 212?

A. Yes.

Q. And what is that?

A. It's a subscription agreement.

Q. And taking a look at the execution page of that agreement, which I believe appears at 19, can you explain to the Court what we're looking at here.

A. I don't see the execution date, I'm sorry. But it's a signature page from one of the two investors that Dmitry used to fund the fund that was called Blue Horizon Enterprise, or Blue Horizon for short. And it's signed by Mikhail Sazonov, who was the CIO of Dmitry's Family Office, and witnessed by Andrey Milkov, another member of the Family Office.

Q. In the amount as indicated there, that's Blue Horizon's share of the initial investment in ATP?

A. Yes.

Q. Was there a counterpart for Ezbon?

A. Yes.

ATTORNEY BERDON: Let's just take a

look at JX 213, please.

Q. This appears to be the same subscription agreement; correct?

A. Yes.

Q. Let's take a look at the signature page, the limited partner signature page.

Does that reflect the amount of the subscription by Ezbon International?

A. Yes, it does.

Q. And your understanding is Ezbon International is affiliated with Dr. Rybolovlev's Family Office?

A. Ezbon and Blue Horizon were investors incorporated in the BVI investor entities that were funded by Scorpios Trust, as I understand it, which is a trust in Cyprus for Dmitry's daughters, as I understand it.

Q. So as between Blue Horizon and Ezbon, back at the time of the execution of this subscription agreement, what was the sum total? Was it 1 point --

A. 1.425 between Ezbon and Blue Horizon, 1.425 billion.

Q. And what was to become of the other 75 million out of the 1.5 billion that you described?

A. That was my limited partnership interest funded by a loan from Dmitry -- or Ezbon, I believe.

Q. And did your participation, limited partnership participation, ever increase to the $75 million level?

A. No. It reduced to 54 million.

Q. And that was by agreement between yourself and Dr. Rybolovlev?

A. Essentially, yes.

Q. The documents in this case, Dr. Harrison, talk about the establishment and the presence of things called "pools."

Can you explain to the Court what a "pool" is in the context of ATP.

A. A pool is a subdivision of the fund which -- of a fund, but a fund that became Apple Tree Life Sciences Ventures, Inc. -- a master fund, if you will -- that contained different groupings of investment based upon vintage, dwell time, the teams that have put them together, the high watermarks of the different aggregated companies in each pool. They were essentially accounting devices.

Q. And why were pools necessary from the

point of view of the limited partners of ATP?

ATTORNEY SELDEN: Objection. Calls for hearsay, I believe.

ATTORNEY BERDON: Okay.

Q. Did you participate in the discussions with the Family Office about the establishment of pools?

A. Yes.

Q. What did the Family Office and you -- withdrawn.

What did you believe the utility of the pool would be?

A. It was multipart. I just described the utility sort of from a technical perspective because we had old teams and a new team coming in that would found new deals. So we needed to segregate their deals in a pool out of fairness.

There was the fact that the new money for a new fund, essentially -- or a new commitment was coming from Dmitry in the amount of $1 billion on top of the billion and a half. And there were concerns from the Family Office about KYC issues and that the establishment of a new fund would be difficult.

So we all agreed that pools would be

the correct way to go, the most efficient way, the simplest way.

Q. And the first time the pools were established, was there an amendment to the LPA that was signed between the parties?

A. Yes.

Q. Do you remember which amendment that was?

A. I think it was Amendment 13.

ATTORNEY BERDON: Marco, can we pull up JX 15, please.

Q. Dr. Harrison, do you recognize what's been marked as JX 15?

A. Amendment 13 to the LPA.

Q. And taking a look at Section (a) there, "Separate Pools," is this what you were discussing in terms of the first embodiment of pools?

A. Yes.

Q. Were those embodiments subsequently changed by amendment executed between the parties?

A. Yes.

Q. And were the names of pools changed?

A. Yes, the names of those pools were changed, and new pools were established.

Q. You made reference just a minute ago to a transition to a new $1 billion commitment and a new team, I believe. Can you tell the Court how it came about that the Family Office made a new billion-dollar commitment to the fund.

A. Yes. We had had quite some success in our investment programs. Not everything was a success, but it was a very successful run. And Dmitry was very excited to invest in more companies of a particular type. And there were also some issues with the prior team that, despite their successes, they were much more focused on investing than they were on operating.

So the idea became to hire a top team of pharmaceutical, R&D entrepreneurs who were ready to jump into venture capital, use their networks and their formidable skills and backgrounds to found deals and actually manage them themselves. So that's what we did.

Q. Very briefly, can you just tell the Court when you speak about these experienced executives, who are you talking about?

A. We hired Paul Eisenberg, who was a chief medical officer of Amgen, one of the top

regulatory professionals in the world. We hired Mike Ehlers, who was the head of R&D of Biogen and before that ran neuroscience at Pfizer. We hired Spiros Liras, who was a top medicinal chemist for 25 years at Pfizer and had been at Biogen for one year, didn't like it. We hired Paul Jardine, who is a top brain in medicinal chemistry, also at Pfizer for 25 years, I believe. And others.

Q. Did you discuss these hires with Dr. Rybolovlev?

A. Absolutely.

Q. And was the addition of this talent part of the process of deciding how the new billion-dollar commitment would be invested?

A. Yes. He followed it very closely. When we hired Mike Ehlers, he needed to be told immediately by a Signal call. It was something he was very enthusiastic about.

Q. How did you and the team vet new investments?

A. As I told you, in my experience, typically to find a good deal, you need to find somebody who has come out of a system where they're seeing everything related to that deal. So you hire a

graduate student in immunology to find a great immunology deal. And we did that, and we had a great immunology deal with an exit called Syntimmune.

In the case of hiring these pharma executives, typically they know exactly the deals they want to do, and they have great relationships in academia, but their companies squelched them. So that theory proved out. When we interviewed people, there were a ton of really interesting ideas, great network, and obviously they knew how to manage projects.

So we just followed through on that thesis. And that was the basis on hiring the team, and that was the basis on bringing in the new crop of deals.

Q. And what was the general process that you then had to get those deals to be approved and budgets for those deals to be approved with Dr. Rybolovlev?

A. Well, first, we would talk about them internally. We would have meetings where we would basically beat each other up. We would kick the deals apart, put them back together. We would decide what we liked. I would, in the end, adjudicate what was a worthwhile investment. And then I would begin to talk

about it with Dmitry. And we would agree, as I said earlier, to discuss that deal in depth at an in-person meeting in the near future. There were many in-person meetings, so that was easy enough to do.

Q. And, generally, was Dr. Rybolovlev's approval of sort of a go on a deal arrived at at one of those meetings?

A. Oh, yes, absolutely. From the very beginning he would agree to something, and it would happen. So although there was a formalization that came afterwards, I came to trust in his word, and that was how it worked.

So we would eventually present the deal -- or I would present the deal. We would talk about it at whatever length he wanted. We would talk about the amount of the initial commitment in the budget. He would nod yes, and then we would go and formalize the deal.

Q. And tell me what the formalization involved.

A. The formalization involved finishing the business plan, finishing the term sheets with the source of the starting technology or IP or founders, and then putting together an investment memorandum, a

budget, something called a CFIUS memorandum in a budget request, and then sending all to the Family Office in an email of transmittal. And that was the formal process of getting a budget approved.

Q. Now, was the amount of the initial investment agreed to before the Family Office received the investment memo?

A. Yes, in the meeting with Dmitry. It was usually on the boat or in his apartment or somewhere, and it was agreed.

Q. Were specific milestones ever the subject of negotiation between yourself and Dr. Rybolovlev?

A. Never.

Q. Did you and Dr. Rybolovlev ever talk about there being conditions to your ability to pull down tranches of funding once a budget had been approved?

A. Only in two budgets did that ever occur in the entire history of our relationship.

Q. And what were the two times that that occurred?

A. There was something called the Braeburn RPA, royalty purchase agreement, which had

specific milestones, and we all agreed to them. And the most recent and last budget approval before all this trouble, and that was for a company called Replicate. And that had one milestone that Dmitry and Yuri wanted to put in.

Q. Once the budget was approved and formalized, of what use internally at ATP were any milestones that had been discussed in the original investment memo?

A. Very little.

Q. And why is that?

A. Because managing research is an iterative process. You are conducting experiments and evaluating their results, and you are then taking the next step. And it's completely a contingent and pragmatic enterprise. And that's what a good research scientist or a good manager of research or a good VC does.

Q. Well, you talked about formalizing arrangements with the people who had the technology and founders. What type of agreements did you execute with those folks at the initiation of a new project?

A. There would be multiple agreements. But I think the most important would tend to be the

Series A, because it usually was a Series A round, a Series A stock purchase agreement.

Q. And in any cases did those Series A stock purchase agreements contain milestones related to release of tranches of funding?

A. In some cases, yes.

Q. And in those cases, what was the utility of having tranches describing the funding associated with milestones?

A. To give the funds control.

Q. What do you mean by that?

A. Well, typically a milestone is developed between a founder or investing company and a venture capitalist based upon the best foreseeable business plan or research plan at the time that that round closes. And a round will typically run for two years, let's say, or three years.

And things change. And they always change. There are so many contingencies that come up in biotech: research, clinical, toxicity, formulation, regulatory certainly, manufacturing. They always come up. And the whole point is how you deal with them.

And those tend to perturb your initial milestone set. They always do. And VCs and boards

are used to dealing with that and constantly modifying and modulating them. And very few people really adhere to a milestone set because the idea is to continue to build the company working with the teams.

So for us, knowing that, being of that world, of that practice, whenever we put in hard milestones, it was just to have a bit more control in case we should ever want to stop funding.

Q. In your experience, was a missed milestone in and of itself a reason to terminate funding under a Series A agreement?

A. No, as I said.

Q. Have you ever decided to shut down a company that was in the ATP portfolio?

A. Yes.

Q. Can you give us any examples?

A. There was a company called Adendra, there was a company called Kynos, there was a company called Rox. There was a company called Vytronus. There were multiple. It doesn't always work.

Q. How did you adjudicate whether or not to terminate funding of those companies?

A. It depended on the case. There could be a catastrophic failure in the clinic. There could

be a safety signal. There could be just a bald execution problem that you saw and you realized this project should not be continued.

I believe that was the case in Adendra, because there was supposed to be a certain kind of antibody produced and it just simply wasn't produced and we said this isn't worth it.

There could be other problems. But you reach the ability -- in a long career you reach the ability to judge when to shut something down. You're not always right, but you try to get there and you turn things off.

Q. Are there any companies in the current ATP portfolio that you believe should be shut down?

A. No.

Q. And have you participated in conversations about the current status of research going on at each of the companies in the ATP portfolio?

A. Yes.

Q. And from time to time were there disagreements among your management team about the relative benefits of going forward with one company versus another?

A. Yes, absolutely. That's a healthy management team. We are always discussing quite vigorously the pros and cons of any given deal at any time.

Q. Given the availability of funding, would you continue to pursue research for each and every one of the companies that are currently in the ATP portfolio?

A. Yes. In some cases in a more focused way, but yes.

Q. I'd like to direct your attention back to the subject of pools and the new contribution.

Was there an amendment executed between the parties that implemented that new billion-dollar commitment?

A. Yes.

ATTORNEY SELDEN: Objection. Calls for a legal conclusion.

THE COURT: You can answer the question, if you have an understanding of whether there was an agreement you executed for that purpose.

A. Amendment 17 to the LPA.

Q. Thank you.

ATTORNEY BERDON: Marco, can you bring

up JX 89, please. And, Marco, can you just show the first page. Thank you.

Q. Taking a look at what's up on your screen as JX 89, do you recognize it, sir?

A. Yes. That's Amendment 17.

Q. And it was executed in September 2020?

A. Yes.

Q. At the time of the execution of Amendment 17, what, to your understanding, was its purpose?

A. Its purpose was to establish the contribution of a new billion dollars or an additional billion dollars to ATP IV LP.

ATTORNEY BERDON: And can we do the call-out, please, Marco, on -- thank you.

Q. Dr. Harrison, do you have an understanding as to whether this Section "20. Pools A, B and C" was something that you negotiated to effectuate that change?

A. Yes.

Q. Dr. Harrison, can you explain to the Court the different categories of what was stratified in Pools C, B, and A, as they appear in interest, in sequence here?

A. Yeah. Well, we started to bring on this new team in 2018. So they were already doing deals. And so we desired to segregate the deals that they were doing in a new pool.

And it's all called differently now, so I think that was Pool C. Is that right? Right. So that was essentially for new deals formed by the new team. And that was going to be the focus of the billion dollars.

And then Pool B contained some deals that had already been done. And there was a mix between old team and new team in Pool B.

And then Pool A was essentially all the old deals in -- that took up much of the initial billion-and-a-half-dollar commitment.

Q. And were the names of those pools subsequently changed?

A. Yes.

Q. What are the pools called that have the new deals, as you referred to them?

A. It's a little complicated. The new deals are now in Pools V-1 and V-2, Roman numeral V, referring to ATP V, and Pools 1 and 2, V-1 and V-2.

Q. Is there something called Pool V-3?

A. Yes.

Q. What's in Pool V-3?

A. It's older deals that had not quite made it across the finish line that we founded with the prior team and which we felt had potential but needed work. And we thought who better to do that work but this fantastic team of pharma R&D professionals that we just brought in. So we segregated those deals in a separate pool called Pool V-3.

Q. At the time of the execution of Amendment 17, was there also an amended subscription agreement signed?

A. I believe so.

ATTORNEY BERDON: Marco, can we go to JX 99, please.

Q. Dr. Harrison, do you recognize this agreement?

A. Yes. That's the subscription agreement to which you were just referring to.

Q. Is that for both of the Rigmora LPs or just one?

A. Just one.

Q. Was there one -- so this one says

"Blue Horizon." Was there one also executed for Ezbon?

A. Yes.

ATTORNEY BERDON: Can we scroll down to the Ezbon.

Q. Take a look at JX 101.

Do you recognize that?

A. Yes.

Q. Is that the amended subscription agreement from 2020 for Ezbon?

A. Yes.

Q. Cumulatively, what was the amount of that new subscription?

A. $1 billion.

Q. After the execution of Amendment 17 and this amended subscription agreement, was there another significant contribution of capital agreed to between the parties?

ATTORNEY SELDEN: Objection. Calls for a legal conclusion.

THE COURT: Tease that out for me. How does this factual question call for a legal conclusion?

ATTORNEY SELDEN: I believe Mr. Berdon

is calling for a legal conclusion as to whether there is, in fact, another contractual agreement for capital. If it is a factual question as to Dr. Harrison's understanding, I have no objection. But to the extent Mr. Berdon is seeking a legal conclusion as to whether there is an another contract governing the commitment of capital, I object to that.

THE COURT: I'm interested in this witness as a fact witness. And it's a fair question to ask, whether he thinks he entered into an agreement.

So why don't you ask the question.

ATTORNEY SELDEN: Thank you.

BY ATTORNEY BERDON:

Q. Dr. Harrison, did you and the Rigmora entities talk about there being a substantial increase in their investment after the execution of the billion dollars?

A. Yes.

Q. And did you consider at least part of that investment to be an agreement to contribute new capital?

A. Yes, absolutely.

Q. And did you believe that you were

entering into an agreement that would be binding and increase the level of their subscription commitment in that agreement?

A. Yes.

Q. And what was that agreement called?

A. Amendment 20.

ATTORNEY BERDON: Can we please pull up JX 1061.

Q. Do you recognize what's been marked as JX 1061?

A. Yes. Amendment 20 to the LPA.

Q. When was that executed?

A. June of 2021.

Q. It says here that in numbered paragraph 21 -- it's labeled "Braeburn Inc." Can you tell the Court what Braeburn is.

A. Braeburn is a pharmaceutical company that we founded in 2012 that now -- and we founded it as a Phase 1 company and it now markets a drug for opioid addiction and should have a $300 million sales revenue year this year.

Q. And what was the purpose of creating a separate pool, Braeburn, at the time that Amendment 20 was put into place?

A. To segregate the investment in Braeburn.

Q. Did that have an effect on high-water mark?

A. Yes. Braeburn was a very capital-intensive deal and it was considered fair to move it out of the other pools and give it its own pool. We changed economics, carry economics in favor of Dmitry in exchange for the lower high-water mark, and there were certain other features of Pool Braeburn that were put into the amendment.

Q. Did Amendment 20 also discuss the contribution of new capital?

A. Yes.

ATTORNEY BERDON: Can we go to, please, Section 22, Marco.

Q. Was there an agreement in connection with the establishment of Pool Braeburn that involved the contribution of -- or the valuing of capital that had already been contributed into the fund?

A. Well, to form the pool from ATP IV, or whichever Pool Braeburn had been in at that time, that there was a contribution to the new pool, which at that time of the formation of Pool Braeburn

constituted its capital. And that was 204 million, approximately, which was the valuation of Braeburn at that time.

Q. Taking a look at page 6, additional paragraph 22.

Can you tell the Court what your understanding is of the role of ATP Pool V-3 in Amendment 20.

A. Yes. I referred to it before, the setting up of a pool, in which companies that had been founded by a prior team but hadn't quite made it, that would be managed by the members of our new team, the pharma R&D executives. And that was Pool V-3. And in this paragraph, the companies that we wanted them to work on and that we put in that pool are called out.

ATTORNEY BERDON: Can you go to page 7, Marco.

Q. Is there a discussion there of capital -- new capital commitments?

A. Yes.

Q. What was the new cash, if any, that was to be provided under paragraph 22(b) relating to Pool V-3?

A. There were already existing budgets in

the amount of 71 million, you can see it in the paragraph, for these companies. And there was an agreement for committed capital of an additional 235 million, which you can also see in the paragraph. And the companies themselves were valued at approximately 190 million. And those were contributed to the new pool from the old pool. And the total of those three numbers was 500 million, which was the capitalization of Pool V-3.

Q. After the execution of Amendment 20, did ATP start to call capital on the amounts it had agreed to in Amendments 17 and 20?

A. Yes.

ATTORNEY BERDON: Taking a look at JX 230, please.

Q. Dr. Harrison, take a look at what's been marked as JX 230. What is it?

A. It's an email transmitting a capital call.

Q. Can you just introduce the Court essentially to who Anna Batarina is.

A. Anna Batarina is a partner in the fund. She started out as a member of Dmitry's Family Office. She was the CIO, as I understand it, for one

year and then was put at ATP by Dmitry as a kind of liaison, and eventually we made her a partner and a part of the team.

Q. Did Anna Batarina have to talk to you before she was allowed to talk to Dr. Rybolovlev in the chain of command?

A. Oh, no.

Q. And why do you say that?

A. Anna had a fluid dialogue with Dmitry. They talked quite often. I mean, I don't know how often. But whenever we were together, Dmitry would call her, she would call Dmitry. It was a full communication. I actually talked with her and said I think, from a GP perspective, we should really discuss what information gets communicated because some information is just not mature. And she felt that all information needed to be communicated. So that's how it was done.

Q. Did it become the practice at ATP to keep track of the drawdowns against agreed capital contributions whenever capital was called?

A. Yes.

Q. And how was that tracked internally?

A. Oh, internally we had a CFO.

Unfortunately, he resigned due to the defaults. But Bill would track these things meticulously, his finance team would. Of course we have audited financials, we have quarterly reports. So these were, of course, tracked.

Q. And did you provide updates to Rigmora about the accounting that you had on hand?

A. Yes.

Q. And how often were those updates provided?

A. With every single capital call.

ATTORNEY BERDON: Can we please pull up page 4 of JX 230.

Q. Dr. Harrison, do you recognize this form?

A. Yes, I do.

Q. And what is it?

A. It is the exhibit that you just referred to, which gives the Family Office a then-current statement of their funded and unfunded commitments across all the pools in the fund.

Q. And it shows commitments for ATP IV; yes?

A. Yes.

Q. And can you explain to the Court, what was left in ATP IV as of June of 2021?

A. After Amendment 20, we created a Pool ATP IV, and that contained the residuals of the prior exited deals. There were milestones that would pay out and that sort of thing from companies that had been sold.

Q. And at that point, what was the intention for Pools V-1 and V-2? Were those for the new deals?

A. Yes.

Q. And you talked about Pool V-3 previously. Cumulatively, what was the capital commitment that you communicated to Rigmora in June of 2021?

A. In this capital call -- the total unfunded commitment as of this capital call after the call was about 1.5 billion.

Q. Do you know if Anna Kolonchina, the recipient of JX 230, ever got in contact with Rigmora -- withdrawn.

Do you know if Anna Kolonchina on behalf of Rigmora ever got in touch with ATP to object to the accounting that was provided here?

A. Not that I'm aware of.

Q. How many capital calls do you believe were made and paid in the three years between 2021 and 2024?

A. I think it's four years, but scores. I don't have a number.

Q. Somewhere close to a hundred?

A. I don't know. I'm sorry. I mean, we could check, certainly, but many, many, many.

Q. Any time during that period of time before October of 2024 that Rigmora indicated a disagreement with the running total that had been provided by ATP attached to one of its capital calls?

A. There was never a time.

Q. I'd like to direct your attention to the fall of 2022. Did you have conversations with Dr. Rybolovlev over the summer of 2022 about his views towards future investment and founding of new deals?

A. Yes.

Q. What were those conversations?

A. Well, they evolved. They started out with the same idea that we had had in forming the pools that would take the new capital commitment because we had this great team and they had many, many

deals in their network. And no matter how we tried to beat them back, they kept coming up. And the team had some very many great deals to do. So there was a push/pull.

Dmitry was concerned about the Ukraine, concerned about liquidity on his behalf, but he really wanted the new team to be able to be capitalized to do deals. So we went from, I think, six new deals to three new deals to eventually late in the year -- and I know I get ahead of your question -- but just to complete the idea, only one new deal, and barely that.

And during that summer, he indicated that he had wished that he had not taken on the commitment to invest in new deals. And he told me that if he could default on a pool or on pools, it would be on V-1 and V-2. And there were several other features of the landscape at that time that were quite troubling.

Q. So let's go to the first time that you recall Dr. Rybolovlev saying that he regretted the investments in pools V-1 and V-2.

Was that in a face-to-face meeting?

A. Yes.

Q. Do you recall where that meeting took place?

A. I believe it was in Monaco.

Q. Can you place it in what month?

A. June or July.

Q. Did you end up writing a memo to Anna Kolonchina giving a chronology of events?

A. Yes. That was a memo at the end of November, because much had happened from the start of that summer through near the end of that year.

Q. Would reviewing that memo perhaps refresh your recollection as to the timing of meetings?

A. It might. I remember that there were -- there was a very long set of meetings with Dmitry in his apartment in New York in October, and we met multiple times. And much of this information came out in those meetings.

ATTORNEY BERDON: Marco, can we please pull up JX 969.

Q. Dr. Harrison, do you recognize what's been marked as 969?

A. Yes.

Q. And what is it?

A. It's an email from Anna Kolonchina to me dated December 12. And then it's responding to a long email that I sent her dated November 29.

ATTORNEY BERDON: Taking a look at the top bullets on page 3, please, Marco. I'm sorry, the bottom of page 2.

Q. Taking a look at those bullets -- and you don't have to read them out loud -- I'm just going to ask whether they help refresh your recollection as to the timing and location of meetings?

A. Yes.

Q. When do you believe the Monaco meeting took place?

A. I'm sorry. Yes, the -- so the meeting where Dmitry discussed with me the idea of reducing commitments both to new deals in V-1 and V-2 and calling less capital per unit time for approved budgets in V-1 and V-2, that took place in Monaco in late September .

Q. The word "austerity" is here in quotes. What do you recall about anyone's use of the word "austerity" in those meetings?

A. I recall that Anna Kolonchina used the word first, and it was the word she used to describe

this idea of calling less capital per unit time.

Q. And at the follow-up set of meetings, do you recall Dr. Rybolovlev drawing a distinction between his view of funding pools V-1 and V-2 versus V-3?

A. Yes, those are the New York meetings in October. And he basically told me, as I interpreted it, that was contemplating a selective default on pools V-1 and V-2.

Q. And at that point were the companies in Pool V-3 companies that had products in active clinical development?

A. No.

Q. What was the basis -- did he explain to you why Pool V-3 was preferred to him over Pools V-1 and V-2?

ATTORNEY SELDEN: Objection. Calls for hearsay.

ATTORNEY BERDON: By a party opponent?

THE COURT: Overruled.

BY ATTORNEY BERDON:

Q. Did he tell you why he favored Pools V-1 and V-2 over V-3?

A. Though they were earlier deals, I

believe he understood them better. We talked about them a lot. And they were ostensibly going to reach the clinic sooner than the deals in Pools V-1 and V-2. That's actually not what occurred. But that was the perception at the time.

Q. And at the time that Dr. Rybolovlev spoke to you about his desire to focus on Pool V-3 over deals in Pools V-1 and V-2, did he talk about the possibility of a default?

A. Yes.

Q. And did he express to you his view as to the consequences of a default if he defaulted not just on deals in Pools V-1 and V-2?

A. He told me that he believed there was a pool-by-pool default, not a global default. And then at one of the meetings when I -- I said that's -- I disagree. And then he asked me to agree in a subsequent meeting.

Q. Just to be clear, Dr. Rybolovlev asked you to reach an agreement that there were provisions -- that there would be provisions for pool-by-pool default; is that right?

A. Yes.

Q. Did you agree to make that change?

A. On the spot I told him -- it was often on the spot. I told him I would consider it because I was very, very eager to cooperate and try to work with him. I respected him. He provided an enormous amount of capital and we were doing a lot of good together. But I went home and I thought about it and I realized I couldn't agree to it.

Q. Did you ever reach agreement to modify the LPA to approve a pool-by-pool default structure?

A. Absolutely not.

Q. Did you do anything in terms of the administration of the fund or the portfolio or capital calls in response to the information that you had been given about liquidity or cash flow issues with Rigmora?

A. Yes, absolutely. As I said, we were always trying to accommodate them and trying to work with them. I couldn't agree to a global default, but I could certainly agree to calling capital at a lower rate. And so we went back to the teams and the companies and said, look, can you make due with less? In this quarter, can we call this amount and not that amount? Can we reduce the scope of the projects that the companies are working on? Those sorts of things.

And I would get pushback. And it would be, wow, yeah, but you know that means we're not going to reach the clinic.

And I would say it's okay if it takes another six months or even a year. It's better to have lower capital calls. It's what Dmitry needs.

And everyone would agree, and we would slow the companies down or drop some programs and call less capital.

Q. If you made those types of changes, would that have an impact on the company's ability to reach milestones that might have been described in the original investment memoranda?

A. Yes, in theory. But as I said, those milestones in an IM are rapidly obsoleted by the developments in the companies. But to the extent that there was one that was still being worked on, yes, absolutely. Any program that was being worked on when we slowed down the capital was going to get wherever it would go slower.

Q. And did you ever discuss with Dr. Rybolovlev the effect of reduction in the amount or pace of infusions of capital on the progress of these companies?

A. Yes. We said we can do it, but it's going to slow things down. And we said okay.

Q. While you were administering this belt-tightening, were you concerned that Dr. Rybolovlev would actually default on his commitments?

A. No. I had faith in the pillar of the partnership, at least my opinion of it, which I told him at the very beginning, and I maintain, and that is that he would not default because of the global default, if necessary, as a deterrent. Also because I thought he was honorable and believed in the companies.

The problem was that I had -- once we started to slow down the flow of capital, I had many, many people coming to me, worried in the constant -- the refrain was, okay, I understand liquidity constraints and slowing things down, that's okay. But do you think that the Family Office will meet its obligations for the entire Series A? Should I worry about that?

And my answer was always no, absolutely not.

Q. Just to be clear, your answer to those

folks was that ultimately you believed that the Series A funding would be there?

A. Yes, that the approved budgets would be met and the approved budgets matched the size of the Series A financings per company.

Q. In parallel with this, were you also doing some thinking about what would happen in the event of a default?

A. Yes.

Q. What did that look like generically, without disclosing the contents of any specific conversations?

A. When your largest LP tells you he's thinking about defaulting, honestly, you pick up the phone and call your lawyers and say, what does this mean? Can we look at the LPA? I need to understand this. I've never been in this situation before. And so we did.

Q. What would the consequences be of a funding default in Pools V-1 and V-2 to the folks associated with the portfolio companies, in your estimation at that time?

A. They would lose their jobs, they would lose the value of their equity. Projects wouldn't be

funded that we committed to academic institutions. And extremely well-known scientific founders with many, many options as to where they could go, other venture funds -- and they had chosen us -- who had had long conversations with me about the existence of the global default, those commitments wouldn't be honored. Each company has employees, has contracts for various kinds of leases, funded research back to founder labs. All of it would cease, and indeed in the current default has.

Q. There's a bit of contention in this case that perhaps some of the portfolio companies were wasteful or inefficient with their spending of capital.

Are you aware of that?

A. Yes.

Q. And did you or your management team ever take a look at the relative efficiency of one of your portfolio companies versus a set of peers?

A. Yes.

Q. Do you remember which company you looked at in that case?

A. That happened to be Ascidian.

ATTORNEY BERDON: Can we take a look

at JX 874, please, Marco. Let's start at page 1.

Q. So who is Dan Rosan?

A. He's the chief financial officer and chief business officer of Ascidian.

Q. And what was being sent to you and Ms. Batarina and Mr. Ehlers here?

A. It looks like a board pack from May of 2024.

Q. Turning to page 42 of that deck.

A. It also includes the Roche deal, definitive agreement.

Q. I'm sorry. Can you just tell the Court what you mean when you say "the Roche deal."

A. Ascidian did a big corporate partnership with Roche, and I believe it had just closed at that time.

Q. What type of financial relationship was put into place between Roche and Ascidian; do you recall?

A. It's a typical BV deal where Roche committed to develop three what are called targets, starting points, in the biology that Ascidian is exploring to create drugs. Those happened to be in the neurodegenerative disease space. For those three

targets, they agreed to an upfront fee of nondilutive cash on signing of 15 million per target, so 45 million.

And then there typically are some R&D milestones, early milestones that the company covers the R&D that takes place at its labs for those targets. And then there are milestones that are paid in the course of the work on the project starting with as early as one year after the commencement of the work for research milestones all the way out to post sales, reaching a certain plateau in revenue. And there's a royalty.

Q. Taking a look at what is in front of you as page 42 of that board deck, is this the comparison of efficiency that you mentioned earlier?

A. Yes. I was actually surprised.

Q. And how do you interpret the information on this slide?

A. Well, this is a list of competitors in what's called the RNA editing space or DNA editing space. And I will not go into detail unless asked. But these are companies that were founded to do something close to what Ascidian does.

And you can see -- and it measures how

much equity funding had been required until the company got its first project into the clinic.

And you can see that while some of them have greater pipelines and one has more than one clinical project, they have massively more equity financing than Ascidian. Ascidian took $78 million to get a very important product into the clinic for Stargardt's disease, which is the most common hereditary blindness, and it has a pipeline of seven programs. Not bad on 80 million.

You see what others have done for -- I don't know. The closest is three times more or something. No, that -- the closest that got into the clinic with one product was 361 million.

Q. Thank you, Dr. Harrison.

I'd like to just turn your attention back for a minute to Braeburn.

You mentioned that Braeburn is a pharmaceutical company that has a product on the market now. Has it been valued recently?

A. Yes.

Q. And what was the equity valuation at that time?

A. $2.2 billion.

Q. And was there also a DCF valuation done at that time?

A. Yes. It was 2.9 billion.

Q. Why is there a difference between the equity value and the DCF value, to your understanding?

A. The delta is made up by a royalty that ATP owned entirely, which was valued at the time of distribution at about 700 million and has a total face value of around 900 million. And that was distributed into a pass-through entity that is owned by the two partners in Pool Braeburn, myself and Anna Batarina, and the Family Office.

Q. Putting the royalty agreement aside, was Braeburn on firm financial footing in 2021, 2022?

A. No.

Q. And did ATP enter into any financial arrangements to address that in addition to the royalty agreement?

A. No -- oh, I'm -- in 2021?

Q. No. 2022 or 2023.

A. Oh, yes, we did, yes.

Q. What arrangements did Braeburn enter into?

A. We worked with Braeburn to put in

place a launch debt with Hercules Capital.

Q. Before putting the Hercules facility in place, who was going to be responsible for paying for the launch of Braeburn?

A. It would have been paid entirely out of the royalty purchase agreement, which was from capital provided by the Family Office.

Q. And did the Family Office have financial obligations to contribute capital for the purpose of funding the Braeburn launch?

A. Yes. The RPA required a budget commitment of $200 million, which they signed.

Q. Was there a rate of return that was agreed to in return for that $220 million commitment?

A. Yes. It was a 40 percent royalty but contingent on several things. It was capped at five times whatever amount would have been invested in the RPA, the royalty purchase agreement.

Q. Did Rigmora originally support the idea of the Hercules financing?

A. Yes, they asked us to do it.

Q. And did they stay constant in that support?

A. It was a bit schizophrenic. In -- so

we set up this launch debt with two different debt providers, and there were KYC problems, and they withdrew their term sheets.

Fortunately, ATP had a relationship with Hercules through another portfolio company that was public. So we called Hercules and asked them if they would do a deal, and they did. They did a very good deal with us.

Right at that time, the Family Office called for the distribution of Braeburn under Amendment 20 of the LPA. It's a distribution provision that entitled the Family Office to call Braeburn out of Pool Braeburn but subject to several conditions. The conditions weren't met, but more importantly, Hercules put conditions on providing their launch debt, which was that Braeburn be controlled by ATP and also that the securities of Braeburn -- namely, the equity and the royalty purchase agreement, and there was also a convertible note -- be essentially subject to their lien to secure the note. So calling, distributing those securities would have resulted in obliterating that deal.

Q. So the Family Office and ATP reached agreement to move forward with the Hercules financing

and put the distribution of Pool Braeburn aside at that point?

A. Yes, essentially.

Q. Did the issue of the distribution of Pool Braeburn come up again?

A. Yes.

Q. When was that?

A. July -- late July of 2024.

Q. And did that lead to a disagreement?

A. Yes.

Q. Did that disagreement become public?

A. Yes.

Q. How?

A. They sued us in Cayman.

Q. In connection with that lawsuit, did ATP assert any counterclaims?

A. No.

Q. Did ATP run into court here in Delaware to assert claims against Rigmora after being sued in Cayman?

A. No.

Q. What happened to that disagreement and lawsuit in Cayman?

A. I flew to Monaco and I suggested to

Dmitry that the best thing would be to settle. We had a couple of days of meetings and we agreed to the basic outline of a settlement in order to continue to work together.

Q. And during the time between the commencement of that lawsuit and the ultimate agreement to settle it, what was going on in terms of funding Pools V-1 and V-2?

A. We were calling capital, and the Family Office was meeting the capital calls.

Q. Did the Family Office's position change with respect to any aspect of its obligations to meet capital calls?

A. Did their position change?

Q. Yes.

A. Yes.

Q. And what changed?

A. Bizarrely, in October of that year, we started to receive the capital calls with a disclaimer that the Family Office viewed them as voluntary.

Q. And did the Family Office at that time explain to you why they felt it was voluntary?

A. No.

Q. Not in any conversations between

yourself and the folks at Rigmora did they explain it to you?

A. There weren't open, fulsome conversations at that time because, don't forget, we were in litigation and we were trying to settle it. So the conversations were constrained to initially the legal exchanges in the suit and then the settlement discussions.

ATTORNEY BERDON: Can we pull up JX 998, please.

Q. Dr. Harrison, looking at Exhibit 998, do you recognize it?

A. Yes.

Q. And what is it?

A. It's one of those disclaimer emails.

Q. And it's from Anna Kolonchina?

A. Yes.

Q. Now, she refers to an affidavit in that email.

Do you know what she is referring to there?

A. I believe it would be an affidavit that she would have made in their Cayman lawsuit.

Q. And did this language or language

referring to it ever appear again in correspondence from Rigmora?

A. Yes. It became a feature of their correspondence related to incoming capital calls.

Q. And how did the Braeburn litigation resolve?

A. It resolved in a settlement, which took the form of Amendment 22 to the limited partnership that I believe was signed December 20, 2024.

Q. Thank you.

ATTORNEY BERDON: Your Honor, I think we're up close to the time you wanted to take a break.

THE COURT: We are. We can do that. Thank you.

Let's take 15 minutes.

(Court in recess at 10:45 a.m.)

(Resumed at 11:00 a.m.)

THE COURT: Please be seated.

ATTORNEY BERDON: May it please the Court.

BY ATTORNEY BERDON:

Q. Dr. Harrison, just before the break we had talked about the execution of Amendment 22.

During the time that the Cayman litigation was pending, were there portfolio companies at ATP that were nearing the end of their Series A commitments?

A. Yes.

Q. Were there initial budgets?

A. Yes, their budgets at that time.

Q. And were there discussions between yourself and Dr. Rybolovlev about new budgets while the litigation was ongoing?

A. Yes, they were part of the settlement discussion.

Q. And were there -- can you explain to the Court the issues that you were facing in terms of certain companies coming to the end of their financing, initial financing commitments and initial budgets?

A. Well, the issues were that the companies in question in most cases were projected to run out of cash by certain dates. In one case, there was a company, Ascidian in particular, that would get to the middle of that Stargardt disease trial and then run out of funding to conclude it in the proper way with what's called a pediatric cohort. And that required additional capitalization in the form of equity and a new budget commitment. This was not news. This was an ongoing discussion.

Q. And, as you said, those discussions became part of the settlement discussion; is that correct?

A. Yes.

Q. Did they become part of the settlement agreement?

A. Yes.

ATTORNEY BERDON: Can we please have JX 1068.

Q. Dr. Harrison, do you recognize what's been marked as Exhibit 1068?

A. Yes.

Q. What is it?

A. Amendment 22 to the LPA.

Q. Do you recall there being a specific section that was called out to discuss about budgets?

A. Yes.

Q. Off the top of your head, do you recall what that was?

A. I happen to. It's paragraph 26.

ATTORNEY BERDON: Can we go to page 4, please, Marco.

Q. So I don't want to spend too much time on this, Dr. Harrison, but can you tell me an overview of what's discussed here in terms of the cash-out dates for these various companies.

A. They're four companies with projected cash-out dates: Aulos, which is developing a cancer drug in the middle of a clinical trial; Nereid and Nine Square, which are neurodegenerative disease companies that have very promising preclinical projects; and Replicate Bioscience, which is an RNA vaccine company with several promising projects and a clinical project.

Q. And is it fair to say that paragraph 26 here actually gives estimates of their cash-out dates as of the time it was executed?

A. Yes.

Q. In your view, was it clear to the Family Office and Dr. Rybolovlev that these companies were running out of cash in the near term as of December 20 of 2024?

A. Yeah, it wasn't news. We had discussed the need for new budgets -- had been discussing the need for new budgets prior to the commencement of their suit, their lawsuit.

Q. And I note that there's a proviso here that talks about "twelve months" budgets, a period of 12 months after the remaining unfunded amounts.

What was the significance at that time of the "twelve months" language?

A. Well, when I went to Monaco and proposed to Dmitry that we settle, I told him that, look, we've come a long way, we've been working together since 2011, we've had some great successes. But we've yet to build the pharma company that you wanted to build. It turns out that in the portfolio right now, Dmitry, there are projects that, at least to my mind, represent the formative aspects of that company. And we could take those pieces and really figure out how best to organize them in such a company.

And he said that's what he wanted to do. And that was the basis of the settlement.

But I said that it will take awhile to figure that out. That's a very complicated plan. We have the team, able to do it, but it will take some time. And I proposed that we put in place holding budgets so that the companies that were running out of money could continue for a 12-month period during which time we at ATP would work diligently on creating that plan and also work collaboratively with the Family Office and Dmitry.

Q. Turning your attention to the last sentence of paragraph 26. Can you tell the Court your understanding of the meaning of that last sentence.

A. That they would reasonably consider the new budgets and work diligently, and we would work with them, to create a loan facility that would be secured by the pass-through entity that had received the Braeburn royalty purchase agreement or the Braeburn royalty.

Q. And that was targeted to raise a certain amount of money?

A. About 300 million. He said he would use that 300 million to build pharma.

Q. And what was your understanding at the time of the availability of that type of financing?

A. Very available.

Q. And why do you say that?

A. Because the original idea of doing a royalty financing based on the royalty came from us. About a year prior, understanding there were liquidity issues -- this is before the suit in Cayman -- I started to sort of approach my network, which includes financial groups that do nothing but finance royalties. You sell them a royalty that you own and they pay you back something less than the total cash flow that you project it will have.

And we had worked out a deal where this $900 million-phase royalty would generate approximately 700 million for the Family Office. And we brought it to them, and we sort of didn't hear about it for awhile. And then they came back and said, oh, we have a better deal, we're going to take it on ourselves.

And that disappeared. That was sometime in the early summer of '24. And then the lawsuit. So when we emerged from the lawsuit via the settlement agreement, I thought we were going to

collaborate on the royalty financing, but they wanted to do it themselves. And after several months they failed.

Q. Do you believe that Rigmora was reasonable in trying to pursue that equity financing on their own?

A. I can't comment on that. I think it -- they certainly didn't use a resource that was right in front of them — us. We tried, but they wouldn't accept our help.

Q. Did Rigmora hire a financial advisor to try and help them?

A. Yes.

Q. And to the best of your understanding, does that financial advisor have a presence in the market for royalty finance?

A. I don't know that they particularly do or not. I think there's somewhat of a general shop based in the UK. I know that the group that we were working with does nothing but royalty deals.

Q. Have any of the companies listed in paragraph 26 been given additional financing by Rigmora?

A. Yes.

Q. Which?
A. Replicate.
Q. At the time of the execution of Amendment 20, what was Replicate's target out-of-cash date?
A. At the time of the execution of Amendment 22?
Q. 22. Forgive me.
A. February of 2025.
Q. Do you recall the date on which Amendment 22 was executed?
A. December 20th of 2024.
Q. And did ATP submit new budget requests to the Family Office after the execution of amendment 22?
A. Yes.
Q. When?
A. December 24th.
ATTORNEY BERDON: I'd like to put up Exhibit 1079, please, Marco.
Can you scroll down do the bottom email, please.
Q. Dr. Harrison, except for the fact that this appears to have been taken from Rigmora's files,

do you recognize the email that's highlighted in front of you?

A. Yes. It's my email of transmittal contained in the email to the -- the attachments were the budget requests.

Q. And in particular, did you have materials there for Replicate?

A. Yes.

ATTORNEY BERDON: Can we go to page 3, please, Marco.

Q. Do you recognize what's on the screen now?

A. Yes.

Q. What is it?

A. It's an investment memorandum we prepared for the $11 million funding extension for Replicate.

Q. Was it typical for ATP to prepare a whole new investment memo for an $11 million budget extension?

A. No.

Q. Why did you prepare it?

A. We were coming out of a lawsuit. We wanted to be really buttoned up. We wanted to make

sure that we did absolutely everything we could to make certain that the budgets were going to be approved. And we actually thought it was unnecessary in a normal operating environment. But we weren't sure what that operating environment would be after the settlement agreement, so we had our teams prepare a lot of materials.

Q. And I'm not going to walk you through it today because it's pretty technical. But did you believe it was adequate for the purpose?

A. More than adequate.

Q. Did you hear back quickly from the Family Office in response to your request for the $11 million budget extension for Replicate?

A. Not really quickly.

Q. Well, do you recall any response?

A. Yes.

Q. And what do you recall?

A. Yuri Bogdanov, who had recently become the head of the Family Office, sent us a very curious diligence request email.

ATTORNEY BERDON: Can we pull up JX 1107, please.

Q. Dr. Harrison, do you recognize what's

been marked as JX 1107?

A. Yes, I do.

Q. And taking a look at the email, what is it?

A. That's an email from me to Yuri saying that it's essential that we fund Replicate. We agreed to fund 12 budgets to the companies that we know are running out of cash, Replicate among them. Replicate is running out of cash on schedule, which would then be two weeks from the date of the email.

ATTORNEY BERDON: Can you scroll to the top. There you go.

Q. Do you recall receiving this response from Mr. Bogdanov?

A. Yes.

Q. And did Mr. Bogdanov have an attachment to this email that posed some questions?

A. Yes.

ATTORNEY BERDON: Can we get the next page, 3, please.

Q. Dr. Harrison, what's wrong with this set of questions?

A. It's bizarre. I mean, first of all, this is a company that we founded I think in 2021 and

on which we'd reported extensively, were the sole owner, and we had many, many, many conversations about with Dmitry.

And typically when you know a deal and you're just funding specific programs that you know and you understand the technology and you understand management and everything, providing an additional relatively small amount of capital shouldn't require much diligence at all.

Questions are, of course, fair. And reasonable questions are more than fair. And we're not only prepared to answer any questions, but we had already talked about Replicate, and then in the investment memo addressed all of their issues involved in what the company was going to do at that time with that $11 million.

What we have here, if you look at the first bullet point, Yuri is asking for all the board minutes and board materials since inception. That's just not a reasonable diligence request. It has no meaning for what the company is going to do with $11 million aliquot going forward in a specific couple of projects. That's the kind of diligence request that might come in an M&A transaction at the very end

of the transaction from a corporate buyer's legal department.

Then there's other features of this. The second one is also very strange. It's asking for a bring-down of all the company's spending, essentially, since inception, categorized by certain categories. I've actually never seen this before in any diligence effort in which I've ever been involved, either as the diligence doer or the diligence receiver, ever. So entirely make-work.

And then there were questions that were kind of unsettling because they referred back to the original Replicate investment memo. But not only were we clear that investment memo milestones don't travel with a development of the company, in Replicate's particular case we had pivoted away from the original investment memo milestones via an approved budget extension that the Family Office knew about and approved.

So Yuri here is asking about this pivot as if it's news. And that pivot was from cancer vaccines to infectious disease vaccines, which we did during COVID. And he's asking to justify the pivot and what does it mean about the company in a quite

negative framing.

And it goes on in that way that made us realize that this was anything but reasonable consideration of a new budget. It was, in fact, a kind of blockade.

Q. And just so the Court understands, when you talk about a "pivot," can you briefly talk about the significance of a pivot from a technology point of view and from the perspective of a venture capital manager.

A. Well, these projects are like organisms. You're always measuring them and figuring out what they're doing and then adapting your plan to what they produce in experimental results. You're also factoring what's going on in the environment, in the world, and you're understanding what you can do with a capital that you have in your budget or your Series A round or committed capital from another source.

In the case of Replicate, the RNA technology that it has really does have the potential to create a certain kind of cancer vaccine that would be great. The problem with that is that it would take three years to read out in a clinical trial. And we

already knew that it was problematic, from that perspective, when we founded the company.

And then when we were facing syndication issues, not related to companies, and COVID happened, we were intrigued by the idea of doing a different kind of a project in infectious disease that would read out, achieve its clinical proof of concept sooner. And that turned out to be a rabies vaccine. And so -- and that required moving from a $40 million Series A budget approval to a $53 million Series A budget approval, i.e., a $13 million extension.

And we talked about that with the Family Office and sent in that budget extension request with no IM, with no fanfare at all. They approved it, and we got on to doing the business of the pivot. The rabies vaccine, by the way, succeeded very well.

Q. Did the Family Office end up approving an extension of the budget for Replicate in early 2025?

A. Yes.

Q. How much did you ask for?

A. 11 million.

Q. And how much did they end up approving?

A. 18 million in two $9 million pieces.

Q. Was there any other condition that the Family Office placed on its willingness to fund those amounts?

A. Inside the budget, no, there was -- we agreed there would be -- this was the only budget aside from the Braeburn royalty purchase agreement, $200 million commitment, where there was a milestone inserted at the request of the Family Office. And that milestone request language is actually in the LPA. They can request and we reasonably do allow, but it only happened once. It was in this budget.

And the milestone was that Replicate conclude a Latin American deal with a pharma company in Latin America for the rabies vaccine.

Q. Do you recall receiving an email from Patrik Blöchlinger regarding the Replicate budget approval?

A. Yes, it was also quite strange. We sent the -- yes.

ATTORNEY BERDON: Can we pull up JX 1192, please.

Q. Dr. Harrison, do you recognize what's been marked as JX 1192?

A. Yes.

Q. Does this refresh your recollection as to any other conditions to the payment that the Family Office made with respect to the two $9 million tranches?

A. Well, we agreed when we were sitting down in Monaco in January -- and actually brought Replicate's CEO over to present to Dmitry and Yuri -- that we would put in this $9 million milestone inside the budget. Indeed, the budget that we sent, which is attached, in which they signed only has that milestone. And there it is.

But in the email of transmittal, outside the budget, Patrik Blöchlinger, the general counsel of Rigmora, adds this condition, which was news to us. And we didn't regard it as legal because it's what they want post facto, and they signed the budget.

Q. Did the Family Office ever approve new budgets that had been requested for Ascidian?

A. No.

Q. Aulos?

A. No.
Q. Nereid?
A. No.
Q. Nine Square?
A. No.
Q. So you testified a little earlier that the capital commitment at inception for Pools V-1 and V-2 was a billion dollars.
Do you recall that?
A. A billion dollars, yes.
Q. Was there any formal delineation between Pools V-1 and V-2 financially?
A. No.
Q. Do you know whether Rigmora has made contributions to those pools?
A. Yes.
ATTORNEY BERDON: I'd like to pull up PDX 1, please.
Q. Dr. Harrison, have you reviewed the source material that was used to compile the amounts set forth here?
A. Yes.
Q. Were they voluminous?
A. Yes.

Q. Were you able to commit them to memory?

A. No.

Q. So based on what we have here in front of you, can you tell the Court what the columns for "Approved Budget" and "Amount Contributed" mean?

A. Yeah. On the far left you see the list of the portfolio companies in Pools V-1 and V-2. You see Replicate in the bottom. And then you see in the fourth column over the approved budget for each company, the total budget, if there were multiple budget approvals.

And then in the next column over you see the amount that has been paid in on each of the budgets. And then you see in the final column the amount that remains of each budget that has not been called or contributed.

Q. So as of May 30th, 2025, was there about $178 million in budgeted but as-yet-uncalled capital for Pools V-1 and V-2?

A. Yes.

ATTORNEY BERDON: Taking the -- scroll down, please.

Q. Dr. Harrison, does the chart at the

bottom of this table contain information regarding Pool V-3?

A. Yes.

Q. And for Ascidian and Marengo, can you explain to the Court what that information is.

A. It's the same sort of information. You have the companies that have approved budgets remaining in Pool V-3, that's Ascidian and Marengo; the total amount of budgets approved in the fourth column over for each company; the amount that's been paid in on each budget in the next column; and then the remaining amount to be called on each budget.

Q. And if one were to sum the amount remaining on Pool V-3 with the amount remaining in Pools V-1 and V-2, did that sum to about $218 million?

A. Yes.

Q. And are you pretty confident in that math from the position of the general partner, not to the dollar, but you're confident in that math?

A. Yes.

Q. Do you also keep track of remaining budgets across pools to govern the capital calling process?

A. Yes.

ATTORNEY BERDON: Can we go to PDX 1 at page 3, please.

Q. Dr. Harrison, can you explain to the Court what this indicates in terms of budget remaining for each of those companies.

A. This is the total of the companies in Pools V-1, V-2, and V-3 listed. And the "Budget Remaining" column contains the budgets for each company that have been approved but not yet called.

Q. So putting that all together, we have about $214 million in budget remaining?

A. Yes. You said 218 before, but I think it sums to 214.

Q. I stand corrected. Thank you.

So did you have meetings in Monaco in March of 2025 to discuss the budget approval request for Aulos, Ascidian, and Marengo?

A. Yes.

Q. And what was the nature of those meetings?

A. We had had meetings in Monaco in January discussing why the budgets weren't approved, why there was no reasonable consideration of the budgets, Yuri's odd diligence request. Basically a

relationship reset meeting.

At that meeting, we also called in Nathaniel Wang, the CEO of Replicate, to scramble from the west coast of the US to Monaco to present, which he did. That was a successful process. And we all agreed that the management from each of Ascidian, Marengo, and Aulos would come at our next face-to-face meeting, and we scheduled that for March.

Q. Were their presentation materials prepared for those meetings?

A. Yes.

Q. And was there a data room opened that Rigmora could access in advance of those meetings?

A. Yes.

Q. And what was the nature of the data room?

A. Well, a data room is something you typically open for a pharmaceutical company to do due diligence, to complete a deal on a new target or something. And it contains all the IP, all the experimental data, every conceivable corporate document that you could imagine, every technical document.

And then you can regulate who enters a

data room, and you see who enters it, and it's a standard feature of getting a deal done in our space.

ATTORNEY BERDON: And just for completion, can we pull up JX 122 -- I'm sorry, 1222.

Q. Dr. Harrison, do you recognize Joint Exhibit 1222?

A. Yes.

Q. And what was it?

A. It was sending Yuri and Dmitry's assistant -- which was our way of communicating via email to Dmitry or with Dmitry -- the materials for those March meetings in advance of the meetings themselves.

Q. And were those presentation materials, in your view, highly detailed?

A. Oh, yes.

Q. Detailed enough for a reasonable person to make some decisions?

A. Yes. I would say detailed enough for an external due diligence, certainly a company with a data room. But if it's a company you own already and you know extremely well, where you've had multiple management meetings, this wasn't the first, this was a lot.

Q. And in addition to these written materials in the data room, you testified that management actually appeared?

A. Yes. We flew them to Monaco.

Q. And did that group include just employees?

A. Well, it included the senior management from each of the companies. And at the time we were also doing a review of oncology projects in the portfolio. And to do that we hired a consultant named Bill Grossman, who had been the head of oncology at Novartis and then became the head of oncology at Gilead. I knew him. He's very smart, highly qualified.

And so he was looking at our portfolio. And we offered to bring Bill to Monaco, be it just to make sure that if Yuri and Dmitry had any questions, they could ask them.

Q. And were questions asked of Mr. Grossman?

A. Yes.

Q. And did he express --

A. Dr. Grossman.

Q. Dr. Grossman. Did he express views

that could be perceived as critical of one or more of the companies?

A. Yes.

Q. What was that?

A. He was critical of the way that Aulos management had conducted the clinical trial.

Q. And did he say that those problems were irremediable?

A. No. Dmitry fastened on it and decided we needed to fire the chief medical officer. We thought that was a bit extreme, and we wanted to focus on what the actual problem was, which we did when we got back.

Q. After focusing on that problem, did you and your senior management at ATP eventually come to a path that you thought was appropriate to move forward with the funding of Aulos?

A. Yes. It was very interesting. We actually talked with -- it's a melanoma trial for treatment of melanoma that's failed everything else. And the company is doing extremely well. And the question is making sure that the criteria for recruiting the patients is correct. It was very interesting to talk to these melanoma experts and

really tighten the criteria and work with management to make sure that those became the inclusion and exclusion criteria in their clinical trial.

Q. Did you discuss that progress with Dr. Rybolovlev?

A. I tried to.

Q. And what did he say to you about his views of your ability to manage that problem on a going-forward basis?

A. In the meeting where I tried to discuss it, it was a Zoom meeting, he brushed it off. Then in a subsequent meeting, he brought up Aulos and he said, I trust your judgment, you've made me a lot of money; I understand that you want to do Aulos and we should do Aulos.

Q. Coming out of those March meetings, were budgets approved for Aulos, Ascidian, or Marengo?

A. No.

Q. After waiting a period or working on this for a period, did you actually make a proposal to the Family Office on how the existing budgets might be reallocated?

A. Yes.

Q. What prompted that?

A. It became clear to me by April -- we had submitted these budgets in December. The Replicate budget process was the only one that had gone through, and it was not normal. And there was no budgets that were being -- there were no budgets being approved.

It was clear to me -- also that the royalty financing that they were trying to do was not going to work out. They were proposing a very different structure that would involve encumbering Braeburn, the company, in a way that would not likely be acceptable.

So I looked at that and I just said, you know, I think the only capital that we're going to have, Dmitry, is the capital in the approved budgets. Why don't we just work within that and figure out how to move some of the clinical projects along to where they need to go so we'd have the definition of whether or not these should be the starting materials for the pharma company.

Q. And under that proposal, what would you be taking away from in order to direct that capital towards the clinical companies?

A. It was a reallocation of some of the

budgets from the preclinical companies to the clinical companies.

Q. Did you end up reaching agreement with the Family Office on a reallocation proposal?

A. Ultimately no. I thought we had but we did not.

Q. And from your perspective, why not?

A. Well, this -- what happened was that we had a Zoom call with Yuri and Dmitry and Anna Batarina and myself, I think it was on May 9th at this point, where I was to present the reallocation proposal. And I sort of led off with a 10-minute introduction of what it would accomplish, and then I was prepared to share screen with a spreadsheet, showing it.

And Dmitry and Yuri said no, that won't be necessary. This is moving in the right direction. Now we meet with the lawyers.

I said, that's strange. Why would we be meeting with lawyers?

Oh, we should just meet with lawyers.

I said, but usually when we do a deal like this -- and there were many -- we form some sort of a term sheet that will then become an amendment to

the fund or a side letter or some such thing. And we didn't need outside lawyers to do that. People might have that reviewed by outside lawyers, but it wasn't a necessary process.

Oh, no, no, this is very important; we need a lawyer call.

And we scheduled it for that Tuesday the 12th. I had sent several emails to Yuri and Dmitry in the interim, saying what is this lawyer call? Shouldn't we just try to do this in a normal way?

And we actually had Dan Finkelman, our GC, create basically a term sheet that would serve as the basis for what would become that reallocation amendment, or whatever you want to call it. So we wound up having this lawyer call, and I think that was sort of the beginning of the end.

Q. What about the lawyer call, from your perspective, got in the way of completion of a reallocation deal?

A. It was an ambush, literally. We got on the Zoom in good faith. We had one of our outside counsel, just to balance the fact that they were going to have outside counsel. But we didn't think anything

-- we were more curious than anything else.

Dmitry, Yuri, Patrik Blöchlinger and Anna Batarina, myself, and Mark Gordon from Wachtell and four lawyers from Latham & Watkins -- who I had never seen before, and I don't even think we made introductions -- where they just lit into me, the lawyers from Latham, saying it's obvious that you think the preclinical companies are worthless, otherwise why would you have proposed this reallocation. If they're worthless, why don't you shut them down? All of these crazy mischaracterizations.

I was shocked. Mark Gordon tried to throttle this very aggressive partner from Latham, but it was still the same thing.

And I just put up a wall. I did not say that. Those were not my words, et cetera. And it didn't go very well.

Q. So from your perspective, what was the value of the preclinical companies at that point and why were you willing to allocate budget money away from them to the clinical companies?

A. We've had a very successful translational track record, meaning we start early and

build through to clinical proof of concept. And looking at these projects that are the very projects that are created by this top-quality pharma team in the preclinical companies, they're just very strong projects, first stage. So what should happen is full budgets for the preclinical companies and full budgets for the clinical companies.

But pragmatically it was obvious that wasn't going to happen. So I did the next best thing, which is to say, look, at this stage, it would be better to advance the clinical projects, focus in on only selected preclinical projects, and bring them with a relatively small amount of money to the -- to the go/no-go decision to bring them into the clinic, which is where the real spend starts.

Q. Okay. After that lawyers call, did you end up getting some correspondence from Mr. Bogdanov?

A. Yes.

Q. And do you recall the date you received it?

A. May 15th.

ATTORNEY BERDON: Can we pull up JX 1336, please.

Q. Do you recognize --

ATTORNEY BERDON: Sorry. Can you go to the bottom email of the chain, please.

Q. Do you recognize what's been highlighted in the bottom email on the chain?

A. I recognize the email. It's an email that Yuri sent instructing us to kill the early-stage companies. And if we killed the early-stage companies, then they might consider providing budgets for the clinical companies.

Q. Well, let's just briefly take a look at the first sentence of the full text paragraph there. "The SLPs see no way for a path to commercial success for these Early-Stage Companies ...."

What was your reaction when you read that?

A. It was certainly a problematic statement, and I disagreed with it.

Q. Why did you disagree with it?

A. First of all, it was problematic because we started these companies as preclinical entities and the idea that if by "commercial success" you meant sales, it's impossible and known that they're nowhere near sales.

But commercial success for a company at this stage is a thing. It exists. You can do a corporate deal, which we have many in the portfolio. Ironically, one on this list and one that's not on this list, which have actually occurred subsequent to this email -- you can do an M&A of a company like this, and these happen. And there are many examples of early-stage companies getting bought for a fair amount of money. You can do an equity financing from the outside, which could eventually lead to a mezzanine round and an IPO for an early-stage company. And we've done those.

And in our case, if the idea is to build a pharma company with a pipeline, you could choose to fund some of these things yourself because there's value in each of these companies.

So I totally disagree.

Q. He also says that one of the reasons -- he says, "because: they have failed to meet [] milestones set out in the investment memoranda on which SLP's initial funding was premised ...."

SLP, what do you understand that to be?

A. Subject limited partner. It was a

term that Rigmora, for some reason, liked to use in legal correspondence.

Q. Did you agree that the preclinical companies' path to commercial success was hampered by their failure to meet milestones set out in an initial investment memoranda?

A. No. On the contrary. The whole point of having a team like we have is to develop the companies from the start that's represented in the investment memoranda to wherever they need to go based upon what the research programs tell them.

Q. It also says here, "there is no third party interest to invest in these Early-Stage Companies ...."

Do you agree with that?

A. No. It's not true.

Q. What type of third-party interest were you aware of at that time with respect to these companies generally?

A. There were negotiations going on with big pharma companies to do corporate deals along the lines that I've discussed, one of which has closed -- two of which have closed actually. And there has been a lot of interest from the VC market in these deals

but which has never eventuated in a financing due to the KY issues that we have faced, particularly post Ukraine.

Q. Two issues. Number one, which of the companies on this list has done a corporate deal that you're aware of?

A. Deep Apple did a corporate deal recently.

Q. And who was that with?

A. Novo.

Q. And when it was announced, was there a potential total value of that deal announced?

A. I think it was over $800 million.

Q. And going, then, to the point that you just made about KY issues. Can you be specific.

First of all, is that KYC?

A. Yes, know your client.

Q. Can you be specific about the nature of those KYC issues that have come up in discussions with potential equity investors?

A. Yes. It's plagued us and we've really tried to neutralize it in the market for years. After the Ukraine was attacked and the sanctions of Russian individuals became prevalent, we did a lot of work and

worrying with Dmitry about whether or not he would be sanctioned. He wasn't. He was correct about that. He was sanctioned by the Ukraine, but no one took that seriously. He wasn't sanctioned in the U.S. and the EU.

This didn't stop the market, namely the equity markets in the U.S., from not investing with a fund that was controlled by Dmitry's entities. And every time that we -- and we had done a lot of analysis on Dmitry. I won't go into it, but we understood that he was not going to be sanctioned.

And we would try to explain this, and the compliance departments would just shut it down. And we had term sheets that were yanked. We had financings that looked like they were about to close that were -- blew up. We had many, many discussions across the market. And it was pretty clear that we were locked in due to this problem.

Q. Another question for you -- down further in the text here it says, "The SLP's position is therefore that further funding of those Early-Stage Companies will waste the ATP Fund's assets. We understand that you hold a similar view ...."

Was that true?

A. Neither statement is true. And that was the problem in that lawyer call. They were putting words into my mouth. I didn't hold that view. I never held that view. I didn't express that view. It was their idea for me to swallow, which I wasn't having.

Q. After receiving what's been marked as -- forgive me -- JX 1336, what did you do?

A. Well, I wrote Yuri a reply saying I disagreed with everything, and here it is. And at that point, obviously, we were having serious conversations about what to do, given what was apparently a quite hostile position of the Family Office to the fund.

Q. Just for clarity's sake, you're referring to your email on JX 1336 at the top dated May 19th?

A. Well, what would you like -- I'm sorry?

Q. You talked about responding.

A. Yes, this is that email.

Q. You talked about the email that's on the top of Exhibit 1336?

A. Yes.

Q. Did you issue capital calls for funding of certain clinical and preclinical companies on May 30th, 2025?

A. Yes.

Q. Why did you issue the May 30th capital calls?

A. Fund the companies.

Q. What companies in particular?

A. I don't have the full list in my mind. But it was time to fund the portfolio.

ATTORNEY BERDON: Taking a look at JX 1622.

Forgive me for just one second.

Can we go up to JX 1622, please, and let's go to page 10.

Q. Dr. Harrison, do you recall -- taking a look at this list that starts at 5/30 with Deep Apple. Can you describe for the Court the companies that you sought capital for by calling capital on May 30th?

A. The ones that are dated May 30th. So Deep Apple, Aethon, Evercrisp, Red Queen, Apertor, Initial, and Marlinspike.

Q. And Replicate, there's one indicated

for June 1st. Was that related to the May 30th capital calls?

A. Yes. We had overcalled in error on May 30th, so we retracted that May 30th call and replaced it with a June 1st correct call.

ATTORNEY BERDON: And let's go to page 13, please.

Q. So, Dr. Harrison, does this chart represent how those capital calls compared to the remaining approved budgets as of the time?

A. Yes.

Q. How did you set the amount of capital to call for each of these companies?

A. We based it on the companies having six-month budgets from the presumptive date of the receipt of those calls.

Q. And what were you projecting could be accomplished within those six months at each of these companies? What was the goal?

A. In each case, following forward on their research plans.

Q. And on May 30th, did you also call capital for partnership expenses?

A. Yes.

Q. And did you call capital for a fee that was chargeable on a semi-yearly basis for ATLS?

A. Yes.

Q. Interesting, did you call your own management fee on May 30th?

A. No.

Q. So for any of the money that you called on May 30th, was any of that to be directed into your pocket?

A. No.

Q. At the same time as you called capital on May 30th, did you also file this lawsuit?

A. Yes.

Q. And why did you file the lawsuit?

A. After the May 15th letter from Yuri, Anna Batarina contacted me and said she had spoken with Dmitry and Yuri and she wanted to tell me something.

I said, what's that?

And she said, if you call capital, it's treason, and they will sue you.

And I said, oh. And I knew that at that point, there was no possibility of a reproachment. No possibility of any kind of

agreement.

Q. Did you believe that you had the right under the LPA to bring a lawsuit against an LP who had breached the LPA?

A. Yes, absolutely. It's in the LPA.

ATTORNEY BERDON: Can we please pull up JX 1 at 74, 75, Marco.

Q. Taking a look at what's next to (iv), here. Do you recognize this language, Dr. Harrison?

A. Yes.

Q. And what do you understand it to mean?

A. It gives me right to sue a partner who defaults.

Q. And taking a look at (iv) at the bottom, "To the fullest extent permitted by law ...." Can you just read that to the Court.

A. "To the fullest extent permitted by law, each Limited Partner hereby specifically agrees that, in the event such Limited Partner violates the terms of this Agreement, such Limited Partner shall not be entitled to claim that the Partnership or any of the other Partners are precluded, on the basis of any fiduciary or other duty arising in respect of such Limited Partner's status as such, from seeking any of

the remedies permitted under this Agreement or applicable law."

Q. Did the LPs pay the capital calls that were served on May 30th?

A. No.

Q. And did ATP, to your understanding, issue notices saying that the LPs were in breach of their agreement to contribute capital in response to those calls?

A. Yes.

Q. And are you seeking a finding that the LPs are in breach of that agreement?

A. Yes.

Q. What's the current status of the preclinical companies, Dr. Harrison?

A. They are in desperate condition. We've had to do massive layoffs. We've had to move companies to -- out of facilities, heavy negotiations with landlords, sales of capital equipment, consolidations, reduction of research programs.

In one case we kept a program that bloomed from a platform technology, but we had to cede that technology back to the source institution. Very difficult relationships with founders. You know, a

mess.

Q. If funding were to be made available to you, for example, by the end of the year, would you be able to reconstruct those companies?

A. Yes. We've managed to keep alive the critical projects that we thought were valuable, even at the beginning of the reallocation proposal, in the form of key employees in most of the companies that retained the knowledge. In some cases, there's tiny amounts of research that are ongoing. And so, yes, absolutely, they can be readily reconstituted. I don't know for how long, but yes.

ATTORNEY BERDON: I pass the witness.

ATTORNEY SELDEN: Good morning, Your Honor. Shannon Selden of Debevoise & Plimpton. We have some binders for the Court and the witness. May we approach the bench and hand out those binders?

THE WITNESS: May I ask a question? Are they also going to be on the screen, or do I use the binder?

ATTORNEY SELDEN: We will show them both on the screen. But you can use the binder, if that's more convenient for you.

THE WITNESS: Thank you.

ATTORNEY SELDEN: Your Honor, am I correct in thinking that we'll take a break for lunch at 12:30?

THE COURT: Correct.

CROSS-EXAMINATION

BY ATTORNEY SELDEN:

Q. I was going to say good morning, Dr. Harrison, but I see it's afternoon.

Good afternoon, Dr. Harrison.

A. Good afternoon.

Q. Do you recall Mr. Berdon showed you a demonstrative with budgets and commitments broken down by pool?

A. Yes.

Q. Setting aside the math for a moment, that demonstrative was based on your understanding of the LPA and its references to pools, wasn't it?

A. It was based upon my understanding of the budget commitments that have been signed in, which we keep records of in that ATP.

Q. The demonstrative that you looked at with Mr. Berdon is based on your understanding of the LPA, its amendments, and the budget requests and commitments; is that correct?

A. Yes.

Q. Dr. Harrison, you understood that there was a limit to the amount of capital that had been committed to the fund; correct?

A. Yes.

Q. You understood that the fund could not invest more capital than it had committed to it; correct?

A. Correct.

Q. As of May of 2023, you knew that Dr. Rybolovlev and the Family Office intended to cap their investment in the fund at $2.5 billion; correct?

A. Dmitry had informed me that that was his wish, but that is not reflected in the agreements that had been signed.

ATTORNEY SELDEN: Could you please play clip 96 from Day 3 of Dr. Harrison's deposition at page 243, lines 11 to 15.

(A video clip was played as follows:)

Question: Does that refresh your recollection that in May of 2023 Dr. Rybolovlev and the Family Office informed you that they intended to cap the investment at $2.5 billion?

Answer: Yes.

(End of video clip.)

BY ATTORNEY SELDEN:

Q. At that point in May of 2023, you didn't do anything to assess the amount by which the fund's commitments to invest in its portfolio companies exceeded $2.5 billion; correct?

A. I think when Dmitry informed me that he wished that it be capped at 2.5 billion as opposed to the 2.9 or so that it actually summed to, we were very interested in, as usual, creating accommodations. So we did go back and try to figure out, is there any way to shoehorn everything we're doing into something like 2 1/2 billion dollars? I think I remember that I couldn't possibly get it down to less than 2.7. We kept trying and trying. And we talked about that.

ATTORNEY SELDEN: Could you please play clip 70 from Day 3, page 244, line 22, to page 245, line 1.

(A video clip was played as follows:)

Question: Did you do anything to assess the amount by which the fund's commitments to invest in its portfolio companies exceeded $2.5 billion?

Answer: No. Not specifically, no.

(End of video clip.)

BY ATTORNEY SELDEN:

Q. Dr. Harrison, you don't recall calculating the difference in dollars between 2.5 billion and the amount of dollars that the fund had committed to invest in its portfolio companies as of May 2023; correct?

A. The specific answer to your question is no, because I was calculating something else.

Q. And you didn't do that calculation at any other point in time; correct?

A. Could you clarify the calculation that you mean?

Q. Dr. Harrison, you do not recall calculating the difference in dollars between the $2.5 billion cap that Dr. Rybolovlev informed you of and the amount of dollars that the fund had committed to invest in its portfolio companies; correct?

A. We calculated the aggregate of commitments and approved budgets and tried to bring them within range of what Dmitry said he wanted, but we were unable to do so.

ATTORNEY SELDEN: Could you please play clip 71, which is from Day 3, page 247, line 25,

to 248, line 4.

(A video clip was played as follows:)

Question: Did you calculate the difference in dollars between $2.5 billion and the amount of dollars that the fund had committed to invest in its portfolio companies as of May of 2023?

Answer: I don't recall.

(End of video clip.)

BY ATTORNEY SELDEN:

Q. And you didn't do that calculation at any other point in time, did you, Dr. Harrison?

A. I honestly don't recall what -- doing exactly what you're asking. But I repeat that we struggled with Dmitry's request over months, over multiple discussions, to attempt to fit everything into 2 1/2 billion, and it was impossible.

Q. Dr. Harrison, I'm afraid we have limited time today, and I'm asking you yes/no questions. So I'd ask you to listen to my question and answer that question. And if you have other testimony to give, I'm sure Mr. Burden will have an opportunity to redirect. But I am sensitive to the clock.

Dr. Harrison, as of last week you

didn't know the total amount of money that the fund had contractually committed to invest in its portfolio companies; correct?

A. I don't keep that as a running sum in my head.

Q. In October 2023, ATP's general counsel, Dan Finkelman, wrote you an email discussing the fund's unfunded commitments to its portfolio companies; correct?

A. I'm sorry. When was that?

Q. October of 2023.

A. I don't know. I don't remember.

ATTORNEY BERDON: Your Honor, as Your Honor knows, there's been a roll-off production of otherwise documents that were claimed as privileged. And we would ask that they be treated as highly confidential in this proceeding because, even if used in this proceeding among the parties, they will still retain privilege in Cayman under Cayman law as long as they are not disclosed to the public.

So we would ask that the courtroom be sealed during any questioning relating to otherwise privileged information that was in the roll-off production.

ATTORNEY SELDEN: Your Honor, paragraph 25 of the pretrial order governs the use of confidential or highly confidential information in this proceeding. It requires the parties to meet and confer in advance of trial, which defendants attempted to do. We asked plaintiffs to de-designate this material by letter dated September 29, by letter dated October 8, and by chaser email dated October 12.

Plaintiffs have declined to engage with us with respect to the reduction in designation of that material, and did not raise this concern about closing the courtroom in advance.

Paragraph 25 of the pretrial order further provides that if the parties are unable to reach agreement -- which we had very much hoped to do -- the parties seeking to maintain highly confidential information throughout trial should seek an order from the Court, which plaintiffs have not done in advance of trial.

So we would ask, including for the interest of time, to be able to use this information, which we understand is subject to a privilege waiver publicly and with the witness.

ATTORNEY BERDON: Your Honor, just for

completeness of the record, we did ask for a meet-and-confer on Monday in a letter that was sent, and I don't believe that one was made available to us.

THE COURT: So I understand Mr. Berdon's request made just now to be in the motion that was contemplated in the pretrial order. Is that wrong?

ATTORNEY SELDEN: We had expected, Your Honor, that if plaintiffs were going to raise the objection and seek to close the courtroom, that they would have raised that in response to one of the three letters that we had sent them prior to October 12th, or at the very latest going into this hearing.

I think there has been a privilege waiver with respect to these documents. They have been used in depositions. They have been produced. They are among the rest of the joint exhibits on the list. And we think it's appropriate to use them in this proceeding.

I also think, given the limited time again, Your Honor, and the number of issues and, frankly, the amounts and nature of the claims at stake, it would be appropriate if we could use them with the witness and move quickly through them.

THE COURT: I don't think he's objecting to your use. I think he's objecting to using them publicly in a way that would undermine the privilege objections or privilege assertions in other proceedings.

What is your response to that?

ATTORNEY SELDEN: My response to that, Your Honor, is perhaps we could stipulate that we will use the documents in open court in this trial proceeding. And the effect of that use in this proceeding, to the extent that it has an implication on the Cayman privilege waivers or evidentiary rules in the Cayman court, I think the Cayman court can adjudicate that if and when those issues arise, and Your Honor should leave that to the Cayman judge and let the documents come in here. I think we can --

THE COURT: So I hear you saying that you want to stipulate that the Cayman court will resolve privilege issues there.

ATTORNEY SELDEN: Yes, that the Cayman court decide Cayman privilege issues.

THE COURT: You don't need to stipulate to that. The Cayman court will resolve Cayman privilege issues.

The question is whether the use of those documents here will affect their arguments as to privilege in Cayman. I hear Mr. Berdon saying it will. And his solution is that we close the courtroom when you want to use them.

What is your response to that?

ATTORNEY SELDEN: My response to that is that there has been a privilege waiver with respect to these documents and they should be used in open court like any other nonprivileged document. That they were -- many of them -- improperly designated as highly confidential in the first instance, improperly designated as privileged in the second instance. And those improper designations should not now be a bar to their use in this public proceeding.

THE COURT: Correct me, it's been awhile. I thought that the argument you made as to these documents was that your client was within the scope of privilege?

ATTORNEY SELDEN: Yes, I think there are a number of arguments that we made with respect to these documents, Your Honor. One of which is that our client is within the scope of the privilege and so they shouldn't have been designated privileged in the

first instance.

Secondly, that there were over-designations of material that was not privileged at all as to anyone.

And third, that there are documents designated "Highly Confidential" which ought not to be highly confidential.

So I think there are layers of objection to many of these documents, none of which, frankly, Your Honor, I think require sealing the courtroom. The documents that we propose to use relate to a dispute between these parties that is many years in the making. The document I am about to show Dr. Harrison, for example, is from October of 2023. I don't think that is relevant to or prejudices any ongoing business concern or the companies or the other kinds of sensitive, live, trade secret, business decision, public information.

THE COURT: That doesn't speak to whether they're privileged. So if a document -- if the reason why -- if there is an argument that the reason why your client received the document in discovery here is because your client's within the scope of privilege, that doesn't eliminate the

protections of that document to the rest of the world. Right? It means that your client can see it. But there is a risk that disclosing it in open court could undermine arguments that the privileged information your client's entitled to see is no longer confidential and, thus, no longer privileged.

So I see the concern here. I don't know whether the document you're discussing now or about to show the witness falls into that category. But if it does, I think the solution is to seal the courtroom and for you all to identify who in the courtroom is within the scope of privilege so that showing it doesn't blow privilege. So I'm not sure how we do that now. Maybe you want to talk a break and do it, or maybe you want to talk about it over the lunch break. Either way, I'm open to.

ATTORNEY SELDEN: Thank you, Your Honor.

I would suggest that, in the interest of time, we skip ahead and I'll proceed with questions that don't implicate those documents, and then we can discuss during the lunch break whether and how to seal the courtroom and who's within the scope of privilege.

Would that be acceptable, Your Honor?

THE COURT: That works, yes.

ATTORNEY SELDEN: Thank you, Your Honor.

BY ATTORNEY SELDEN:

Q. Dr. Harrison, on your direct with Mr. Berdon, you discussed Rigmora's obligation to discuss budgets in good faith following the entry of Amendment 22; correct?

A. Correct.

Q. And following Amendment 22, on Christmas Eve or December 24, 2024, you sent Dr. Rybolovlev a budget request for four companies; is that right?

A. Correct.

Q. And it's fair to say that since those companies had been founded, the fund had contributed tens of millions of dollars to them; is that right?

A. Yes.

Q. And when sending the budget request, you informed Rigmora that you had set up data rooms for them to access; is that right?

A. Yes.

Q. You expected Rigmora to review the information provided in the data rooms and ask

questions; right?

A. No.

Q. You set up data rooms containing supportive materials with the new budgets that you did not expect Rigmora to access?

A. I doubted very highly whether they would review them. We did it to make sure they understood that after the settlement agreement we were being radically transparent.

ATTORNEY SELDEN: Let's put up JX 1107, if you will.

Q. This was the response that Mr. Bogdanov sent to your December 24, 2024, budget request; correct?

A. Yes, for Replicate.

Q. Mr. Bogdanov replied on January 5th after the holidays; is that right?

A. Yes.

Q. Dr. Harrison, do you recall that you testified that Replicate had pivoted from oncology to a rabies vaccine over the course of the fund's investment in that company?

A. Yes.

Q. It's not bizarre for an investor to

have questions about that change in strategy from oncology to rabies, is it?

A. It's bizarre if the investor already knew about it and approved the budget that enabled it, in my opinion.

ATTORNEY SELDEN: If we could turn to page 3 of Exhibit 1107.

Q. That's the list of questions regarding Replicate; correct?

A. Correct.

Q. It's your position that these questions didn't constitute a bona fide diligence request; correct?

A. Correct.

Q. And it's your position that Mr. Bogdanov's questions did not have any diligence logic in assessing the merits of the companies; correct?

A. Essentially, yes.

Q. Let's look at that list of questions.

At paragraph 5 in the third sentence, Mr. Bogdanov asks, "After four years, could you please outline the main reasons for shifting RBI-4000 and RBI-5000 from oncology to infectious disease

indications?"

Do you see that?

A. Yes.

Q. In question number 6, Mr. Bogdanov asked, "In the 2021 Replicate memo, the team stated: 'The profile of Replicate's first product is highly differentiated ....'"

Then later he goes to to ask, "Currently, the company has a substantial share of indications related to infectious diseases: [] Does this suggest that the company has lost its differentiation and is now operating in a more competitive environment, as was suggested in 2021?"

In 6.3 he asks, "How has the company's technology evolved over the past four years compared to its main peers?"

Do you see those questions?

A. Yes.

ATTORNEY BERDON: Object to the form to the extent that the next question is going to be lumping, compound.

THE COURT: We'll see what the next question is. Please continue.

BY ATTORNEY SELDEN:

Q. The next question is, Dr. Harrison, in your view, these questions from Mr. Bogdanov constituted an obstructionist tactic; is that correct?

A. The totality of these diligence questions did, yes.

Q. In your view, the diligence questions were sent to prevent and avoid funding a company that the Rigmora LPs, in good faith, were obligated to consider a budget for; is that right?

A. Yes.

Q. But Rigmora, in fact, agreed to provide bridge funding for Replicate before receiving answers to any of Mr. Bogdanov's diligence questions; correct?

A. Yes, that was an emergency effort. We suggested that Replicate would go out of business while we were resolving the issue of these diligence questions. And we suggested a million-and-a-half bridge, to which the Rigmora LPs agreed.

Q. And then a month later, Rigmora approved an $18 million budget increase for Replicate; correct?

A. Correct.

Q. And the $18 million budget increase

that Rigmora approved was more than the $11 million you had initially requested on December 24th, wasn't it?

A. Technically correct.

Q. Let's talk for a moment about what information ATP provided to the Rigmora LPs in connection with their request to make an investment.

Prior to approval of a portfolio company deal by the fund, a primary deal sponsor from ATP was responsible for preparing a thorough investment memorandum; is that right?

A. Yes.

Q. Your view was that the investment memorandum should include an operating plan for the portfolio company; correct?

A. Yes.

Q. Another thing the GP provided to the Family Office was the background and precedent for their approach to any particular company; correct?

A. Yes.

Q. The investment memoranda provided for a tranche investment scheme gated by milestones; correct?

A. The investment memoranda provided for

a tranched investment scheme, and the then-current thinking on what the company would achieve over time.

Q. One of the purposes of that tranched investment scheme was to derisk ATP's investment; correct?

A. All tranched investment schemes do that, or intend to.

Q. Including the tranched investment schemes included in the investment memorandas for the portfolio companies that ATP sought funding for; correct?

A. May I answer the question in my way, or do you just want a yes or no?

Q. I'd like a yes or no.

A. Yes, correct.

Q. After the fund's initial investment, you frequently pivoted away from the plans for the portfolio companies that had been presented in their investment memoranda; correct?

A. Technically correct. It's not that we tried to pivot. It's that the companies had research programs that suggested to us that the best way to manage them was to make changes.

Q. When that happened and the company

departed from the plans presented in its investment memoranda, you didn't update the investment memoranda provided to the Family Office; correct?

A. No, we did not.

Q. In fact, you've repeatedly said that how the evolution of a project relates to its business plan or its investment memorandum is irrelevant; right?

A. I wouldn't call it irrelevant; I would call it a starting point. But where it is in the middle of its investment cycle, it can't be predicted at the time of the investment memo. It's the look at that time, the view at that time.

ATTORNEY SELDEN: Could you please play clip 106, Day 3, page 282, line 17, to 283, line 23.

(A video clip was played as follows:)

Question: You were uncomfortable going to founders and companies and reminding them that in their SPAs there were milestones that had to be achieved before funding would be released?

Answer: As I have said over many hours with you, Shannon, that is simply not how it works in this market where you're developing drugs

from new technologies working with teams of scientists of various stripes. It is simply not how it's done.

You work in a way that is enabling and that understands that research brings forward different results, and you work with them and attempt to push things forward.

And as I've said repeatedly, based upon experience, often a project can look like it's not going well, and you look at it differently and you change things and it's going well. And as I've said repeatedly, how that evolution relates to a business plan or an investment memo that occurred at the outset of that company's life is irrelevant.

(End of video clip.)

ATTORNEY SELDEN: We have stopped that testimony in the middle of Dr. Harrison's answer, but -- to avoid raising any issues with respect to confidentiality or privilege.

Your Honor, I would suggest that we break a minute or two early for lunch and take up the sealing issues after that. I think that likely the most efficient thing will be to simply seal the courtroom for the balance of Dr. Harrison's testimony after lunch. But let me consult with my team, if

that's acceptable to Your Honor.

THE COURT: Sure. We'll resume at 1:30. Thank you.

(Lunch recess taken at 12:25 p.m.)

(Resumed at 1:30 p.m.)

THE COURT: Please be seated. Thank you.

So what did you work out?

ATTORNEY SELDEN: Good afternoon, Your Honor. We have consulted with plaintiff's counsel. We are happy to seal the courtroom. I apologize for any confusion. I didn't know plaintiff's counsel had wanted to do that before this morning, but we are happy to seal the courtroom.

We have asked from our team anyone outside the privilege to leave. So they shouldn't be here, but we'll pause for a moment.

THE COURT: Yeah, so there's a lot of people in the courtroom. Is everyone in the courtroom within the scope of privilege?

ATTORNEY SELDEN: For defendants, Your Honor, I can say that we are. There are indeed a number of lawyers here, I'm afraid. But everyone here has been checked and is within the scope of privilege. And I've consulted with Mr. Berdon as to that question.

Your Honor, while plaintiff's counsel caucuses, I would just note the interpreter is here.

I believe the interpreter is authorized.

THE COURT: Yes.

THE INTERPRETER: Your Honor, I'm a certified court interpreter with the State of Delaware and I'm considered to be a court officer.

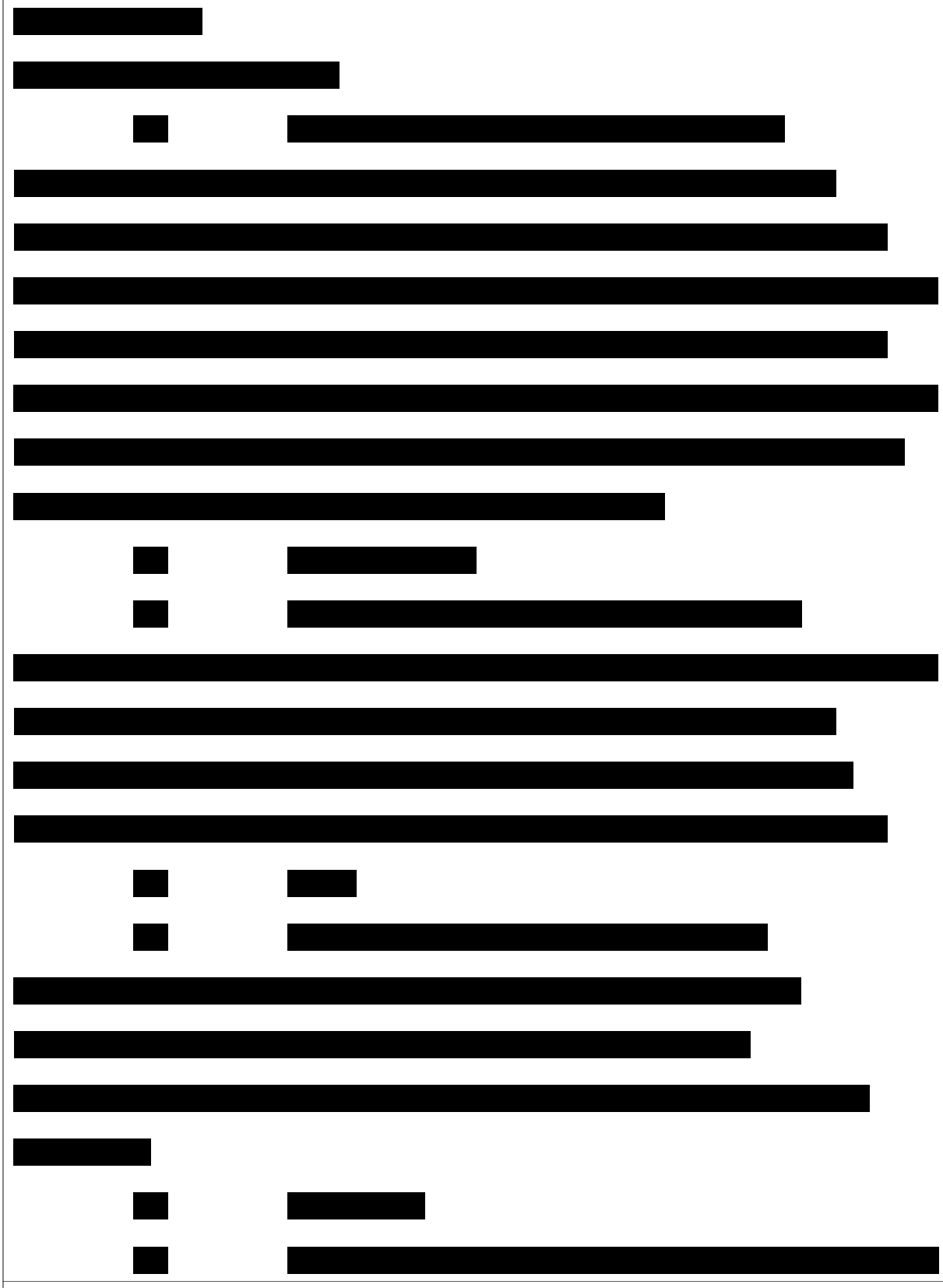
THE COURT: Yes. He's allowed.

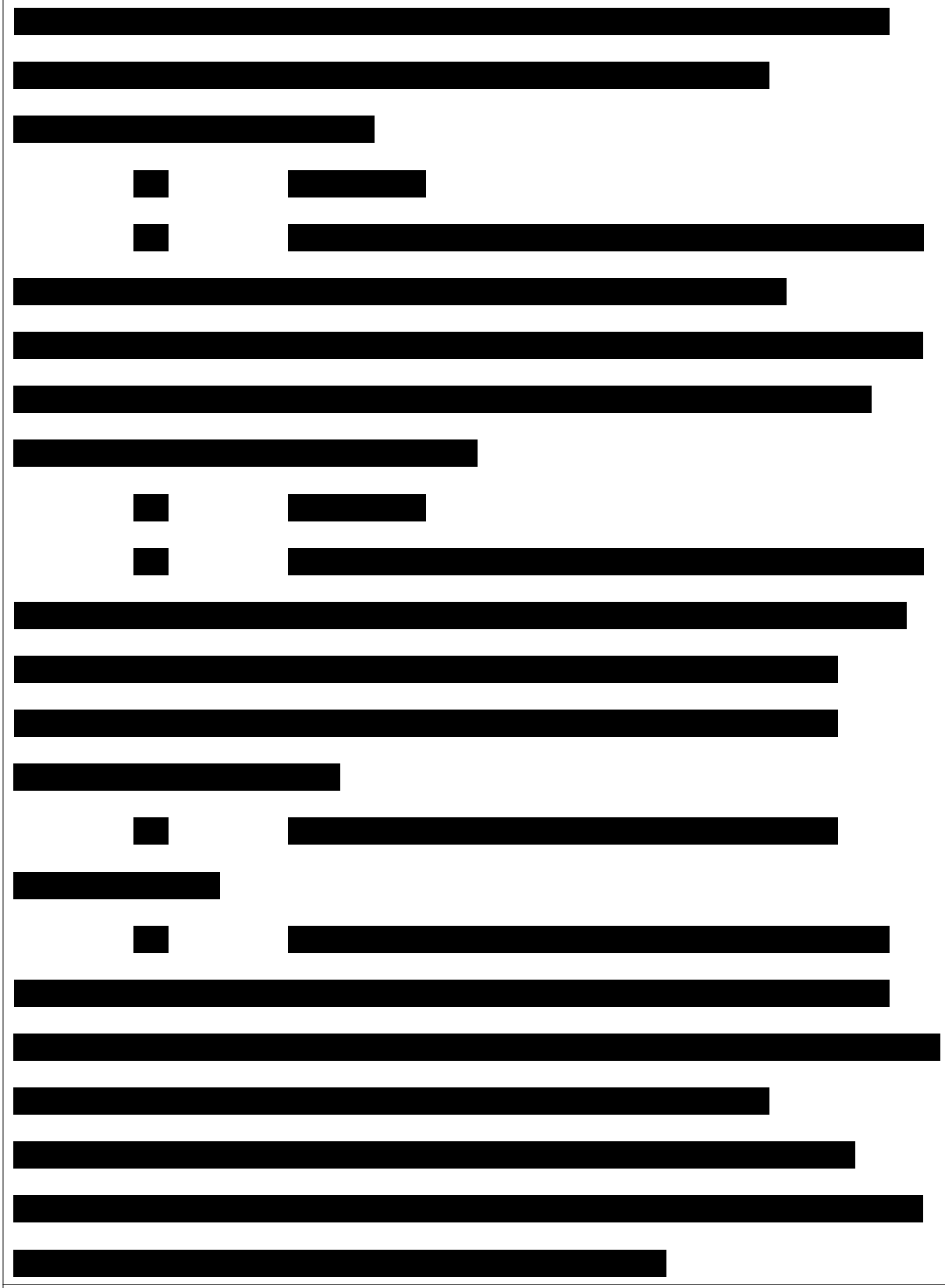
ATTORNEY SELDEN: Great. Thank you.

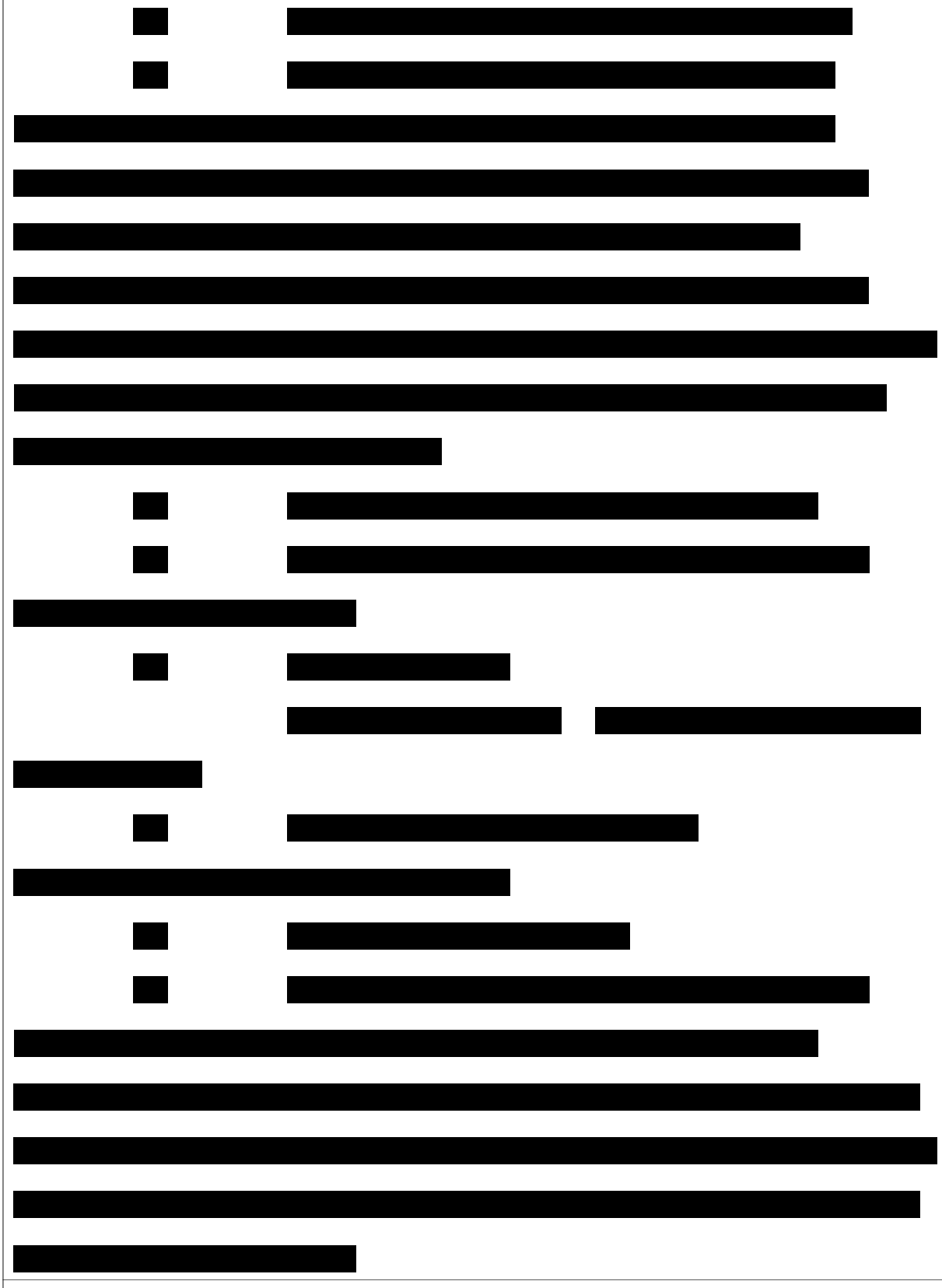
THE COURT: Shall we proceed?

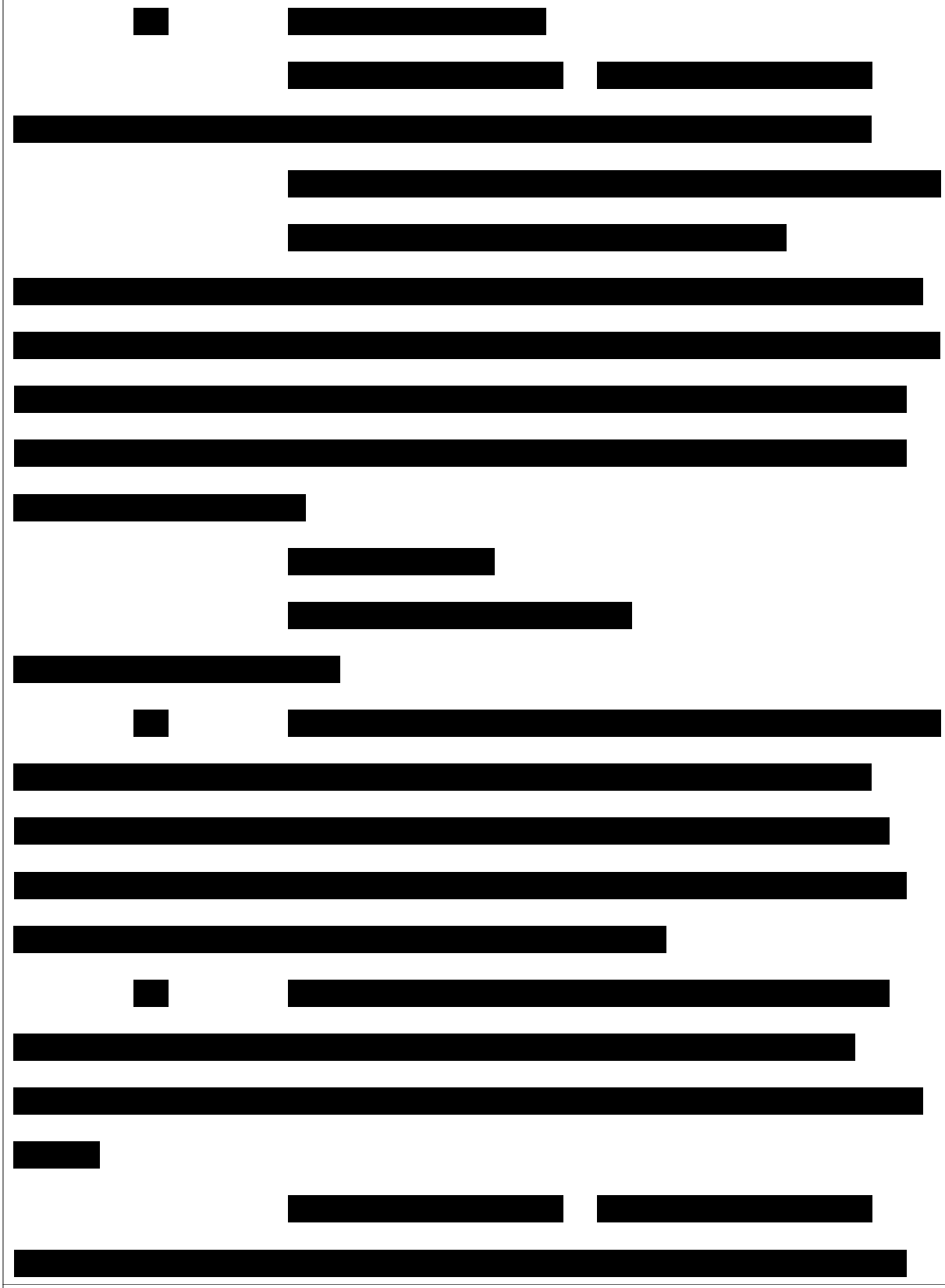
(This portion of the record was deemed confidential and the courtroom was cleared.)

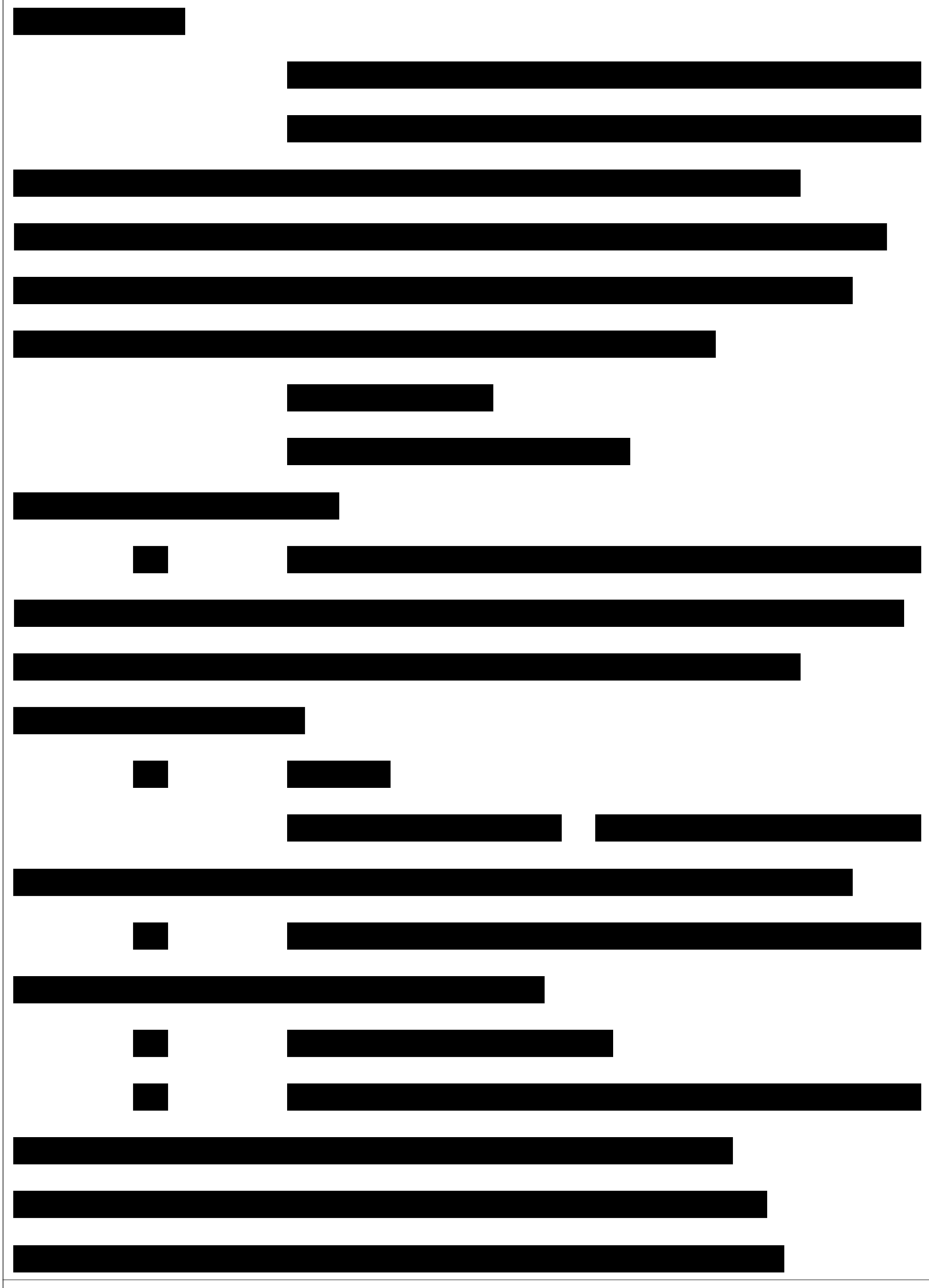
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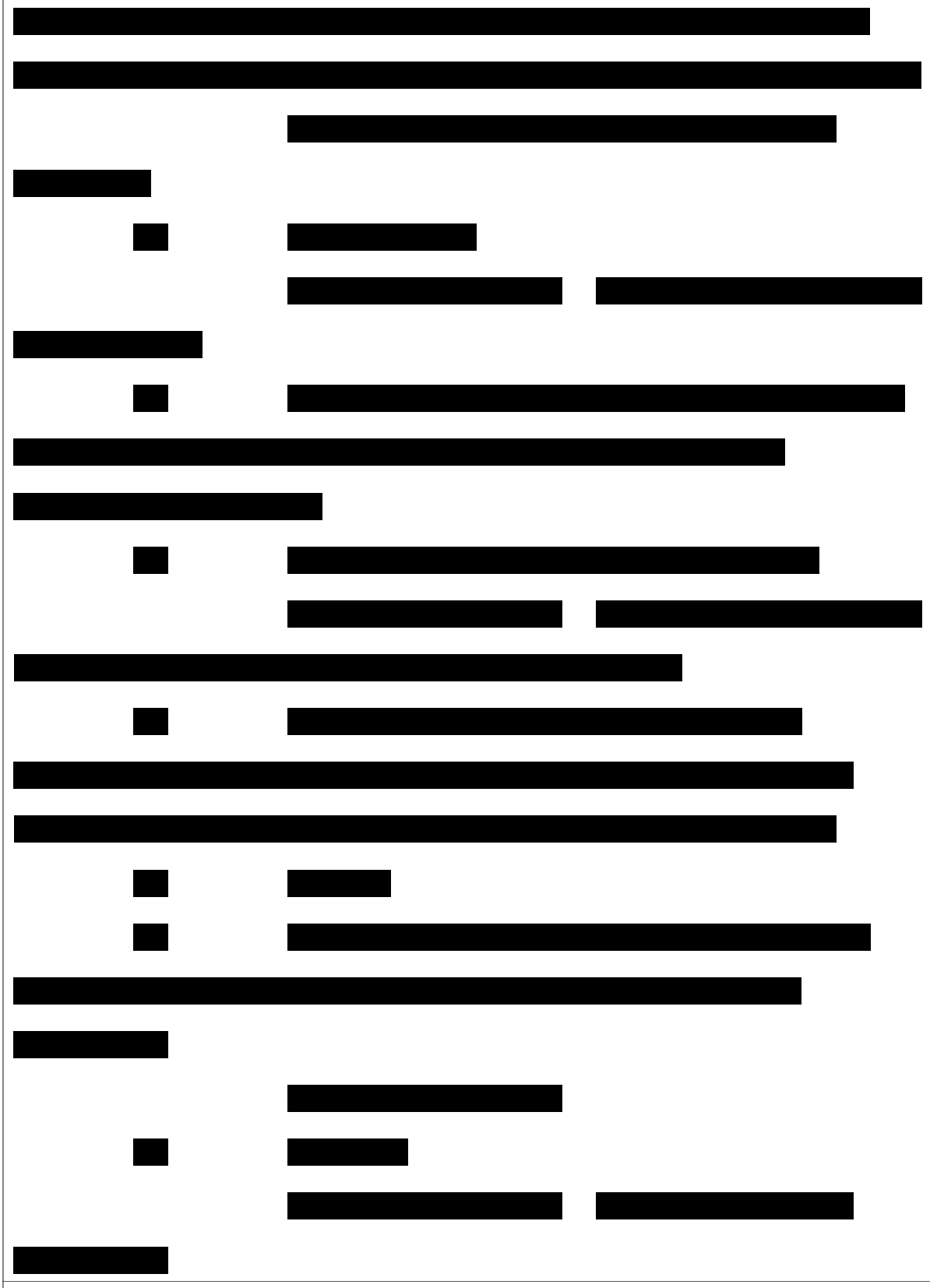


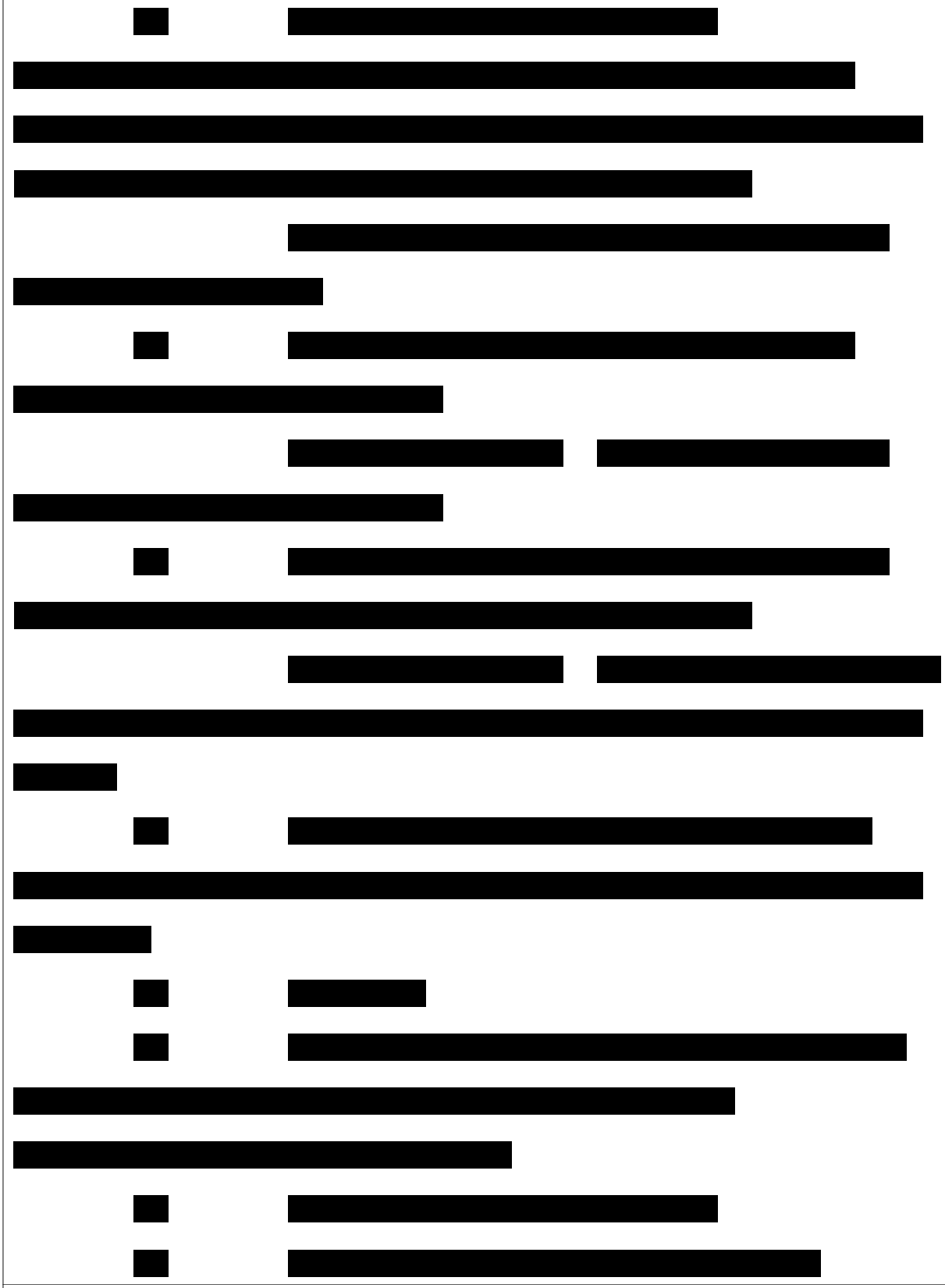


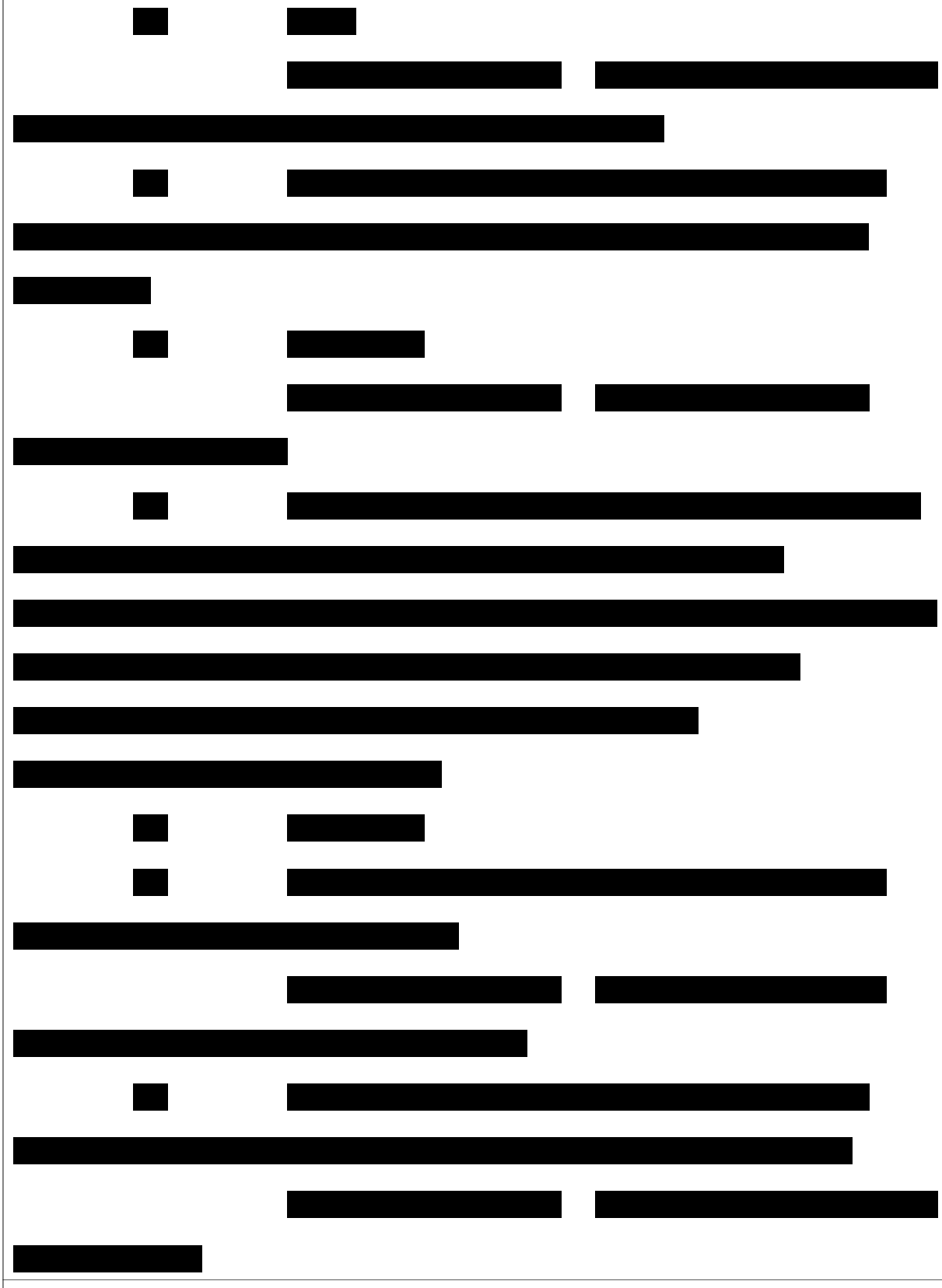


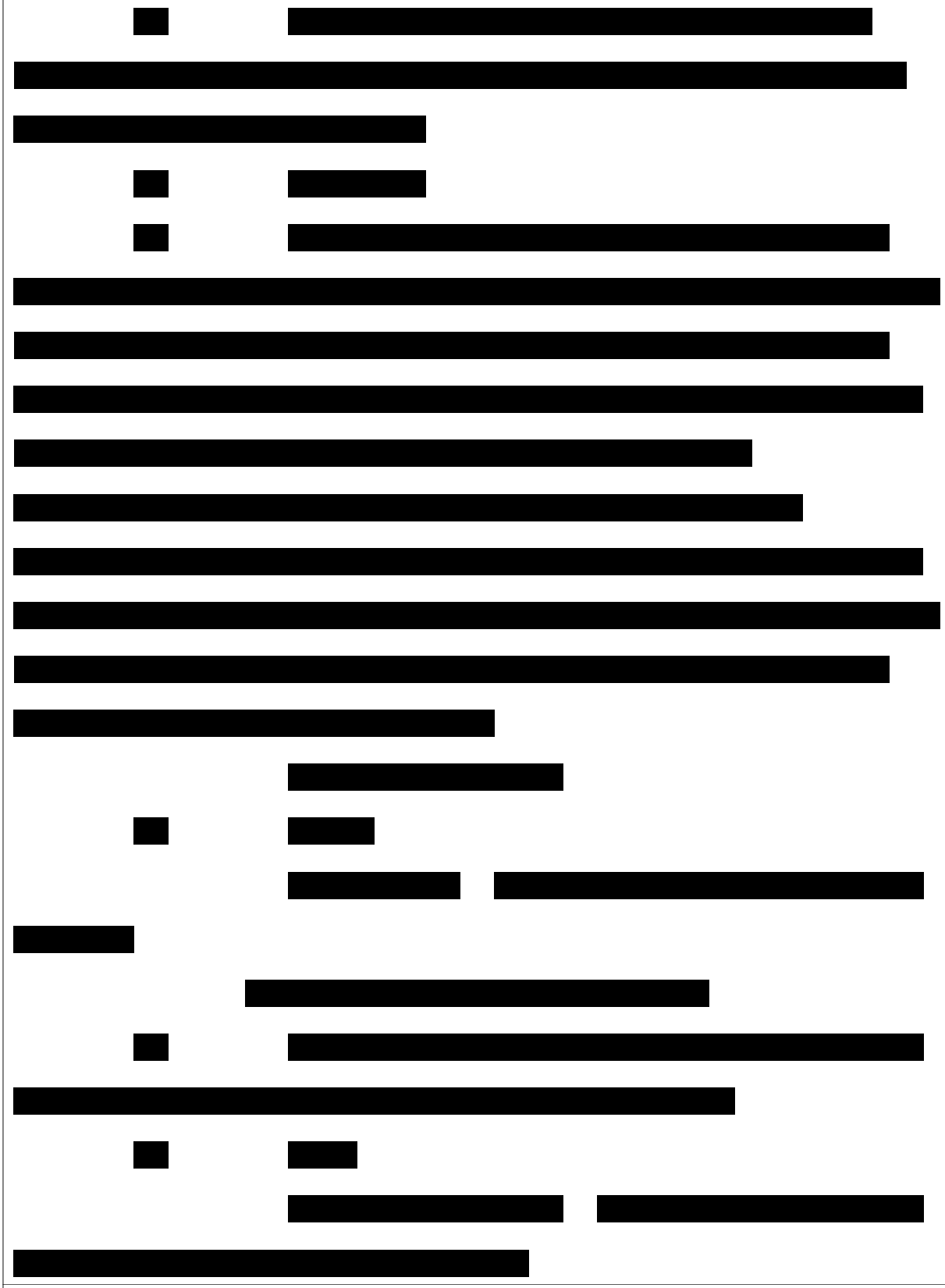


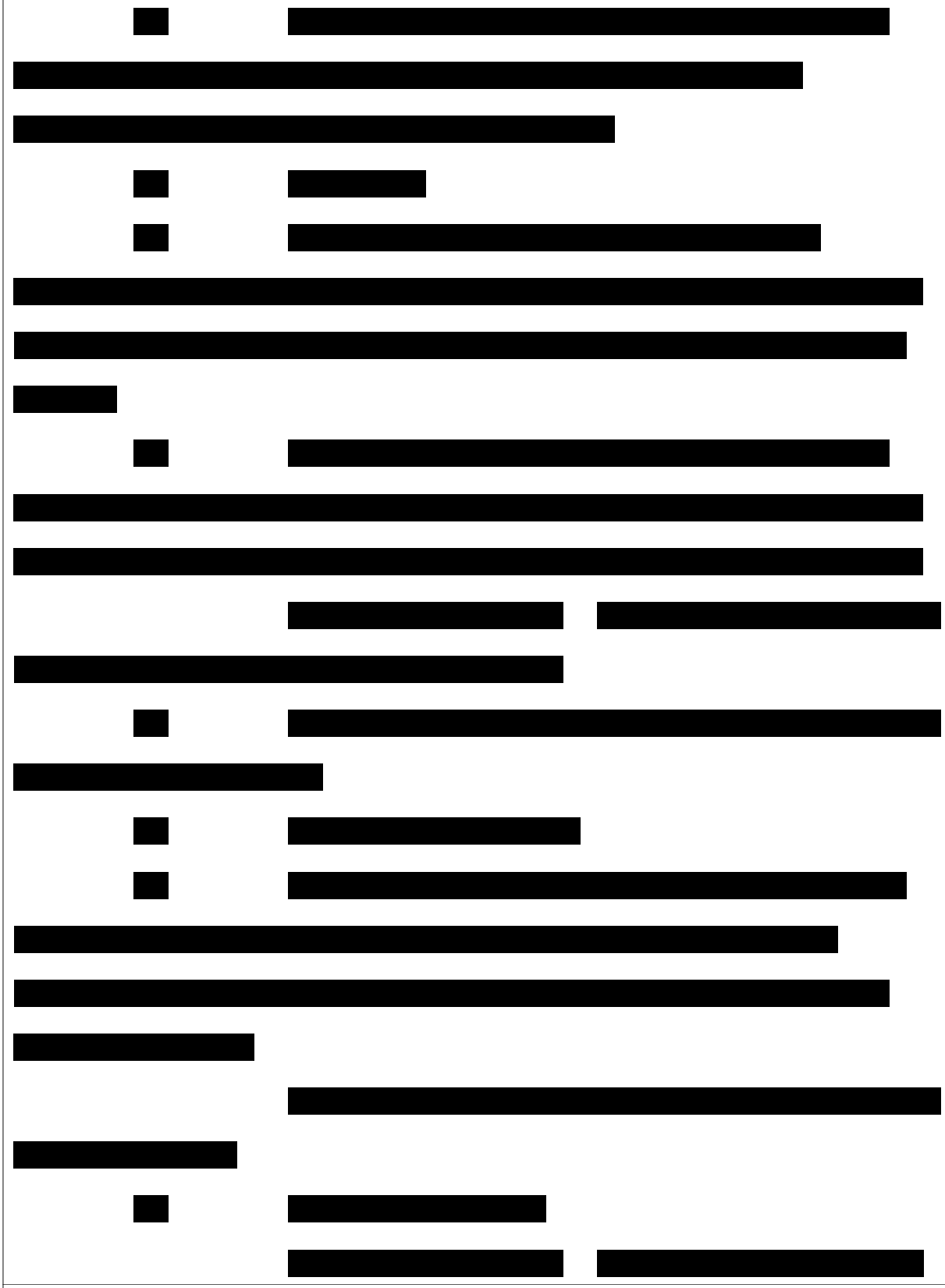


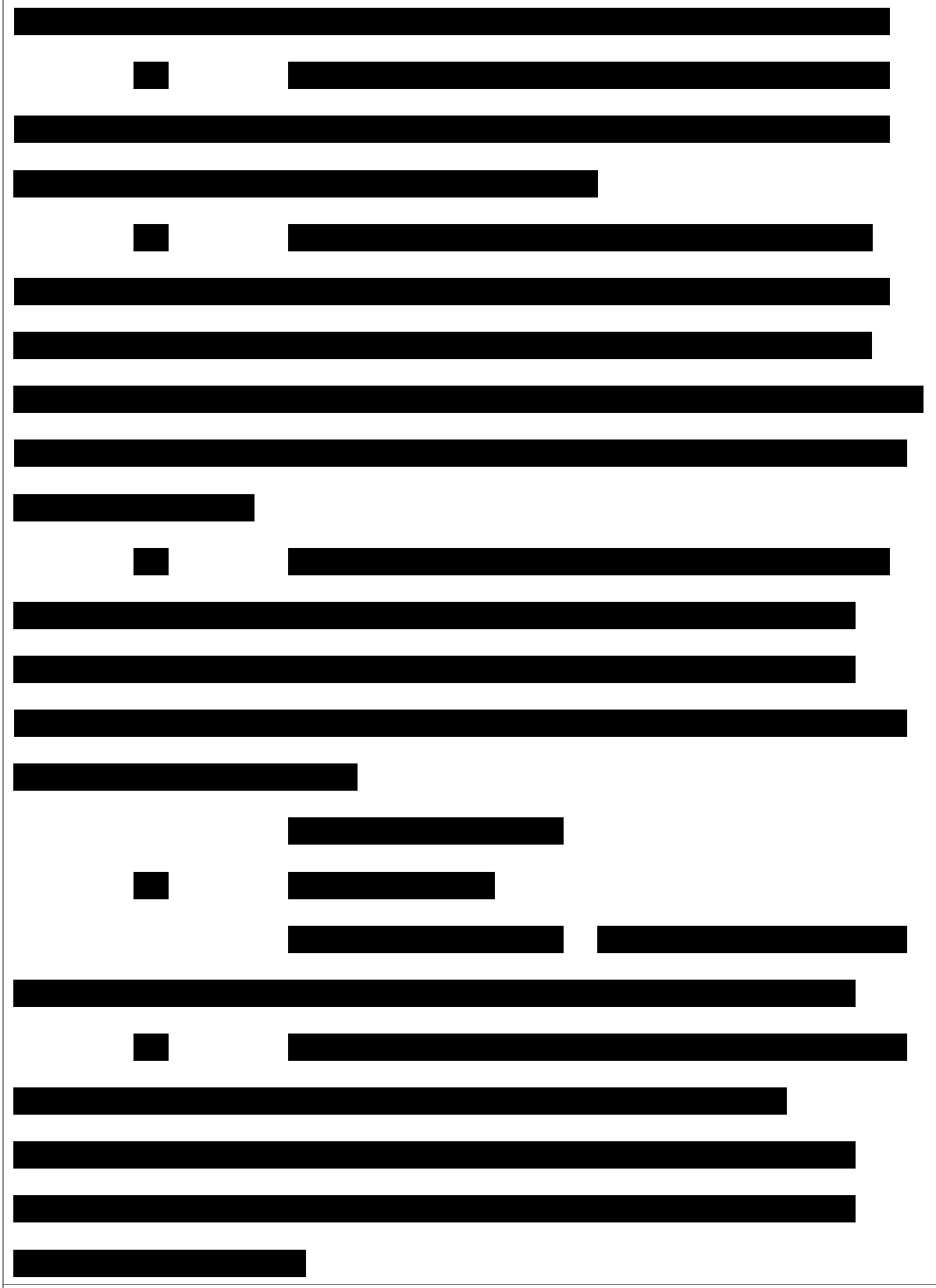


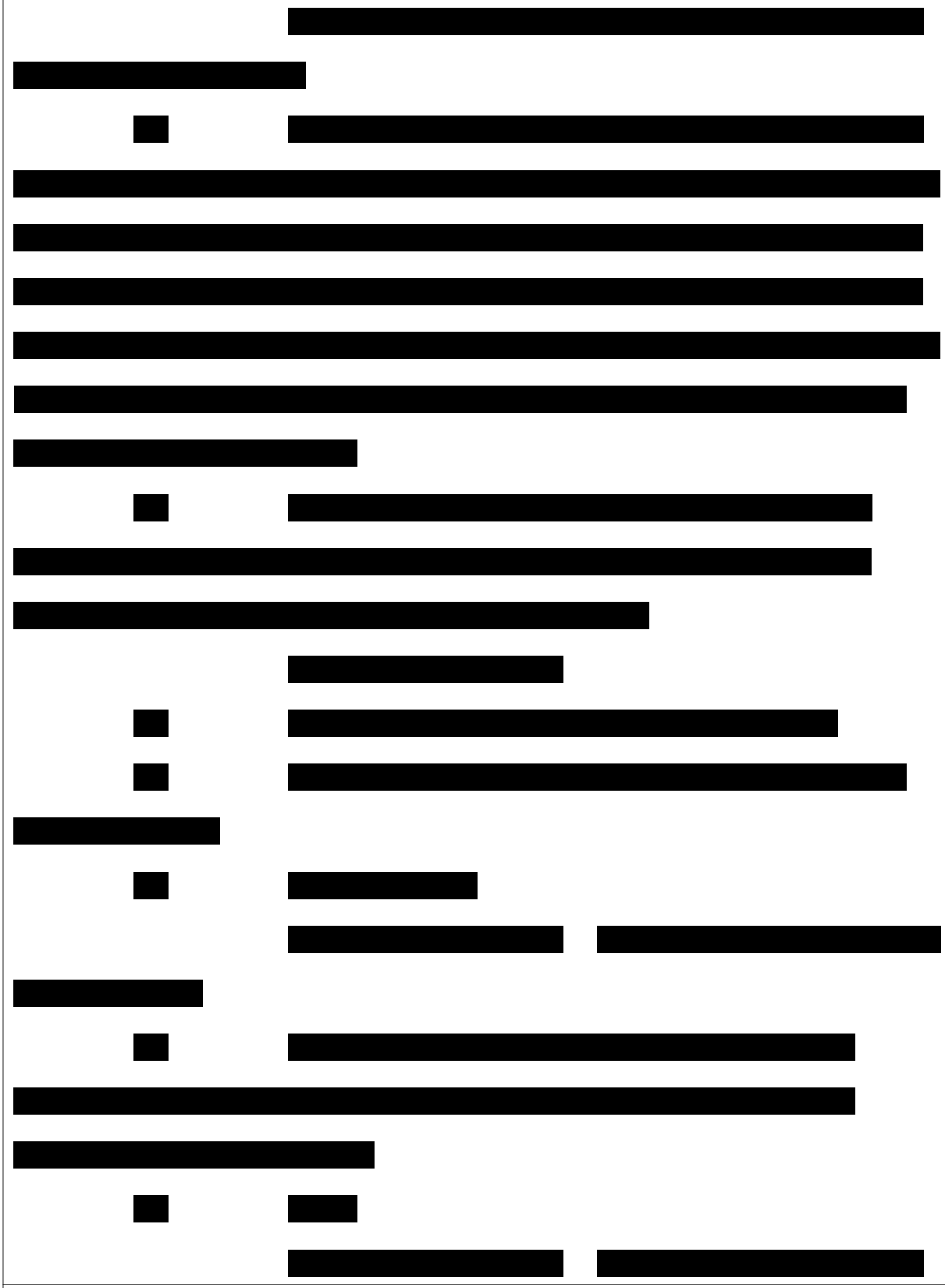


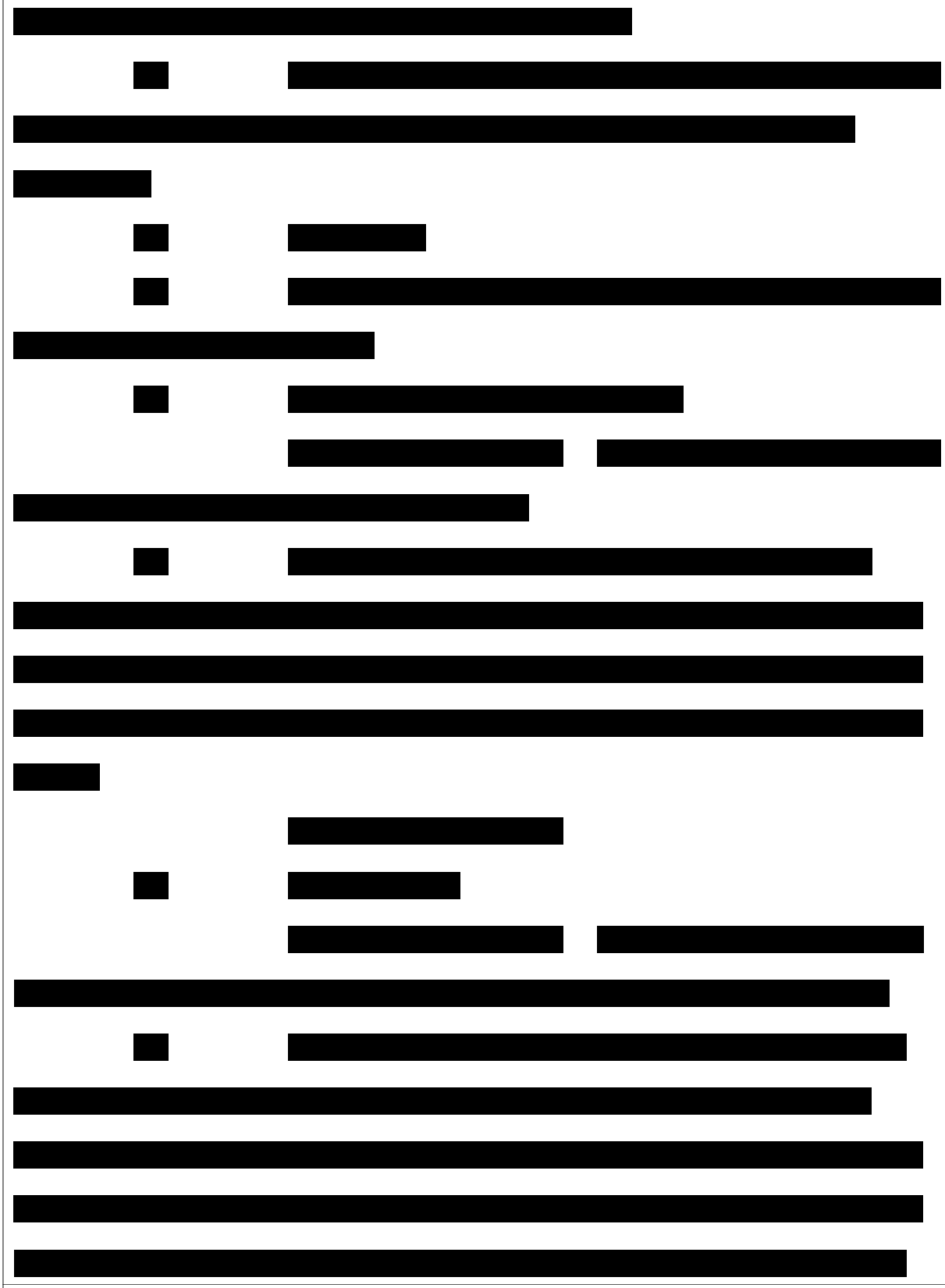


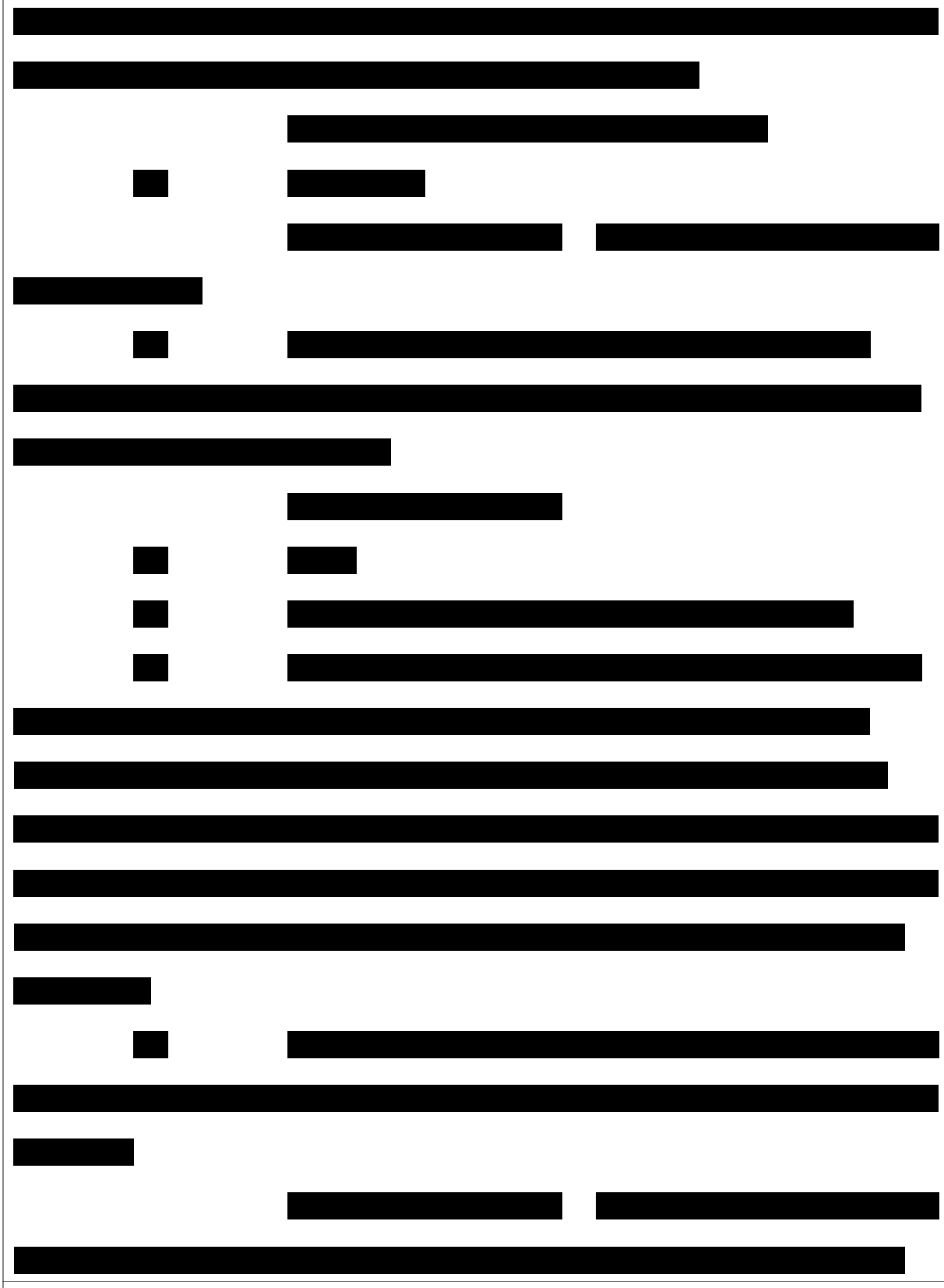




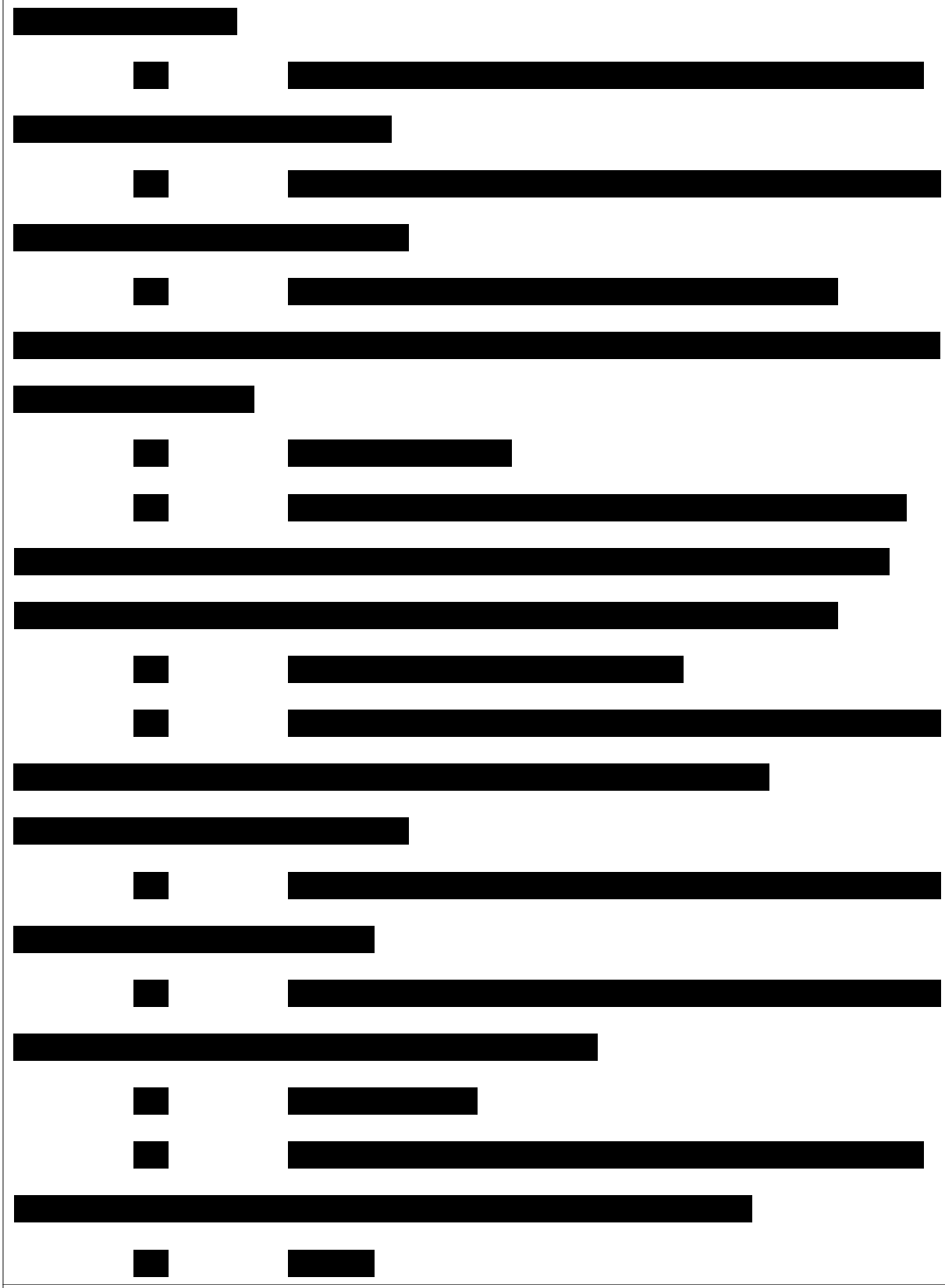














[redacted]

(Witness excused.)

THE COURT: Do you want to let everyone know that they can come back in.

(The courtroom was reopened to the public.)

ATTORNEY BARLOW: Your Honor, the plaintiffs call Joe Yanchik.

ATTORNEY EPSTEIN: Good afternoon, Your Honor. Rachel Epstein from Quinn Emanuel. While we wait for Mr. Yanchik, I thought maybe one issue of

housekeeping, which is we have the Cayman experts from both sides, Mr. Phillips and Mr. Bloch. We brought them here in case Your Honor has questions. But I think absent that, we'll submit them on the papers.

THE COURT: Any objection?

ATTORNEY TAFT: No objection, Your Honor.

JOSEPH YANCHIK, having first been duly affirmed, was examined and testified as follows:

DIRECT EXAMINATION

BY ATTORNEY EPSTEIN:

Q. Good afternoon, Mr. Yanchik. Can you introduce yourself to the Court?

A. Joseph Yanchik, currently a venture partner at Apple Tree Partners.

THE COURT: If you could bring the microphone a little closer.

Q. Mr. Yanchik, how long have you been a venture partner at ATP?

A. I've been at ATP for 20 years now in different capacities. I started as a venture partner back in 2005. Did that for two years, and then started two companies in that role. I joined those companies full time. I was CEO of both. Eventually,

as they both grew, I opted to be full-time CEO in one of the companies, Aileron Therapeutics, and remained on the board of the first one.

Q. And what happened to Aileron?

A. Aileron we took public. We actually ended up taking both of them public. We raised close to a half a billion dollars into those two companies. Aileron went into the clinic, and then it eventually merged with another company.

Q. When did you leave Aileron?

A. I was there for 12 years, so I would have left around 2018. I reengaged with Apple Tree around 2019, end of 2019 as a consultant. And then at that point I took a full-time role back as a venture partner at the beginning of 2020, and I've been doing that since.

Q. Prior to joining ATP the first time, what was your background?

A. I started in '93 as a lawyer in Cahill Gordon in New York. I was a corporate lawyer, working primarily on typical transactions, mergers and acquisitions, high-yield debt, public offerings. I did that for four years, and then I was recruited to an outfit on Sand Hill Road in Silicon Valley, where I

worked exclusively on startup biotech companies. I spent half of my time representing the companies; half my time representing VCs.

After that, I started a dot-com. Shortly after that, I started a gene therapy company out of Stanford. That was eventually acquired by an incubator in the Bay Area.

One of the partners at that point asked me to join his company, which was an ag bio company. He asked me to help them restructure the company. They had a longstanding relationship with Monsanto that he wanted to see if we could renegotiate. So I did that. We did that successfully.

And around that time I met Seth Harrison and he made me an offer to join Apple Tree in Boston around, as I said, 2005.

Q. So overall how long have you been in the biopharmaceutical industry?

A. As a lawyer and as an operator, about 30 years.

Q. And are you the only venture partner at ATP?

A. No, I'm not. There are multiple

venture partners in the fund.

Q. Do all of the venture partners at ATP have similar backgrounds to yours?

A. No, they don't. We have a variety of backgrounds. Most of the venture partners have scientific drug development research backgrounds. I'm a little bit unique in my background with law and finance, as well as an operator. I'm one of the few who have raised capital into companies and run a public biotech company.

Q. So as a venture partner, generally what were your responsibilities at ATP?

A. Initially they were fairly typical to the venture partners. We had three to five companies at any given point in time where we might sit on the board that we were primarily responsible for. We would help them recruiting, developing their plans, as well as financing plans. And that's what I did for most of the time. Most of my time was spent on Braeburn, Marengo, Replicate. I also helped to set up Aulos, where I was on the board for a bit. I helped to set up Ascidian, where I maintained regular contacts with the management team.

So I had my three or four, but I would

also help on an as-needed and as-requested basis across the portfolio.

Q. So do you still have responsibility for those three or four?

A. I do.

Q. Do you have responsibility for any additional companies at this point?

A. I do. My job evolved fairly significantly after the first of the year. Initially I was asked to assist Rigmora, give some opinions on a royalty financing deal that they were working on, which I was happy to do.

After that, we started to work on various modeling exercises and whatnot, cross-portfolio, which is a little bit new for me. It was my understanding at the time we were creating these to present Rigmora with various investment options. We were looking at consolidations. We were looking at reprioritizing.

By the time we got to around, I would say, late April, end of May, it started to become clear that the companies were running out of money and we were approaching an insolvency period. Given my background, I started to take a more formal role in

terms of helping these companies start to navigate a process where we might be pre-bankruptcy. So I started to have a cross-portfolio role in particular with the preclinical companies.

Q. And can you describe for the Court a bit the process that you undertook in late April or early May.

A. Yes. Well, we were -- as a natural outgrowth of the modeling exercises we were doing -- as I said, once we started to become concerned that the companies were running low on cash, we started to dig in very deeply and build very precise models of what the cash was, what their liabilities were, what the management contracts were, leases, just a very detailed view, because we knew we were approaching a point in time where these companies might start to run out of money.

By the time we got to early May, some of the boards were independently starting to act because they were concerned with personal liability. So I started to, once again, be the primary go-between with creditors, the boards.

At that point we were forced to terminate approximately 70 percent of the employees

across all the companies. So I was responsible for that, including senior management that I was responsible for. And then just talking to -- as the primary vocal mouthpiece for the companies when we're dealing with creditors, landlords, prospective partners, et cetera.

Q. Since the filing of this suit at the end of May, have you continued in this process?

A. Yes. We're still in the middle of it. Most of the liabilities that the companies had at the time, back in April, are still on the books. We've asked the various creditors and landlords to hold tight if they could, explaining as transparently as we could what was going on with this process.

So, yes, we've still got quite a bit of work ahead of us to work that out.

Q. Currently, at a high level, what is the status, in your view, of these various companies?

A. They are in a form of, as I would call it, stasis.

So what we tried to do was reduce the burn rate of the companies as drastically as we could without completely destroying them.

And so the first part of the process

was who are the three or four people, in particular scientists, that we needed to try and retain.

The second was who are the creditors who are likely to give us the biggest problems.

And third, how could we secure the various IP, biologic materials and whatnot, with the goal of being able to restart them later.

So right now they are in stasis and dealing on an ad hoc basis with various creditor issues as they arise.

Q. And are you aware that in May of this year, the general partner called capital from the Rigmora entities?

A. Yes, I am.

Q. Do you have a general understanding of the quantum of those capital calls?

A. Yes, I do.

Q. In your view, if the portfolio companies were to receive that cash, how would it affect them?

A. Well, today I believe we could reconstitute them. That was how we set it up. The employees so far are hanging on. I believe that's a finite period of time that that opportunity will exist

for us. If we get the cash right now, we can pay off the debts, we could retain the employees, possibly even rehire some, and continue the research, which we've been planning in terms of how to ramp that up.

Q. And you said it's a finite period of time, in your view. Why is that?

A. Well, whenever you stop a research organization, it starts to deteriorate. So if we take more time, we will start to lose employees. They've been gracious to stay as long as they have, and we have not put any retention packages in for them, which has been amazing that they have stuck it out. But they believe in the science, I think.

Also, we are in a very competitive market. People will pass us. We work in valuable areas. We're aware of competitors. They are passing.

And then the creditors. So far they've held off. I don't believe they will hold off for much longer, and then they can force us into bankruptcy. And then we are likely to lose the assets.

Q. Switching topics a little bit, are you aware of some actions in the Cayman Islands brought by the Rigmora LPs against the GP?

A. Yes, I am.

Q. And are you aware that one of the requests that has been made is for provisional liquidators?

A. Yes, I am.

Q. Do you have a view on whether or not that will affect the companies?

A. It will affect the companies. I believe it will end the companies. You know, as the primary person who has been talking to the creditors and the employees, it's my understanding that these would be provisional liquidators. I think once you take anyone with the role that says "liquidation" on there and put them into the current situation, it will be a signal that we are done. I believe the employees will leave. I believe the creditors will move to protect their positions.

Secondly, the reason we've been able to hold it together is because Apple Tree has had success with some of these creditors, many of these employees. We've been able to build companies. So far they've been willing to take us on our word. Once we're out, they are going to assume that we lost and the build is gone. And once again, that will be a

signal, I believe. So I just -- I don't see how we survive that.

Q. So putting aside the factors that you've just mentioned, do you think that if, for example, the provisional liquidators had a scientific background, that would help mitigate some of the concerns?

ATTORNEY TAFT: Objection. Leading.

THE COURT: You can ask leading questions, but it's hard for me to assess the credibility of the witness when you do that. So try not to.

ATTORNEY EPSTEIN: Fair enough. I can withdraw it.

BY ATTORNEY EPSTEIN:

Q. Other than the concerns you've just raised, do you have any other concerns?

A. Well, it's the role that we play. We have spent, in most cases, three, four, five years growing up with these companies, watching the science, recruiting the executives, building out the financing plans. And you have to -- to do this successfully, you have to develop an independent view from the management team. And you need to partner with them in

that regard with that independent view.

I don't see how that would be replaced. I don't see how anyone would be able to come in, even with a scientific background, and replace the understanding we've developed around the teams and the technologies and the markets.

Q. Are there any other concerns regarding provisional liquidators that you believe the Court should know about?

A. No. That would state it.

ATTORNEY EPSTEIN: Pass the witness.

CROSS-EXAMINATION

BY ATTORNEY TAFT:

Q. Good afternoon, Mr. Yanchik. Will Taft, Debevoise & Plimpton, for the defendants.

Mr. Yanchik, you are a lawyer, but you are not a Cayman law lawyer; correct?

A. That's correct.

Q. And you mentioned your work on the reallocation process in the spring of this year. The goal of that reallocation plan was to optimize the number of milestones that could be achieved across the fund; correct?

A. That's not how I would state it, no.

ATTORNEY TAFT: Can we play clip 39, Yanchik 1, 258, 18 to 22.

(A video clip was played as follows:)

Question: So you're looking for a way to optimize the number of milestones achieved across the fund; correct?

Answer: That was the goal of the reallocation plan.

(End of video clip.)

BY ATTORNEY TAFT:

Q. Do you agree that optimizing the number of milestones achieved across the fund would be a reasonable objective?

A. It was -- to be clear, it was one goal, but it was also trying to deal within certain parameters of diminishing capital.

ATTORNEY TAFT: Can we play Yanchik clip 57. That's Volume I, 258:23 to 259, line 1.

(A video clip was played as follows:)

Question: And was that a reasonable objective in your assessment?

Answer: To try to optimize the -- I think that's always a reasonable objective.

(End of video clip.)

BY ATTORNEY TAFT:

Q. Mr. Yanchik, you began thinking about a restructuring plan for certain companies in late April, early May of this year; correct?

A. I would not call it a restructuring plan. Once again, we were trying to develop multiple options that we believed Rigmora wanted to see to engage with the portfolio in a variety of ways.

So restructuring was one component. Restructuring was certainly one of the things that we were considering at the company level, at the fund level. But you continue to say "the goal," and there were multiple goals at this point in time.

Q. You mentioned that there were reductions in force --

A. That's correct.

Q. -- in May of this year; correct?

A. May, June. That's correct.

Q. And some of those happened before May 30; correct?

A. I don't recall the precise dates, but it was right around that time. It was handled on a company-by-company basis. So they did it when they thought that they were prepared.

Q. But capital wasn't called for most of these companies until May 30; correct?

A. At that point in time, that's my recollection, yes.

Q. Do you recall in connection with proposed restructuring that you were advising counsel that ATP intended to close down up to five of the portfolio companies?

A. I don't recall that. Advising that we would just shut them down outright and get rid of the assets, I do not recall that.

ATTORNEY TAFT: Can we bring up JX 2143. And if you can go to the second email on this chain on the first page.

Q. It is an email dated May 2.

Do you recognize this email?

A. I do.

Q. And here you are advising counsel that "As you can see, we are cash out in a couple weeks at some of the companies, so decisions are being finalized this weekend .... This has not been communicated to the companies or employees as of yet."

ATTORNEY TAFT: And we can go to the next paragraph, fourth paragraph.

Q. Do you see it says, "We intend to close down 4 or 5 of the remaining companies depending on final budget and other considerations"?

Do you see that?

A. I do.

Q. And do you recall that of those four or five companies, there was only one of them that ATP really wanted to salvage the IP from?

A. No, I disagree with that.

ATTORNEY TAFT: Can you look further down to the next -- the fifth paragraph. Thank you.

Q. Do you see where it says, "Of the shuttered companies, Nine Square is the one we really want to keep the assets but needs to be shuttered quickly"?

A. That one is referring to needing to move quickly on Nine Square. But I do not believe the intention ever was to get rid of all the assets. As a matter of fact, every one of my activities from February until very recently is trying to find ways to maintain all of the assets, whether or not we felt the liabilities of various companies made the corporate entity potentially problematic.

Remember, at this point we're

speculating as to how fast the creditors were going to come in and how things were going to deteriorate. But it was never our intention to get rid of all the assets.

But what I said earlier -- it would be helpful to be able to see the whole email here. What I said earlier was depending on the final budgets and what happened. So we were dealing with quite a few contingencies at that time.

ATTORNEY EPSTEIN: I'm sorry, Your Honor. Do we have paper copies for the witness?

ATTORNEY TAFT: Do we have a binder?

May I approach?

A. Can you tell me what tab, Counsel?

Q. It was JX 2143.

ATTORNEY TAFT: You can take down the slide.

A. I think what's important here is that the first sentence, it discusses how -- at this point in time there was an attachment to this email that indicated the various companies and the liabilities. At this point in time, at the beginning of May, we were speculating as to what was retrievable and what wasn't with regard to the companies. But the goal

always was to try to maintain as many assets as we could, whether or not we could develop them, depending on how much capital came in.

Q. Mr. Yanchik, changing topics, do you recall a communication with Dr. Ehlers in which you suggested that the Russia factor may be an excuse for other challenges that ATP presents?

A. I do recall that.

ATTORNEY EPSTEIN: I'm just going to object as being outside the scope.

THE COURT: You can continue. Overruled.

ATTORNEY TAFT: I have no further questions.

THE COURT: Thank you.

Anything further?

ATTORNEY EPSTEIN: Nothing further, Your Honor.

THE COURT: Thank you. You can be excused.

(Witness excused.)

ATTORNEY BARLOW: Your Honor, plaintiffs call Mark Robbins. And my colleague, Ms. Jessica Reese will be handling the questioning.

THE COURT: Thank you.

MARK ROBBINS, having first been duly affirmed, was examined and testified as follows:

DIRECT EXAMINATION

BY ATTORNEY REESE:

Q. Good afternoon, Dr. Robbins.

A. Good afternoon.

Q. Would you please introduce yourself to the Court.

A. I am Mark Robbins. I'm the president and chief executive officer of Kodiak Strategic Consultants.

Q. Did you prepare a slide deck to accompany your testimony this afternoon?

A. Yes, I did.

Q. Is this the presentation that you prepared?

A. Yes.

Q. Dr. Robbins, what is the business of Kodiak Strategic Solutions?

A. Kodiak Strategic Consultants.

Q. Consultants.

A. It provides clinical, regulatory, business development, consultation strategies for

pharmaceutical and biotech companies.

Q. And prior to becoming a consultant, what was your experience in the life sciences industry?

A. I have over 30 years of experience working at pharmaceutical biotech companies doing preclinical, clinical, regulatory affairs, and business development activities.

Q. What degrees do you hold?

A. I have a doctorate degree from the University of Minnesota Medical School and a law degree from St. Louis University.

Q. Dr. Robbins, do you have any experience with preclinical or early-stage life science companies in investing?

A. Yes, I do.

Q. Could you tell us about some of that experience.

A. I work with a lot of early-stage companies helping them to develop plans, strategic plans, investment portfolios, raising money, talking to different potential investors, making presentations. And I also personally evaluate startup companies and I personally invest in some early-stage

companies.

Q. In your consulting work, have you assisted companies in trying to obtain funding for preclinical research and development activities?

A. I have.

Q. Approximately how many companies have you assisted with?

A. Over a dozen.

ATTORNEY REESE: I ask the Court to qualify Dr. Robbins as an expert in biotechnology funding, research and development, and investment.

THE COURT: Any objection?

ATTORNEY TAFT: No objection.

THE COURT: Thank you.

BY ATTORNEY REESE:

Q. Dr. Robbins, what was your initial assignment in this matter?

A. My initial assignment was to assess whether Rigmora's 2025 decision to defund these preclinical studies was reasonable from an investment standpoint.

Q. Did you prepare a report on these topics?

A. Yes, I did.

Q. Is this the slide that you prepared summarizing the opinions in your opening report?

A. It is.

Q. Briefly, what did you conclude?

A. I concluded that Rigmora's decision to halt all funding of these preclinical studies was not how a reasonable investor would act trying to get a return on investment. By defunding the companies, they were essentially diminishing value.

In coming to that assessment, I used a multifactor framework to evaluate each of the companies within the portfolio, and I wrapped those up into an overall portfolio to make an assessment to make a continued investment.

Q. Did you also prepare a rebuttal report in this matter?

A. I did.

Q. And what were you asked to evaluate in your rebuttal report?

A. I was asked to look at Dr. Rimm's opinion that it was -- defunding of these seven companies because they missed the milestones from the investment memorandum was reasonable from an investment standpoint.

Q. I'm looking to Slide 7. What opinions did you form in preparing your rebuttal report?

A. I found that Dr. Rimm's focus was too narrow when she just looked at the milestones in the investment. And as Dr. Harrison testified, once you start doing research, those milestones readily change.

Investors in R&D in biotech companies understand that as you get data, milestones will shift. And they have to shift. And so I looked also at these companies to see were they really developing assets that were worthwhile and had a potential for getting returns. So those were key factors.

Q. Dr. Robbins, turning back to your opening report, how did you go about assessing the reasonableness of Rigmora's across-the-board decision to defund the portfolio companies in May 2025?

A. I looked at each of the companies individually, and then I rolled them up into the portfolio. And the way I looked at each of the companies was through a multifactor analysis that typically is used when you are looking at investing in companies and assessing companies.

Q. If we could turn to Slide 8. Is this a slide you prepared summarizing that multifactor

framework?

A. It is.

Q. What types of factors are included in this framework?

A. You evaluate the experience of the management team, the scientific research, what development progress has been made, what development progress can you expect to have, what the intellectual property protections are.

You also look to see is it breakthrough therapy that's meeting an unmet need. That's absolutely critical, that there has to be a need for product.

You look at third-party interest to see is this an area of interest to people outside of the company to understand what the landscape is.

Q. Did you design this multifactor framework yourself?

A. No. This framework is informed by my work in the industry from doing business development over 30 years, putting together presentations. Also, as an investor, these are the things I look at when I do that. This is also, from an industry standpoint, pretty much a standard when you are making

presentations to VCs. It also fits into the same realm -- an investment memorandum that ATP was putting together. And it's supported by academic and industry publications that this general framework is used.

Q. I want to talk a little bit more about some of these factors. Why is third-party interest important to assess?

A. Third-party interest helps validate the area for which you are going for. You want to see if there's an unmet need, is it realistic, and also if there is, from a third-party interest, potential business development opportunities. A lot of these early-stage companies, their goal is not to commercialize it themself, but to license them out and do core development or development with large biotech and pharmaceutical companies. So that's also important.

Q. You mentioned business development deals. For an early-stage company that's nearing or at the conclusion of its Series A funding, would an investor be looking for finalized deals exclusively?

A. The finalized deals are great, if you have them. But it takes a long time to get a business development deal. You are doing development all

along. It's prudent to have conversations early on with companies so they are aware of what you are doing, follow up as data gets generated. But actually, signed deals can take several years in process. So it's not unusual. You just want to see what's being tracked.

Q. Stepping back, does any one of the factors outlined here determine whether a company is worth investing in?

A. All these factors are critical in making that assessment. You want to make sure that there's a good management team, there is scientific validity, that it's a very strong portfolio. So you want to make all those assessments. All these factors count.

Q. And would you expect the factors to be weighted similarly for companies with assets in the same stage of development?

A. No. Each early-stage company is unique. And so sometimes certain factors will weight more than other factors.

For instance, if you have a person who is a Nobel Prize Laureate who has a great idea, that's going to be highly weighted. If you have something

that has a huge unmet need, that can be highly weighted. IP -- so you look at each individual company, early-stage company uniquely.

Q. And for this assignment, did you evaluate each individual portfolio company individually?

A. I did.

Q. Turning to Slide 9. Is this a slide that you prepared summarizing your findings?

A. Yes.

Q. Could you briefly walk through what you found.

A. So I looked at the seven companies on the slide and I found for each of the companies, that they had had significant preclinical or clinical development progress. They were all working towards getting an IND in place. They had leadership teams that were composed of world-renowned experts in the area they were working in. They all had breakthrough technologies, very novel. And they were in discussions -- some of them had partnerships with large biotech companies or they were in discussions with large pharmaceutical biotech companies.

Q. And so based on all of the materials

that you reviewed, do you believe a reasonable investor would have across the board refused further funding for the preclinical companies in May of 2025?

A. In my opinion, a reasonable investor wouldn't do that because the portfolio had a lot of potential value to it. And by halting funding and asking the companies to be wound down and liquidated, it's destroying value; whereas a reasonable investor wants to increase value and get a return on their investment. There's no basis to want to destroy value.

Q. Dr. Robbins, are you aware that Rigmora's expert, Dr. Rimm, reached a different opinion regarding the reasonableness of Rigmora's decision in May of 2025?

A. I am.

Q. And what do you understand her opinion to be?

A. I prepared a slide. I can say it. Dr. Rimm's opinion was that to -- it was reasonable to defund these companies because the milestones that were laid out in the initial memorandum four to five years before, those milestones had been missed. And therefore, because those milestones had been missed,

it was reasonable to defund all the companies.

Q. And what do you mean when you say "those milestones had been missed"?

A. The time that was in the initial investment memorandum for the milestones maybe were not achieved in that time frame. That's common in pharmaceutical development, though, because you have to follow the research and development and adjust your time limits based upon the data that's coming out.

Q. And did you consider development progress when you were evaluating the preclinical companies?

A. I absolutely did.

Q. How did your consideration of development progress differ from Dr. Rimm's consideration?

A. I took a more holistic approach. I didn't rely upon the initial investment memorandum for the timelines. I looked to see what was actually being done at the companies, what work had been completed, where they were in development at that time when they were cut off from funding. I looked at that. I looked at was unmet need still there. I looked at was the technology still promising. I also

looked at the management teams.

Q. Is this Slide 11 a slide that you prepared summarizing some of the progress you observed amongst the preclinical companies?

A. It is.

Q. Just briefly focusing, first, on development progress, could you describe what you observed about the preclinical companies.

A. All the preclinical companies had made significant development progress. Two of the companies were already in IND-enabling studies. They were getting a place to file IND in the next year or so. IND is necessary to be able to initiate clinical trial. They had gone through candidate selection of some of these companies. So they were all going through the normal development process, and they were hitting milestones.

Q. What about third-party partnerships or collaborations, what did you observe amongst the preclinical companies?

A. They all were in good negotiations for partnerships. As was testified before, Aethon had started a partnership with Revolution Medicine. That had a potential value of up to 940 million that had

already been executed.

At the time of the defunding decision, Deep Apple was in discussions with Novo Nordisk. And, actually, they executed a license agreement shortly after the defunding decision was made in June 2025. They had a value up to $812 million.

In addition to that, all the other companies were in discussions with large pharmaceutical biotech companies.

Q. Did you also evaluate the preclinical companies' leadership and management teams?

A. I did.

Q. Turning to Slide 12, does this slide summarize some of what you observed regarding the companies' leadership and management teams?

A. It is.

Q. Could you briefly describe what you observed.

A. Well, with Evercrisp, the co-founder was Dr. Jennifer Doudna. She is a Nobel Prize winner who is the preeminent scientist in gene modification. She came up with the CRISPR/Cas technology. She's won a Nobel Prize for that. So she was involved, and they have top science in that company.

I looked at Apertor. You have Dr. Jay Keasling in charge of that. He's done 12 startup companies, raised over $2 billion.

You have excellent oversight of these companies by ATP with Dr. Paul Da Silva Jardine, Dr. Spiros Liras, where they have many years of experience working at Pfizer, Biogen, large pharmaceutical companies. They know the drug development process very well, and they are overseeing these companies. So you have great management team and excellent science.

Q. Did you undertake any review of the commercial potential of the preclinical companies as part of your assignment?

A. I did not.

Q. Why not?

A. I didn't find it particularly relevant. The commercial aspects are many years out.

In R&D, in development, there's lots of pivots. And typically as an investor, you are not looking for necessarily the full valuation from a financial standpoint. You are looking at the opportunity for advancing the technology far enough to either get license deals in place, to exit by company

merger, acquisition, additional investment coming on where you can partially exit, or going public.

So there are lots of ways to have value well before you take on the commercial risk. So I didn't find the commercial assessment critical.

Q. Now, turning back to development progress, in your opinion, can a company that has missed a milestone date set early on in an investment memorandum still represent a promising scientific and clinical opportunity?

A. Absolutely. Many very successful therapeutics have missed development milestones. I can't think of anybody developing a drug, even in large companies, that meet all the timelines that -- from initiation of the project until the product is commercialized. There's research and development that starts out, and it's really hard to tie it to the time frame you have to follow the data.

Q. And what might prompt a preclinical company to pivot?

A. You want to be able to pivot -- and pivot is where you're changing the direction slightly. You want to be able to pivot because you might find the mechanism of action of the drug is better suited

for a different indication or your lead molecule isn't the best lead molecule and you have something else that would be much more substantial. So you want to pivot to that. Or you have a platform technology that is developing different drug molecules and you'll find a pivot is going to be better in order to go into a different therapeutic area.

There was discussion of that today. I believe it was Replicate, where they pivoted from an oncology vaccine and they went to a rabies vaccine and actually are on the market for that product. Those are successful pivots.

Q. And in your experience, are companies that pivot -- strike that.

How do these pivots impact the scientific and clinical potential of an asset?

A. They typically improve it. They can partially delay the timeline of that. But usually when you pivot, it increases the likelihood of success. It's no one's interest to go down a path that's not going to be successful. So to pivot to something that looks more promising increases the valuation. You want a flexible management that knows when to pivot.

Q. In your experience, how common is it for a preclinical biotech or pharmaceutical company to pivot?

A. Very common.

Q. Turning to Slide 14, and stepping back, based on your experience, do you believe it is appropriate for Dr. Rimm to assess the preclinical companies based solely on their progress as compared to timelines that were set several years ago in investment memoranda?

A. No. Those timelines and investment memoranda are optimistic of the time the investment is going to be made, realizing that once you start research and development work, those timelines are going to be modified.

Q. And are you aware of any academic literature supporting this milestone-centric approach that Dr. Rimm employs?

A. No.

Q. In your opinion, would it be reasonable for an investor in Rigmora's position to base its funding decisions in May of 2025 solely on progress as compared to investment memoranda from several years prior?

A. Absolutely not, because as a sophisticated investor in the pharmaceutical biotech arena, you know those timelines are subject to change.

ATTORNEY REESE: Thank you very much.

ATTORNEY TAFT: Your Honor, may we approach with some binders for you.

Will Taft for the defendants.

CROSS-EXAMINATION

BY ATTORNEY TAFT:

Q. Dr. Robbins, your report assesses 13 portfolio companies owned by the fund; correct?

A. That's correct.

Q. And, in your opinion, continued investment in at least part of that portfolio would have been warranted in May of 2025; correct?

A. That's correct.

Q. But a reasonable investor might decide to invest in fewer than all of those portfolio companies; correct?

A. I believe that's a correct statement. I looked at it from a portfolio view, looked at each company individually, and then wrapped up the portfolio. I didn't make a determination on individual companies.

ATTORNEY TAFT: Can we play clip 30 that is Robbins transcript 70, lines 4 to 11.

(A video clip was played as follows:)

Question: So a reasonable investor might invest in fewer than all of them; correct?

Answer: Potentially. Like I said, it's hard to pick which ones are going to be the winners and losers there. But to defund all of them I don't think is reasonable.

(End of video clip.)

BY ATTORNEY TAFT:

Q. So, Dr. Robbins, you did not conclude that all 13 portfolio companies merited continued funding; correct?

A. I didn't make that assessment.

Q. Now, you agree, and I think you just stated on direct, that a reasonable investor seeks a return on investment; correct?

A. Yes.

Q. And in performing your analysis, you mentioned under questioning that you didn't consider the portfolio's commercial potential; correct?

A. I did not do a financial analysis of it. I looked at their unmet therapeutic need they

were looking to treat. And from that perspective, I recognized there was a need for the product. But I did not do a financial assessment, that's correct.

Q. So your analysis does not consider the financial potential of any portfolio company; correct?

A. That's correct.

Q. So you didn't review the balance sheets for any portfolio company; correct?

A. No. But the balance sheets weren't particularly relevant because the balance sheets were being controlled by the fund. So balance sheets were what they were.

Q. And you didn't assess the value of any of the portfolio companies; correct?

A. That is correct.

Q. And you didn't provide any opinion as to the likelihood that any of these portfolio companies would actually develop -- succeed in developing an approved therapeutic product; correct?

A. That's correct. But for being successful, they don't have to develop an approved therapeutic. They can license out. There's always risk in pharmaceutical development.

Q. And you didn't assess the amount of

money that would be required by any portfolio company to achieve a potential exit for the investor; correct?

A. That's correct.

Q. And you expressed no opinions in your report about how much funding any of the preclinical companies merited; correct?

A. That's correct.

Q. You discussed Dr. Rimm's opinions right now and in your rebuttal report; correct?

A. Correct.

Q. You don't dispute Dr. Rimm's conclusion that by mid -- by first quarter 2025, all of the early-stage companies had missed investment memorandum milestones; correct?

A. I don't dispute that. I don't think that's a -- I think that's a flawed analysis, but I don't dispute that.

ATTORNEY TAFT: No further questions. Thank you.

THE COURT: Thank you. You can be excused.

(Witness excused.)

ATTORNEY TAFT: Your Honor, by agreement of the parties, we've agreed to take

defendants' expert, Dr. Strebulaev, out of order. I would therefore call Professor Strebulaev to the stand.

We will be distributing some binders. May I approach?

THE COURT: Yes.

ILYA STREBULAEV, having first been duly affirmed, was examined and testified as follows:

DIRECT EXAMINATION

BY ATTORNEY TAFT:

Q. Good afternoon, Dr. Strebulaev.

A. Good afternoon.

Q. Could you please introduce yourself to the Court.

A. My name is Ilya Strebulaev. I'm a professor at the Stanford University Graduate School of Business.

ATTORNEY TAFT: Could we please pull up Slide 1.

Q. Dr. Strebulaev, would you take a few moments to describe your background and qualifications with respect to venture capital investing.

A. Of course. First of all, my educational background, I did my BA in economics at

Moscow State University, then my MA in economics at the New Economic School, and then my M.Phil and Ph.D. in finance at the London Business School.

And upon completion of my Ph.D., I joined Stanford Graduate School of Business in 2004. And I am now there, the David S. Lobel, professor of private equity and professor of finance.

My expertise is venture capital and private equity. In terms of teaching, I teach a range of capital classes that students at Stanford take to become either venture capitalists or founders of venture capital-backed companies.

In terms of research, I founded and had our venture capital initiative that produces a lot of research.

Just an example, one of our -- my research pieces with my colleagues where we surveyed venture capitalists in the United States that represent the majority of assets under management. And I'm proud to say that academic paper has been the most cited paper in the field of venture capital research in the past five years.

ATTORNEY TAFT: Your Honor, defendants offer Dr. Strebulaev as an expert on venture capital

investing.

THE COURT: Any objection?

ATTORNEY JONES: No objection.

ATTORNEY TAFT: If we could pull up the next slide.

BY ATTORNEY TAFT:

Q. Dr. Strebulaev, could you please describe this analysis for the Court.

A. Of course. As a part of my assignment in this case, I was asked to review the capital contributions by Rigmora to the ATP fund on the cumulative basis through the end of May of 2025. And as I understand, there may be a dispute whether certain deemed capital contributions should be considered against the capital contribution -- capital commitments of Rigmora against subscription agreements.

And so what I show here is -- the black line shows the total cumulative capital contributions by Rigmora, taking into account those deemed capital contributions under dispute. And the orange one, excluding those capital contributions.

Q. And I see a vertical green line going down on the right-hand side. What does that

represent?

A. That represents the start of the Russian-Ukrainian war in February of 2022. As I understand, there are allegations in the complaint that after the start of the war, Rigmora, sorry to say, lost enthusiasm for honoring its capital commitments and tried to stop providing funds to ATP.

What I think this chart clearly shows is that the capital contributions by Rigmora continued more or less at the same pace both before and after the start of the war.

ATTORNEY TAFT: We can take that slide down.

Q. Dr. Strebulaev, as part of your work on this case, did you consider whether it was consistent with reasonable investor behavior for Rigmora to condition the discussion of additional budgets for certain companies in the portfolio on the general partner agreeing to wind down the early-stage companies?

A. Yes, I did consider this, and I concluded that it was reasonable.

To start with, let me point out that any investor doesn't have an unlimited budget, an

unlimited capital. And therefore, what a reasonable investor does is tries to -- it tries to allocate its limited capital towards the best investment opportunities that are available to that investor.

For example, one of the factors in this case is that I understand Dr. Rimm concluded that each of the early-stage companies in the matter missed milestones that were in the original investment memoranda, the Series A funding. And in my experience in the venture capital space, the milestones constitute one of the very important factors for venture capital investors because effectively they allow investors to evaluate the progress the company is making relative to the original expectations.

Q. Other than performance against milestones, what other factors does your research indicate a reasonable investor would have contemplated in considering further investment in the early-stage companies?

A. Well, of course there are many factors. But among those many factors, some of the factors would be the recent performance of the venture fund, interest or lack of interest by third-party investors. And also I think an important factor is

the potential conflict of interest that the general partner or whoever manages the venture fund may have.

Q. And as part of your opinions in this matter, did you analyze the fund's recent performance?

A. I did.

ATTORNEY TAFT: Could we pull up the third slide, please.

Q. Dr. Strebulaev, how does this slide relate to the opinions in your case?

A. Well, this is the result of my investigation that I did on the recent performance of ATP fund relative to the comparable sample of early-stage biotech funds.

So let me try to explain. First of all, I concentrate on two financial metrics that are very commonly used in the venture capital industry. The first metric up top is "Net IRR," where IRR stands for the internal rate of return. And the bottom panel shows "TVPI," which stands for the total value to paid-in investments. The fact to think about TVPI is how many dollars you get for one dollar of investment in the venture fund.

Q. Where did you get the data for ATP's net IRR and TVPI?

A. Well, first of all, the ATP data is for ATP Pools V-1, V-2, and V-3. And this is the data that ATP reports itself in its statements to the limited partner. And also what the red bar shows is this performance -- the most recent performance available to me as of December, end of December 2024. And maybe I should mention that Pools V-1, V-2, and V-3 are recent investments. Those pools started between 2019 and 2021 and really the only actively managed investments by ATP.

Now, what you see in blue is the performance of the comparable -- a comparable sample. And I show three metrics here both for net IRR and TVPI: the median performance, the average performance, and the top quartile. And let me also mention, importantly, that in the venture capital industry, investors care a lot about the top quartile because this is risky investments. And investors try to invest in the top-performing managers. That is commonly understood as to be in the top quartile of performance.

So to -- I think this chart clearly shows that ATP Pools V-1, V-2, and V-3 performed poorly. Their performance was below the median, below

the average, and I would say dramatically below the top quartile.

Q. And how would that affect a reasonable investor's assessment of the decision whether to invest additional funds in these pools?

A. Well, as I already mentioned, reasonable investors try to allocate their limited capital to the best possible opportunities. So this analysis would cause a reasonable investor to have a lot of concerns about the poor performance of the fund, and as a result of -- the reasonable investor's result of this would consider whether to continue funding any of the companies within those pools.

Q. Now, as part of your work on this case, did you also assess the third-party interest in the fund's portfolio companies, in the early-stage companies?

A. Yes, I did, specifically the equity interest by third-party investors, which, in my experience and my research, is one of the critical considerations by -- in the venture capital industry.

ATTORNEY TAFT: Can we please pull up the next slide.

Q. How does this slide relate to your

opinions?

A. This was the result of my investigation. Let me try to explain briefly. What I did is I compared seven early-stage companies and ATP Pools V-1 and V-2 -- and they are shown in the red -- with a sample of the comparable early-stage biotech companies, retraced their initial funding rounds to approximately the same size as the early-stage companies in the matter.

And what I looked at is the timing, which is how quickly that comparable companies raised subsequent funding, went public, or did what I would describe as successful M&A, which is with at least twice the amount invested. So I would describe those kind of companies in blue here as successful or potentially successful.

What the chart shows is that the median company raised its subsequent round of follow-on foreign investment within approximately 1.5 years.

If you look at the 75th percentile, it means that 75 percent of the comparable companies raised their follow-on investment at 2.18 years.

If we compare this to the early-stage

companies, none of the early-stage companies in the matter had any follow-on investment for at least 2.18 years, so well beyond the timing of typical comparable biotech companies. And the timing is, as of May 15, 2025, between 2.35 and 4.83 years plus since their initial funding without any subsequent follow-on investment.

Q. And did you also hear Dr. Robbins testify regarding third-party interest in the early-stage portfolio companies?

A. I did hear he testified about it right now.

Q. And did any of that testimony change your opinions in this case?

A. No, it did not, for a number of reasons. One reason is that he had a slide where in the last column he showed what he called third-party interest. And none of those examples that he showed were from investors.

Second is that the examples that he showed, many of those were stale. For example, the very first example he had, I believe, was a company called Evercrisp. And he said the discussion with potential pharmaceutical companies, which is not

equity interest -- in progress or in discussions he said. Well, that is information from, I believe, 2023.

In my review of the most recent reports from ATP, those discussions are not mentioned. And if we go down, there will be more examples like that.

Q. What conclusions do you draw regarding whether -- how a reasonable investor would assess the level of third-party interest in these companies?

A. Maybe I should also mention that as a part of my investigation, I also looked into whether it is common for a single -- for companies to have only single investor in a follow-on financing. And I found out that if you look at the comparable companies, it is very uncommon. It happens only in 4 percent of cases, meaning that for the overwhelming majority of successful or potentially successful comparable early-stage biotech companies who had more than one investor.

So taking this together, the conclusion I draw is that a reasonable investor would be concerned about the lack of third-party interest, investor interest, and will be concerned about the

timing of the -- so the timing by which this -- none of these companies has been able to raise any follow-on financing.

Q. Dr. Strebulaev, among the factors that you said a reasonable investor would consider -- at the beginning, you also mentioned potential conflicts of interest. Did you analyze that as part of your opinion in this case?

A. I did.

ATTORNEY TAFT: Could we pull up the next slide, please.

Q. How does this slide relate to your opinions?

A. Well, so first of all, as I understand, Dr. Harrison really controls ATP. So he's both a limited partner in ATP, in various pools of ATP fund, and he also would get carry if those pools are successful.

And, first of all, let me explain that carry is very commonly used, universally used, I would say, in the venture capital industry. And the idea behind carry is straightforward. You would like to incentivize the fund manager to find and manage companies to achieve profitable exits because what

carry is is the participation in the upside profit of the fund. So after all the initial contributed capital returned to the limited partners, carry means that if there is any profit remains, you would get a fraction of that.

Now, while carry is universal in the venture capital industry, in this specific case, there are at least two factors that would lead to the very specific conflict of interest. Let me try to explain.

So, first of all -- and I show this on the slide. And I concentrate on Pools V-1 and V-2 simply because those are the pools that contain all the early-stage companies in this proceedings.

So for those pools, first of all, Dr. Harrison's capital contribution is zero, meaning that Dr. Harrison has no financial risk with respect to those pools. So that if all of those capital is lost, Dr. Harrison will not lose anything.

Second, as you see, Dr. Harrison at the same time has 7.5 percent carry. And again, what it means is that for every hundred dollars of profit, if there's any profit, Dr. Harrison will get $7.5.

Now, the second reason why it leads in this specific case to a higher than usual, very

specific conflict of interest is because carry can lead to conflict of interest if the companies in question are not performing well.

So if the companies, let's say, have a negative net present value, which means that we should not really proceed funding them any further, but the fund manager has no financial risk and, at the same time -- just on the outlier possibility that one of these companies can be successful, the fund manager will generate potentially substantial profit.

So this asymmetry leads to potentially very large conflict of interest that would make Dr. Harrison's --

THE COURT: We're going to take our 15-minute break.

(Court in recess at 3:04 p.m.)

(Resumed at 3:18 p.m.)

THE COURT: Please be seated. We'll go until 5:00. Please begin.

ATTORNEY TAFT: Thank you, Your Honor. Again, Will Taft for defendants.

BY ATTORNEY TAFT:

Q. Dr. Strebulaev, have you reviewed the reports submitted by Dr. Rao, the plaintiff's expert in this case?

A. I did.

Q. And did you review his opinion that it would generally not be economically rational for an investor who was already in one of the early-stage biotech companies to stop providing additional funding barring circumstances like a scientific roadblock or failure of a drug candidate?

A. I did.

Q. Do you agree with that opinion?

A. I do not agree. In fact, Dr. Rao makes a basic mistake. He violates basic principles of economics. And it is such an important principle that the economists even have a name for it. It is called the "sunk-cost fallacy."

Economists generally agree that the

investment's already made in the past, and this what we call sunk costs, should not be considered when we decide on making future investment decisions.

What matters for the future investment decisions is the potential future additional cash flows that the project can generate in expectation on top of the cash flows that that project should have generated anyway if we provide additional capital.

Q. So a reasonable investor in May of 2025 would have been focused on the potential return on investment of incremental dollars that they're putting in; correct?

A. That is absolutely correct. And doing anything else would be an example of sunk-cost fallacy.

Q. Thank you.

Dr. Strebulaev, do you have an opinion as to whether Rigmora's decision to condition the discussion of additional budgets for certain portfolio companies on ATP winding down the early-stage companies was consistent with reasonable investor behavior in a venture capital context?

A. The answer is yes. And I would look at the factors that are reviewed: missed milestones,

poor performance of the fund recently, lack of third-party investor interest, substantial potential for a conflict of interest. I think take -- combine all of this together, a reasonable investor would be justified in raising very serious concerns.

And I think as a result of this, Rigmora was justified in considering whether to reallocate funds away or to stop providing additional funding to these early-stage companies.

ATTORNEY TAFT: Thank you. I turn over the witness.

ATTORNEY JONES: We have some binders. Can we approach with those?

THE COURT: Sure.

CROSS-EXAMINATION

BY ATTORNEY JONES:

Q. Good afternoon, Doctor. Taylor Jones from Quinn Emanuel for plaintiff.

How are you?

A. Good afternoon.

Q. Doctor, you don't have a medical degree; right?

A. I don't.

Q. You don't have a biomedical

engineering degree?

A. That is correct, I don't.

Q. You've not earned any degrees in the life sciences; right?

A. That is correct.

Q. And none of the courses that you've taught in venture capital investing are specific to the biopharmaceutical industry; correct?

A. If you say specifically, then yes. Of course, the venture capital class I teach cover all the venture capital investments. That would also include healthcare, life sciences, biotech, but not specifically.

Q. Understood.

Biotechnology has never been a specific research area of yours either; right?

A. That is correct. Again, if we understand the specific in the way I already described.

Q. So you're not an expert in biotechnology specifically; correct?

A. No.

ATTORNEY JONES: Let's pull up JX 1318, please. And this is in your binder behind

the tab that says JX 1318, if you'd like to turn there in the paper version, Doctor.

Q. You reviewed this email in preparing your report; correct?

A. That is correct.

Q. This is Mr. Bogdanov's May 15th, 2025, email to Dr. Harrison and others at ATP.

A. That is correct.

Q. And this email is the focus of Section V of your opening report, I believe; is that correct?

A. I don't remember the section number right now, but I believe so.

Q. You, in fact, quote from it in paragraph 57 of your report; correct?

A. Presumably so.

Q. Why don't we turn to your report. That's JX 1576. That's also behind a tab in the binder if you'd like to turn there with me. I'm specifically looking at page 24, that's where you can find paragraph 57.

You quote here from this May 15th, 2025, email, here in your report; correct?

A. That is correct.

Q. And you conclude in your report that a reasonable investor would share some of the concerns that are expressed in this email; right?

A. At least some. I'm not really sure about some or all, but yes, would share concerns, yes, that is correct.

Q. I'd like to look at the first sentence of paragraph 58. You write, "As explained in its May 15, 2025 email to ATP, Rigmora believed that the Early Stage Companies had failed to meet milestones as set forth in their investment memoranda and there was no third-party interest to invest in them."

Did I read that correctly?

A. Correct.

Q. You didn't interview anyone at Rigmora before submitting your reports; right?

A. I did not.

Q. And so the support you cite for this statement regarding what Rigmora believed is in footnote 84 of your report; right?

A. That is correct.

Q. And that cites to paragraph 134 of the complaint, and complaint Exhibit 10; right?

A. That is correct.

Q. Do you remember what paragraph 134 of the complaint is?

A. Not sitting here right now.

Q. Let's turn to tab 1400, JX 1400 in your notebook, please. Paragraph 134 starts on 62 of the complaint. Let me know when you're there.

A. Yes, I do see paragraph 134.

Q. Paragraph 134 is a long quote of the May 15th, 2025, email; right?

A. That is correct.

Q. Let's also turn to Exhibit 10 to the complaint. You'll find that at the back of this same tab. Are you there with me?

A. Yes.

Q. And that is the May 15, 2025, email itself; right?

A. That is correct.

Q. So you don't cite anything else in your report to support an assertion regarding what Rigmora believed; right?

A. That is correct.

Q. You also don't offer an opinion in this case regarding whether Rigmora or Mr. Bogdanov or anyone else at Rigmora were, in fact, reasonable in

their actions; right?

A. I do not. I was not asked to reach such an opinion, one way or the other.

Q. Let's turn back to JX 1318, the May 15th email itself, please. And are you there, Doctor?

A. Yes.

Q. I am looking at the first paragraph after the bullets, the first sentence. "The SLP see no way for a path to commercial success for these Early-Stage Companies, *inter alia*, because: they have failed to meet the milestones set out in the investment memoranda on which SLP's initial funding was premised, the remaining budgets are not sufficient to achieve them, there is no third party interest to invest in these Early-Stage Companies, and any further capital calls would not be in accordance with the milestones and business plans set out in the agreed budgets for the Early-Stage Companies (and the SLP have not consented to these budgets being changed)."

Did I read that correctly?

A. Yes, you did.

Q. And you opine in Part V of your opening report that the early-stage companies raised

issues "That Would Make a Reasonable Investor Concerned About Continuing to Fund Them." Correct?

A. That is correct. I'm not really sure what you mean by Part V. I think maybe Section V.

Q. I should have said Section V, that's right. Thank you.

Now, missed milestones, that's an issue that's mentioned in Mr. Bogdanov's May 15 email that we just read; right?

A. That is correct.

Q. You also discuss it in your opening report?

A. That is correct.

Q. And the May 15th email also states that the remaining budgets are insufficient to achieve the milestones; right?

A. That is correct.

Q. But you don't consider in your reports whether the remaining budgets were sufficient to achieve the milestones; right?

A. That is correct. I was not asked to do it.

Q. Struggling to raise funding from third parties, that issue is also mentioned in the May 15th

email?

A. That is correct.

Q. You do discuss that in your opening report; right?

A. That is correct. I also discuss it in my rebuttal report as well.

Q. Section V(A) of your opening report, that's the section that focuses on whether the preclinical companies missed milestones; correct?

A. I do discuss in my opening report. I don't remember the section number right now. Apologies.

Q. That's not a problem at all. We can turn there if you like. It's -- 1576, again, is the tab. And that section of your report starts on page 25.

So this is the section of your report where you discuss your finding that "The Early Stage Companies Missed Milestones." Right?

A. That is correct.

Q. Now, you opine here that it's "common to require that portfolio companies [hit] milestones to progress to the next round of funding." Right?

A. That is correct.

Q. But you can't give an opinion here on whether the portfolio companies at issue here were required to meet milestones in order to progress to the next round of funding; right?

A. I don't believe so. It seems a legal question to me.

Q. And you're not a lawyer; right?

A. I'm definitely not a lawyer. I'm not qualified to render any legal opinion, only an opinion as an economist.

Q. Thank you.

Paragraph 61 of your report on the next page here, you opine that "a reasonable investor would be concerned about the failure of portfolio companies to meet their predetermined milestones." Right?

A. That is correct.

Q. You didn't determine whether ATP had, in fact, missed milestones; correct?

A. Do you mean ATP or the portfolio companies of ATP, Counsel?

Q. I'll accept that correction. The portfolio companies. You didn't determine whether they had, in fact, missed milestones; right?

A. I did not. I was not asked to do it.

Q. You relied on the lawyers from Debevoise to tell you that the portfolio companies had missed milestones; isn't that right?

A. Well, what I understood is that, from counsel, is that there's another expert, Dr. Ilonna Rimm, who was asked to -- by a technology expert to opine or to investigate whether milestones were missed or were not missed. And that she reached an opinion.

Q. You also don't opine on which milestones were missed; right?

A. That is correct.

Q. And you don't opine on the reasons that preclinical companies may have missed certain milestones; is that right?

A. You mean specific companies at the issue in this matter?

Q. Correct?

A. That is correct, I do not.

Q. You would agree, wouldn't you, Doctor, that a reasonable investor would want to know why the portfolio companies missed milestones?

A. I would say that it depends. Typically, yes. But, of course, as I mentioned, there

are many factors that a reasonable investor would consider, in addition to -- sorry, in addition to missed milestones. A missed milestone definitely would raise, I think, a substantial red flag for any reasonable investor. But then there are other factors at play.

Q. Do you recall providing deposition testimony in this case on August 26, 2025?

A. I do.

Q. I'd like for you to turn to your deposition transcript, which you should have in front of you. I'm going to turn to page 101.

A. I can also look at the --

Q. That works for me. Whatever you would like to do.

A. Thank you. I will look at the screen, if that's okay.

Q. Starting on line 20.

"Question: Okay. Dr. Strebulaev, are you intending to testify that a portfolio company's meeting of milestones that were presented in an investment memo were a prerequisite to the release of funding within the Series A round?"

Mr. Taft objects to form to the extent

it calls for a legal conclusion.

"Answer: I think, Counsel, some words that you use such as 'prerequisite' seems legal to me. But I do intend to testify of course only if asked and called upon that a reasonable investor would review at all times, including in connection with a continuous funding in a Series A round, about how the -- annually the portfolio company is progressing. And that would include whether the company is able to reach its milestones, whether it missed milestones; and if it missed, why it missed milestones."

Did I read that correctly, Doctor?

A. You did.

ATTORNEY TAFT: Your Honor, the full answer was not read.

THE COURT: You can read it during redirect.

BY ATTORNEY JONES:

Q. Now, the second issue you identify in Section V of your report is that there was "no third party interest to invest" in the preclinical companies; right?

A. That is correct.

Q. In paragraph 62 of your report, you

give an opinion as to the reason the preclinical companies were unable to obtain third-party funding; isn't that right?

A. Again, Counsel, I need to see paragraph 62, but I believe that's correct.

Q. Of course. Let's go there. That is on page [sic] 62 of JX 1576. I'm going to try and join you in reading the screen here.

Are you with me there?

A. I am.

Q. In paragraph 62, you write, "If potential new investors had thought that the Early Stage Companies were viable investments, these companies would likely have been able to obtain funding from third parties. Based on my review of the evidence, this was not the case."

Did I read that correctly?

A. You did.

Q. So you're opining here that the reason third parties did not invest is because they didn't think the early-stage companies were viable investments; correct?

A. I was not asked to evaluate whether the investments were viable. But I was asked to opine

how -- in the venture capital industry, what are the indicators that the companies are potentially viable. And one important indicator is the third-party equity interest, which means that if the market, the venture capital market, considered those companies to be of interest, there would be interest from third-party equity investors that would materialize.

And upon the review of the evidence, I have not seen such materialized interest.

Q. And when you say "review of the evidence," you mean emails and deposition testimony in this case; correct?

A. Well, the entirety of the evidence I think that was given me. But that would include depositions and emails I believe, yes.

Q. Let's look at pages 26 to 27 of your opening report. I'm at paragraph 63.

So here, you write, "I have reviewed documents suggesting that ATP tried to find third-party investors and partners in the Early Stage Companies and was unable to do so. ATP's document production includes emails regarding its business development attempts with regard to the Portfolio Companies that show outreach to many pharmaceutical

companies, where the update to those attempts was mostly 'awaiting feedback.' Review of these emails indicates an unwillingness to fund the Early Stage Companies from third-parties. For example, they mention that potential investors and partners were interested in Aethon, Apertor, and Evercrisp but ultimately concluded that it was 'too early' to engage."

Did I read that correctly?

A. You did.

Q. You quote from one of these emails, right, in paragraph 63 to your report?

A. That is correct as well.

Q. And that's this block quote here that I'll read from now.

"I am a fan of the technology and appreciate its potential. The challenge we have had is finding a target that the company sees as commercially viable. As I explained in my email last September, with Sanofi signing a strategic deal for exclusive US over-the-counter rights to Tamiflu® in Flu Care, they are currently unwilling to consider another antiviral for flu. They also aren't sure about the commercial potential of an antiviral for

coronavirus, PIV3 or RSV."

Did I read that right?

A. Yes, but you said it's a quotation from the email. And I think, Counsel, you also read the last sentence, which is not a quotation, if I'm not mistaken. But it's part of my report.

Q. Well, let's go to the email and see. So this is behind JX 0811 in your binder. And I believe the email that you're quoting from is on the page ending in Bates stamp 533, about halfway down the page.

Let me know when you're there.

A. I am with you, Counsel.

Q. And that's the email that you quote in paragraph 63 of your report; is that correct?

A. Is it a question? I'm sorry, Counsel.

Q. This is the email that you quote from in paragraph 63 of your report; correct?

A. I do, with the proviso that if you look at the footnote, footnote 92 of my opening report, this is just one of the emails I quote. I also quote an internal email, and I also quote the deposition of Mr. Jardine as well.

Q. Thank you.

The first sentence of this email, on the page ending in Bates 533, says, "It is great to hear from you. I would certainly appreciate a preview of the data and you are correct our CDA is good until 2028."

You omitted that from paragraph 63 of your report; correct?

A. No. I cited the entirety of the email in -- well, I cited this as footnote 92. I said, "Emails between ATP and Red Queen, March 2024," and then I gave the Bates stamp number. I did not omit the first sentence. I just did not quote from the email --

Q. Got it.

A. -- directly.

Q. So that's exactly what I meant. You didn't quote the two sentences that I just read; right?

A. That is correct.

Q. And you indicate that omission with ellipses; right?

A. I'm sorry, Counsel. I'm not really following you.

Q. Go back to paragraph 63 of your

report.

A. I am there.

Q. You have ellipses at the beginning of this block quote; right?

A. Yes.

Q. And that indicates this omission, doesn't it?

A. Yes. I think really it is -- and apologies if I did not do it correctly, but I think this is the document. And then I say this email that I am quoting in footnote 92 starts at page 553.

Q. Understood.

A. So from this point of view, I think I -- I did not quote the sentence for the space constraints, but I did mean, I think, I believe that email, the entirety of that email.

Q. Got it. Okay. Let's go back to the email again behind Tab 811.

The last sentence here, once you get there, the last sentence here says, "I do think clinical data showing that is having a positive impact in people infected with those pathogens might be able to change opinions."

You left that out too; right?

A. Again, Counsel, I'm not really sure if I left out. Yes, I did not cite anything -- sorry. I did not cite the specific text of the email in my report. I reference to it in my footnote 92. That would include the yellow sentence that you indicated.

That also -- I also did not include the middle sentences as well that, for example, say, and I'm going to quote, "The challenge we have had is finding a target that the company sees as commercially viable." And I think what was important for me is in this email and in the previous --

Q. Let me stop you for a second. I believe you did include that in your paragraph 63; right?

A. I'm sorry?

Q. You did quote that in your paragraph 63.

We can move on, Doctor. It's not important.

You did not use ellipses to indicate that last omission; correct?

A. Sorry. Again, Counsel? I'm not really sure I follow.

Q. That's okay. We can move on.

A. I believe the way I used ellipses is to indicate where you can find that email.

Q. That's fine. Let's move on, Doctor.

Let's turn to JX 786. Here, I'm looking at the page ending in 003. And this is a document that you reviewed during your deposition; right?

A. That is correct.

Q. And I'm looking at the email in the middle of the page. It says, "Dear Seth and Anna, Given the latest news re syndications where various funds expressed sanctions concerns toward[] assets ownership structure, we have requested memorandum from Debe clarifying this matter as per US sanction laws. We have explicitly asked for a Memo that can be shared with the Fund and its advisors so that we can share it with you. Kind regards, Anna Kolonchina."

Ms. Kolonchina was an employer of Rigmora; right?

A. That is correct, I believe.

Q. Now, in reaching your conclusion in Part V(B) that third parties would have invested if they thought the preclinical companies were viable investments, you didn't consider that third parties

might be concerned about investing because of U.S. sanctions against Dmitry Rybolovlev; correct?

A. I did not, and I have not seen any evidence in the record from third-party investors that indicated that concern.

Q. You conclude in your report that the performance of the pools containing the preclinical companies was "below its peers, and substantially below top performing comparable funds." Right?

A. That is correct.

Q. The May 15 email doesn't discuss the performance of the pools containing the preclinical companies as compared to its peers; right?

A. I believe that's the case.

Q. You prepared that analysis of comparable companies solely for this litigation; correct?

A. Well, yes, I was retained as an expert witness for this litigation. That is correct.

Q. In roughly June 2025?

A. Well, while my work was done roughly in June, August -- June, July 2025, the information that I used was as of December 2024. The exact details are explained in my methodology that I used to

prepare the comparison in my report.

Q. You don't claim anywhere in your reports that Rigmora conducted this analysis before sending the May 15 email; right?

A. I do not.

Q. You also read the LPA as part of your work for this case; isn't that right?

A. I did, of course, as an economist.

Q. And there's nothing in the LPA that says capital commitments depend on whether the portfolio companies are performing in the top quartile; right?

A. I think that might call for a legal conclusion.

THE WITNESS: Your Honor, if I may, I will answer.

A. I don't remember seeing this.

Q. Two out of three of your principal conclusions involve a concept that you call a "reasonable investor." Right?

A. Two out of three? I'm not really sure what you mean by three, Counsel.

Q. You discussed the concept of a reasonable investor in your report; correct?

A. That is correct.

Q. A reasonable investor, would you agree, has access to information an investor would want to make a decision?

A. That depends.

Q. Turn back to your deposition, please. I'm on page 32, starting with line 19.

ATTORNEY JONES: Marco, do we have that?

Q. "Question: What is your definition of 'reasonable investor' as you have used it in your report that's been marked as Exhibit 1?

"Answer: A reasonable investor is an investor who is a rational economic agent and will be making decisions in light of all [] the information that an investor possesses, so information an investor would like to possess to make a decision."

So the investor has access to all the information the investor would want to make a decision; right?

A. No, that is not correct, Counsel. So what I said is that "all of the information that an investor possesses." Sometimes the investor would find it -- a reasonable investor would find it in that

investor's interest to delegate decision-making to some others.

So, therefore, to make a decision you don't need to try to get more information. But yes, if you already have this information, then you typically would utilize it.

Q. You're not aware of Rigmora retaining any biotech consultants before it sent the May 15 email; right?

A. I don't know one way or the other.

Q. Now, you have this opinion that I believe you testified about a moment ago, in Section III(D) of your report, that a GP's interest can diverge from an LP's interest in relation "to providing additional rounds of funding." Right?

A. That is correct.

Q. And that can create a conflict of interest that can also be a concern to a reasonable investor; correct?

A. That is correct.

Q. But you would agree that this risk can be mitigated; correct?

A. To some extent, yes, that risk can be mitigated. And one way to mitigate it is by the

general partner, by the fund manager, to provide a substantial capital contribution --

Q. Another way that it can --

A. -- as a limited partner.

Q. Another way that it can be mitigated is to give the LP the right to approve budgets for the portfolio companies; right?

A. So that typically is not what's done. I think this is more or less --

Q. Typically. But that's one way they can be mitigated; right?

ATTORNEY TAFT: Your Honor, if the witness can finish the question without being cut off.

THE COURT: I think the court reporter would appreciate that as well.

But I encourage you to listen to the questions as well.

THE WITNESS: Thank you.

ATTORNEY JONES: Apologies. I'll slow down.

THE WITNESS: Would you repeat the question, Counsel. I apologize.

BY ATTORNEY JONES:

Q. One of the ways that that conflict can

be mitigated is by giving the LP the right to approve budgets for portfolio companies; right?

A. So in the cases where there is one major LP, that could be one of the ways. But I would not say it's mitigated. I would say this is one of the factors that should be taken into account. This does not eliminate the potential conflict of interest, especially if some or all of the companies are underperforming.

Q. In this case, Rigmora did have the right to approve budgets for portfolio companies; right?

A. I believe that is the case.

ATTORNEY JONES: Can we just pull up Slide 5 to your demonstrative again.

I'm sorry. The very last slide is what I'm looking at. That's it. Thank you.

Q. This slide doesn't account for the fact that Rigmora has to recover the full amount of its capital contributions before Dr. Harrison receives any carry; right?

A. That is correct, which is the, as I mentioned, the idea of the carry, is that limited partners first recover the capital contributed to the

fund, and then the carry is shared, or the profits are shared, rather, between the limited partner and the fund manager; in this case, Dr. Harrison.

Q. And this slide also doesn't account for the fact that Rigmora receives over 90 percent of the profits in Pools V-1 and V-2; right?

A. I'm not really sure what you mean by that. Of course it does account because, as I understand, there's really only two beneficiaries here, which is Rigmora and Dr. Harrison. So Dr. Harrison receives 7.5 percent of carry. Rigmora does not receive carry because Rigmora is a limited partner.

So carry is received only and only by Dr. Harrison and his trusts.

Q. And you understand that Dr. Harrison does contribute capital to Pool V-3; right?

A. That is correct. I believe that he contributes around .3 percent. I may be mistaken on the number. But his carry in Pool V-3 is also larger. It's about 11.2 or 11.3 percent.

Q. Pool V-3 is not on this slide; right?

A. I did not include it on this slide because it does not include -- because none of the --

as I understand, none of the early-stage companies in the matter are included in Pool V-3.

Having said that, if you include Pool V-3 on the slide, my opinion would not change.

ATTORNEY JONES: No further questions. Thank you.

ATTORNEY TAFT: No further questions, Your Honor.

THE COURT: Thank you.

THE WITNESS: Thanks so much.

(Witness excused.)

ATTORNEY BARLOW: Your Honor, plaintiffs are going to call Spiros Liras.

SPIROS LIRAS, having first been duly affirmed, was examined and testified as follows:

ATTORNEY BONACORSI: Good afternoon, Your Honor.

DIRECT EXAMINATION

BY ATTORNEY BONACORSI:

Q. Good afternoon, Dr. Liras. Can you please introduce yourself.

A. Yes. I'm Spiros Liras. I'm a drug discovery and development professional. I've been working in the business for about 30 years. I have a

Ph.D. in organic chemistry.

I started my career at Pfizer, where I was at for 24 years. I was vice president of research at Pfizer, leading programs in multiple disease areas spanning from neuroscience to cardiovascular-metabolic diseases and rare diseases. I was fortunate to have led teams that deliver nearly 50 compounds into clinical development.

Q. How long have you been at ATP?

A. I left Pfizer in 2018. I joined Biogen for a very brief period of time, about 15 months, where I established the external portfolio innovation unit. Reason of this was to basically promote entrepreneurship.

And while I was at Biogen, I was recruited by ATP. It was a compelling opportunity for many reasons, in part because ATP had a fantastic reputation in terms of actually going and building companies from scratch, from very nascent research, which is where I lived in for all my life, really, professionally, to a great success in terms of turnovers by exits and other measurements.

At the time that I was hired, our managing director, Seth Harrison, was building an

exceptional team of expertise with other partners. Some of them I had tremendous respect for and I always looked forward to working with.

And I think the last and most important thing is that Seth had a tremendous respect, hopefully still has, for chemists. I'm a chemist, and I really appreciated that as an added advantage.

Q. Are you a venture partner with ATP?

A. I am.

Q. And what do your responsibilities include as venture parter of ATP?

A. Predominantly to select projects, to liase with the external environment, identify compelling opportunities.

Subsequent to this, sort of like invest my time in terms of building a coherent and convincing investment thesis, which is then approved by the ATP investment team, which encompasses all venture partners. Ultimately, the decision to fund is Dr. Harrison's.

Once a company is funded, we compile a pretty thorough investment memo which kind of serves as a roadmap from the implementation of a project all the way to the delivery of value as measured by exits.

That's a pretty complicated and comprehensive document, which includes an investment thesis, the rationale, which is the foundation, the quality of our founders, several sections that relate to what we call milestones, which are forecasts and projections that measure progress against stated goals. We also have risk mitigation strategies that appear in the investment memo. We do comparables to assist how novel the science is and how potentially valuable it will be to patients and investors.

Q. And in addition to your role as a venture partner with ATP, do you have any roles within the portfolio companies?

A. Yes. I am a CEO of a company called Deep Apple Therapeutics. I was a funding CEO for a number of companies, which I thought it was an extraordinarily attractive aspect of my job at ATP because in addition to selecting and funding a project, we spent a great deal of our time building teams. And that's quite fantastic because we work with some of the smartest people on earth. Quite frankly, all of our founders at ATP have been members of national academies of medicine, science, winners of breakthrough prizes, Nobel Prizes, amongst other

things. It's an exceptional opportunity to really engage with a cohort of people that shape the science as we know it today.

Q. And was this dynamic between ATP and its portfolio companies one the factors that caused you to join ATP?

A. Yes.

Q. At a high level, how would you describe your responsibilities within the portfolio companies, to the extent you have a role?

A. Yeah, early on, it's about team building and about guiding the scientific progress of the portfolio. For a specific company we select team members, we hire people. It actually has a pretty wide breath of scope.

For example, we even explore real estate opportunities for best fit for the companies that we create. But some of them had specific needs.

Progressively, as the company advances and matures, we hire people that are more relevant to the needs at time, meaning that we will hire translational biologists when we have something to translate. We will hire chemists when we have something to produce and evaluate to work to enable

the journey of the company.

One of the things that I would like to highlight for companies of ATP, certainly the ones that I was involved in, is that they're extraordinarily efficiently managed financially. Most of them actually for the tenure of five years had less or just about 20 people, for the most part, with the exception of one.

Q. Okay. And you just mentioned investment memorandum. Did you help prepare investment memorandum for the portfolio companies you were involved in?

A. I did. I was a co-author.

Q. Could you describe, at a high level, the purpose of the investment memorandum.

A. It's basically to capture all aspects that justify the spend, from strategy all the way to operation and execution, and also a pretty diligent time-bound, obviously, effort to understand the marketplace and how this company fits and differentiates.

Q. I think you may have mentioned this earlier, do the investment memorandum contain what's known as milestones?

A. It did in the title.

Q. And what is the purpose of the milestones within the investment memorandum?

A. For us, the milestones were basically forecasts of a time and point in which we had credible data to guide three decisions: One is we continue as planned. The other was there's compelling data to pivot and change the direction of the company. And the other, obviously, always in scope was whether there was enough data to convince us to exit the investment. That's kind of the comprehensive purpose of what we called milestones.

Q. And do you understand the milestones to be a static requirement to receive additional funding for the portfolio companies?

A. No. And they shouldn't be because this is early research, and it changes quite rapidly.

Q. And were you ever told by anyone at ATP that milestones had to be hit to receive additional funding?

A. No.

ATTORNEY BORN: Objection, calls for hearsay.

THE COURT: Overruled.

BY ATTORNEY BONACORSI:

Q. Dr. Liras, when you were working at Pfizer, did they take the same approach with respect to milestones?

A. Every time. We build what we called project operating plans. I had forecasts and projections for key delivery, and we defended those either on a quarterly basis or biannually in front of senior leadership in presentation.

Q. And did you understand the milestones to be substantive decision points with respect to research and development?

A. Yes.

Q. And not related to requirements to receive funding?

A. Absolutely.

Q. And in your experience at ATP, have there been circumstances when a company pivoted from the milestones set forth in the original investment memorandum?

A. Many times. For good reason.

Q. Can you provide a few examples.

A. Sure. Apertor Pharmaceuticals is one of our companies where we originally conceived the

possibility of delivering a vaccine enhancement product. As many of us remember, that was 2021, 2022. It was the thick of the pandemic. We were encouraged by our SAB to do so. We found the clinical candidate. I met the objectives.

We went through a thorough commercial and clinical evaluation analysis and convinced ourselves that clinical development at the time of the pandemic with immunocompromised people was not going to be productive. So we pivoted from that.

We knew we had a very valuable platform in synthetic biology. And we discovered that that could be deployed against oncology targets with high medical need with not really a lot of availability of frontline cases, treatments of patients.

Q. In your opinion, is a pivot like that one that indicates positive development for the portfolio company?

A. Yes, in this particular one and in many other cases.

Q. And would you describe this flexibility with respect to milestones as a benefit of ATP's model?

A. I do, because in the way that we construct our thinking about companies, we not only spell out what aspirational may be possible, but also what may not and where the risks are. And we contemplate those risks in an effective way to actually mitigate and preserve the investment and actually enhance the value of the investment.

Q. And thinking about your experience in biotech more generally, is pivoting something that exists outside of ATP?

A. I would argue that most successful companies in the history of biotech have pivoted. I can offer one fantastic example. There's a company called Gilead in South San Francisco. Gilead is a known antiviral company these days. They started as an oligonucleotide company completely irrelevant to the current mission.

In the early '90s, as everybody recalls in San Francisco, there was different pandemic, HIV. A lot of people were losing their lives. Gilead, as a courageous company, decided to dedicate their resources to solve antivirals, and they did this multiple times. In fact, they have produced hepatitis C, small molecule treatments that are

curable. Now people no longer have to go through liver transplants. And I think this is one example where a company listened to actually what was the -- an immense and incredibly urgent social need as well as followed an opportunity for breakthrough science.

As part of the story, actually, Gilead outlicensed its oligonucleotide platform to a company called Ionis, which in itself is the most -- one of the most actually revered companies for the liver in early oligonucleotide therapeutics. So it was a win-win for everybody.

Q. Pivoting back to Apertor -- and that's one of the preclinical companies you're responsible for?

A. That's correct.

ATTORNEY BONACORSI: Can we pull up JX 095, please.

Q. Do you recognize this document as the investment memorandum for Apertor?

A. Yes. This is the investment thesis, the executive summary, which basically contemplates -- it's a summary of the rest of the investment memo presented in a more strategic fashion. It has all the key elements that we described subsequently in more

detail.

Q. Okay. And did you draft this memorandum?

A. I did.

Q. And turning to page ending 0002, do you see the subheading here "Investment Thesis"?

A. Yes.

Q. And what is the purpose of this paragraph?

A. It's to lay out actually what would be not only the first indication that will create value for patients, but also subsequently ways to build on the breakthrough science that the company delivers to expand and build and accelerate investment and success basically.

Q. And this section is informed by the scientists and chemists working at the portfolio company?

A. Yeah, this is -- and many in the ATP cohort, actually.

Q. Can we turn to page ending 0027. And is this -- this section here refers to milestones. Is that what you were mentioning earlier?

A. Yes.

Q. And these were set out before the company was ever funded?

A. These were set up before the company -- before the company was funded. In fact, that memo somewhat precedes that decision. And they are underpinned by no data, to be fair, because this is breakthrough science. So what we do there is we apply our knowledge of reasonable transitions, where we can deliver a body of data that will convince us about and support the three points that I raised earlier, which is continue, pivot, or discontinue.

Q. And do you see in front of you there's Tranches 1, 2, 3, 4, 5?

A. Yes.

Q. And could you describe Apertor's progress with respect to Tranches 1 through 3.

A. Even if you take those tranches literally -- and some of them are diagnostics. For example, just to point out your attention to Tranche 1, there's no reason to actually count how many compounds you make at a company. You don't judge a company by how many compounds they've made. Be that as it may, the company exceeded by a long shot the number of compounds that were specified.

Importance is to focus on milestones that represent hard currency, in my opinion. Those are INDs and development candidates. Especially INDs, which are regulatory documents. We submit those to the regulators.

If you actually look at Apertor's delivery when you add up that investment memo to $33 million, which is a completion of Tranche 4, we were expected to have delivered an IND and a development candidate. What we delivered -- two development candidates with an investment as of May 29th of $29 million. So, in fact, we never were actually funded to achieve the delivery of this full tranche.

Having said that, as we model it subsequently, it would have taken us $1.5 million more of an investment to get to a full delivery of this milestone, which was aligned with our forecast. But we were not given that opportunity.

Q. And in your opinion, would you say that the company overperformed vis-à-vis the funding they had received up to that point?

ATTORNEY BORN: Objection. Leading. I've been letting this go, but ...

THE COURT: The same instruction applies, Counsel. And you have been leading the witness. And that's fine, but it's hard for me to assess the credibility of the witness if you do so.

ATTORNEY BONACORSI: Understood, Your Honor.

BY ATTORNEY BONACORSI:

Q. Dr. Liras, you mentioned earlier Apertor had a period where there was a pivot?

A. Yes.

Q. Looking at these tranches, could you explain at what point the pivot occurred?

A. I would say the pivot occurred right about -- definitely by the completion of Tranche 3 and in the beginning of Tranche 4. In fact, I remember vividly that the investment that we made at the time was about $24 million, if not 25.

Seth, myself, Paul Da Silva Jardine had an exchange by email and other discussions where we actually put all options on the table, including shutting down the company. A breakthrough publication came out at this point of time that told us that the value of the synthetic biology platform was incredible. We deployed that based on that

publication. We extended a very small tranche of $2 million to explore that concept, and this is what ultimately delivered the clinical candidates.

Q. What did this pivot mean for the remaining milestones in the investment memorandum?

A. In a sense, the remaining milestones, again, in a forecasted way, in my opinion, could be achieved had we received the whole investment of the Series A.

Q. And do the investment memorandum also contain a section regarding risk?

A. It does.

Q. And can you turn to pages ending 003, 004.

Can you describe the purpose of this section.

A. Yeah. This is to identify risks based on our state of the knowledge at the moment of incorporating -- or actually at the moment of drafting the investment memo. This is entirely actually aligned with what happened. And it kind of, again, demonstrates the rigor and depth of the ATP team.

We predicted that we could identify compounds, but we predicted that there could be some

ambiguity as to whether -- which indications would make most sense, and we labeled this as a medium risk.

Once we actually decided that because of clinical complexity and commercial reasons adjunctive theory for vaccine enhancement wasn't the way that we wanted to go, we spent the time more thinking and less spending to think what would be the next potential valuable indications. And now we have a couple of indications for targeting renal cell carcinoma and non-small cell carcinoma that are basically guided by genetics, which facilitate patient selection of the clinic, which is a big ask.

Q. Were you involved in providing updates regarding portfolio company progress to ATP?

A. All the time with various means. We had -- obviously, we had board decks that were shared with ATP. We also had quarterly reports that are fact-based in terms of capturing things along progress or along opportunities to pivot. Those were supplied every quarter. And we also had, you know, direct and spontaneous dialogue within the team, as well as the justifications for calling additional tranches.

Q. Okay. Could you describe some of those dialogues.

A. The dialogue that -- the dialogue that I referred between myself and Paul Da Silva Jardine, one of my colleagues, was whether we should actually consider promoting shutting down the company. We went through a very thorough debate about this, analyzed the literature, and decided that that wasn't really a desired path. We presented the case to Seth. We agreed that we would get a small investment, it was $2 million, to actually prove the new hypothesis. And that was pretty material to the progress of the company subsequently.

Q. And do you know whether any of the updates went to Rigmora?

A. Through the quarterly reports I think they did.

Q. And did you assist with drafting or drafting portions of those quarterly reports?

A. All the time. I received direct feedback from scientists about specific scientific facts, but I authored the final version which was submitted to ATP.

Q. And do you recall receiving outreach from Rigmora about the progress of the portfolio companies?

A. Not ever.

Q. And can we turn to JX 560, please.

You see this is an email from an Anna Batarina to Anna Kolonchina and others at Rigmora, attaching the first quarter 2023 quarterly report?

A. Yes.

Q. Flipping to the next page, do you recognize this as "First Quarter 2023 Report"?

A. I do.

Q. And you testified earlier that you drafted the updates in this report for the companies that you were involved in?

A. That's correct.

Q. And can we turn to the bottom of 0011, please.

Dr. Liras, is this the update for Apertor?

A. Yes, it is.

Q. Can you summarize for the Court the purpose of this update and what you're describing here.

A. Yeah. Essentially, this follows one decision to pivot. And therein we state that we performed comprehensive analysis by basically engaging

all aspects of ATP's colleagues, including commercial assessment as well as medical assessment. And we concluded that oncology in renal cell carcinoma will be one of the most productive ways to go and also identified evergreen opportunities in research areas outside of oncology.

Q. And could you read the paragraph starting "With key data" at the bottom.

A. That's right. There we -- we typically socialize companies as they come closer to delivery of a developing candidate or an IND. And we actually anticipated -- we made a schedule basically to accelerate the research and also accelerate the presentations and the content of the presentation so we can meet and have productive interactions with business partners. That's something that we do as par for the course across all companies.

Q. And is it your understanding that Rigmora received these quarterly reports?

A. Yes.

Q. And do you recall whether after receiving this Q1 2023 quarterly report, Rigmora provided additional funding to Apertor at a point in time?

A. Yes.

Q. And pivoting subjects here a little bit, are you familiar with stock purchase agreements between the portfolio companies and ATP?

A. I am.

Q. And did you have any role in drafting those?

A. I read and signed the documents as a representative of the company.

Q. And could we pull up JX 1329, please.

And do you recognize this document, Dr. Liras?

A. Yeah. This is a Deep Apple Therapeutics SPA.

Q. What is the purpose of this document?

A. It basically -- it's a legal contract between the purchaser and the company to sell stock, and it's essentially a legal agreement to do so.

Q. Can we turn to the page 0038, please. And do you see this, Dr. Liras, here? This is section 1.3(d).

A. I do.

Q. Could you please read the first sentence of this clause.

A. "Notwithstanding the foregoing, the Purchaser shall have the option, at any time, and upon at least three [] business days' notice to [] Company, to accelerate its obligation to purchase all or a portion of the Additional Shares (at a [] share price equal to the Purchase Price), notwithstanding [the] Milestone has not occurred."

Q. And do you have an understanding as to what this sentence means?

A. It means that the buyer can choose to buy stock independent of success of said milestones.

Q. And the buyer here is who?

A. ATP.

Q. And do you recall testifying a few moments ago that Deep Apple is another company that had a pivot with respect to the milestones?

A. I did.

Q. And could you describe the pivot with Deep Apple.

A. Yes. So we built Deep Apple on the basis of a fairly broad research platform. There, we identified targets that spanned a number of disease areas from psychotherapeutics and neurogeneration to oncology, inflammation, immunology, and genetic

obesity. Those were targets that were actually included in the initial investment memo.

Shortly thereafter -- I should also mention that Deep Apple has scientific leadership that probably adds up to 100 years in experience in cardiometabolic diseases. If not that, pretty close to that.

We engaged with KOLs. Because of our genetic obesity target, we were told that this was the time to move in, all-in, in obesity. Obviously this was supported by the clinical success and commercial success of medicines like GLP-1.

So we basically substituted 80 percent of that portfolio, kept only two targets, and rebuilt a portfolio of obesity, which now is yielding several clinical candidates, one of which -- one of the programs, an early program I might say, served as a basis of a very lucrative, strategic partnership with Novo Nordisk valued at $812 million. Novo Nordisk is potentially one of the two most recognizable names in the treatment of diabetes and obesity these days.

Q. Did you keep ATP updated on the progress of potential business development deals?

A. Yes, in a very progressive manner. We

started talking about discussions under CDA in our quarterly reports. We escalated that description to include description about the progress of the CDAs.

For example, I recall that we put in that with Roche we were in a co-creation of research plan, which is a necessary next step after people like what they see under confidentiality.

Then we proceeded to build term sheets. Deep Apple was fortunate to have term sheets from four or five companies, the who's who actually, because it was a company that was highly visible by that time. We negotiated that in good faith with three potentials, and we settled with Novo Nordisk on June 11th of 2025.

Q. And were these negotiations or the status of those discussions reflected in the quarterly reports?

A. Yes. And in fact, in our board decks, we also displayed all the term sheets with all financials.

ATTORNEY BONACORSI: Could we pull up JX 824, please.

Q. And, Dr. Liras, is this an email from Anna Batarina to Anna Kolonchina attaching the 2024

first quarter quarterly report?

A. Yes.

Q. Turning to page ending 002, do you recognize this document as that quarterly report?

A. I do.

ATTORNEY BONACORSI: And could we turn to 0014, please.

Q. Does this appear to be the summary you drafted on Deep Apple?

A. That's correct.

Q. And could you read the third paragraph please?

A. "Given the intense interest in obesity, the company is in active and confidential discussions with major venture groups including Atlas Ventures, Foresite Capital, Orbimed, Vida Ventures, Alpha Wave, and Blue Owl. Similarly, the company is exploring in parallel strategic partnerships with pharma including Roche, Novo Nordisk, Lilly, Pfizer, and Merck for obesity, and AbbVie, Argenx, Blueprint, and Otsuka for MRGPRX2," which is our inflammatory candidate.

Q. Were these discussions what led to the eventual deal with Novo Nordisk?

A. They did. And like I said before, it was a very competitive process because we had parallel term sheets from Roche and Amgen.

Q. This quarterly report was provided to Rigmora?

A. Yes.

Q. And did you receive any questions from Rigmora about these discussions?

A. No.

Q. And switching gears a little bit. With respect to your management oversight of the portfolio companies, how did you build the teams of personnel that worked with you in those companies?

A. Within the portfolio specifically?

Q. Or any of the portfolio companies.

A. Yeah, any of the companies.

So in the beginning, we basically, as the company is in an embryonic state, we hire people from founders labs that bring a lot of know-how. And progressively, as we built programs that need specific resources, for example, chemistry, we hire a small chemistry team.

Deep Apple is unique because we invested a good deal of our human resource in machine

learning and computational and cyclical studies because it's really a hot topic in AI and machine learning and drug discovery. So we did that fairly early.

And then, you know, we built -- successfully we hired the head of drug discovery and a head of translational biology as the company began to get closer to clinical development.

Q. And when you were hiring for your portfolio companies, do you face competition in the hiring process from other companies in the biotech space?

A. We always do. And I think a tribute to most of our competence is that we were able to extract people from notable companies, especially in south San Francisco, which is a hotbed for biotechnology.

Q. And how has the lack of funding for the portfolio companies over the last few months impacted the ability of these companies to retain the talent?

A. It's been devastating. On June 17, I had to go to San Francisco for 31 hours to oversee the layoff of about 75 people across four companies.

Q. And if funding resumes, do you believe you'll be able to resume operations at a normal level?

A. I believe that there is a good chance because we have exceptional founders and we have outstanding science. Though the companies at this point in time are obviously operating with skeletal crew.

Having said that, one remarkable thing that is worth sharing is that our company, Nine Square, which now has three scientific employees and one operating officer, just recently secured a term sheet, nonbinding, by a major pharmaceutical company for half a billion dollars in a research collaboration.

And I think that's a tribute to the company, to the resilience of the staff, as well as the visibility and exceptional quality of the science we produced.

ATTORNEY BONACORSI: No further questions. Thank you, Dr. Liras.

THE WITNESS: Thank you.

CROSS-EXAMINATION

BY ATTORNEY BORN:

Q. Good afternoon, Your Honor. Natascha

Born for the defendants.

Good afternoon, Dr. Liras.

A. Hello.

Q. Dr. Liras, in your view, it's not unreasonable to prioritize clinical companies over preclinical companies; correct?

A. It happens quite frequently in pharma and biotech.

Q. In fact, you saw the prioritization of clinical companies over preclinical companies plenty of times when you were working at Pfizer; correct?

A. I did not see that. I saw the prioritization of clinical substrate over preclinical projects.

ATTORNEY BORN: Thank you. No further questions.

ATTORNEY BONACORSI: No further questions.

THE COURT: Thank you, Doctor. You may be excused.

THE WITNESS: Thank you.

(Witness excused.)

ATTORNEY BARLOW: Your Honor, plaintiffs call Yuri Bogdanov. Rigmora will begin on

the questioning.

ATTORNEY BORN: Where should we put the translator? Mr. Bogdanov's English is quite good, but occasionally he needs help with a particular term.

THE COURT: Are the mics at counsel table on?

THE INTERPRETER: Permission if I could sit here.

ATTORNEY BORN: You want to move my chair. Can you sit there? Does that work for people?

THE COURT: Let's swear in witness. We'll deal with the logistical issue. I think it would be better if the translator was miked, but go ahead.

STEVEN LAGUTIN, having first been duly affirmed, interpreted between Russian and English as follows:

THE COURT: Is that okay, that positioning?

THE INTERPRETER: I'd rather be here, but it's okay.

THE COURT: All right.

ATTORNEY BORN: We don't need translation for everything, just if he has a question

about a specific term, we'd like you to be on hand.

THE COURT: Why don't you state and spell your name.

THE WITNESS: Yuri Bogdanov, Y-U-R-I, B-O-G-D-A-N-O-V.

YURI BOGDANOV, having first been duly affirmed, was examined and testified as follows:

THE COURT: Give me one second here.

You can understand English fairly well?

THE WITNESS: Yes.

THE COURT: So if you need translation, you are going to ask counsel for a translation; is that correct?

THE WITNESS: That's correct.

THE COURT: Thank you.

DIRECT EXAMINATION

BY ATTORNEY BORN:

Q. Mr. Bogdanov, could you please introduce yourself for the Court.

A. Well, I'm Yuri Bogdanov.

Q. Do you hold any graduate degrees, Mr. Bogdanov?

A. Yes. I graduated from the Moscow

Finance University.

Q. And what discipline is your degree in?

A. Business and real estate valuation.

Q. When did you receive that degree?

A. In 2002.

Q. Are you currently employed?

A. Yes. I'm employed by Rigmora Holdings Limited.

Q. If I just refer to that as "Rigmora," you'll know what I mean?

A. Yes.

Q. What is Rigmora?

A. Well, Rigmora is the special advisory body for the trustees of the trust, and also the investment vehicle which holds a number of important investments.

Q. You just mentioned the trust. What do you mean by that?

A. It's the Scorpios trust created for the three generations of the Rybolovlev family.

Q. Does Rigmora invest in the biotech industry?

A. Yes.

Q. How so?

A. Well, Rigmora, through the special purpose vehicle, the BVI companies, holds the limited partners' stake in the Apple Tree Partners.

Q. If I refer to Apple Tree Partners as the fund or ATP, will you know what I mean?

A. Yes.

Q. And do you understand those limited partner entities to be the defendants in this case?

A. That's correct. I do.

Q. If I refer to those as the Rigmora LPs or just the LPs, will you know what I mean?

A. Yes.

Q. Do you know where the capital that the Rigmora LPs invest in ATP comes from?

A. It comes from the trust's assets.

Q. And did the Rybolovlev family trust have investments beyond its indirect investment in ATP through the Rigmora LPs?

A. Yeah, the trust has significant investments and assets outside of ATP that included the real estate, other businesses, hedge funds, private equity funds, liquidity positions for many of them.

Q. What is your current position at

Rigmora?

A. I'm co-CEO and chief investment officer.

Q. And how long have you held that position?

A. Since last October, since October of 2024.

Q. And did you have a role at Rigmora before you became the co-CEO and chief investment officer last October?

A. Yes. I held numerous executive positions. But last three or four years, I worked as the special advisor.

Q. And what did you understand your role to be while you held the title of special advisor?

A. Well, to advise the trustees and the management of Rigmora on various matters, including the investments, and act as kind of like the second opinion and sometimes like, if they don't like the content, to challenge the management decisions.

Q. While you held the role of special advisor, did you have any responsibility for managing the Rigmora LPs' investments in the ATP fund?

A. No.

Q. When you were promoted to co-CEO and CIO of Rigmora in October 2024, did that involve any new responsibilities?

A. Yes, obviously. And I, like, began responsible for overseeing a large portfolio of assets and investments and advising trustees on the various matters, including the ATP-related, yeah.

Q. Did you do anything to familiarize yourself with Rigmora's investments when you became CEO?

A. Yes. I reviewed a number of documents, contracts or reports, presentations, yeah, covering those topics.

Q. Did you familiarize yourself with the Rigmora LPs' investment in the ATP fund specifically?

A. Yes, I did. Like, briefly reviewed a number of documents. But, again, at that time, you may know, we had an open litigation, so that was also another focus of my work.

Q. And you mentioned the Rybolovlev family earlier. Do you know Dr. Rybolovlev personally?

A. Yes, I do. I know him for more than two decades. I worked for Uralkali, the business

which belongs to the family trust, in Russia.

Q. Have you ever spoken to Dr. Rybolovlev about the Rigmora LPs' investment in the fund?

A. Yes, I did. Many times.

Q. What impressions, if any, did you form about how Dr. Rybolovlev viewed the Rigmora LPs' investment in the ATP fund?

A. Well, he took them very seriously. And, you know, he has a medical background. He started as a doctor, and he was really very passionate about those investments. It's not just investments. It's like his attempt to do something good for the people.

Q. You mentioned earlier that there was litigation pending when you came in as CEO in October 2024; is that right?

A. That's correct.

Q. What was that litigation about?

A. It was the litigation about the limited partner's right to call the distribution of the particular asset, the Braeburn, and the GP refusal.

Q. Do you know what the outcome of that litigation was?

A. The parties agreed to settle the case.

Q. And did you play any role in the settlement process?

A. Yes. I was the lead negotiator on the Trust side.

Q. Could you outline the settlement for me at a high level?

A. Well, the parties agreed -- well, first, to set certain rules and principles on how the Braeburn will be distributed. The parties agreed to distribute in kind the royalty subsidiary, the special purpose vehicle which holds the royalty, the right to receive the royalty from the Braeburn for the very material amount. And, finally, the parties agreed to discuss certain budgets of five of the portfolio companies.

Q. And was there an amendment to the LPA in connection with the settlement discussions?

A. That's correct. The parties signed the Amendment 22 which is, like, summary of the settlement terms.

Q. Let's turn to JX 1068, which should be the first tab in your binder.

A. Yes, I'm on it.

Q. Is this Amendment 22 that you were just referencing?

A. Yes.

Q. And can you tell me the date of this amendment?

A. It's 20th of December, 2024.

Q. Let's take a look at paragraph 26, which is on page 4.

A. I'm on it.

Q. And we're going to start by looking at the first sentence.

Can you tell me your understanding of what this sentence required the parties to do with respect to budgets?

A. Well, the sentence requires the parties to discuss the new budgets for five portfolio companies in accordance with the process set in the LPA. And those companies are Ascidian, Aulos, Nereid, Nine Square, and Replicate. I used just short names of the companies.

Q. And as the lead negotiator for Amendment 22 on the Rigmora side, why were you willing to commit the Rigmora LPs to discuss budgets for these five companies?

A. Just because it's our investments and our businesses. That's what we usually did. And that's what we planned to continue, to discuss the budgets and analyze the projects and understand the businesses in our investment pool.

Q. Turning to the final sentence of this paragraph, it says that "If any approval of a new budget is given by the [SLP]," and then it refers to "such approval" of a new budget being "contingent upon at least $300 million being realized" by the Rigmora LPs "on a sale or financing of [their] interest in ATP LLC."

Do you see that?

A. That's correct. Yeah.

Q. What, if anything, was your understanding of this provision?

A. Well, the provision introduced the condition for the execution of any budget approval. And that condition was the realization of either a sale of part of the royalty agreement I referred earlier or the refinancing.

Q. When Amendment 22 was executed, were you planning on waiting to discuss any new budget proposals you received from Dr. Harrison until the

Rigmora LPs had $300 million in hand?

A. No. No.

Q. When Amendment 22 was executed, were you planning on waiting to seriously consider any budget increases until the Rigmora LPs had these $300 million in hand?

A. No. Of course not.

Q. At the time this amendment was executed, did you care whether the Rigmora LPs obtained the $300 million financing or not?

A. Of course I did. And I think we started the process even before the amendment was signed. We hired the broker, the professional investment broker, to help us with this transaction.

Q. Could you tell me a little bit more about the process that you were just referring to.

A. Well, it was, again as I said, quite a process. We engaged the Greenhill. It's a broker. It's a part of the Mizuho Group. And I think we started in November, unless I'm mistaken.

And we created a data room. We worked with the broker on the presentation of the case. And we agreed on a long list of potential bidders. We sent more than 60 -- yeah, more than 60 invitations to

bid. And we signed, I think, around 50 of nondisclosure agreements with potential creators. And, again, that was quite a process.

And then when we have short list of candidates, we started the direct discussions of the terms.

Q. And was there any interest in providing the royalty financing?

A. Yes. There was certain interest. And we received, I think, the first bids around February or March, yeah.

Q. What came of that?

A. Say again, please.

Q. What came of that? What happened next?

A. Oh, well, it took longer -- well, for many reasons. Like, in the middle of the process, partially thanks to the new administration steps, the company -- I mean the Braeburn -- started to revisit its forecast. And it was revised significantly. I think that we got some years off by almost 50 or 60 percent.

And we were in the negotiations and discussions with the bidders. But it took quite -- it

took quite some time for them just to understand what is going on with the market. And that's why the process was a little bit delayed.

Q. Have you been able to secure any royalty financing in connection with Braeburn?

A. We haven't yet done it, but we're still working.

Q. After Amendment 22 was signed -- and we can set Amendment 22 aside.

After Amendment 22 was signed, do you recall whether Dr. Harrison got in touch with you about potential budget increases for the five portfolio companies referenced in the amendment?

A. Yes. Shortly after the amendment date.

Q. Let's pull up JX 1079, please.

A. Could you please say again the last digit.

Q. 1079. Sorry. It should just be the next tab.

A. Okay.

Q. Let's start with the bottom email. Is this the email from Dr. Harrison that you were just referencing?

A. That's correct.
Q. And what's the date on this email?
A. 24th of December. It's Christmas night.
Q. Do you remember where you were when you received this email?
A. Yes. I was with my family on a holiday trip in the middle of nowhere in Argentina on the salt flats, is that the right term, yes, in the camp tent.
Q. Is Christmas an important holiday for your family?
A. Yes, of course. Like, they raise certain protests when I just work on that night. Not as important, where Russians has the Orthodox Christmas and New Year, but also important one.
Q. And so you mentioned that you worked on this night. It sounds like you did not wait until after the holidays to review the information Dr. Harrison sent?
A. No. I -- like, well, first I read those materials, and I forwarded them to my team and asked them to start work.
Q. What was the work that you and your

team did?

A. Well, we analyzed the materials, we reviewed some other documents, including the original investment memorandum -- memoranda -- and we started drafting a list of the questions, follow-up diligence questions.

Q. There's a reference in this email to D-rooms containing supporting materials. Do you know what Seth Harrison meant by "D-room"?

A. I think it refers to the virtual data room with some supporting documents.

Q. And did you and your team review the documents in the D-room?

A. I personally struggled to get in access, but I think that my team members finally got the access, or it took like few days. There were some IT issues I remember.

Q. What did Dr. Harrison propose with respect to Nereid in his December 24 email?

A. I'm just trying to find it. Okay. So on the Nereid, Dr. Harrison proposed what he called a synergistic merger with another portfolio company, Marlinspike.

Q. And did you discuss Dr. Harrison's

proposal for merging Nereid and Marlinspike with Dr. Harrison?

A. Yes, I recall we had a follow-up Zoom call, I think in early February.

Q. Do you recall what the Rigmora LPs' position was on that call?

A. Well, we, in principle, agreed with the proposal. But we understood that Dr. Harrison would require some further investigation on some tax and legal aspects of that merger.

Q. Did you hear anything further from the GP about the proposal for a Nereid-Marlinspike merger?

A. I think no, up till the very end of April, early May when he mentioned that.

Q. What did he mention?

A. He said that he stopped the merger because of certain legal issues and apparently a very expensive lease that they wanted to cancel. And apparently they were considering a different way for the bankruptcy, or Chapter 5, if I'm not mistaken.

Q. Was that the last you heard from the GP about its proposal concerning Nereid and Marlinspike merging?

A. That's correct.

Q. After Dr. Harrison's December 24 email, did you ever receive a budget request for Nereid that did not involve a proposed merger with Marlinspike?

A. No, to the best of my recollection, we didn't receive it.

Q. Looking back at Dr. Harrison's email, what did he propose with respect to Nine Square?

A. On the Nine Square, he proposed to increase the budget for another 15 million.

Q. Did you engage with the GP about discussions for a potential budget increase for Nine Square?

A. I think that we, probably in February, I don't remember the months, we agreed to discuss the Nine Square budgets once we have the royalty financing done.

Q. Did the GP ever follow-up on the potential budget increase for Nine Square after that call?

A. No.

ATTORNEY BORN: I'm just conscious that we have about five minutes left. We're about to get into a longer chunk, it might make sense to --

THE COURT: To break for the day?

ATTORNEY BORN: Yeah.

THE COURT: So we resume at 9:00 a.m. tomorrow.

And I'll have my assistant email Mr. Barlow and Mr. Rohrbacher to confirm the timing of the day so you-all know what to expect.

With that, we are adjourned. Thank you.

(Court adjourned at 4:54 p.m.)

I N D E X

WITNESSES:	Page
SETH HARRISON	
Direct by Attorney Berdon	7
Cross by Attorney Selden	115
JOSEPH YANCHIK	
Direct by Attorney Epstein	157
Cross by Attorney Taft	168
MARK ROBBINS	
Direct by Attorney Reese	175
Cross by Attorney Taft	192
ILYA STREBULAEV	
Direct by Attorney Taft	196
Cross by Attorney Jones	212
SPIROS LIRAS	
Direct by Attorney Bonacorsi	239
Cross by Attorney Born	266
YURI BOGDANOV	
Direct by Attorney Born	269

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

ATP III GP, LTD., in its capacity as General Partner of ATP Life Science Ventures, L.P.,	:	
Plaintiff,	:	
v	:	C. A. No. 2025-0607-KSJM
RIGMORA BIOTECH INVESTOR ONE LP and RIGMORA BIOTECH INVESTOR TWO LP,	:	
Defendants.	:	

- - -

Chancery Courtroom 12B
Leonard L. Williams Justice Center
500 North King Street
Wilmington, Delaware
Friday, October 17, 2025
9:00 a.m.

- - -

BEFORE: HON. KATHALEEN St.J. McCORMICK, Chancellor

- - -

TRIAL TRANSCRIPT - VOLUME II

APPEARANCES:

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Appearances Cont'd ...

APPEARANCES CONT'D:

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of the New York Bar
Debevoise & Plimpton LLP
for Defendants

ALSO PRESENT:

STEVE LAGUTIN, Russian Interpreter

- - -

THE COURT: Good morning.

ATTORNEY BORN: Good morning, Your Honor.

THE COURT: Anything else we need to attend to before we begin or resume witness examination?

ATTORNEY BORN: I don't believe so, not on our end.

ATTORNEY BERDON: Not from plaintiff, Your Honor.

THE COURT: Let's proceed.

YURI BOGDANOV, having been previously affirmed, resumed and testified as follows:

DIRECT EXAMINATION (Cont'd)

BY ATTORNEY BORN:

Q. Good morning, Mr. Bogdanov.

A. Good morning.

Q. I'd like to pick up with JX 1079, which is the second tab in your binder.

A. I'm on it.

Q. You remember yesterday we talked about the discussions concerning Nereid?

A. That's correct.

Q. And you remember yesterday we talked

about the discussions concerning Nine Square?

A. Yes.

Q. I would like to turn to the third company referenced in this email, which is Replicate. What did Dr. Harrison propose with respect to Replicate in his December 24 email?

A. He proposed to consider another budget increase for 11 million.

Q. Did he say anything else about Replicate in that email?

A. Yes. He noted that Replicate would run out of the cash by the third week of January.

Q. Did you take any action based on that part of the email?

A. Yes. We set Replicate budget as our priority and worked for the holidays.

Q. What did that work look like?

A. As I said, we analyzed the materials, we drafted the list of the follow-up diligence questions.

Q. And did you send those questions to Dr. Harrison?

A. Yes, shortly after the new year, I sent an email with those questions.

Q. Do you recall what questions you had for Dr. Harrison about Replicate?

A. Yes, I do. It's kind of like basic diligence questions on the company's past performance, on how the company executed its original plan, some questions on the progress on their clinical programs, and some questions on the economics of the partnership deals the company was considering at the time.

Q. Why were you interested in understanding how Replicate had performed in the past?

A. Well, it's one of the, like, most important indicators before you make any decision on the new budget to see how the team and the company performed against their original programs, to see whether they can deliver.

Q. Let's turn to JX 1107.

A. Could you say again the number?

Q. 1107. I think it's two tabs down.

A. Uh-huh.

Q. Is this an email from you to Dr. Harrison dated January 5?

A. That's correct.

Q. And does this attach the list of questions you were just discussing?

A. That's correct.

Q. You can set that document aside.

Did you have any meetings concerning the Replicate budget with the GP?

A. Yes. We had an in-person meeting in Monaco in mid-January.

Q. And who attended that meeting?

A. Dr. Harrison, Dr. Rybolovlev, Anna Batarina. Well, actually, it was a series of meetings in a couple days. Then we were joined by the Replicate COO.

Q. Can you describe the meeting with Replicate's CEO for me?

A. Well, he presented the company's case, he explained what they were proposing to us. We asked a number of questions, partially addressing those questions I sent to Dr. Harrison earlier, and we discussed the budget needs of the company for the 2025.

Q. Was the meeting with the Replicate CEO helpful to you as you assessed Dr. Harrison's request for a budget increase?

A. Yes, it was pretty helpful. It helped us to just finally make a conclusion on that.

Q. Do you recall whether Dr. Harrison asked the Rigmora LPs to provide any capital for Replicate while you were considering the proposed budget increase?

A. Yes. Dr. Harrison proposed to consider bridge financing, and we did it in a matter of days.

Q. Do you recall whether the Rigmora LPs approved the $11 million budget for Replicate that Dr. Harrison had proposed on December 24th?

A. We approved finally an even bigger budget of 18 million, and I think we did it in the very beginning of February, right.

Q. Let's pull up JX 1193.

Is this the Rigmora LPs' email approving the budget for Replicate and the attached budget approval?

A. That's correct.

Q. Do you recall whether the Rigmora LPs placed any conditions on the approval of the budget?

A. Well, there was an existing condition introduced by them in '22, the completion of the royalty financing. And on half of the budget there was another condition added, the completion, the

closing of the Latin deal the company was considering at the moment.

Q. Do you recall whether the Rigmora LPs provided any capital pursuant to this budget after it was approved?

A. Yes. We made another capital call of $5 million.

Q. And at the time that the Rigmora LPs paid that capital call, did you have a view as to whether either of the conditions on the approval of the Replicate budget were satisfied?

A. They were not satisfied.

Q. Why did the Rigmora LPs fund the capital call for Replicate, despite your view that the conditions on the approval had not been satisfied?

A. Because it's our company, it's our investment. We did care about the company's progress. That's why we decided to pay it.

Q. Let's turn back to JX 1079, which is the second tab.

A. I'm on it.

Q. This is the December 24 email from Dr. Harrison again?

A. Wait. I opened the wrong tab. Yeah,

I'm on it.

Q. What did Dr. Harrison propose for Aulos?

A. For Aulos he proposed to support the management recommendation and approve the additional budget of 28 million.

Q. Did you have any in-person meetings with Dr. Harrison concerning a potential budget increase for Aulos?

A. Yes. I think we had the meeting in March, mid-March in Monaco.

Q. And who attended those meetings?

A. Dr. Harrison, Dr. Rybolovlev, Anna Batarina, I -- and, for the first half, we also had the external consultant who made their review of the company's program. And then we were joined by the Aulos management.

Q. Did you do anything to prepare for the meeting in advance?

A. Yes. We received the materials 24 hours before the scheduled meeting. We tried to analyze them and draft a list of the questions we were going to ask.

Q. You mentioned a moment ago that an

independent consultant attended that meeting about Aulos. What did you mean by independent consultant?

A. There was like a retired executive, I believe he worked for Gilead before in one of the senior positions, and he was retained by the partnership to assess two oncology programs of the fund, namely Aulos and Marengo.

Q. What was your reaction to the independent consultant's presentation about Aulos?

A. Well, it was kind of like unpleasant news. We learned that apparently the management made kind of like a fundamental mistake in designing the clinical trials, and that mistake could cost us additional budget and potentially delays in the delivery of the clinical program.

Q. Turning back to Dr. Harrison's December 24, 2024, email, which is JX 1079.

A. It's the same tab; right? Yeah.

Q. What did Dr. Harrison propose with respect to Ascidian?

A. On Ascidian he wrote that they're still considering multiple scenarios, and it would require more discussion and time to understand what variables would emerge as reality by the mid-2025.

Q. Did Dr. Harrison propose a specific dollar amount increase in the budget for Ascidian at this time?

A. At that time, no.

Q. Did you have any meetings with Dr. Harrison to discuss a potential budget increase for Ascidian?

A. Yes. I think it was the same date in March when we met to discuss Aulos.

Q. And who was present for that meeting?

A. Dr. Harrison, Dr. Rybolovlev, Anna Batarina and I. On Ascidian we were joined by two people from the management of the company.

Q. And did you do anything to prepare for that meeting in advance?

A. The same answer. We received the materials 24 hours before the meeting, and we analyzed them and drafted a list of the questions.

Q. Do you recall whether Ascidian's management presented financial projections during the meeting?

A. Yes. They presented three scenarios, as far as I remember.

Q. Do you recall whether those

projections included the time that Ascidian anticipated receiving additional capital from the fund under the existing budget?

A. Yes. I recall that in one or two scenarios, they expected additional funding in Q4, this year; and one or two, I don't remember what was their implication, even later. So I think that they expected the remaining budget to be paid in 2026.

Q. And do you recall when you, in fact, received the next capital call for Ascidian from the GP?

A. Yes. It was -- well, it was Saturday morning, Monaco time, 31st of May. They were sent on May 30.

Q. And did that surprise you?

A. Of course.

Q. How come?

A. Just because it was different from what the company told us. It was different from what general partner told us in late April when he shared two forecasts on Ascidian and both forecasts provided for the capital call payment in 2026.

Q. Did there come a time when Dr. Harrison proposed to reallocate funding from

certain of the fund's portfolio companies to other portfolio companies?

A. Yes. I think it was late March this year, right, late March, when we had a Zoom call and he first time introduced this idea to us.

Q. What did you understand his idea to be?

A. The idea was just to move the capital from more risky companies towards more advanced clinical-stage companies of the fund.

Q. How did you react to that proposal?

A. Well, generally positively. We welcome and appreciate any ideas which would improve the risk profile of our investments and increase the return on the investments.

Q. Did you hear anything further from Dr. Harrison concerning the proposal for reallocating funding from the early-stage companies to the clinical companies?

A. Well, yes. He, in the same call, said that he would need more time to develop this proposal in greater details, and then he scheduled another call in late April to discuss the reallocation proposal.

Q. What did you understand the

reallocation proposal to be following the late April call?

A. Could you please rephrase? I don't understand the question.

Q. Yes. You said that you discussed the reallocation again in late April I think?

A. Yes. Right.

Q. What did you understand him to be proposing at that time?

A. Well, the proposal was just to move significant budget from the early-stage companies keeping probably around 40, 50 million for those companies, decreasing, effectively, almost three times the budget for the early-stage companies, and increase the budgets for clinical-stage companies.

Q. Could we pull up JX 1282.

This is an email from Dr. Harrison to you dated April 29, 2025; is that right?

A. That's correct.

Q. And did Dr. Harrison send this following the call?

A. That's correct. On the call he showed us the Excel spreadsheet, and I asked him to send the Excel after the call.

Q. You can put that document away.

By early May of this year, had you formed any conclusions about the fund's investments in early-stage portfolio companies separately from Dr. Harrison's reallocation proposals?

A. Yes, we did. We started our own analysis of the performance of the early-stage companies I think in March, and in March and April we came to certain conclusions, and obviously we realized that many of those companies failed to hit the milestones their investment memoranda provided.

Q. Do you recall how you assessed whether the early-stage companies had met their milestones?

A. Yes. We compared the investment memoranda milestones with the available information in the fund's quarterly digests or sometimes the company's websites or at the FDA database.

Q. Did you feel that you were able to accurately evaluate whether the early-stage companies had hit the milestones?

A. Yes.

So the milestones I designed, to let the investor make an informed decision -- and usually it's kind of like binary events you can easily assess.

Like not in all cases, but the majority of the cases you can do that.

Q. Can you give me an example of a milestone you thought you could assess whether it had been achieved or not.

A. Well, for instance, IND, Investigational New Drug Application. So it's either done or not.

Q. Did you do anything to evaluate whether the early-stage companies that you thought had missed their milestones had pivoted to new projects that could be a commercial success?

A. Well, apparently they pivoted to the new projects; but in order to assess that, you need to review the new investment memorandum that gives you an understanding what would be the new budget for that project and what would be the risks. Obviously we never received the new investment memorandum.

Q. Did you ever receive a formal proposal from Dr. Harrison concerning reallocation of funding from early-stage portfolio companies to clinical companies?

A. Yes. We received it in early May, I think around 10 or 11th of May.

Q. Can we turn to JX 1307.

A. I'm on it.

Q. This is an email dated May 11, 2025, from Dr. Harrison to you and others. Does this attach the proposal you just mentioned?

A. That's correct.

Q. And can you explain to me what you understood Dr. Harrison to be proposing.

A. He proposed to reduce certain budgets for the early-stage companies, dramatically reduce, and increase certain budgets for the clinical-stage companies, namely Aulos, Ascidian, Marengo, and Replicate.

Q. What was your reaction?

A. Well, in general it was in line with our expectations, but with certain changes which looked unacceptable to us.

Q. Could you tell me about the things that looked unacceptable to you?

A. Well, it provided for the, like, waiving of our rights under the LP to review, consider, and approve or not approve budgets, and it gave the full discretion to the general partner.

Q. Did you speak to Dr. Harrison about

this proposal?

A. Yes. We scheduled a call shortly after the date we received that proposal, and I invited my deal lawyers to attend the call.

Q. As far as you can recall, what did Dr. Harrison say on that call?

A. I have really bad recollection because it was very emotional and heated call. It was a short one. I think that we first started with, like, an introduction, saying that we support the idea of moving the capital from the early-stage companies to the clinical-stage companies, but we believed that it should be done in accordance with LP terms and we should consider the new budgets, we should discuss them, and that's it.

And very quickly the call became emotional, heated. The parties started to talk, like, simultaneously. I recall general counsel of ATP was yelling "dollar for dollar, dollar for dollar." And finally Dr. Harrison said, I withdraw the proposal.

Q. Did it surprise you that Dr. Harrison withdrew the proposal?

A. Yes, of course, just because I believed that both parties agreed that it would be in

the best interest of the partnership to move that capital. That came as a very unpleasant surprise.

Q. Did you take any action following that call?

A. Yes, I did. I sent an email just confirming our position on the reallocation proposal and informing the general partner that we were of the opinion that the further funding of the early-stage companies is not in the interest of the partnership.

Q. Did you ask him for any information about the early-stage companies?

A. Yes, of course. We asked him to share with us any proposals that could help to salvage value from the early-stage companies.

Q. And what did you mean by salvaging value from the early-stage companies?

A. Well, we were open to consider old proposal; for example, the proposals to secure funding through the business development deals for the partnerships with other companies or new projects or potentially sale of certain companies, mergers.

Q. Did you address the clinical companies in that email?

A. I think yes. I think I said that we

are still willing to consider the budgets for the clinical-stage companies.

Q. And do you recall when you sent that email?

A. Yes. May 15.

Q. What were you hoping to get from Dr. Harrison in response to your email?

A. Well, I expected that he would engage in discussions with us and to counter us with proposals on the, as I said, like, salvaging the values from the early-stage companies. I expected some cooperation.

Q. Did you ever get the information you were hoping to receive?

A. No.

Q. We discussed earlier today the potential budget increase for Aulos. Did you discuss with the GP the potential budget increase for Aulos after May 15, 2025?

A. Yes, we did.

Q. What do you mean?

A. We sent a list of the questions on the Aulos, and we asked general partner to provide us with, like, the answers to those questions and also

with an update on the company's progress since we met with Aulos management in early March, and it was late May.

Q. Could we take a look at JX 1360.

Is this the email with the questions you had for Dr. Harrison about the potential budget increase for Aulos?

A. That's correct.

Q. And when was that?

A. It was May 22 this year.

Q. Did you receive answers to these questions?

A. No.

Q. Turning to Ascidian, did you discuss with the GP a potential budget increase for Ascidian after May 15, 2025?

A. Yes, I did.

Q. And what do you mean by that?

A. Well, I drafted the list of the questions on the company's new budget and sent it to the general partner.

Q. Can we take a look at JX 1361, please.

A. Could you please say again the last two digits.

Q. 1361.

Are these the questions that you sent Dr. Harrison about Ascidian?

A. That's correct.

Q. And when was this?

A. The same date. May 22.

Q. Did you receive answers to these questions?

A. No.

Q. Did you ever follow up with the GP about your questions regarding Aulos and Ascidian?

A. Yes. I followed up -- sorry.

I followed up I think in a matter of a week and I sent another reminder.

Q. Can we take a look at JX 1375, please.

A. Yes.

Q. Is this the follow-up email?

A. Yes.

Q. And what's the date on this?

A. 28th of May.

Q. Have you heard back?

A. No.

Q. Mr. Bogdanov, do you recall whether the GP issued capital calls on May 30?

A. Yes.

Q. And were you surprised by those capital calls?

A. I was astonished to see this.

Q. How come?

A. Just because all the forecasts the general partner shared with us, and the most recent was dated, like, 28th of April, in two scenarios provided for the calls in the second quarter were in a range of 15 to 20 million, and we received calls for more than 100 million in one night.

Q. Before the GP issued the capital calls on May 30, are you aware of any occasion where the Rigmora LPs did not pay a capital call for an ATP portfolio company?

A. Not a single case. We always paid.

Q. Do you recall whether the Rigmora LPs paid any capital calls after May 15 and before May 30?

A. Yes. We paid two capital calls for two portfolio companies.

Q. Do you recall which companies?

A. One was Initial. I forget the name of the other one.

Q. Let's take a looking at JX 1339. It's

a couple tabs in the other direction.

A. Say again last two digits, please.

Q. 1339.

A. Yes. Initial and Apertor, right.

Q. And this is the email from Rigmora to Dr. Harrison approving the capital calls?

A. That's correct.

Q. And what's the date on this email?

A. May 20th.

ATTORNEY BORN: No further questions.

CROSS-EXAMINATION

BY ATTORNEY BERDON:

Q. Good morning. Andrew Berdon for the plaintiffs.

Good morning, Mr. Bogdanov.

A. Good morning.

Q. Mr. Bogdanov, I'd like to turn your attention first to the capital call that you just testified about. Can you pull up JX 1339, please.

Dr. Bogdanov, taking a look at the last sentence of the email, can you read it, please, out loud, on the record.

A. The last paragraph, right.

Q. Actually, I'll withdraw the question.

It says, "Funding on this basis is acceptable on the SLP as it will enable the orderly wind-down of these companies which is in everyone's interest."

Is that right?

A. That's correct.

Q. So when you told the Court that you had approved a capital call for Initial and Apertor, you didn't mention that you had only approved the money for wind-down costs, did you?

A. We approved the capital call.

Q. You didn't approve a capital call for the purpose of funding research, did you?

A. That's what my email says, right.

Q. Mr. Bogdanov, taking a look at JX 1361.

You said that you had sent a letter to Dr. Harrison offering to provide additional discussions on Ascidian. Under the word "Subject" there's two words there, "Without Prejudice." Without prejudice, why did you put that on this piece of correspondence?

A. I think we responded to the "Without Prejudice" email from the ATP employees.

Q. Did you put it on there so that ATP couldn't cite it against you in any litigation?

A. I'm not a lawyer. I was advised by my counsel.

Q. But you're using it here in this litigation to try and beat ATP's claim; correct?

A. Could you please rephrase the question. I'm not understanding.

Q. You're relying on JX 1361 in this litigation to defend against ATP's claim; right?

A. I rely on this document, right, and on the exchange.

ATTORNEY BERDON: Let's pull up JX 1360, please.

Q. In JX 1360, Mr. Bogdanov --

A. Wait. I'm not on that.

Q. JX 1360 you also have the "Without Prejudice" legend on that piece of correspondence as well?

A. That's correct.

ATTORNEY BERDON: Let's turn to Exhibit 1307.

Q. Mr. Bogdanov, I'd like to direct your attention to the page at the bottom that says 0003.

A. Yes.

Q. You testified that -- in essence, that you objected to this proposal because it would usurp the authority of the limited partner to approve budgets; is that right?

A. I'm not sure I just would put it in this way. I said that we believe that proposal was acceptable, but the proposal should follow the LP -- the existing LP terms. That's what I said.

Q. Well, you understood that there were timing issues here that made certain decisions time sensitive; correct?

A. Probably, yes.

Q. And it was pretty clear in No. 1 that the general partner at (d) told you exactly how they intended to make decisions about the allocation of money among the clinical companies.

They requested discretion, though; correct?

A. They requested discretion, of course.

Q. But they made it clear how they intended to deploy the capital; correct?

A. No, because to make it clear how the general partner intends to deploy the capital, you

should provide your limited partner with a set of the basic investment documents, including the investment memorandum, which I requested and didn't receive.

Q. But the general partner here proposed language that would say, "The General Partner currently anticipates that if Marengo Therapeutics achieves Phase 2 data for invikafusp [] that [it] is deemed by its board of directors to be suitable for [] Breakthrough Designation, most or all of such additional $56.00 million will be allocated to Marengo ...."

They're willing to say that in writing in an agreement with you; right?

A. I'm sorry. Could you please --

Q. I withdraw the question.

Taking a look at Nos. 2 and 3 below, did you ask the general partner why it was important that they retain some discretion to allocate money among the different companies in Pools V-1 and V-2?

A. We didn't have a chance to ask. The proposal was withdrawn too fast.

Q. Well, isn't it true that they had proposed grouping the projects among the companies without necessarily following the exact corporate

form? Didn't they explain that to you?

A. He mentioned on the call, I think on the April or May call, I don't remember which one it was when we discussed that, that, yes, he would probably look at the early-stage companies as kind of like portfolio of assets rather than the companies, but he didn't give, like, detailed explanation of what it may have meant.

Q. But you understood also that there was a time sensitivity to getting these decisions made because these companies faced out-of-cash dates that were all within the next three to six months; correct?

A. I'm not sure he mentioned that they would have the cash-out dates shortly, but we understood that it was in our interest to consider those decisions pretty quickly.

Q. So, Mr. Bogdanov, currently you're the senior-most person at Rigmora with responsibility overseeing Rigmora's investments at ATP?

A. That's correct.

Q. And you came into that role in October of 2024?

A. Yes.

Q. And prior to October 2024, you didn't

have any involvement whatsoever in the approval of any budget for an ATP portfolio company; correct?

A. That's correct. Probably like ten years ago, I had some involvement, but not --

Q. Not in the prior ten years?

A. No.

Q. And before you became involved in that process, an executive named Anna Kolonchina was in charge of it?

A. That's correct.

Q. Your educational background is in business valuation; correct?

A. That's correct.

Q. And you haven't taken any courses in any bioscience in your educational career; correct?

A. That's correct.

Q. And before joining Rigmora, you worked as an auditor and a consultant; correct?

A. Right.

Q. And none of your work in your audit or consulting practice involved preclinical or clinical stage development of new drugs; correct?

A. As I said, I had two clients in the biotech industry in Russia, yes, but it was more than

20 years ago, so you are right.

Q. Mr. Bogdanov, isn't it true that starting as early as 2022, Rigmora faced a liquidity crisis?

A. That's how I framed that in my correspondence, yeah.

ATTORNEY BERDON: Can we pull up JX 444, please.

I'm sorry. Let's go to 446, please.

ATTORNEY BORN: If we're turning to documents that weren't in our binder, could we get a binder, and could the witness have a binder?

THE COURT: You should have a binder on the shelf.

ATTORNEY BERDON: I apologize.

THE WITNESS: I don't have a binder.

THE COURT: The binder is coming, everyone.

BY ATTORNEY BERDON:

Q. Let's go again to 463.

A. Could you please say again the number.

Q. We're going to JX 463, please.

THE COURT: Before the binder break, you had said 446.

ATTORNEY BERDON: I understand.

THE COURT: Now we're skipping it?

ATTORNEY BERDON: I'm skipping ahead, yes, Your Honor.

THE WITNESS: 4316?

Q. 0463.

A. 04 -- yes, I'm on it.

Q. Mr. Bogdanov, looking at the first page, do you recognize this as an email that you sent?

A. Yes.

Q. And you sent it to Dmitriy Chechkin?

A. That's correct.

Q. Dmitriy Chechkin is another senior official at Rigmora; correct?

A. That's right.

Q. Let's go to the next page, please. You said, "We are in a liquidity crisis, the primary task is obviously to provide [the] funding need for the next 2-3 years." Correct?

A. That's correct.

Q. And you said that -- taking a look at No. 2, you said that there had been a previous crisis at Rigmora with similar characteristics that was resolved by liquidating the private equity portfolio;

correct?

A. That's correct.

Q. And you said in No. 3 that, "The current cash gap can be closed by drastic reduction in venture investment (and particularly biotech) and divestiture." Correct?

A. That's correct.

Q. And was ATP Rigmora's biotech investment at that time?

A. Not only biotech investment, but yes.

Q. And you said that the structure -- in No. 4, "the structure of our assets with predominance of venture projects (biotech [and] gaming) carries [the] same risks that had led to the current crisis: poorly predictable money inflows (divestments) and massive outflows (capital calls)."

You said that?

A. I said that.

Q. And you observed that you would "remain []in the same logic of shifting money from less risky (Private Equity Funds, real estate, boat) to more risky assets with 'fire extinguishing' from time to time." Correct?

A. That's what I wrote.

Q. And No. 11, you said, "Hence, priority number one is to create [a] cash buffer (all free money should go there), then work on creating a 'cash cow'"; correct?

A. Right.

Q. The paragraph below that, it says, "How do we go about creating the cash buffer." You say, "The only way in this situation to start moving towards the cash buffer is to drastically reduce ATP payments." Have I read that correctly?

A. Right, through attracting the new investors into the fund.

Q. And taking a look at the "Summary" at the end, take a look at No. 4. "The first priority in this case is to put a 'plug' on expenses (no new projects, reducing investment expenses), the tasks of creating [a] cash buffer and finding new business can be solved in parallel."

That does not discuss bringing in new investors. That discusses putting a plug on expenses; am I right?

A. It referred to the plug on the new projects.

Q. Mr. Bogdanov, you mentioned that

Rigmora acts as an advisor to the trustees of the trust. Do you recall that testimony?

A. Right.

Q. And does the trust report to -- withdrawn.

Does Rigmora report to the trustees on a periodic basis?

A. Rigmora reports to the trustees of the trust, right.

Q. Let's pull up JX 0526, please.

A. Yes.

Q. Taking a look at what's been marked as Exhibit 526, what is that?

A. Let me read first.

Q. We are pressed for time, so I'm going to ask you a question and you can tell me if I'm right.

Is this an email that you sent containing trustee materials from March of 2023, Mr. Bogdanov?

A. I think that yeah, I just forwarded that email to my own address, yes. It was originally sent by Anna Kolonchina, as I see on the page.

Q. And it was sent to Elias Neocleous?

A. Elias Neocleous; right.

Q. And who is he?

A. He's the managing partner of Elias Neocleous law firm, and he's also the trustee.

Q. Taking a look at the page bearing the number 0007, do you recognize that?

A. Yes, I do recognize.

Q. And that's a cash flow statement for the Rigmora trust; correct?

A. That's correct.

Q. And if you look at the right-hand side at the bottom, "Net Cashflow[s] for the period," you will see that your 2022 plan was for $170 million deficit; correct?

A. That's correct.

Q. Your '22 actuals at that point was for $126 million deficit?

A. There was a net decrease in cash position.

Q. And your 2023 forecast was for $184 million deficit; correct?

A. That's correct.

Q. And the projected cash at the end of 2023, according to this forecast, was going to be

$38 million?

A. That's correct.

Q. Rigmora funded its investments in ATP, at least in part, through the sale of other assets; isn't that true?

A. Partially, yes.

Q. Let's turn to page 9.

Isn't it true, Mr. Bogdanov, that Rigmora was debanked by several banks in the EU in 2023?

A. Was what? Sorry. I don't know the word.

Q. Taking a look at the highlighted bullet point, isn't it true that in 2023 you reported to the trustees that several banks decided to close relationships with the group, namely Credit Suisse, UBS, and Bank of Cyprus?

A. That's correct.

Q. And that was because their compliance teams forced those changes; correct?

A. Most likely, yes.

Q. And let's take a look at JX 0681, please.

Take a look at JX 0681, Mr. Bogdanov.

Let's take a look, then, down to page 7 titled, "Cashflow 2023-Comments." Under "Financing," isn't it true that bank -- you had a credit line -- had asked that its guarantee of Swiss [francs] 120 million required additional cash collateral of $48 million at that time?

A. Could you please refer to the page.

Q. I'm on page 7 of JX 681, "Cashflow 2023-Comments," under the heading "Financing."

A. It's marked as page 8 in my binder. Okay. Sorry.

THE COURT: It shouldn't be. If you look on the screen, it's right in front of you.

THE WITNESS: It's 8 here.

Q. Isn't it true that you reported to the trustee that a bank guarantee required additional cash collateral because of the sale of two positions in stock where ATP had done exits and taken two companies public?

A. The bank guarantee required additional cash collateral, that's correct.

Q. Let's turn back to page 6, please.

And this contains similar data as the last report, but it has an updated forecast for 2023

and actuals for the first nine months of 2023; correct?

A. Apparently I'm on the wrong tab. Could you please say again the tab number.

Q. We are at Exhibit 681, and we're on page 6.

A. Thank you.

Q. Let's take a look at the "Net Cashflow for the period" --

A. Yes.

Q. -- on the right-hand side.

The plan was to be negative 185 for 2022. The nine-month actuals had already hit negative 147, and the updated forecast was for negative 202 million in negative cash flow; is that right?

A. That's correct.

Q. And instead of forecasting $38 million to be cash on hand at the end of 2023, the new forecast was down to $11 million; correct?

A. That's correct.

Q. And out of that money, it required distributions to beneficiaries of at least $10 million; correct?

A. That's correct.

Q. And it also provided for the sale of assets in order to fund Rigmora's overall expenditures; correct?

A. That's correct.

Q. Turning to page -- Exhibit 698. Isn't it true, Mr. Bogdanov, that --

A. Wait. What exhibit?

Q. 698.

Isn't it true, Mr. Bogdanov, that in March -- forgive me.

Isn't it true, Mr. Bogdanov, that in March of 2025 you had a text with Zufar Iskhakov that's set forth in Exhibit 698?

THE COURT: Do you have that exhibit?

A. It's 698. I have it in front of me.

Q. Withdrawn.

Mr. Bogdanov, in November of 2023 Rigmora entered into an agreement with ATP to reduce the amount that ATP would be able to call in capital for the year 2024; isn't that true?

A. Yes.

Q. And taking a looking at paragraph 3, it says, "As of the date set forth above, the aggregate amount of unfunded budget commitments for

the Portfolio Companies in ATP V-1 equals []63.33 million and in Pool ATP V-2 [it] equals $292[] million." It says that?

A. That's what the agreement says.

Q. Let's turn to the last page. Was it signed on behalf of Ezbon?

A. That's correct.

Q. Was it signed on behalf of Blue Horizon?

A. That's correct.

Q. Turning just quickly to Replicate. Isn't it true that you learned in late 2024 that the original budget for Replicate had been approved based on oral conversations?

A. That was my guess. I'm not sure I received a confirmation of my guess.

Q. And when you sent that list of 19 questions to Replicate, you didn't know one way or the other whether it was even possible for those questions to be answered in a reasonable amount of time; isn't that true?

A. I didn't know. I expected that all these questions can be easily answered by the company, but if they don't have the answers, well, that would

be, like, a surprise.

Q. Did you ask any biotech consulting firm for help in diligencing these new budget requests?

A. No.

Q. Does anyone at Rigmora have a background in biotech investing specifically outside of ATP?

A. We do have investment background, yes.

Q. Does anyone at Rigmora currently have a background in biotechnology science?

A. No.

Q. Has anyone at Rigmora worked specifically as an analyst in the biotechnology sector?

A. No.

Q. Turning to the subject matter of investment memoranda. I'd like to take a look at Exhibit 0267, please. 267, Mr. Bogdanov.

Do you recognize this document as a budget approval form for Red Queen?

A. Right.

Q. And it says Red Queen proposed budget, 55 million?

A. That's what this document says, right.

Q. "Intended Use of Proceeds: General working capital requirements." Correct?

A. Right.

Q. There's no discussion there of it only being made available in tranches?

A. I probably already said that we received bundle of documents. It was almost always the investment memoranda in this cover form, right.

Q. It did not include in the budget approval a list of any tranches; right?

A. Right. They're included in the investment memoranda.

Q. It wasn't included in the budget, was it?

A. No.

Q. Let's take a look at -- just for completeness, it doesn't say, "and for purposes included in the investment memoranda," does it? It didn't include that on the face of the form, did it?

A. You are right.

ATTORNEY BERDON: And let's take a look briefly at Exhibit 267. 267, please.

316, please. Apologize.

And let's go to page 3, please.

Q. So when Rigmora wanted to put more information in a budget approval, it could; correct?

A. I think this is like the additional follow-on 10 million on top of the original investment memoranda for Replicate, which was 40 or 44 million. I don't remember the exact number.

Q. Well, it says here Replicate current budget, 40, right?

A. 40, right.

Q. And it says proposed budget 53; correct?

A. Yes.

Q. This is for a $13 million increase?

A. That's correct.

Q. And it says, "Intended Use of Proceeds: Research and Development, IND and PoC."

A. That's correct. It's an additional program to be added to the investment memorandum of Replicate.

Q. Well, does it say anything about adding to the investment memorandum here?

A. No. It's just what I'm explaining.

Q. But it provides for a specific

intended use of proceeds; right?

A. Right.

Q. And PoC stands for proof of concept; correct?

A. That's correct.

Q. Are you familiar generally with the process that was used at Rigmora for reviewing capital calls before October of 2024?

A. In general, yes.

Q. Are you aware of anyone at Rigmora prior to May of 2025 checking to see the status of the program against investment memos before funding capital in response to a capital call on an approved budget?

A. We believed that that was the work which was done by the general partner.

Q. So the answer is the limited partner, Rigmora, did not do that check itself; correct?

A. Yes. We relied on the general partner.

Q. And it was not Rigmora's policy before 2025 to ask for copies of the Series A funding agreements that were executed by ATP with the portfolio companies; correct?

A. It's hard to comment for me what was my predecessors did.

Q. You worked there for ten years; correct?

A. Yes, but I was not involved in ATP matters up to October 2024.

Q. You mentioned earlier that when you received requests for new budgets and you were talking about new budgets for the early-stage companies, you went back and checked against milestones and that those companies had missed milestones.

Do you recall that testimony?

A. Yes. That was like our conclusion.

Q. Had all the companies missed milestones?

A. At the moment we didn't know for sure, but we realized that many of them missed milestones. In some instances, we missed information to assess their performance.

Q. Let's pull up JX 1285, please.

Do you recognize this as an email from your colleague, Mr. Iskhakov to yourself, Andrey Milkov, and Alexey Yakovlev?

A. Yakovlev, right.

Q. And let's take a look at the chart that appears in color.

ATTORNEY BERDON: Can we blow that up, please, Marco.

Q. Isn't it true that your colleague, Mr. Iskhakov, reported to you that Red Queen and Marlinspike had actually achieved and were in line with their investment memo milestones at that point?

A. That was his guess at the moment, right.

Q. So it was his guess?

A. Yes.

Q. So he was -- it wasn't binary whether or not looking at the investment memoranda and the quarterly reports would clearly demonstrate whether milestones had been hit?

A. Zufar is a junior analyst, and we just started that work, and it was work in progress. We, I think, made a number of iterations of that exercise later that month.

Q. Are you aware of any document that actually states that Red Queen or Marlinspike had missed milestones?

A. I'm not sure to what document you're

referring.

Q. Exactly. Are you aware of any time that you contradicted Mr. Iskhakov's conclusion with respect to Red Queen or Marlinspike and their meeting milestones?

A. Could you please rephrase. I'm not sure I really follow.

Q. Did you ever find a mistake in this chart and find out that, in fact, Red Queen and Marlinspike were behind on their milestones?

A. Sitting here, I don't remember, but I remember --

Q. That didn't happen, did it?

A. Say again.

Q. That didn't happen, did it?

A. I'm not sure. I think that we came to the conclusion that almost all of them missed milestones by the time we sent the email.

Q. You have seven companies; right?

A. Seven companies, right.

Q. At least two right here you're being told that they weren't behind on milestones; right?

A. Yes. It's like not the final document.

ATTORNEY BERDON: Let's go to 1242, please.

Q. As of April, you had Mr. Iskhakov check the amounts of remaining approved budgets for ATP; is that right?

A. That's correct.

Q. This was just a little over a month before your May 15 email; right?

A. That's correct.

Q. And you had received some new capital calls from ATP; correct?

A. That's correct.

Q. And Mr. Iskhakov says that "The new capital calls are reflected in our records. All are within [] budget." Correct?

A. That's correct.

Q. You didn't ask Mr. Iskhakov to check the progress against milestones of Nine Square or any of the other companies with capital calls to make sure that they were within the investment memoranda criteria before funding that capital call, did you?

A. Yes, I think we started that work analyzing of their performance later that month.

Q. You did it later in the month. You

didn't have it done for this capital call; right?

A. I think, yes.

Q. Let's just take a look at the chart there. Do you have any reason to believe that the figures here that were compiled by Mr. Iskhakov were incorrect at the time that you received the email on April 4?

A. I think they were correct.

Q. You had no reason to believe that Mr. Iskhakov was being sloppy or inaccurate; right?

A. No. He's pretty accurate.

Q. One of the issues that you raised in your May 15 email was that there was a lack of third-party interest in the portfolio companies; correct?

A. Yes.

Q. And one of the issues that we discussed with Dr. Harrison was third-party funding available from business development deals.

A. I referred to the equity investors.

Q. I understand. And I realize you weren't in the courtroom for Dr. Harrison's testimony.

Dr. Harrison talked to us about business development deals that provide nondilutive

funding for research and development projects.

Are you aware of those types of relationships?

A. Yes, I'm aware.

Q. And were you aware at the time that you wrote the May 15 email that there were ongoing discussions with BD partners among the portfolio companies?

A. Yes, I'm aware.

Q. And are you aware that in June, just three weeks after you sent your May 15 email saying essentially that Deep Apple was worthless, Deep Apple signed a deal with Novo Nordisk that would provide up to $812 million in funding?

A. Well, first, I never said that those companies are worthless. Second, we were aware that Deep Apple is considering the new project. That's why the general partner didn't include in his plans, on capital call plans, any capital to be called for Deep Apple in Q2. Yes, we were aware.

Q. You instructed that Deep Apple be shut down in your May 15 email?

A. That's not correct.

Q. Let's pull up the May 15 email,

please.

A. What exhibit number?

THE COURT: JX 1318.

THE WITNESS: Thank you.

Q. Let's take a look at the sentence that starts, "The SLP's position is therefore that further funding of those Early-Stage Companies will waste the ATP Fund's assets."

A. Yes, I see it.

Q. And Deep Apple was on the list of companies that you were instructing ATP to liquidate if it wanted to have further conversations about funding for clinical-stage companies; correct?

A. We invited the general partner to come with the ideas how we can salvage value from those companies, and this business development is a good illustration of that idea.

Q. You instructed the general partner to liquidate Deep Apple if it wanted to have further conversations with you about budgets for Aulos, Ascidian, and Marengo; isn't that true?

A. We instructed the general partner and we asked him to come with ideas how we can salvage value from those early-stage companies.

ATTORNEY BERDON: Let's turn to 195, please.

Q. This is an email from Anna Kolonchina to Seth Harrison in a chain that is -- let's go to the next email down, please.

It forwards a draft of Amendment 20.

A. Yes.

Q. Have you ever seen what's been marked as Exhibit 195 before?

A. I'm not sure. Like, most likely I reviewed certain documents from the past when I was not involved in the ATP matters, but I'm not sure.

Q. Let's take a look at numbered paragraph 5 on page 4, "Remaining Unfunded Capital Commitments." It says in paragraph (a) that there's an unfunded capital commitment for Pool ATP IV of 20 million; correct?

A. Yes.

Q. "Pool ATP V-1 will be deemed to have remaining unfunded capital commitments of [$220] million ...."

A. Right.

Q. Pool ATP V-2 was going to be deemed to have an unfunded capital commitment of 664 million.

ATTORNEY BORN: Objection. This predates his time, and I think he says he's not sure if he's ever seen it before.

ATTORNEY BERDON: He is the chief executive officer of the company, and I believe it is fair game to ask him because he also testified that he probably also saw it during the course of his work.

THE COURT: If you don't have an understanding of this document, then you can so testify, but you are the CEO of the company.

A. Frankly speaking, this is a draft and I don't recall reviewing the drafts. I do remember that I reviewed the final amendment which was signed, but this is the work in progress. I can hardly help you.

Q. Let's take a look at the top email on the first page. Anna Kolonchina writes back to Dr. Harrison and she said, "Please find attached marked up version with [a] couple of revisions. No substantive changes here ...."

Do you see that?

A. Yes, I see.

Q. Mr. Bogdanov, Rigmora received a number of capital calls on May 30; correct?

A. That's correct.

Q. Was each of those capital calls within the amount of the approved budget for the portfolio company on which it was called?

A. I think so.

Q. Has Rigmora paid them?

A. No.

Q. Does Rigmora have any intention to pay them absent an order of this Court?

A. Again, we disputed those calls, right.

ATTORNEY BERDON: Pass the witness, Your Honor.

THE COURT: Just a moment. I have a few questions and then you can decide what to do with him.

Remind me, you took over the responsibilities that you currently have at Rigmora in October 2024; is that correct?

THE WITNESS: That's correct.

THE COURT: What were you told when you took over those responsibilities?

THE WITNESS: I didn't have any specific instructions. Obviously I was involved in many matters. So that was kind of like a small

transaction. But my predecessor left exactly on that date when I became the new CEO, it was October 17, and there were no specific instructions.

THE COURT: There were no instructions from anyone as to how to proceed?

THE WITNESS: There were no specific instructions.

THE COURT: Go ahead.

ATTORNEY BORN: No further questions. Thank you, Your Honor.

THE COURT: Thank you.

(Witness excused.)

ATTORNEY BARLOW: Plaintiff rests subject to rebuttal.

THE COURT: Thank you.

ATTORNEY SELDEN: Good morning, Your Honor. Shannon Selden of Debevoise & Plimpton for defendants. Defendants will call Dr. Dmitry Rybolovlev.

(Steven Lagutin, Russian Interpreter, was previously placed under oath.)

COURT CLERK: Please remain standing and raise your right hand. State and spell your first and last name for the record.

THE INTERPRETER: Rybolovlev Dmitry Yevgenevch.

COURT CLERK: Can you spell it, please.

THE INTERPRETER: R-y-b-o-l-o-v-l-e-v, Dmitry, D-m-i-t-r-y, and there's a patron (indecipherable), Yevgenevch, Y-e-v-g-e-n-e-v-c-h [sic]. I might be off on that.

THE COURT: Going forward, the questions will be directed to the witness and then you translate. I want to make sure that we're hearing the words from the witness.

DMITRY YEVGENYEVICH RYBOLOVLEV, having first been duly affirmed, was examined and testified as follows:

DIRECT EXAMINATION

BY ATTORNEY SELDEN:

Q. Good morning, Dr. Rybolovlev. Could you please state your name for the record.

A. Dmitry Rybolovlev.

Q. Dr. Rybolovlev, where were you born?

A. The Soviet Union, the city of Perm, P-e-r-m.

Q. Where did you grow up, Dr. Rybolovlev?

A. Same place.
Q. Did you go to university?
A. Yes. I graduated from Perm Medical Institute.
Q. When did you graduate?
A. In 1990.
Q. Did you ever work in medicine?
A. Yes. I was working as a medic, as a male nurse, taking night shifts. All in all, about five years.
Q. Did you practice in medicine after graduating?
A. Yes. I practiced one year as an intern doctor.
Q. And why did you stop working as a doctor?
A. At that time the work of a doctor in the USSR was paid, to say the least, modestly. I was making at that time about 120 rubles a month, plus ten rubles for being an excellent student. At the same time I had no apartment -- I had family, I had no apartment, I had no means to support myself. Therefore I had to change my nature of activity.
Q. And what did you do next?

A. Me and my father opened a small enterprise providing medical services to industrial enterprises, to factories. At that point in whatever was called the Soviet Union, there was a process named "perestroyka," or restructuring, that would allow private enterprise activity, which is what we took advantage of.

Q. Did there come a time when you changed jobs again?

A. Yes. The thing is, back when I was a child, I happened to read a book that was pretty popular in the Soviet Union at the time. It was a book by Theodore Dreiser, *The Financier*.

Then I took an interest in it, and then at that time the market -- the stock markets in Russia started developing, and that pushed me towards going to study and taking one of the first -- be one of the first ones to take the certificate on the operations with shares, valuable papers.

Respectively, I was the first one to open an investment company in my region. At that moment in Russia they started the process of privatizing of the state-owned companies. So therefore I happened to be one of the ones who were

most prepared in my region for that kind of market.

The process of privatizing happened to have an auction that the government was selling the enterprise through various mechanisms to various private actors. The entire population was given some voucher that they could sell or they could exchange for shares of certain enterprises. Therefore I created a special investment fund and became an active participant in this kind of activity, privatizing.

At some point we accumulated about 20 enterprises under our ownership. Eventually they went down -- the number went down to seven. And furthermore, as a result of further sales and various acquisitions, I focused on two major enterprises. As a result, I happened to obtain a control package of one of them. That was a company Uralkali.

Q. Dr. Rybolovlev, could you spell Uralkali for the court reporter.

A. U-r-a-l-k-a-l-i.

Q. Dr. Rybolovlev, at some point did you obtain a controlling block Uralkali?

A. Yes.

Q. And what did you do then?

A. The thing is, it was a pretty big

enterprise of the Soviet style that had about 15,000 people working on it. Correspondingly, there has been a big -- large work done to restructure the enterprise and conducting various reforms to make it more in line with the western-style corporate leadership.

As a result, in 2007 we introduced the company to the London Stock Exchange. It was a successful step and at that time we managed to earn our first billion. Eventually in 2010 the company was sold.

Q. And how much did you receive for your stake in Uralkali when it was sold?

A. Around 5 billion.

ATTORNEY SELDEN: Your Honor, would now be a good time for a break?

THE COURT: We can break now. I will need about 20 minutes for the morning break because I have a ton of administrative things to do every break. Why don't we break now and resume in 20 minutes.

(Court in recess at 10:30 a.m.)

(Resuming at 10:50 a.m.)

THE COURT: Please be seated. Thank you.

Just a reminder, we'll break next at noon.

ATTORNEY SELDEN: Thank you, Your Honor. Shall I proceed?

BY ATTORNEY SELDEN:

Q. Dr. Rybolovlev, did three come a time when you left Russia?

A. In 1995 I moved my family to Switzerland and became a tax-paying resident of Switzerland myself. Although there was a lot of time I was still spending in Russia because we needed this time to take care of the enterprise. And when in 2010 the company was sold, I finally left Russia for good.

Q. The company that you're referring to is Uralkali?

A. Uralkali.

Q. What did you do professionally after you sold your interest in Uralkali?

A. Yes. I happened to have a medical education and I really love medicine and I really regret that I ended it so abruptly. I started taking

interest in being in Switzerland in biotech.

After sale of the Uralkali, I conducted several meetings with various fund managers in the U.S. in order to find an optimal way to invest in biotech industry. My idea was essentially to replicate the approach that I had in Russia. The idea was to have like a rolling investment in multiple companies with subsequent focusing of one or two of them in order to eventually create a family business.

The other possible way to do it would be to heavily invest in one company, but considering biotech being a pretty risky industry, that was a pretty risky venture in itself.

As a result of these meetings, I met Seth Harrison, which essentially liked the strategy. He happened to have small foundation; and as a result of our cooperation, we created this fund.

Q. And what's the name of that fund that you created with Dr. Harrison?

A. It was the Apple Tree fund, which essentially had the same name as the fund that Mr.-- Dr. Harris [sic] had. However, this time we took the commitment to invest about 1.5 billion.

Q. Dr. Rybolovlev, do you have other

investments besides the fund?

A. Yes. I generally like investing in technology. In the future, I believe there will be three major ways -- well, three major directions that humanity will benefit the most from, which is number one, health, the food, and entertainment.

Yeah. So this is as far as we go considering this foundation regarding the health or the health protection. We also made some investments in creation of cellular-based meat. I believe this will dramatically change the approach that humanity treats the nutrition stuff, because this is going to be an artificial meat, essentially, and this is going to be having absolutely no impact on the environment. And right now, as you know, the cattle farming is one of the biggest factors that impacts the environment. So we have this company in Oxford, and it develops pretty well.

The next direction is gaming, and there we have several investments. Also, we do have some realty investments as well as other portfolio investments.

Q. And, Dr. Rybolovlev, do you also own a football team, or a soccer team as we would say here?

A. Yeah. This is a part of the same approach we took regarding the entertainment industry. Yeah. We happen to have ownership of 66 percent of the soccer club Monaco. And like I said, this is another investment in the entertainment industry, in gaming.

Q. Dr. Rybolovlev, in addition to your investments, do you also like to keep significant cash on hand?

A. We do not like to keep a lot of liquidity on hand. I believe the money, whether it's cash, it has to work. So when it comes to dealing with liquidity, such as cash, we manage it pretty scrupulously. And I believe our liquidity's fine as far as our assets goes.

Q. Does that approach make it difficult to satisfy obligations to pay in cash when they arise?

A. In all my being in the business, we had no difficulties with that.

Q. And, Dr. Rybolovlev, do you understand Dr. Harrison alleges or APT alleges that the war in Ukraine changed your approach to investments beginning in February of 2022?

A. I don't agree.

Q. What impact, if any, did the Ukraine war have on your approach to investing?

A. No impact.

Q. Have you been the subject of any U.S. or EU sanctions since the start of the Ukraine war?

A. No.

Q. Do you invest in the U.S.?

A. The main investments just happen to be here in the U.S.

Q. Dr. Rybolovlev, let's talk about your investment in the fund that's at issue here, APT. How did you structure your investment in the fund?

A. So we happened to be in the position of LP, Dr. Harrison was GP, general partner.

Q. And the LPs that invest are the Rigmora Biotech Investor One and Two?

A. Yes.

Q. Have other LPs invested in the fund, to your knowledge?

A. It has been always our position that Dr. Harris would have the similar motivation in the interests of the company as us. This is why we decided to give him a small share as LP in terms of free credit line that we provided for him to get a

share.

Q. Dr. Rybolovlev, are you familiar with the term "capital commitments"?

A. Yes.

Q. What do you understand it to mean?

A. That's the number of commitments that companies of the trust took upon themselves to the fund.

Q. Did the Rigmora LPs make a capital commitment to the fund?

A. Yes.

Q. How much did the LPs initially commit to invest in the fund, if you know?

A. About 1.5 billion.

Q. Does that include the loan you mentioned to Dr. Harrison?

A. Yes.

Q. Do you recall how much that loan was?

A. About 75 million.

Q. Dr. Rybolovlev, when the LPs committed to invest $1.5 billion in the fund, was that paid in all at once, upfront?

A. No. Within the scope of the life of the founding fund.

Q. Did there come a time when the fund began making investments?

A. Somewhere in the area of 2013.

Q. When the fund started making investments, did you play any role?

A. Yes. Normally the way it happened is Dr. Harris would come one day with a proposal, briefly describe it, and name general number required for it.

Yeah. So normally, if we like the idea as a whole, we would approve it. And, further, there was a process of formalizing it and approving it at Rigmora.

Q. What was that process, if you know?

A. Yeah. Dr. Harris would provide a package that was required to Rigmora with numerous investment documents, such as milestones, et cetera, numerous documents, and, furthermore -- eventually Rigmora would study it and make decision.

Q. Was that formal process important to you?

A. Yes, of course.

Q. Are you familiar with the term "milestones"?

INTERPRETER: I'm sorry, Ma'am?

Q. You're familiar with the term "milestones"; right?

A. Yes.

Q. What do you understand that to mean?

A. That is a very important mechanism of control of the company's development. This is so-called timeline which is agreed upon both with founders and the management about the way the company's supposed to develop.

So if milestones, for whatever reason, are not achieved so there is some issue, that basically shows that the founders and managers didn't cope with the problem. Therefore, this requires further in-depth analysis in order to understand what exactly needs to be done, whether the milestone needs to be changed or the company has to be terminated.

Q. Were milestones something you considered when reviewing the investment proposals?

A. So definitely Rigmora was adhering to this mechanism. However, my level set was always telling me that the number -- the numbers that we utilized did not always go along with the outlined budget. For example, we can spend 1 or 3 billion -- million eventually to understand that a company does

not fulfill the obligations.

The adherence to the control points, which is what it is, is one of the major obligations of general partner.

Q. Do you consider biotech to be a high-risk investment?

A. Yeah, it's a high-risk investment.

Q. Why is that?

A. There's a very little number of companies that eventually reach success.

Q. Is it fair to say that milestones are important to your investments in the fund?

A. Yes, clearly. When you are not situated inside the company, it's very important for you to understand the mechanism that works as an investor.

Q. Dr. Rybolovlev, did there come a time when the LPs increased their capital commitment to the fund, to your knowledge?

A. Yes. About -- in about the middle of 2020, we decided to increase the commitment by 1 billion.

Q. Why?

A. So Dr. Harris came up with a proposal

to continue investment, and we liked this considering the fact that biotech investments we consider strategic investments. Based on this, we gave our approval.

Q. In 2020, after the LPs agreed to increase their commitment, what was their total capital commitment to the fund, if you know?

A. About 2.5 billion.

Q. Did there come a time when the LPs made another capital commitment to the fund?

A. No.

Q. Were you involved in an amendment to the fund's LPA regarding a company called Braeburn?

A. Essentially, no. That involves a lot of technical works, which I do not get involved much into.

Q. That was Amendment 20. Do you recall being involved in Amendment 20?

A. Yes. So we often discussed this with Dr. Harris, but Dr. Harris eventually proceeded to -- was the one who directly involved in the execution of this.

As far as Braeburn, he had pretty negative view of this, and, therefore, we decided to

separate it in a separate pool. And if time comes, we could reallocate this, but then Dr. Harris would lose his carry.

Q. Did you agree to commit more capital to the fund in connection with that amendment?

A. No.

ATTORNEY EPSTEIN: Objection.

THE COURT: What is the objection? You have to stand up and say it out loud.

ATTORNEY EPSTEIN: Foundation. He said that he wasn't involved in the direct.

THE COURT: So this is not a deposition. If you want to make an objection, stand up and make it. If you want me to resolve, I'll resolve it.

What is your response to the objection on foundation?

ATTORNEY SELDEN: My response to the objection is he has described his general understanding of what Amendment 20 does. At a high level, I'm asking for his general understanding of whether he agreed to commit more capital in response to Amendment 20. I think that's a fair question under the circumstances.

THE COURT: Overruled. Thank you. You can answer the question.

A. Can you repeat the question, please.

Q. I can. And maybe I can improve it and avoid the objection.

Dr. Rybolovlev, do you have an understanding of whether the LPs agreed to commit more capital to the fund in connection with Amendment 20?

A. No.

Q. Did you, yourself intend to agree to commit more capital to the fund in connection with Amendment 20?

A. No.

Q. Is it possible the LPs committed more capital to the fund without your knowledge?

A. No.

Q. Do you know how much the LPs have actually invested in the fund to date?

A. About 2.7 billion.

Q. Why, if you know, did the LPs invest more capital in the fund than the 2.5 billion you stated they committed?

A. Well, we consider it our investment and our assets, and we are interested -- taking

interest in developing those companies. Therefore we decided to increase our assets.

Q. Was the total amount of the LPs' capital commitment important to you?

A. Of course.

Q. Why is that?

A. It's very important for everyone to understand his own obligations.

Q. Did you ever discuss the total amount of the LPs' commitments to the fund with Dr. Harrison?

A. Yes.

Q. When was that?

THE INTERPRETER: 2023?

A. 2023.

Yes, it was 2023, and we clearly communicated to Dr. Harrison that we would prefer to stay in the range of 2.5 billion, which is basically the number of the general subscription to the fund.

Q. Was that in May of 2023?

A. About that.

Q. What were those conversations like?

A. He was pretty negative about it.

Q. Was that the only time that you discussed the limit on the LPs' capital commitment to

the fund?

A. No. Also we did it in fall of 2023.

Q. What were those discussions like?

A. Well, it was kind of pretty obvious that there might be some issues with the early-stage companies.

The fact of the matter is that when the decision about investment in these companies was being made, the market happened to be in a very high position. That happened as a result of COVID. There was a big, positive reaction in terms of development of medical sciences. Also, there was a large number of unqualified investors entering the market at that time, therefore. Therefore, even in preclinical studies companies had opportunity to syndicate a number of investors.

So, with that in mind, you also have to keep in mind the fact that the reserve -- the Federal Reserve rate is extremely important factor of this. And if the rate is low, the attraction is higher. So I could say there were two major factors in this. The first was COVID and the second was low interest rate that attracted so many investors at that time in preclinical studies.

As you know, eventually the rates went up and investors started giving up on risky assets. Well, correspondingly, the index that show the level of development, the level of technology companies went down, and eventually it became obvious that for the early-stage companies, for that early-stage companies, attracting more investments was becoming more and more difficult. This is one side. And the other side, the subscription, by the end of 2023 has to come to the end, has to finish.

So we made a deal with Dr. Harrison that he would make an attempt to sell the companies with early-stage. We were prepared for big discounts. And it happened that he didn't find anyone in a year and a half. So that means the market didn't accept it.

Q. Why were you willing or ready to sell at a big discount at that point in time, in the fall of 2023, some of the companies in the fund's portfolio?

A. Yes. The early stage.

Q. My question was why.

A. It was becoming obvious that at that stage of the market it would become more and more

difficult for them to attract outside investments and, correspondingly, making investment themselves. And this is one side. And the other side is our subscription was coming to the end.

Q. When you say "subscription," are you referring to the $2.5 billion capital commitment of the LPs to the fund?

A. Yes.

Q. Do you know how much of that $2.5 billion commitment had been drawn down by the fund at that point in the fall of 2023?

A. "Draw down," what did you mean by that?

Q. Do you know how much of that $2.5 billion in capital commitment had been called and invested by the fund at that point?

A. At what date?

Q. The fall of 2023.

A. I don't exactly remember. We were very much getting close to the end of it, but at the end of 2023, the commitment was up.

Q. Did you discuss with Dr. Harrison how close the fund was to exhausting the LPs' commitments?

A. Right. This is actually one of the

reasons we needed to sell the companies.

Q. How did your discussions with Dr. Harrison go?

A. Pretty tensely. Pretty tense.

Q. I'm sorry. I'm just having a hard time hearing. Pretty tense?

A. With tension.

Q. With tension.

Dr. Rybolovlev, was it around that time that you requested a distribution of a company called Braeburn?

A. Yes.

Q. What's Braeburn?

A. This is a company that develops a product that uses -- that is used in opioid dependency, addiction.

Yes. So at the point of conception the beauty of this company was the fact that it was utilizing the pretty well-known -- pretty well-known technique of fighting addiction. However, the general way of doing it happened to be through pills. We did it through injections. That would change a lot and allow us to eventually develop the company and hopefully attract more capital and make -- of the

company that it was considered a low risk at that time. With that capital we could invest into high-risk capital companies eventually.

However, we faced very unexpectedly another risk here. There was a regulatory risk where then several years, under very different pretext, the FDA did not approve the product as per results of the trials.

There was a point when Dr. Harrison was saying that it would be more frugal to just write this investment off.

It's not only based on our will that the company not only managed to survive, but eventually got approval from FDA. Correspondingly, in 2023 we decided to reallocate it.

Q. What happened when you requested distribution of Braeburn?

A. He refused.

Q. Then what happened?

A. So, considering by then we had a number of negotiations, we decided to keep it at least at the level of some more constructive part. As a result, we just decided to keep the legal rights for reallocation but decided not to proceed with that.

Q. Did there come a time when you were involved in litigation over Braeburn?

A. Yes. About the middle of 2024 we decide -- we requested again to reallocate. He refused again. So, correspondingly, we went to court.

Q. Is Dr. Rybolovlev saying "reallocate" or "distribution" of Braeburn? I believe there's an error in the translation.

A. Redistribution.

Q. So, Dr. Rybolovlev --

THE COURT: There is an objection. Why don't you state your objection, Counsel.

ATTORNEY EPSTEIN: My objection is I don't believe that Ms. Selden speaks Russian. So I am not understanding the objection in the transcription.

THE COURT: I think she knows what her client intended to testify because she's been working with him up until today. So it's a fair question to ask if the translation was accurate, given that it's probably inconsistent with what she knew him to say. So I'll allow it to proceed. Thank you.

ATTORNEY SELDEN: I have wished many times in the past three months that I did not drop Russian after my first semester of college.

BY ATTORNEY SELDEN:

Q. So, Dr. Rybolovlev, you were involved in litigation over Braeburn in 2024. Did that incident with Braeburn affect your confidence in Dr. Harrison?

A. Of course.

Q. In 2024, during this time, is that when Anna Kolonchina left Rigmora, do you know?

THE INTERPRETER: Anna Kolonchina --

ATTORNEY SELDEN: Left Rigmora.

A. Yes.

Q. Do you know why she left?

A. Yeah, she came and said that she burned out, she's tired and she needed a break.

Q. Did you want her to leave?

A. No.

ATTORNEY SELDEN: May I just ask the translator to speak into the microphone or speak up a little bit. You're very hard to hear from here.

Q. Dr. Rybolovlev, have you had any discussions with Dr. Harrison about further investment in the fund since December of 2024?

A. Yes.

Q. When was that?

A. Yes. It was at the end of 2024, beginning of '25 when we discussed the increase of the budget regarding several companies.

Q. Has Dr. Harrison submitted any new budget requests since December 2024, do you know?

A. Yes.

Q. What was Rigmora's response to the new budget request, if you know?

A. Yeah. Well, we -- of course we discussed it. Correspondingly, we requested that leaders of several companies would visit us in Monaco. For example, there was a discussion regarding the company Replicate budget increase.

Well, correspondingly, we approved the budget and paid a fraction of it, which is about 4 or 5 millions.

Q. And you understood that Mr. Bogdanov had some questions about Replicate; is that what you said?

A. Yes. At that point Dr. Bogdanov got our attention to the fact that unexpectedly the legal expenses of the foundation grew dramatically, abruptly. Correspondingly, he said that he has his suspicions that part of this money might be used in

the litigation on the Cayman Islands, Cayman process.

So, respectively, he requested more information. And Dr. Harrison provided a very emotional response to that. That was in Monaco when we were meeting there in January.

Correspondingly, as a result of this conversation, this budget was decreased by 250,000. But we never received that information. All of that was in parallel time-wise and with discussion of the Replicate budget. So correspondingly, we had a question whether everything that we see is accurate and right. Correspondingly, Mr. Bogdanov requested more additional information about Replicate, for example, the transcripts of the CEO conferences. The transcripts of the council of directors.

ATTORNEY SELDEN: Do you mean board minutes?

THE INTERPRETER: Board of directors.

A. And prospectively, Dr. Harrison also reacted very negatively to that. So I asked him, why is that? All the more reason is whatever Mr. Bogdanov is requesting is part of our agreement. He said yes. And then I go, what is the problem, then? So for me, it really looked very weird. If you, for example,

invest 50, $100 million in the company and somebody refuses to produce you the transcripts from the board of directors meeting, that is strange.

So as you understand, after these discussions, we had a pretty good understanding that we need a more detailed investigation with this matter.

Q. Did Dr. Harrison's reaction to these information requests affect your approach to his budget proposals going forward?

A. Only from that particular point of view that we really need to provide a very more thorough analysis of things.

Q. From that point in time, did you believe you needed to ask for more information?

A. Yes.

Q. And why was that?

A. The fact of the matter is that this discussion about a simple request of producing like a pretty simple information being refused really affected the confidence.

Q. Did there come a time when you met with anyone from the portfolio company?

A. Yes, we were meeting with the CEO of

Replicate, Aulos, and Maria [sic].

Q. Marengo?

A. Marengo.

Q. What, if anything, did you learn from those meetings?

A. It depends on the company. If you look at the -- each company needs to be looked at individually. For example, in the case of Aulos, they got in the pretty complicated situation because due to the management error, the entire -- the clinical trials would have to be repeated. Although the results were seemingly fine, they, in reality, could not be used. However, we still expressed our readiness in further financing.

As far as company Marengo, everything as a whole was good.

Q. During that period of time, were you still considering budgets that Dr. Harrison brought you?

A. Yes.

Q. Why were you still considering budgets from Dr. Harrison, given what you've told us about your loss of confidence?

A. Well, this is our investment. This is

our money. And we are basically the first people interested in their good development.

Q. Was there a time when you discussed with Dr. Harrison reallocating budgets within the portfolio of companies?

A. Yes. About May, beginning of May, Dr. Harris suggested that we reallocate the assets, the funds from the early development companies to the well-developed companies. And as far as early development companies, some of them would stay while the other one may well liquidate.

Q. What did you understand the next steps to be with respect to that reallocation proposal?

A. So we approved this approach. As a matter of fact, we were pretty happy to see that finally Dr. Harris moved in this direction.

THE COURT: So need to take an hour now or an hour and a half. We'll resume at 1:30. Thank you.

(Lunch recess taken at 12:00 p.m.)

(Resumed at 1:42 p.m.)

THE COURT: Thank you. Please be seated.

Mr. Rohrbacher.

ATTORNEY ROHRBACHER: Blake Rohrbacher, Your Honor. Two brief housekeeping matters. After Dr. Rybolovlev is done, the defendants will be playing a series of clips of video designations with counterdesignations from the other side. Including those video clips, we calculate that the other side has about 47 minutes left or less. And so we hope it won't become an issue, but I just wanted to raise it in case it does.

THE COURT: All right. Look, I shouldn't do this, but if I need to watch the clips elsewhere, I can. I prefer to take in testimony all at once in court so you all are conscious of my own personal time. You've been exceptionally accommodating of me, so I'm willing to do that.

ATTORNEY ROHRBACHER: There are clips. We are hoping to play them here live as part of our case in chief. So that is -- and we've made cuts elsewhere to make sure that we have the time to do them.

THE COURT: Great. Let's hope that works.

Shall we continue?

ATTORNEY SELDEN: Thank you, Your Honor.

BY ATTORNEY SELDEN:

Q. Good afternoon, Dr. Rybolovlev.

Before lunch I had asked you about a reallocation proposal made by Dr. Harrison in May of this year.

Do you remember that?

A. Yes.

Q. You were happy with that proposal?

A. Yes.

Q. What did it propose to do?

A. It was proposed that the early-stage companies would be partly liquidated or consolidated. Correspondingly, we would need to investigate also what is the value of IP that can be actually stayed in, and most of what it is could be -- the money could be directed towards the companies with the clinical research.

Q. What does it mean to consolidate the early-stage companies, if you know?

A. I didn't understand the question.

Q. What did you understand the proposal to do with respect to consolidation of the early-stage companies?

A. So most of it I implied by decreasing of expenses for the companies of the early stage. That would essentially lead to breaching the various agreements, breaching the agreement of rent. That would essentially lead to firings or dismissal of personnel.

And among those -- the ways that were remaining in the companies, we would choose the most prospective one, the most promising one, and keep it; whereas, the money that would be -- that we would have after these changes would be directed to the bigger companies with the clinical-stage research.

Q. And why were you happy with that proposal to consolidate the early-stage companies?

A. That was the right decision, and that was something we'd been discussing for a long time before that.

Q. Did you reach an agreement on a reallocation plan with Dr. Harrison?

A. Yes. We had a video phone call during

which he was convincing us that was the right thing to do. Accordingly, I agreed, and from that point we discussed that him and Yuri Bogdanov would proceed to the technical part of it.

Q. And do you know what came of those discussions between Dr. Harrison and Mr. Bogdanov?

A. Essentially, it turns out that Dr. Harrison wanted complete control of all the sums of money, which essentially would deprive of us of any right of LP.

Whereas, the way it was perceived by Yuri Bogdanov was different. That was in line more like first you go through the liquidation of the early-stage companies, and then you proceed with budgeting of the clinical research companies.

Q. Were you ultimately able to reach agreement on a final reallocation plan with Dr. Harrison?

A. No. I believe eventually they could not come to an agreement, and there came a point where we ended up in court.

Q. Do you know why you were unable to reach agreement on the reallocation plan?

A. I gave it a lot of thought, and it

looks to me that for Dr. Harrison power and control is more important than effectiveness.

Q. Did you have confidence in Dr. Harrison at that point?

A. Clearly, the trust was undermined. However, until the very last moment, we kept trying to preserve constructive dialogue.

Q. Dr. Rybolovlev, switching gears for a moment. Was there ever a time before the complaint was filed when you decided that the LPs would not satisfy any more capital calls from the fund?

A. No.

Q. Had the LPs, to your knowledge, ever failed to pay a capital call before this litigation was initiated?

A. No.

Q. Was there ever a time when you thought that the LPs would be unable to pay a capital call when it came?

A. No.

Q. How do you think about investing in the portfolio companies now?

A. Again, I continue investing in the portfolio companies because we consider them our

companies and our investments; and, of course, we would like for them to keep developing further. But it's very important that among those companies were the companies that have clear chance to reach success.

Clearly, for us as investors, writing off some assets is a very painful process because we're talking about the money that had been invested but never get back. When we take something -- a decision like this, we take it through pain, but sometimes it has to be done so that the good money would not follow the bad ones.

Q. Dr. Rybolovlev, how do you think about investing with Dr. Harrison in the future?

A. I believe that trust in Dr. Harrison is irreparably undermined, and I don't see how he could possibly manage the money of our family trust.

ATTORNEY SELDEN: Thank you, Dr. Rybolovlev. I pass the witness.

CROSS-EXAMINATION

BY ATTORNEY EPSTEIN:

Q. Good afternoon, Dr. Rybolovlev. It's good to see you again.

A. Good afternoon.

Q. So am I correct that throughout this

entire examination that we went through this morning, your counsel did not show you a single, contemporaneous document from you backing up anything; correct?

A. There were no documents.

Q. And you don't really use email; correct?

A. No, I don't.

Q. And you primarily communicated with Mr. Bogdanov via Signal; correct?

A. Signal and WhatsApp.

Q. And you did not change your settings on Signal or WhatsApp to retain messages until about May 30 when this suit was filed; correct?

A. I didn't quite understand the question. What is retention of messages?

Q. Do you understand that Signal messages disappear after a certain amount of time?

THE INTERPRETER: Yeah. "Retention" was interpreted differently. I apologize. Backing up or saving messages basically?

ATTORNEY EPSTEIN: Is what I meant by retention, yes.

A. No, I haven't changed it.

Q. So you have not changed your settings to retain messages?

A. No.

Q. So I believe you said earlier that biotechnology investing can be risky; correct?

A. Yes.

Q. And you appreciated those risks when you decided to go into business with Dr. Harrison; right?

A. Not completely.

Q. Well, fair to say that 15 years later you now appreciate those risks even more?

A. Yes.

Q. And you would agree that biotech, and drug discovery in particular, is a capital-intensive business; right?

A. Yes and no, depending on circumstances.

Q. But in any event, one of the things that you like about biotech investing is when a drug does reach market, it does bring massive profit; right?

A. Yes, but besides that, also we use to help of people.

Q. I think you said those were one of the three things you were interested in investing in along with food and entertainment; right?

A. I believe that the more we know about the biology of the human body, it's not only going to help us, but change our civilization overall.

Q. So you understand that preclinical companies are riskier than clinical companies; right?

A. Yes.

Q. And in your view in the current market in 2025, you believe it's very, very difficult to track funding at the preclinical stage; right?

A. Somewhere in the year of 2022 I believe there is an index that could provide you a very good picture of what's actually happening. So that index will reflect that there was a peak somewhere between 2020, 2021, after which the fall started, and the fall went consistently through 2022, 2023 and '24. And it's been only one, maybe two months since we've been observing some positive changes, that is, the market started correcting itself, and we believe that this is going to help us, all of our technology companies, biotechnology companies.

ATTORNEY EPSTEIN: Could you put up 74, 9 through 11, Marco. The question too, please. It was another long answer.

Q. So you were asked, "And to the best of your recollection, did Rigmora approve, at least preliminarily, a merger of Nereid into Marlinspike?"

Do you see that?

THE INTERPRETER: Counsel, could you repeat that.

Q. "To the best of your recollection, did Rigmora approve, at least preliminarily, a merger of Nereid into Marlinspike?"

Do you see that?

I'm sorry. Maybe my question didn't get translated. My question was simply, does he see that statement.

A. That's what I was going to answer you. Overall the answer is yes, but there's some nuances.

Q. I'm going to stop you again.

THE COURT: Let's pause for a moment. You're trying to impeach the witness; is that correct? So, in trial, if you say something that's inconsistent with something you've said before, then the attorney who's asking you questions is going to show you what

you said before, and the attorney will say something like "did I ask that question and did you give that answer?" When they do that, they're not reasking the question on the page. They're just showing it to you. Your attorney will have the opportunity to say why what they showed you does or doesn't matter. Does that make sense?

THE WITNESS: Yes.

ATTORNEY SELDEN: Your Honor, might I just add one other point, which is that Dr. Rybolovlev doesn't read English.

THE COURT: I'm aware, which is why I understand it was confusing.

ATTORNEY SELDEN: Thank you so much.

THE WITNESS: There is two answers to that question. One of them is short and one of them is comprehensive. This is why when I answered I answered yes, but with nuances.

THE COURT: So you might want to impeach the witness using video clips if you have them or speaking the words into the record.

BY ATTORNEY EPSTEIN:

Q. So you recall that just now I had asked you whether or not in your view it was very,

very difficult to attract funding at the preclinical stage in 2025. You recall I just asked you that; yes?

A. What is the question exactly?

ATTORNEY EPSTEIN: Could I have it read back?

ATTORNEY SELDEN: May I suggest we take down the exhibit to lessen the confusion?

THE COURT: That's really up to the examining attorney.

ATTORNEY EPSTEIN: We can go ahead and take down the exhibit.

Would you read the question back, please.

(Record read as requested.)

A. Yes.

Q. And now if we could bring up 74, 9 through 11.

Do you recall that at your deposition you testified that "[I]n this market in 2025, it is very, very difficult to attract funding at this stage, for this stage."

A. What's the question?

THE COURT: Do you remember saying that during your deposition?

THE WITNESS: Yes.

ATTORNEY EPSTEIN: You can take that down, Marco. Thank you.

Q. That was a change from 2020 or 2021 when companies were more easily able to syndicate at the preclinical stage; correct?

A. Counsel, when you say "syndicate," what exactly do you mean?

ATTORNEY EPSTEIN: Could we bring up page 73, 11 to 25.

Q. Do you recall at your deposition testifying that you expressed a mistake that "because it was a situation in the market, that was 2020/[20]21, when biotech stock grew substantially against the background of the Covid epidemic, [] a lot of nonqualified investors moved in" --

A. Yes.

Q. -- "so suddenly the sector had much more money in [it]."

A. Yes.

Q. And "At this point [in] time, companies were able to syndicate at a preclinical stage. But this period was [very] short, but Seth and the team seemed to believe that that's how it [was]

going to be from now on."

THE COURT: He needs time to translate.

ATTORNEY EPSTEIN: Of course.

A. Yes.

Q. And so at least at the time of your deposition, it was your view that it is more difficult to syndicate preclinical companies in 2025 --

A. Yes.

Q. -- than it was in 2020 or 2021; correct?

A. It was much easier.

Q. In 2020 or 2021?

A. 21st.

Q. There's nothing that you're aware of in your agreements with Dr. Harrison that conditions funding the portfolio companies on the ability to syndicate; right?

A. I didn't understand the question.

Q. You understand that your -- Rigmora's relationship with Apple Tree Partners and the general partner are governed by contract?

THE COURT: I think the last question is do you understand that Rigmora's relationship with

Apple Tree Partners and the general partner are governed by contract?

What was the response?

THE INTERPRETER: The answer was yes.

THE COURT: Next question.

Q. Are you aware of anything in those contracts that conditions Rigmora's obligation to fund portfolio companies on the ability to syndicate those companies?

A. Limit Rigmora's capabilities to syndicate, is that the question?

Q. No. The question is, do you know of anything in the agreements that says that Rigmora does not need to fund the portfolio company if the syndication market changes?

A. I don't remember.

Q. So as you sit here today, you're not aware of anything; correct?

A. The thing is, I do not get involved in the technical part of document -- documents. The fact of the matter is I vocalize the main directions we need to go, and from that point various attorneys and other specialists get involved. I do not participate in that process.

Q. So you're not involved in the details?

A. No.

Q. And as you sit here today, you're not aware of anything in the agreement that says that Rigmora can stop funding portfolio companies if market conditions change; correct?

A. The fund would syndicate the companies, right. It's not Rigmora that syndicates the companies.

Q. Let me try this question again. Are you, Dr. Rybolovlev, as you sit here today, aware of any provision in the contracts between Rigmora and Apple Tree Partners that says that Rigmora may stop funding approved budgets for portfolio companies if the syndication market changes?

A. I don't remember anything like that.

Q. So do you recall earlier you were talking about wanting your cash to work for you?

A. Right. The money doesn't have to lie in one place; it has to work.

Q. You don't really like it when your cash is just held in an account; right?

A. I just do not like it when the money do not work.

Q. In fact, as a general approach, you did not want large balances held in the companies that you invest in; right?

A. Right. It's just money sitting there.

Q. In fact, in your view, if a company has a cash reserve for more than six months, it's just lying there while it could be doing work; right?

A. Overall, yes, but it depends on various situations.

ATTORNEY EPSTEIN: Could we have 48 -- excuse me, it's 49.

Q. Do you recall that at your deposition you were asked, "Can you tell me what you mean when you say, 'And, therefore, it wouldn't be right for us if there were significant balances in the companies, in biotech companies'?"

A. Yes.

Q. And you were asked, "What [do] you mean by that"?

Do you recall that?

A. Yes.

Q. And you answered, "Well, a company has spare cash for a quarter, had for a year, two years, three years, and accordingly, the cash reserve is for

more than six months, it's just lying there while it could be working."

Do you recall testifying to that?

A. Yes.

Q. And you believe -- withdrawn.

Dr. Harrison has told you before that, in his view, a just-in-time approach is not a path to success for biotech companies; correct?

A. Yeah. We periodically discussed this subject as to what remainder the company should have on their accounts.

Q. And you understood that Dr. Harrison's view was that a just-in-time approach to funding did not work for biotech companies?

A. The thing is that in the biotech the companies syndicated much earlier. Therefore, the model that was used in our fund when the LPs -- the only investor of the LP is LP fund.

ATTORNEY EPSTEIN: I'm going to move to strike that.

THE INTERPRETER: One second. Can I -- can he repeat the answer?

A. For a long time we have been the only investor in the fund, which is LP. And then, if

that's the case, then it works very normally. So when the company syndicates on an earlier stage, therefore it gets the money and the money is on the company's account. This is what happens.

THE COURT: I'm going to ask -- this time will count against them.

ATTORNEY EPSTEIN: Thank you.

A. So while we don't have the syndication yet, we finance it as budget organization. And I believe six months' worth of money is fine for normal functioning of the company.

For example, we did have a situation when the company needed more money to resolve the issue on the business development, for example. When we saw that there was a sufficient amount of money left on the company's account, we always would transfer sufficient amount of money to complete that task.

ATTORNEY SELDEN: Your Honor, I would just note that I believe, via the translation, it appeared that Dr. Rybolovlev is being asked for his understanding and not for a yes/no question. I understand that time will count against us, and I just want to acknowledge that but flag that translation

issue.

THE COURT: So that is five minutes against the clock on the other side.

ATTORNEY EPSTEIN: I'd like to move to strike that as nonresponsive, understanding that it was a translation error. So let's move on.

THE COURT: We have an objection.

ATTORNEY SELDEN: I'm sorry. I just wasn't sure if you were going to strike that as nonresponsive. I have not been noting translation errors as they go --

THE COURT: Yes. So the motion to strike was on the grounds that it was nonresponsive, which it was, although it was due to a translation error. So I'm striking it and I'm counting the time against you all, and we're going to move forward.

ATTORNEY SELDEN: Thank you, Your Honor. I'm trying not to raise translation issues as we go, but -- okay.

ATTORNEY EPSTEIN: I unfortunately don't speak Russian, or we'd be moving more quickly.

THE COURT: Not for me.

BY ATTORNEY EPSTEIN:

Q. So moving on, do you recall testifying

earlier at some length about the importance of milestones and investment memoranda and a formal process for budget approval?

A. Yes.

Q. But do you recall that at your deposition you testified that your normal process was for Dr. Harrison to come over and present one or two of the investments or the companies, and since it's difficult to work out the science and you trusted Dr. Harrison, you would agree with the proposal?

Do you recall that?

A. Overall, yes.

Q. And you testified just a few minutes ago that you don't get involved in the technical details; correct?

A. Yes.

Q. And you recall that you testified at your deposition that once you agreed with a proposal from Dr. Harrison, the further details of the budget and approvals by trustees was done by Anna Kolonchina.

Do you recall that?

A. Yes.

Q. And you testified at your deposition that you do not know the details of the budgeting

process; correct?

A. Yes.

Q. Do you recall testifying earlier about Rigmora's capital commitments to Apple Tree Partners being capped at $2.5 billion?

A. Yes.

Q. And do you recall testifying that, in your view, Amendment No. 20 did not change the amount of Rigmora's capital commitments to Apple Tree Partners?

A. Make changes? Could you repeat it?

Q. Rigmora's original investment to Apple Tree Partners -- how much capital -- I'll withdraw.

How much capital do you believe that Rigmora has committed to Apple Tree Partners?

A. 2.5.

Q. And are you aware that Amendment 20 was signed on June 21, 2021?

A. I don't remember.

Q. I'll represent to you that it was for purposes of this next question. Okay?

A. Sure.

Q. I should correct the record. It's dated June 21 of 2021.

So could we have JX 0230.

If you look at -- you'll recognize, if you look at the screen, the name Anna Batarina; correct?

A. Yes.

Q. And I'll go ahead and read it to you and have it translated since I know you can't read it. It was sent on June 24 of 2021, and it was sent to Anna Kolonchina.

You would agree with me that June 24 of 2021 is later than June 21, 2021; correct?

A. Probably, yes.

Q. Last we checked.

And in the email it says, "Please see attached the capital call notice for [] $2,000,000 Braeburn follow-on as well as the ATLS Fee, Incubation expenses, and the initial amounts for the IGI agreement."

Do you see that?

I understand you can't read it. So I'll represent to you again that that is -- what I've read into the record is what I see on the screen.

So am I correct that you've never seen this email before?

A. Yes.

ATTORNEY EPSTEIN: Can we go to page 4, Marco.

Q. So Dr. Rybolovlev, have you ever seen this chart before?

A. It's hard for me to look at it without external attributes like who prepared it, et cetera. When the chart has too many numbers, I really don't look at it.

Q. So you don't look at charts with too many numbers?

A. Right. I could have seen it as a part of some documents. I cannot just tell you I've seen it just looking by itself.

Q. Sitting here today, do you recall ever seeing a chart that says in Pool V-1 and V-2 as of June of 2021 --

THE INTERPRETER: From June -- I'm sorry.

Q. -- as of June 24, 2021, that there was roughly $940 million left to call for Pools V-1 and V-2? Do you recall ever seeing a chart that says that.

A. I don't remember.

Q. And do you recall ever seeing a chart that says as of June 24 of 2021, there was $310 million left to call in Pool V-3?

A. I don't remember.

Q. So then I take it you also don't remember ever seeing a chart as of June 24, 2021 that said in Pool IV, which was the original investment pool, there was $20 million left to call; correct?

A. I don't remember.

ATTORNEY EPSTEIN: Pass the witness.

ATTORNEY SELDEN: We have no redirect, Your Honor.

THE COURT: Doctor, you can step down.

(Witness excused.)

ATTORNEY BORN: Your Honor, we would call our next witness, Dr. Ehlers, by video.

Dr. Ehlers joined the fund as a venture partner and chief scientific officer in 2019. Dr. Ehlers founded or co-founded four of the fund's portfolio companies and served as board member of several others. Dr. Ehlers left the fund in November 2024, but remains the CEO of Ascidian and continues to serve as a board member of Aulos and Replicate. Dr. Ehlers has declined to testify in person today.

The video of his deposition testimony reflects plaintiff's inclusions. Defendants have designated 18 minutes of testimony, and plaintiff has designated 8 minutes.

THE COURT: Is it in sequence where it's defendants and then plaintiff, or is it all mixed in?

ATTORNEY BORN: We've prepared two versions in case this situation occurred. So we can play it with just ours.

THE COURT: I think it would be helpful to have it mixed in so I actually understand why they're cross-designating what they're cross-designating. We still are going to break in 15 minutes. So let's start it and then we'll take a break.

ATTORNEY BORN: I'm just reading the agreed language. The video contains Dr. Ehlers' testimony concerning the fund's investment in and management of certain of its portfolio companies. We agreed to do it sequentially. So that was the agreed-upon language.

We also overnight prepared a short additional clip of a minute and half of testimony by

Dr. Ehlers that rebuts Dr. Harrison's testimony about the global default charge. We can just play that at the end while we're watching his video or we can do it at the very end of trial, whatever works best for you.

THE COURT: Whatever.

ATTORNEY BORN: Okay.

MICHAEL EHLERS, was examined and testified via video as follows:

Question: So you said a little bit ago that you've now become more aware of what the potential structure and approval process would be. What's your understanding of when the Rigmora LPs are required to contribute additional capital to ATP?

Answer: And probably this is a dramatic oversimplification, it may not be completely correct, because I will freely admit to having, at best, partial information, but I'd say my understanding at this point is that there's budgets that are submitted and reviewed by the LPs. And then kind of based on those -- and for each of these deals there was kind of an initial agreed here's what the Series A financing is and that that commitment through that Series A financing was a commitment that was sort of locked -- like a boxed-in commitment to the given

deal or the given portfolio company where, within that box, tranches of capital could be released upon request based on milestones and other things, that budgets would then get reviewed.

And that over time, I think -- when I say that I became aware of it, because that was all very smooth early on, and then later as, I would say, biotech markets went to hell in a handbasket and it was pretty clear that to be able to get to syndicated financing or pharma deals or other things it was requiring later and later-stage data to the point of clinical data. And, of course, to get to clinical data requires a larger investment in that.

So while some of these deals were reaching their outer end of that initially agreed amount, then it became a different process, right. That's when I say I became more aware. Like with Intergalactic, because it was a very complicated technology, it ended up requiring more money than we'd anticipated going in and some things didn't work. We ended up being through that agreed-upon funding at a point where we had, I'd say, strong in vivo data and proof of concept, but then to get to clinical data was going to be beyond that and that required a different

set of requests. This is this kind of micro tranche sort of thing.

And something similar was kind of experienced at Ascidian where, again, there was an initial agreed-upon amount, and, for that matter, both Aulos and Replicate. In all these cases I was close to, it was a very, I'd say, straightforward process when it was within that initially agreed-upon amount. And as it got beyond that and there was a need to finance or fund further, that that became sort of a series of one-off, you know, mini budgets, mini discussions that just went through ATP.

And that's when -- that's when I say I became more clear about that being a constraint, that it was easier when it was within the initially approved amount and then beyond that everything was a discussion.

Question: When you said "the biotech markets went to hell in a handbasket," when was that?

Answer: Well, when was the -- I mean, the peak of it all -- I'd say the positive peak was, what, early '21? So I'd say we left '21 and into '22 and '23 and '24 and now '25. You know, it really started becoming more challenging. I think this got

particularly notable in '22 on into '23, and it's really continued to today. I mean, this is a well-known phenomenon at this point.

Question: And do you recall whether Ascidian needed to meet certain milestones in order to be entitled to receive the next tranche of Series A funding?

Answer: Yes, that was the general structure.

Question: So you say, "I've updated the milestones in Series A tranches for both Ascidian and Intergalactic as indicated in the attached. Seth gave excellent advice on making the tranche milestones more specifically value-creating data points."

Do you see that?

Answer: Yes.

Question: And why is it key to have the milestones be something that somebody else from the outside looking in can recognize as a value-add?

Answer: It's important for a few things. One is that a tranche financing, I think, de-risks an investment for the investor rather than putting something in as a lump sum, if you will, and that it also focuses the company, management and the

company, on the things that really matter in terms of value as defined by the investors. And I think that's super helpful because when you're running an organization, it's very easy to just sort of run things and do the standard stuff. It's very helpful to have those focused targeted goals that really kind of move the needle and that you're doing that in the most capital-efficient way possible because those dollars in need to be sort of reflected, ideally, in value that's more than the dollars that have gone in, to some extent.

And that's -- of course, value is a vague thing; right? It's kind of whatever anyone else will look at and ascribe to it, but that's the way I think about it.

Question: You mentioned that tranche financing de-risks an investment for the investor; is that right?

Answer: Yes.

Question: How so?

Answer: It provides kind of waypoints through the course of, you know, maybe a larger investment that ensures that there are key goals and key advances made before additional money goes in and

that there's visibility into that.

Question: And you -- you referred to tranche financing. What is that?

Answer: It's taking an amount, an overall amount, say, of a Series A raise and dividing it up into segments.

Question: And is part of tranche financing that each segment of funding is released only upon the achievement of a milestone?

Answer: I would say that is typical. It might not be only, but it's usually kind of guided by -- it's usually automatically triggered by that. And then usually there's some degree to which boards or investors can make judgment calls around it.

Question: And did you expect that Dmitry would be interested in understanding what the milestones -- the tranche milestones were?

Answer: Yes.

Question: Why was that your expectation?

Answer: Well, it was his money that was being invested. So I would expect that he was interested to know what the plan was for this new investment.

Question: And did you expect that he would want to evaluate the fund's investment in Ascidian by reference to those milestones?

Answer: I would imagine so, yes. You know, I think it was -- I mean, my impression from this during that time would have been that this was a required element to approve what the plan would be.

Question: Do you recall how much the Series A funding for Ascidian from ATP was?

Answer: Oh, I believe it was 50 million. It might be a little bit more than that, but I believe it was 50 million. That got expanded over time to the point where, you know, there was a Series A extension. There was a bit more where I think now 90 million overall has gone in, but the original Series A I believe was 50 million.

Q. So I think you said that it was your understanding that Ascidian needed to meet the specified milestones in order to receive the tranches of Series A funding; is that right?

Answer: What I would say is that my understanding for the reason I'm putting these together, Ascidian and beyond Ascidian, was to take whatever the Series A financing was and say we need

this tempo of financing to go in in these tranches, and those tranches will essentially buy you or allow us to fund to this particular milestone. And that that's kind of the plan and that as we go along and achieve these, of course, provide those updates and then seek release of additional tranches of funding.

And, again, I think back to why this de-risks is that, you know, if you're advancing through a company and you realize early on that your core idea is just flawed or doesn't work, then you've not put in the totality of the money to begin with. So it's figuring out step by step what aspects -- is this technology really working, how is it working, et cetera, you know, in a measured way. And that's exactly what we did at Ascidian.

Question: And you may not have had any understanding of this at all. So I'm just going to start by asking you whether you had any understanding. And I've been asking you about what Ascidian needed to do to get the funding from ATP, but did you have any understanding as to whether ATP could call more capital from the Rigmora LPs if Ascidian didn't meet the milestones?

Answer: I think my assumption was

that they could.

Question: What was that assumption based on?

Answer: No information to the contrary, I guess I would say. So, I mean, it was -- I knew that there was a certain commitment, but also I think a selling point for ATP in the model was that as sole owner and investor in a company, there was a lot of flexibility in how investing would occur and that this was a core strategic advantage of ATP relative to, I'd say, a typical syndicated investment where you've got multiple investors, all of which have to agree on things and for which there's much less flexibility in that regard.

That was probably the basis for my assumption on that because I think one of the selling points -- certainly the way I would sell to founders, like why -- why work with us as an investor as opposed to some other investors, I'd say a selling point to founders that I would provide is that, one, you know, there's kind of a full Series A commitment that would go in as opposed to like a seed and do that; and second is you don't have to corral a bunch of VCs to kind of agree and you can focus on execution only. So

those would be selling points.

Again, there are advantages and disadvantages of the kind of model. So I think, you know, based on those as being -- a little bit of the selling points of ATP is probably the origins of an assumption that there would be -- that there was flexibility in exactly how, if needed, there would be additional investment.

And to some extent that ended up being true, right, because Ascidian, at least this -- you know, we went beyond the original Series A investment, you know, as it became clear that things were working to a point, but, you know, we didn't have syndicated financing. And to be able to finance the sort of next things we would need additional capital, and that was -- that was agreed upon. So I think that ended up being basically a correct assumption, at least in this regard.

THE COURT: We'll take 15 minutes.

(Court in recess at 3:00 p.m.)

(Resuming at 3:15 p.m.)

THE COURT: Thank you. I probably don't need to say this, but please remember to tell our court staff, including our court reporters, what an awesome job they do.

Let's continue. Mr. Barlow, you have some housekeeping matters, I understand.

ATTORNEY BARLOW: Your Honor, you proposed shortly before the last break that the video might be watched later. If that is the case, we would propose that the video from Mr. Engels be watched later. If that would apply only to our video of Mr. Engels so that we could present more time in trial testimony, we'd certainly be okay with that, and we would prefer to proceed in that way and use the time for trial testimony rather than video.

THE COURT: All right. So right now we're watching Mr. Ehlers. Am I saying that right?

ATTORNEY BARLOW: We understand that that's underway.

THE COURT: Mr. Engels, how long is that deposition or that testimony?

ATTORNEY BARLOW: Our portion of it is 15 minutes.

MALE SPEAKER: 10.

THE COURT: 10. Okay. And then I understand Mr. Finkelstein was also going to be called by deposition?

ATTORNEY BARLOW: We have already withdrawn all of Mr. Finkelman's --

THE COURT: Finkelman. I'm sorry.

ATTORNEY BARLOW: -- deposition testimony for us.

THE COURT: Correct, but you all wanted to show Mr. Finkelman's?

ATTORNEY SELDEN: Yes. We have eight minutes of deposition testimony for Mr. Finkelman for which we would seal the courtroom.

THE COURT: I can watch that at my desk too, rather than seal the courtroom. It'd be a more convenient way.

So if what you need is more time in court to present live witnesses, I will grant whatever accommodation you need to make that happen. I'm also willing to watch whatever you want me to watch back at my desk, provided it's no longer than what it was just represented.

ATTORNEY BARLOW: Understood, Your

Honor.

THE COURT: So let's finish this witness and go to whatever's next.

(The video was resumed.)

Question: Does this refresh your recollection at all as to whether Ascidian achieved these initial milestones?

Answer: As I look at this, I do recognize these and I would say that we've achieved all those. I don't know if they were exactly at the time points where the milestones are indicated, but I would -- I would say that Ascidian has achieved all those milestones.

Question: And Ascidian, upon its achievement of these five milestones, received the tranches of Series A funding that were tied to these milestones?

Answer: Yes, more or less, I'd say. So we definitely received those tranches and we achieved the milestones.

Question: You referred to there being discussion as to how much runway Ascidian would have with and without the 6 million; is that right?

Answer: Yes.

Question: How much runway -- you know, as of these discussions in sometime around May of 2025, how much runway did Ascidian have without the 6 million?

Answer: Oh, maybe a yearish.

Question: And how much runway would Ascidian have with the 6 million?

Answer: It'd add- -- and, again, it's a yearish based on kind of mile- -- you know, risk-adjusted milestones. I think it's -- Dan Rosan will probably correct me. So on all these things give it a plus or minus, but we -- that would add about two quarters.

Question: Do you have an understanding of how much runway Aulos has at present?

Answer: Oh, I'm going -- the Series B was to fund inclusion of these expansion cohorts. So I think that's going to take until roughly the middle of next year. Roughly.

Question: Okay. So as of today, Aulos has significant -- sufficient cash to get through the middle of 2026?

Answer: I believe that's correct. It was really structured in a way to get through these

expansion cohorts, and I think that's how long it's going to -- that's how long it's going take. I could be off by a bit, but it's roughly that.

It might be more in the third quarter or something.

Question: Looking at the top of the next page at 11:30 p.m. you say, "Craziness. No drug in sight."

Do you see that?

Answer: Yes.

Question: Were you referring to Nereid?

Answer: No. I believe I was referring -- because I think our texts were crossing.

Question: Yeah.

Answer: And I think I was referring to this Marlinspike expansion in headcount and of funding the remaining 35 million.

Question: And so, in your view, it was crazy to fund the remaining 35 million when there was no drug in sight?

Answer: That's what I stated, yes.

Question: And so you say, "It does not seem like optimal capital allocation given where

we are at and reallocation is clearly in DR's best interest for ROI."

Does "DR" mean Dmitry Rybolovlev here?

Answer: It does.

Question: And "ROI" means return on investment?

Answer: It does.

Question: So your review was that reallocating capital away from the six early-stage companies would produce a better ROI?

Answer: I would -- I would put it that ensuring capital allocation to our late-stage programs, wherever they reside, to generate, you know, potentially transformed clinical data was -- was the prioritization. In and of itself, reallocation away, I wouldn't put it that way. I'd say from wherever you get it, we should be prioritizing those clinical programs. And if that means if it's a zero-sum gain across the portfolio, then take it from somewhere else.

Question: Was the reallocation -- this reallocation that you're proposing here in this exchange, is this something you came up with initially, or is this an idea that has roots somewhere

else before this?

Answer: You know, I mean, it seems so obvious to me that other people might have contemplated this as well. So I mean, I -- I don't know if it had origins elsewhere. To me it was -- to me it was kind of an obvious potential strategy here. So...

Question: At this point in time, in August 2024, was it your view that the fund overall would produce a higher return on investment if capital was allocated from these six early-stage companies to the four later-stage companies that we were discussing?

Answer: You know, what I say here I think is clear in that regard because I just say reallocation is clearly in DR's best interest for ROI.

And there could have been nuances about how and exactly what amount and to which programs, in a way, but broadly speaking, yeah, the imperative was to generate clinical data, in my view.

Question: Marking as Exhibit 18 an article by Dr. Michael D. Ehlers titled "Lessons from a Recovering Academic" and dated May 19, 2016.

Answer: One my favorite articles.

Question: You say "Substantial literature indicates that too many drug discovery programs fail at late stages despite the presence of evidence that could have rationally led to termination earlier. Why does this matter? As drug discovery programs advance to screening, identification of initial lead compounds clinical candidate selection and on into clinical trials, the cost soars."

Do you see that?

Answer: Yes.

Question: And then you say, "It is hard to step away from exciting science revealing new biology. So much effort, heart, soul, and money goes into making molecules that are suitable for testing in humans that it is a disappointment when, despite best efforts, the clinical hypothesis is refuted."

Do you see that?

Answer: Yes.

Question: Is this still your view?

Answer: It is.

Question: Did you know when you received this email what Jardine had discussed with Dr. Harrison?

Answer: Yes, I had a pretty good

idea.

Question: What was that idea?

Answer: It was that Paul Da Silva Jardine was concerned about Raj Chopra's management style and leadership of Marlinspike and Aethon.

Question: What specifically were his concerns insofar as he told you?

Answer: Abusive behaviors, inability to retain and attract people a bit as a consequence of that, and, to some degree, kind of a lack of strategic focus.

Question: Do you know whether Jardine took these concerns to Seth?

Answer: I believe that he did.

Question: And do you know whether Seth took any action based on that?

Answer: I -- I am not aware that there was action taken by Seth.

Question: Do you have an understanding as to why Mr. Chopra left?

Answer: Yeah. My understanding is that he got a position within a flagship portfolio company.

Question: And it was your

understanding that he was not fired by Dr. Harrison?

Answer: I've got no information that he was fired at all.

Question: Is it your view now that Dr. Chopra should have been asked to leave ATP at some point before he left earlier this year?

Answer: If it had been me, I probably would have asked him to leave before that.

Question: So, Dr. Ehlers, do you recall earlier in the deposition you were showed Exhibit 8, which is an email with an attachment of the Aulos SPA?

Answer: Yes, I have it in front of me.

Question: And I believe you were asked about several provisions in this document as it concerns milestones, and that is at -- it's after the blue sheet, Bates ending 360.

Answer: Yes.

Question: And do you --

Answer: I recall.

Question: Okay. And do you recall testifying about the board reasonably determining in good faith whether the company had a milestone and if

that would lead to the release of funds?

Answer: Yes.

Question: And is it also your understanding that the GP had discretion with regard to calling capital for the portfolio companies?

Answer: Yes.

Question: And if you go to Bates ending 361, there is a highlighted paragraph in the middle of the page.

Do you see that?

Answer: Yes, I do.

Question: And counsel skipped that paragraph when she was questioning you earlier; is that right?

Answer: We didn't discuss it, that's correct.

Question: And in your words, what does this provision provide for?

Answer: Just a minute. I'll read it.

So my understanding of this provision is that it allows the purchaser, in this case ATP, to purchase any additional shares or kind of outstanding shares at any time that they wish, provided they give appropriate notice.

Question: And is this reflective of your understanding that ATP or the GP had discretion with respect to calling capital?

Answer: Yes, as stated here. So if they -- if ATP wanted to, they could purchase additional shares and put in additional money at any time.

Okay. But assuming you weren't capital-constrained, would you be -- you would not be forced in deciding allocation between certain companies over other companies?

Answer: That's probably true.

Question: Okay. And over your time at ATP, there were obviously instances where you raised concerns with Seth; is that accurate?

Answer: Yes.

Question: Okay. And, for example, you raised concerns with Seth about Raj; is that right?

Answer: Yes.

Question: And do you -- did you feel free to voice concerns with Seth when you had them?

Answer: I did, yes.

Question: And is it fair to say that

he would listen to you sometimes with respect to your concerns, i.e., for example, removing Raj from the board?

Answer: That's accurate.

Question: And were there other times where Seth decided to go in a different direction?

Answer: Yes. Yeah.

Question: And did that sort of go hand-in-hand with Seth's discretion in running ATP?

Answer: Well, I mean, what I would say is fundamentally these were Seth's decisions on these matters, whether it was personnel or portfolio companies.

Question: Okay. And you'd agree that through Seth's decision-making over the years ATP has generated significant value through its portfolio companies?

Answer: Well, I think the financial numbers would support that.

(Video paused.)

ATTORNEY SELDEN: Good afternoon. I would like to play the next clip of the rebuttal testimony. I understand plaintiff has an objection.

ATTORNEY BARLOW: I'm sorry, Your

Honor. This is Ehlers rebuttal testimony. Go ahead. I withdraw the objection.

(Video resumed.)

Question: During your time at ATP, did you have any understanding as to whether the LPA referred to a default charge?

Answer: I would say during my time at ATP, no. Only after I left ATP and there was the announced litigation and the publicly available stuff on that did we become -- did I become aware that there was such a thing.

Question: So the default charge is not something that you discussed with Dr. Harrison during your time at ATP or before you joined ATP?

Answer: Well, definitely not before I joined ATP.

Was I ever -- I don't think that while I was at ATP I ever had a discussion on that, because I think my awareness that there was such a thing only came about when this litigation came about. And if I'm remembering correctly, I mean, I left ATP November '24, and I think this was afterward.

Question: And so to be clear, that's not something that you discussed with executives at

any of the ATP portfolio companies --

Answer: No.

Question: -- with which you were involved?

Answer: No. And I'm not -- I don't even know if any of -- if any of those folks have an awareness of it, it would have come through whatever publicly available information of the litigation.

(End of video clip.)

ATTORNEY ROHRBACHER: Counter-housekeeping, Your Honor. So we have Dr. Rimm that we will put on on direct. We understand that the plaintiff would like to play their video in your office. The Finkelman video would make sense because it would require sealing anyway. Time-wise they're about an hour and a half. They've used more than -- an hour and a half more than us, 87 minutes to be precise. So given the time left, we would still like to play our Engels clip. If they wanted Your Honor to watch that in the comfort of your office, that's fine. But we have Rimm, then we'd like to play our Engels clip, and then we have Alexey Yakovlev. And we believe we have plenty of time under what we should have available.

THE COURT: Okay. Let's proceed.

ATTORNEY TAFT: Your Honor, the defendants call Dr. Illona Rimm. And we do have witness binders. With permission, we'll approach.

ILONNA RIMM, having first been duly affirmed, was examined and testified as follows:

DIRECT EXAMINATION

BY ATTORNEY TAFT:

Q. Good afternoon, Dr. Rimm.

A. Good afternoon.

Q. Could you please introduce yourself to the Court.

A. My name is Dr. Ilonna Rimm.

Q. Thank you.

Dr. Rimm, have you ever served before as an expert giving testimony in court?

A. I have not.

Q. Okay.

ATTORNEY TAFT: We have some slides, Mr. White, thank you. And the next slide, please.

Thank you.

Q. Dr. Rimm, could you please describe your medical and scientific training for the Court.

A. Yes. I graduated from Harvard

University with an MD and a Ph.D. in immunology. I then took care of patients for 20 years. I worked at Boston Children's Hospital, the Dana-Farber Cancer Institute, and the Brigham and Women's Hospital. In my last role I served as an attending in a stem cell transplant unit for eight years. In addition, I served as an attending physician on the pediatric oncology service.

This time was very important in my career. I took care of patients with very serious illnesses, and I came to understand that via health care innovation we, with our hands, could develop cures for these previously incurable diseases. And that was very exciting to me. I was so excited about health care innovation, I decided to make a transition in my career to learn more about how health care innovation is done.

Q. Dr. Rimm, at that point, did you begin to get involved in investing in life science industries?

A. Yes. I started at Wyeth Pharmaceuticals, where I served in global business development as the manager of genomics deals. I then moved to venture capital. I worked at Oxford

Bioscience Partners, where I was an entrepreneur-in-residence. I worked closely with all of the general partners, deciding where we should invest money and which of the portfolio companies should receive additional money and which portfolio companies should not receive additional money.

I then moved to the public equity side of health care investing and worked there for a number of years. During that time I decided I really needed to learn more about valuation, and I completed the chartered financial analyst designation.

Currently I work at Rimm Healthcare Capital Advisory, where I work with early-stage health care companies, and I work with the CEOs as they are starting to raise their seed rounds. I do that work at the Harvard Innovation Lab, which is located on the campus of the Harvard Business School.

Q. Thank you.

ATTORNEY TAFT: Your Honor, we offer Dr. Rimm as an expert on biotech investing and the evaluation of early-stage biotech companies.

THE COURT: Any objection?

ATTORNEY BERDON: No, Your Honor.

BY ATTORNEY TAFT:

Q. Dr. Rimm, could you address some of the common risks that investors in early-stage biotech companies face.

A. Yes. Investing in early-stage biotechnology is extremely risky. There is the scientific risk, the clinical risk, the regulatory risk, and the competitive risk. In addition, the process takes 10 to 15 years, which, again, increases the risk.

ATTORNEY TAFT: Mr. White, could we bring up the next slide.

Q. And, Dr. Rimm, you've prepared some slides in connection with today's testimony; correct?

A. Yes, I did.

Q. Okay. Could you please describe how this slide relates to the opinions in your report.

A. Certainly. So this slide shows the drug development process. As you can see, across the top is a timeline. And as you can see, the timeline takes a long time, from basically 10 to 15 years.

The drug development process goes through discovery, clinical, preclinical, clinical and commercialization. And as we've discussed already a bit, between discovery and preclinical is a very

important milestone called development candidate nomination where a particular single molecule is moved forward. Then that molecule is tested in animals in the preclinical setting, and then we get to the investigational new drug application which is submitted to the FDA, the IND, a very important, again, valuation inflection point. Then the drug goes to clinical trials, which can last many years and have a 90% failure rate. After that, the few remaining molecules that actually become drugs are commercialized and there can, in addition, be failure at the commercialization stage. So there's extensive failure in drop auto-molecules at every stage along the line.

Q. And how could a drug candidate fail at the clinical stage, for example?

A. So at the clinical stage drugs fail either on safety or efficacy. In this country, we want to have drugs that are both safe and efficacious. So we take a lot of failure along the way.

Q. And you focused on the DCN and the IND. Why are those particularly relevant points in the drug development process?

A. Those two points are valuation

inflection points, particularly the IND. If a molecule has passed the IND stage, it can be bought and sold quite easily. Whereas a molecule at the DCN stage at least has more value than a molecule before the DCN stage. So those are stages that are known to have valuation increments.

Q. Thank you. How long does -- sorry. How much does this process generally cost in terms of capital investment?

A. The clinical trials themselves can cost hundreds of millions of dollars. So the entire process is frequently said to cost $2 billion primarily because of all the failure along the way.

Q. And in addition to I think you mentioned regulatory risks and the risk of failure of efficacy or safety, are there other risks that investors in biotech companies need to be aware of when considering the drug development process?

A. Yes. Importantly, there are leadership and management risks. So the question is, you know, if a small group of scientists say they're going to deliver on a particular milestone, will they actually deliver on that milestone on time? And this is considered to be a very important risk.

Q. And, Dr. Rimm, how do investors mitigate the risks of investing in these early-stage biotech companies?

A. Investors mitigate this risk by investing in tranches or bits or segments. So they invest -- if someone is going to invest 50 million, they would usually invest it in bits or tranches of 10 million. We can talk through this on the next slide.

ATTORNEY TAFT: Mr. White, can we pull up the next slide. Thank you.

Q. What does this slide show?

A. So this shows that venture capital investors who are interested in return, which is a key point, use milestones to mitigate risk. And this slide shows the milestone base tranche funding for Deep Apple, according to the investment memorandum. And this is just a sample of what the notion of a tranche investing is.

So at the initial close, the management team of Deep Apple would receive the investment of $5 million in the 2021 quarter 4. Then their job is to generate a lead by the Q3 2022. Let's assume they do. And then they would receive tranche

2, which is $7 million. And they are supposed to take tranche 2 and generate a development candidate nomination, or nominee, a development candidate, and they're supposed to do that by the second quarter of 2023. If they do that successfully, then the investor invests another $12 million.

However, if they fail to do that, if they fail to nominate the development candidate or if they nominate it late, then there may be reconsideration of whether the investor would like to invest tranche 3 or whether the investor would plan to take their assets and invest them somewhere else.

Q. Okay. And how does this milestone-based tranched funding program help mitigate risk?

A. It helps mitigate risk because it addresses the issue of whether a team can actually deliver their milestones on time. And the invest- -- that's something that happens over time. So the investor has a chance to see whether the team will deliver on time.

Q. And if a team is not delivering on time, what signals would that give to an investor?

A. That would usually be seen as quite

concerning by an investor. And the investor would be in a position to make a decision about whether they want to move their assets to something else and invest their next tranche of assets into something else or whether or how it would be handled. But it is certainly a serious issue if a team does not accomplish its milestones on time.

Q. Thank you.

What if a company at some point during this drug development process decides to move away from the initially anticipated program and focus on either a different drug candidate or a different program altogether, how would that be handled in the context of a milestone-based tranched funding program?

A. The way that would usually be handled is a new discussion with new written documentation and additional investment memorandum and an additional discussion of what the new milestones and what the new assets required are, because, again, the investor wants to have a choice about whether they want to do the new approach, whether they want to commit their assets. And it's important to remember that the work that was left behind is essentially a sunk cost that the investor has. So the investor might or might not

wish to go forward with the new approach.

Q. And would it be necessary or typical for there to be a discussion of the new budget in light of the -- of a new budget in light of the changed approach?

A. Absolutely.

Q. Based on your two decades of experience in the biotech industry, how common is this milestone-based investing?

A. I found that it was extremely common. Essentially every organization that I've been involved with that is involved in investing wants to know -- invest in tranches in early stages and wants to know will a team perform according to very specific goals. Occasionally it's called something different than tranches, occasionally it's called stages or rounds, but there's always a sense that there's a measured approach. The investor wants to invest a small amount, and then see if the team performs before they invest any additional assets.

Q. Now, Dr. Rimm, you were here in the courtroom yesterday for Dr. Robbins' testimony; correct?

A. That's correct.

Q. Do you recall that Dr. Robbins testified that he was unaware of any academic literature supporting your milestone-centric analysis?

A. Yes. I heard him say that.

Q. Did that surprise you?

A. Yes. It surprised me, particularly surprised me because one of the references for his slides was a document by Roger Wyse, who was a banker at Burrill, that documents that venture capital routinely works with biotechnology companies in tranches.

ATTORNEY TAFT: Mr. White, could we please turn to Robbins Slide 8, and if we could highlight the upper left-hand corner, please, or expand it.

Q. Dr. Rimm, is this the slide that Dr. Robbins presented with this reference?

A. Yes. And that's the reference, and it refers clearly to biotech investing and tranche and venture capital investing in tranches.

ATTORNEY TAFT: Could we please pull up JX 1581, page 7.

Q. If you look -- do you recognize this article?

A. Yes. Yes.
Q. And what is it?
A. It's the article that we were just referring to.
ATTORNEY TAFT: And if you pull down to the introduction.
BY ATTORNEY TAFT:
Q. Does this article focus specifically on venture capital investing in biotechnology companies?
A. Yes, it does.
Q. Do you recall what section of this article addresses the milestone-based tranche funding?
A. Yes, it's Section 4.1.2 that's on page 1284, I believe.
ATTORNEY TAFT: I think that's a reference to 1284, so I think 10. If we could go to JX 1581.10 and pull up 4.1.2, please.
Q. Dr. Rimm, what part of this section were you thinking of?
A. So I'm going to read the very last sentence of the paragraph that starts with "Venture capitalists will mitigate their own risk by offering funding in stages, investing more money as the company

passes each technological milestone."

Q. And is that consistent with the opinion stated in your report?

A. Absolutely. And I cited other additional academic references in my report.

Q. Thank you.

Dr. Rimm, in your report do you evaluate whether the fund's early-stage companies met their specified milestones?

A. Yes, I did that.

Q. And what materials did you rely on in order to reach your opinions?

A. I reviewed the investment memoranda, and I reviewed the quarterly digests.

ATTORNEY TAFT: And if we could pull up the next slide in Dr. Rimm's -- thank you. I believe it's the next one. Thank you.

Q. Dr. Rimm, what was your conclusion after analyzing the fund's performance against their milestones?

A. My conclusion was that the early-stage portfolio companies failed to meet their milestones, which is shown on this slide. The seven early-stage companies are listed down the left side. The years

are listed across the top. And we're going to go talk about Apertor, which is the second company down.

As you can see in the first couple of years, Apertor completed their milestones on time. However, then we move to the light yellow, where we see that the milestones were completed late, including important milestones, DCN, IND. And then when we get to the right side, we are in salmon where milestones were not met.

As you can see, Apertor failed to complete a number of milestones. When we look at the graph in general, we see that all seven companies have salmon on the right side. And these are all the important milestones, the IND and DCN Phase 1 trial milestones. In addition, a number of these milestones are two or three years late, and they are -- it's not an occasional month here, month there. We are talking about years late in several of these companies. So all of these companies failed to meet their milestones.

Q. And in analyzing the early-stage companies' performance against milestones, Dr. Rimm, did you also consider how that performance related to the amount of capital that had been funded into those

companies?

A. Yes, I did.

Q. And what was your conclusion?

A. It's on it. Can we look at the next slide.

ATTORNEY TAFT: Could we pull up the next slide, please. Thank you.

A. My conclusion was ATP had called capital for tranches with unmet milestones.

So, again, the seven early-stage companies are listed down the left side of the slide. The tranches are listed across the top. Again, on the left side, the gray bars show that there's capital drawn and milestones complete.

On this slide we're going to look at Deep Apple, which is the fifth company down. As you can see, for the first 24 million that was invested in Deep Apple the milestones were complete. However, then there were 19 million was drawn and the milestones were not met. Even though the milestones had not been met, an additional $9 million was called for. As you can see, again, in all of these companies, as we look to the right, all of the companies had substantial situations where there was

capital drawn and milestones not met.

Q. Thank you.

ATTORNEY TAFT: We can take down the slides, please.

Q. Dr. Rimm, in connection with the preparation of your rebuttal report, did you review opinions offered by Dr. Rao in this case?

A. Yes.

Q. And do you recall that Dr. Rao in his first report described certain valuations of the portfolio companies that were prepared under accounting standard ASC 820?

A. Yes, I saw that he did that.

Q. And in your opinion, is the information presented in those reports useful for the purposes of an investor in a biotech company?

A. No. I find that the valuations -- valuations of early-stage biotechnology companies are complicated and not done like other types of valuations. The valuations presented by Dr. Rao are essentially valuations based on the amount of assets put into the company, which is just not informative and not helpful.

As you know, I spent time thinking

about valuations. It's difficult to evaluate valuations in very early-stage biotech companies. Any company before the DCN and the IND is very difficult.

Q. Dr. Rimm, do you have an opinion as to whether Rigmora's refusal to make further investments in companies that had missed their milestones was consistent with reasonable investor behavior?

A. Yes. I think Rigmora's approach to decline funding for these companies was very reasonable. A reasonable investor, particularly an investor who is interested in return, which is specifically a reasonable investor, would have said that these companies missed milestones and called capital. And under that circumstance, it's very reasonable to decline further funding.

ATTORNEY TAFT: Thank you. I turn the witness.

THE COURT: Thank you.

CROSS-EXAMINATION

THE COURT: Please proceed. Thank you.

BY ATTORNEY BONACORSI:

Q. Good afternoon, Dr. Rimm.

A. Good afternoon.

Q. In forming your expert opinion in this matter, you never examined how Rigmora actually used budgets and milestones in connection with making its investment decisions; correct?

A. What I did was reviewed the investment memoranda and the quarterly digests.

Q. But you didn't examine Rigmora's actual behavior through its employees and internal communications to assess how it used budgets and milestones in connection with making its investment decisions; correct?

A. Yes. I know very little about Rigmora's internal decision-making process.

Q. And instead you worked from industry knowledge; is that right?

A. I worked from industry knowledge, the investment memoranda and the documentation of the work, the scientific work that was accomplished, which was documented in the quarterly digests.

Q. You testified that you have limited knowledge related to the capital calls involved in this matter?

A. I have some knowledge related to them, but I was asked to focus, again, on the documentation

of the milestones and that was less related to the capital calls.

Q. In fact, when you wrote your report, you testified that you did not know who at Rigmora was the individual responsible for approving capital calls made by ATP?

A. Yes. And I'm not sure why I would have known that.

Q. And you don't know whether anyone at Rigmora analyzed the likelihood of any of the preclinical companies you analyzed in your report hitting future milestones prior to May 15, 2025?

A. So that sounds like it's a question about what happened within Rigmora, and I have no information about what happened within Rigmora.

Q. And to confirm, one aspect of your expert opinion here concerns the reasonableness of Rigmora's decision to no longer fund the preclinical companies?

A. Yes.

Q. Okay. And you'd agree that your opinion does not address any information about Rigmora's assets, liabilities, or liquidity as of May 2025?

A. Yes. I was asked to evaluate the milestones in the early-stage companies, which does not include the information that you just described.

Q. And it would also not include Rigmora's actual risk tolerance at any time between 2021 and 2025?

A. I did not make any inquiries or have any information about Rigmora and its risk tolerance.

Q. And in your materials cited in your opening report, which is JX 1579, and the page 0082 -- if we could pull that up, please -- and you'll see there's a section here, Dr. Rimm, "Depositions."

Do you see that?

A. I'm trying to get to the right page here. So that's in the later part. Could someone give me the page number again, please.

Q. It's 0082. It should be on the screen in front of you. Or it was.

A. Only part of it is on the screen in front of me. So yes. Go ahead.

Q. And you cite three depositions here; right?

A. Yes.

Q. And none of these depositions are from

Rigmora employees; is that right?

A. Yes, that's my understanding.

Q. And that's because you did not rely on depositions of anyone who actually works at Rigmora; correct?

A. Yes, that's my understanding.

Q. But you do cite the depositions here of certain ATP employees; correct?

A. Yes.

Q. And you reviewed those depositions; right?

A. Yes, although I reviewed them in a limited way. I reviewed them mostly related to the -- to my assignment, which was to assess the milestones. I did not review them in extreme detail.

Q. So you'd agree, then, that you cite those depositions for certain limited points; is that right?

A. Yes.

Q. But you don't rely on any of the testimony in those depositions regarding ATP's actual use of milestones, do you?

A. That's -- no, I don't rely on their comments related to use of milestones in general.

It's possible that I relied on -- that I occasionally used pieces of them, but not as a general statement.

Q. Okay. And you testified earlier that you've some experience working in venture capital?

A. Yes, I do.

Q. And I believe you testified during your deposition that you understood that from that experience limited partnership agreements are important in that context?

A. Yes, of course.

Q. And you also testified that you knew a limited partnership agreement exists between the parties here; is that right?

A. Yes. However, limited partnership agreements are complicated and different, and as part of my role I was not asked to review that.

Q. So you did not review the limited partnership agreement in this case?

A. I reviewed it in a very limited way, meaning only in relation to the role that I was assigned, which was to assess the milestones.

Q. You did not review the limited partnership agreement to determine the role of budgets in the relationship between Rigmora and ATP?

A. I did not review it for that purpose, that is correct.

Q. And you did not review the LPA to determine the role of milestones in the relationship between Rigmora and ATP, did you?

A. I did not review it with regard to that issue. Most of my information related to milestones has to do with my 20 years of experience investing in life sciences. And so in that setting milestones have a very important role. And essentially, as I say, all investors I've ever interacted with address the issues of milestones, although they are sometimes called stages or something else. So I relied on that knowledge.

Q. And to confirm something you testified earlier, then, Dr. Rimm, you didn't rely on the testimony of individuals actually within Rigmora and their use of milestones, did you?

A. No, I did not rely on that.

Q. Okay. And you did not review the LPA to determine the role of investment memoranda and the relationship between Rigmora and ATP, did you?

A. I did not do that. However, again, I was very involved in the senior leadership role of a

venture capital firm for two years. I was very familiar with investment memoranda, and investment memoranda and milestones are used similarly in most venture capital firms. So I wouldn't have thought that it was necessary to review the details in this situation because of my extensive industry experience.

Q. But you didn't review the LPA in the detail necessary to determine with specificity how the parties here chose to outline the contractual obligations to one another.

A. I did not review the LPA with that issue in mind.

Q. Okay. And you also didn't familiarize yourself with any of the portfolio company Series A stock purchase agreements, did you?

A. No. I know they exist, but I was asked specifically to work on the investment memoranda and the quarterly digest, which I think is -- again, this is an industry-wide phenomena that milestones would be in the investment memoranda, and, again, quarterly digest is an industry-wide phenomena. So I paid most attention to what I perceived as a biotech investor are the usual important documents for this situation.

Q. But you'd, of course, agree that parties can set forth whatever contractual obligations they'd like in a limited partnership agreement; right?

A. I think that I am not an authority on that question.

Q. In forming your opinion in this matter, you also didn't rely on any of the portfolio company board materials, did you?

A. Could you restate the question, please.

Q. In forming your opinion in this matter, you didn't rely on any portfolio company board presentations, did you?

A. Well, we -- close to the end I saw some of them, but I didn't rely on them. I would say that eventually some of those became available, but they were not used extensively.

Q. And you acknowledge in your opening report that VCs typically assess multiple factors in looking at investments?

A. Are you asking the question of whether they look at multiple factors, whether when they are deciding to invest; is that the question?

Q. Sure.

A. Yes. VCs look at many aspects of the scientific and clinical and other aspect of a company when they are in the process of making a decision about whether to invest.

ATTORNEY BONACORSI: And could we pull up JX 1579, please, and go to page 27, para 56. Sorry. Page 27, para 56.

Q. And, Dr. Rimm, you see here you state, "In making investment decisions, the VCs assess several key factors, including the scientific soundness of the technology, the experience and composition of the management team, the therapeutic indication and degree of unmet medical need, and the broader regulatory and competitive landscape."

Do you see that?

A. Yes, I see that statement.

Q. And despite that statement, your opinion is based entirely on the quarterly digest in the investment memorandum?

A. Absolutely, yes. I mean, what we're talking about is the original -- what that statement refers to is the initial investment decision, and beyond that, there is very detailed attention paid as to whether the company accomplishes its milestones.

And I -- therefore, that's just the way that issue is handled on the investment level.

Q. And so to confirm, you did not consider all of these factors that you list in your report in this case?

A. I would have thought it was not appropriate to consider those factors. Those factors are usually considered at the beginning. And I arrived when the companies had already been started, and I assume those factors were considered as the initial investments were made. That's usually how it's done.

Q. An investment decision can occur at multiple points within a broader investment strategy; is that right?

A. Well, that's -- what is the question here?

Q. You state in your own expert report here para 56, the first part of this says, "In making investment decisions ...."

You don't say at the outset of an investment; do you?

A. No. I don't say it there, but that's actually accurate. Okay. At the -- usually biotech

companies are started by very smart people. And when I refer to making investment decisions, I'm referring to the fact there that the initial investment decision usually includes all the factors that are listed there.

Q. Okay. And pivoting a little bit here, when forming your opinion in this matter, you did not consider the likelihood of any of the preclinical companies meeting significant milestones in the future; did you?

A. I assessed whether companies had met the milestones as of the end of the first quarter of 2025.

Q. And not beyond that; right?

A. There was no reason to go beyond that that I -- I was not asked to do that.

Q. And you don't believe that hitting milestones in the future would inform the reasonableness of Rigmora's decision not to continue funding?

A. I do not.

So when a company tells me it's going to hit a milestone in the future, what my question is is how did they do on their past milestones? So if a

company has routinely hit their milestones on time, then I'm not so worried about the future. If the company has routinely not hit its milestones on time, then I see the future -- any statement about future milestones as pure speculation.

Q. And, Dr. Rimm, you did not analyze in forming your opinion with respect to the set of preclinical companies the timing of a potential preclinical exits, such as acquisitions or potential partnerships with larger biopharma companies; did you?

A. Could you rephrase the question?

Q. In connection with forming your opinion, you did not analyze the timing of potential preclinical exits, such as acquisitions with the preclinical companies; did you?

A. No, I did not analyze that because we were looking -- I was looking specifically at meeting milestones.

I am aware, as an investor, that those types of exits can occur, but that's not the question that we were addressing here. And these companies were much -- were way before -- very, very early compared to those types of events.

Q. And in forming your opinion, you also

did not -- and this is to quote Mr. Bogdanov -- form the opinion there was no way for a path to commercial success for any of the seven early-stage companies listed in your report; is that right?

A. Could you restate it? I believe that you cited someone who I'm not sure who I know who that is.

Q. We can move on to the next question.

And, Dr. Rimm, you testified about Deep Apple a few minutes ago?

A. Yes.

Q. And you understand that there was an $812 million deal between Deep Apple and Novo Nordisk in June of this year; right?

A. Yes. And I'd like to talk about that deal because I'd like to state that calling it an $812 million deal is a substantial overstatement to what actually happened. That is the description of a deal that's all the possible money that could ever come to Deep Apple, and that almost never happens.

What actually happens is a single payment is made early on, and that's called the deal. And the deal payment in this situation was like $30 million. But at every milestone later when a

payment might be made there's a decreasing probability that that payment will be made.

So I was certainly aware of this, but, you know, large companies do huge numbers of deals like this. They frequently only pay the upfront payment, and they don't pay any later payments because they don't particularly choose to go after that target.

So I did not find -- although it's nice that such a deal happened, as I say, I think it's important to characterize the actual financial value of the deal.

Q. And just -- you didn't do any specific analysis to test the hypothesis that that deal might not have actually been worth $812 million?

A. I'm very aware of all of these deal structures. So I worked in Wyeth Global's business development for two years and worked on these structures and then spent another 20 years interacting with these deal structures with a large number is in the vernacular known as biobucks and everybody circulates the large number, but what actually happens is the very small amount of money is transferred upfront and frequently none of the later payments ever

occur.

Q. Just to close this out, though, you did not do any specific analysis with respect to the deal between Novo Nordisk and Deep Apple, did you?

A. What analysis would be done?

Q. Beyond speaking from your general industry knowledge, did you do any investigation into the deal, paperwork or otherwise?

A. Yes, I read the deal. That's where I have the money, the upfront payment. And as a result, I also know what the milestones were. Some of these milestones were this target is commercialized, some of the larger milestones. So that molecule is very far from commercialization and, as we just discussed, the probability is very low.

Q. Okay. And, Doctor, you were in court yesterday; right?

A. What is the question again?

Q. You were in court yesterday?

A. Yes, I was in court yesterday.

Q. And did you hear Dr. Liras testify here in court yesterday?

A. I did, but I was sitting in the rear. I could hear only some of what was said. So I'm not a

reliable listener or reporter on what was said.

Q. But you did testify just a few minutes ago that you heard what Dr. Robbins testified yesterday in court; right?

A. Yes. I heard that. And also I had, you know, seen his reports and things.

Q. Just a few more questions. And did you hear Dr. Liras testify about ATP's flexibility with respect to milestones?

A. You know, I really cannot respond to that question. I just don't have enough information about what I heard.

Q. Okay. And you also just probably saw the tape played by your counsel where Dr. Ehlers also testified about the flexibility of ATP's approach with respect to milestones.

Do you recall hearing that?

A. I saw that there was -- I saw the tape that was being played. I actually was not impressed that this was really about the flexibility of ATP about milestones. I was more impressed that Dr. Ehlers was commenting that milestones had to be completed in order for tranches to be invested.

Q. So you don't recall just seeing a few

minutes ago him say that ATP did have a flexible approach with respect to milestones?

A. Well, what I recall is that Dr. Ehlers reported that milestones had to be completed. The term "flexible"" probably was used, but it depends on, you know, what the adjective of the moment is. But he certainly did comment that milestones were attended to.

ATTORNEY BONACORSI: Okay. No further questions. Thank you.

REDIRECT EXAMINATION

BY ATTORNEY TAFT:

Q. Very briefly, Dr. Rimm. Counsel took you to JX 1579.30, which was page 27 of your report. You can turn to it in the paper version it might be easier for purposes of this question.

A. Page 27?

Q. Yes.

A. Almost there. Yes.

Q. So counsel showed you paragraph 56; correct?

A. Yes, that's correct.

Q. What section of your -- what is the subheading for the section of this report?

A. "The Investment Thesis."

ATTORNEY TAFT: Thank you. No further questions.

THE COURT: All right. Thank you, Dr. Rimm.

THE WITNESS: Thank you.

(Witness excused.)

ATTORNEY TAFT: Your Honor, we would call our next witness, Mr. Engels, by video.

Mr. Engels was plaintiff's chief financial officer from April 2021 until August 2025, when he left ATP. Mr. Engels has declined to testify in person today. The video of his deposition testimony reflects plaintiff's inclusions. Defendants have designated 11 minutes of testimony, and plaintiff -- and I believe that that's the entirety of the testimony that will be played in court.

The video contains Mr. Engels' testimony concerning ATP's statements to third parties concerning the amount of capital committed to the fund following Amendment 20.

WILLIAM ENGELS, was examined and testified via video as follows:

Question: When did you form an

understanding of the purpose of Amendment 20?

Answer: I mean, I think, as I said, it -- it developed over time. It's a pretty complicated amendment, restructuring the fund. And so as we understood it, the mechanics of it better and what the functions of each of the different pools and how all of the different components would work, it took a little bit of time to figure out.

I'm not sure -- it wasn't like a light bulb went off on a certain day, but eventually we got comfortable with it.

Question: If you could go to the page that is Bates stamped 114558. Mr. Ravski provides First Republic with copies of the subscription agreements.

Do you see that?

Answer: Yes.

Question: He says, Please note that these agreements total 1.5 billion of committed capital that has since grown to 2.5 billion, which you will find in the amendments to the LPA.

Do you see that?

Yes.

Question: Was that accurate statement

when Mr. Ravski made it?

Answer: No. I think at the time we were still working through the impact of Amendment 20. This was just -- just about a month after it had been signed. And I think, as we discussed, it moved a lot of things around and changed a lot of aspects of the partnership. And so we were still getting a grasp of what it all meant and how it all flowed through.

Question: Could you turn to page 263 of the '24 financials, please. And very briefly, middle of the page, the paragraph that starts, As of December 31, 2024, that reflects the five separate pools in which the fund holds assets; correct?

Answer: Correct.

Question: Okay. And in the paragraph that starts, Pool ATP IV, you still have the reference to the $1.5 billion; correct?

Answer: Yes, it does reference that.

Question: And in the paragraph that starts, Pool ATP V-2, you still have the reference to the $1 billion?

Answer: Yes.

Question: So the paragraph that starts, ATP V-3 does not indicate a dollar amount of

additional capital commitments; correct?

Answer: It does not.

Question: Okay. And the paragraph that starts, Pool Braeburn also does not indicate a dollar amount of additional capital commitments; correct?

Answer: Correct. Those have been consistent with how we've presented them in this footnote.

Question: If we could turn to the document with Bates 392150. This is a list of Apple Tree entities; correct?

Answer: Yes.

Question: And is it your understanding that these are the entities that would be named insureds under the proposed insurance policy?

Answer: Yes.

Question: And is the fund listed among these entities?

Answer: Yes.

Question: Okay. And what is the amount of committed capital that is identified as being committed to the fund in this schedule?

Answer: 2.5 billion.

Question: Okay.

Answer: So it's 18 days after Amendment 20.

Question: Okay. I'm marking as Engels Exhibit 22 -- sorry, 23? -- 23, an email from you to Ms. Afif, with the Bates ATP 104423. The subject is "Professional and Management Liability Insurance Application."

Answer: Okay.

Question: Do you believe you sent this email on or about May 18th of 2023?

Answer: Yes.

Question: I would like you to turn to page 104427. And this section of the application is asking for details about the fund that is applying for insurance; correct?

Answer: It looks like it, yeah.

Question: Okay. And if you turn the page to 104428, what is the amount of total committed capital that is identified for the fund?

Answer: On here we have -- on here, what is listed as 2.5 billion.

Question: And from time to time in your capacity as CFO are you asked to provide letters

to landlords of portfolio companies in connection with their obtaining a -- a lease?

Answer: It's pretty rare, but yes.

Question: Okay. And if you turn to the attachment, this document, ATP 112834, is this such a letter?

Answer: Yes.

Question: Okay. And that's your signature on the page?

Answer: Yes.

Question: And just looking at the first paragraph, how do you describe ATP?

Answer: Pretty generally. As a very early-stage life science venture capital fund with 2.5 billion of committed capital. Yeah, I think it's pretty generalized.

Question: Okay. This is over a year after the execution of Amendment 20; correct?

Answer: Just over a year, yeah.

(End of video clip.)

ATTORNEY DUTZ: Your Honor, Sebastian Dutz, Debevoise & Plimpton. Defendants would call Alexey Yakovlev as our next witness.

ALEXEY YAKOVLEV, having first been

duly affirmed, was examined and testified as follows:

DIRECT EXAMINATION

BY ATTORNEY DUTZ:

Q. Good afternoon, Mr. Yakovlev.

Could you please state your full name for the record.

A. Good afternoon. I'm Alexey Yakovlev.

Q. Could you briefly describe your educational background.

A. I graduated from Moscow Institute of International Relationship with major in finance and accounting.

Q. Could you briefly describe your professional background.

A. I worked as an auditor with Ernst & Young, and then I worked as a financial controller and head of financial department of Uralkali. I also worked as finance vice president with National Container Company in Russia. And in 2014 I joined Rigmora Holdings as the CFO, and in 2019 I became CFO for Rigmora Holdings.

Q. Okay. Are you still CFO for Rigmora Holdings?

A. Yes, I am.

Q. And what are your main responsibilities as CFO of Rigmora Holdings?

A. As the CFO for Rigmora Holdings, I'm responsible for relationships with the banks, managing treasury payments, running payroll, preparing operational budgets for Rigmora offices. I'm also responsible for accounting and audit, for preparing financial forecasts.

Q. Are you aware of what ATP Life Science Ventures, L.P. is?

A. Yes, sure. It's a partnership we invested in biotech company in the U.S.

Q. If I refer to that as ATP or the fund, will you know what I mean?

A. Yes, sure.

Q. What are your responsibilities as CFO of Rigmora with respect to ATP?

A. Well, my main responsibility with regards to ATP is to process capital calls. That means arrange for the payments of the capital calls. I am also keeping records of all the capital calls paid and all the distributions received.

ATTORNEY DUTZ: Could you pull up JX 1237.

BY ATTORNEY DUTZ:

Q. Mr. Yakovlev, this is an email from March 2025 from William Engels. Are you familiar with this document?

A. Yes, I am.

Q. Could you please explain to the Court the context for this email.

A. So Mr. William Engels, CFO of ATP at that time, is sending me certain Excel files following my request. So these Excel files contain -- containing breakdown details for the amount of distributions, contributions, and other amounts we have seen in the capital statements and we asked to provide detailed breakdown for these amounts.

ATTORNEY DUTZ: Could you please pull up the spreadsheet marked JX 1237.004 in native.

Mr. Yakovlev, do you recognize this document?

A. Yeah. This is one of the Excel files.

Q. And what does this sheet "Pool V-4 Total" represent? Can you explain it to the Court.

A. This sheet, you can see all the capital calls on the left side and all the distributions on the right side attributed to the Pool

V-4. They are placed here in chronological order. And the last column, which is cut, you can see the portfolio company. That's it.

Q. And can this spreadsheet be used to calculate the total contributions and distributions to the pools of ATP?

A. Well, this Excel file contains different spreadsheets for each of the pools of the ATP fund.

If you sum up the column total, "Capital Calls" per each pool, you will get the total amount of capital contributed to ATP fund.

Q. And did you review this spreadsheet at the time you received it?

A. Yes. We reviewed the spreadsheet with respect to capital calls and distributions. We compared it to our records and we found no material discrepancies.

Q. Did you perform any analysis or try and reconcile the amounts of capital commitments in this document?

A. Well, we -- there is another tab called "Amendment Summary" with capital commitments. We took note of it, but capital commitment could not

be reconciled with actual financial data like capital call, the amounts paid or received. So I was focused on reconciling the amount of capital calls paid and distributions received.

Q. Do you know how much the Rigmora limited partners contributed to ATP by the end of the year 2024?

A. Yes. To the best of my memory, the amount contributed by Rigmora by the end of 2024 is around 2.65 million.

Q. And can you get to that amount of amount contributed to the fund with this document?

A. Yeah. That's absolutely possible. In this document there are tabs. Along with tabs called "Pool Total," there are tabs called pool -- number of the pool and then a label, Ezbon, Blue Horizon. Ezbon, Blue Horizon are the names of the entities that were initially invested in the fund from Rigmora side. And these tabs contain the data attributed just to these limited partners. So if you sum up the amounts on these tabs, you will get the amount invested by Rigmora's piece.

Q. Just to make sure the record is correct, I think I heard 2.65 million. What just is

the amount, performing the analysis you described, as of end of year 2024?

A. Correct. As the end of 2024, Rigmora piece invested about 2.65 billion.

Q. Are you familiar with Rigmora's payments of capital calls in the year 2025?

A. Yes, I am.

Q. How much has Rigmora paid in response to capital calls this year?

A. I believe Rigmora paid around 42 million of capital calls issued in 2025.

Q. Taking that into account, what is the total contribution that Rigmora limited partners have made to the fund as of today?

A. As of today, taking the contributions made in 2025, the total amount of capital contributed is about $2.69 billion.

Q. How much, approximately, have the Rigmora limited partners contributed to the fund since February 2022?

A. To the best of my knowledge, since February '22, it was about 700 million.

Q. I recall you mentioned earlier that managing Rigmora's relationship with the banks is one

of your responsibilities?

A. That is correct.

Q. Can you describe what banks Rigmora has worked with since February 2022?

A. Rigmora's working with many major banks. So we have a relationship with J.P. Morgan, for example, in the U.S. We have a relationship with Swiss banks like Julius Baer and Pictet, many others.

Q. Are those all current relationships?

A. Yes, these are continued relationships.

Q. As CFO of Rigmora, are you familiar with Rigmora's leverage, the amount of debt?

A. Yes, sure.

Q. What is Rigmora's current leverage, if any?

A. I would say that currently the leverage of Rigmora and affiliated group is below 5 percent.

Q. Has that number changed significantly in the years since February 2022?

A. Well, this number fluctuates from year-to-year, but historically the leverage of Rigmora group is a very low level. I don't remember it

exceeding 15 percent.

Q. Had Rigmora ever not paid a capital call for a portfolio company before May 30th of 2025?

A. To the best of my knowledge, Rigmora always paid the capital calls for portfolio companies.

Q. Are you familiar with the capital calls received by Rigmora on May 30th, 2025?

A. Yes, I am.

Q. How many portfolio companies did ATP call capital for?

A. I believe 10 portfolio companies.

Q. How many years have you been processing capital calls for ATP for?

A. At least from 2019, it was my direct responsibility to process the capital calls.

Q. In your five years of experience processing capital calls, had the general partner of ATP ever called capital for that many companies at one time?

A. No, never for that many companies at one day.

Q. Mr. Yakolev, are you aware of the financial condition of the Rigmora LPs?

A. Yes, sure.

Q. Sitting here today, as CFO of Rigmora, do the Rigmora LPs have the ability to pay the disputed capital calls?

A. Yes. Rigmora LPs and other entities of the trust have sufficiently good assets and cash to meet those capital calls.

ATTORNEY DUTZ: Thank you, Mr. Yakovlev. I pass the witness.

ATTORNEY SELDEN: Your Honor, as we are being handed prepared cross-examination binders for the witnesses, I will note that paragraph 25 of the pretrial order said that plaintiffs and defendants would split the trial time 50/50. I think defendants are currently about 50 minutes behind plaintiffs. We would like to complete our case-in-chief here in court today, if we can. We have one last witness to call that we had proposed to call by deposition. But in the interest of fairness and the pretrial order and us completing our case-in-chief, I would just note that time. I'm not objecting to cross per se, but I am concerned about the time.

THE COURT: You think it's important that you watch me watch the Finkelman video?

ATTORNEY SELDEN: I do not think it's

important that I watch you watch the video, Your Honor. I do think it's important, however, that defendants and plaintiffs have equal trial time available. We certainly gave a lot of thought yesterday to managing our cross-examination so that we would be able to complete within the time. Had I known, we might have taken more time with our cross-examinations. I do not object to this cross-examination. And I do not want you to watch video in court when you don't need to.

THE COURT: Great.

ATTORNEY SELDEN: But I do want to note that point for fairness.

THE COURT: Please proceed. No objection. Please proceed.

ATTORNEY REESE: Thank you. Jessica Reese with Quinn Emanuel.

CROSS-EXAMINATION

BY ATTORNEY REESE:

Q. Good afternoon.

A. Good afternoon.

Q. Now, you testified earlier today that your main responsibility with regard to ATP was to process capital calls; correct?

A. That's correct.

Q. And Rigmora received a capital call on June 24th, 2021, from ATP; correct?

A. Rigmora continually received capital calls from ATP, that's correct.

Q. Well, let's take a look at the June 24th, 2021, capital call, JX 0230.

Mr. Yakovlev, do you see that this is an email from Anna Batarina, and you are copied here on this email dated June 24th, 2021?

A. Yes, I see.

Q. And this capital call, it attaches a capital call; correct?

A. Correct.

Q. And could we please pull up that capital call, which is page 4.

This is, Mr. Yakovlev, Exhibit A to the capital call; correct?

A. Yeah, it's not actually the first page of the capital call, yeah, but an exhibit attached to it.

Q. And focusing your attention, do you see the line that says, "Total Pool V-3 Call"?

A. Yes, I see it now.

Q. And do you see on that row under the column "Unfunded Commitment Prior to Current Capital Call," the amount stated is $310,455,340; is that correct?

A. That's what is stated here.

Q. And to your knowledge, no one at Rigmora raised any deficiency with the amount stated here as the unfunded commitment to total Pool V-3; correct?

A. I'm not aware of that.

ATTORNEY REESE: No further questions. Thank you.

THE COURT: Thank you.

ATTORNEY DUTZ: No further questions, Your Honor.

THE COURT: All right. You may step down. Thank you.

(Witness excused.)

ATTORNEY SELDEN: Your Honor, our final remaining witness is Mr. Finkelman, who we would call by deposition and play the video. It would require us sealing the courtroom. I do not want to make you sit in the courtroom and watch that, if you would prefer not to. So I raise it because that would

be the last witness in our case-in-chief. I can describe the introduction that I would have provided to the video, but I welcome your Honor's guidance as to how you'd like us to proceed.

THE COURT: Look, make sure I have the video. Rather than have everybody leave and come in and tell everybody to go, I think it makes sense for me to take the video back and watch it in my office.

If you want to submit a letter with the instructions you would have given as a preamble to that, I'm happy to read it, and I will read it right before I watch the video, I promise. So why don't we do it that way.

ATTORNEY SELDEN: That works perfectly well. Thank you, Your Honor. I very much appreciate it.

With that, I believe defendants rest. That is our conclusion.

And I think we just have the extra housekeeping matters of those proposed trial briefing scheduling to address, Your Honor.

THE COURT: All right. Thank you.

So what's left to be accomplished, and have you conferred on it? And what do you propose we

do next?

ATTORNEY BERDON: Just for the record, we are not going to be calling any rebuttal witnesses. We just ask that Your Honor view the video counterparts that we've already identified.

THE COURT: Okay. Make sure -- it would be actually really helpful to me if whatever you have that I need to view is put on a flash drive, one flash drive between the two of you. Maybe give me three copies so everybody who needs to have it can have it and sent to my office Monday. That would be helpful.

ATTORNEY BERDON: Yes, Your Honor.

ATTORNEY BARLOW: Your Honor, I think the remaining housekeeping matter is how Your Honor preferred to resolve this issue, this case to get us to judgment, not withstanding the pending request for provisional liquidators.

My understanding of the current situation in Cayman is that while Rigmora requested in Cayman that the provisional liquidator application be heard at the end of this month, that was denied. They've been offered the opportunity to present November 3rd and November 4th.

And at that hearing where this was discussed as a scheduling matter, the Court said the following -- and I hope you don't mind me reading it, because I don't want to be accused of misquoting the Court.

THE COURT: No. It's good that you remind me what I said. So please go ahead.

ATTORNEY BARLOW: No, I'm sorry, reminding you what the Court in Cayman said, Your Honor.

THE COURT: Either way.

ATTORNEY BARLOW: The court in Cayman said depending on what the state of play in Delaware at the time is, and if it looks as if a judgment is going to be given within days, it may be that I would hold back and reserve my judgment in order to give the parties the opportunity to obtain that judgment and make any further submission.

So as we proceed towards a hearing on November 3rd and November 4th in the Cayman Islands, plaintiff would respectfully request a fairly aggressive schedule for the submission of post-trial briefings.

What we have proposed is the

submission of opening briefs on or around Wednesday of next week; that our friends would put in their answering brief Sunday; and that we would get a reply to you by Tuesday, October 28th. That's roughly five days, four days, and two days.

But obviously we're here to accommodate whatever schedule the Court would like. And so any guidance Your Honor might provide in that respect, we appreciate it.

THE COURT: Thank you.

Mr. Rohrbacher?

ATTORNEY SELDEN: I'll address the scheduling, Your Honor.

Your Honor, at this point in the Cayman proceedings, I believe that plaintiff's counsel there, Walkers, and our clients' counsel there, Campbells, are engaged in scheduling cooperatively and have worked together and that schedule is indeed proceeding in the Caymans.

As I had noted when we discussed it previously, it is a provisional hearing pending a full trial in January for a temporary relief. It is not a liquidation of the fund or its portfolio companies. It is oversight by someone independent, with the

benefit of the court and the benefit of Cayman law, such that funding contributed to the portfolio companies during the pendency of the case can stay there as a matter of Cayman law and isn't voided by statute in January.

That said, Your Honor, we again welcome the Court's guidance with respect to schedule.

I think the schedule that plaintiff has proposed is a little too tight. I would ask at least a week to oppose or to file our responding brief, which I think puts it on October 29th if they file on the 22nd. And then that, Your Honor, I will be frank with the Court and tell you that on October 29th I am in the Second Circuit almost all day and wouldn't be available.

THE COURT: You have a large team of attorneys. So I'm sure someone could be here.

ATTORNEY SELDEN: I have a terrific team and they are there. I am only raising that issue because the relevance of the Cayman proceeding on the 31st has nothing to do with the request I am making. It is purely driven by trying to juggle that schedule.

So we would ask at least a week, and I was going to ask, your Honor, that we submit our

opposing brief on October 30th. And if plaintiffs then want to reply on the 3rd, Your Honor will at least have the benefit of our two major opening briefs before the weekend and before the 3rd.

Again, whatever the Court would prefer with respect to this.

And I guess there is also the question of whether argument needs to be scheduled related to those post-trial briefs.

THE COURT: Mr. Barlow?

ATTORNEY BARLOW: I neglected to mention in my opening presentation, of course, we have a pending motion with respect to the status quo order with respect to the proceedings in Cayman which would, of course, allow the parties substantial time to present these issues because they wouldn't proceed in Cayman on those issues. I don't want to get past that.

So as we're looking for additional time. One way to resolve it might be some sort of agreement that the Cayman proceedings aren't going to proceed to judgment and there's not going to be any ruling requested in judgment until Your Honor has a chance to adjudicate the claims.

THE COURT: Thank you. So I understand what I want in an aggressive briefing schedule in light of what's happening in the Caymans, and so I'm inclined to give it to them. But if you want to confer and figure out whether there's a way to relieve that pressure through agreement or stipulation, I'm open to that.

So why don't you take a few days to confer and let me know on Monday whether you reach agreement. If not, plan to proceed at the breakneck pace that Mr. Barlow proposed.

ATTORNEY SELDEN: Your Honor, could I ask again. If we are going to proceed on a faster pace, could we have our opposition brief be due on the 28th of October rather than Sunday the 26th?

THE COURT: If you want that, then work hard to negotiate a situation that gives them a little more confidence that something in the Caymans isn't going to deprive their client of the ability to manage the funds.

ATTORNEY SELDEN: Your Honor, I don't -- for clarity of the record, I will say we have proposed a draft stipulation. I have asked for my counterparts' responses to that. We have not received

a response. We have worked hard to negotiate a standstill agreement that is typical here in Delaware that would maintain the status quo. While we have a control fight elsewhere subject to the jurisdiction of the Cayman court, I do not want you to think that we have not tried in some detail and at some length and with exchange of many drafts and many requests from me for responses that I have not received from my counterparts to enter a basic status quo order where we would get notice, for example, of the sale of a portfolio company or a sale of an interest of the funds.

I asked again Dr. Harrison at his deposition if he was engaged in that. He told me at his deposition on October 6th no, but on October 8th they produced a list of companies that he is contacting to sell assets.

This is a real concern for my clients. So I cannot agree, I'm afraid, that he continue without Court oversight in those proceedings, but I would very much like to enter a basic status quo order here in Delaware and to proceed with briefing in this very significant case where the issues before Your Honor are also warranting serious consideration and

detailed briefing on a schedule that gets those to you in an orderly way. That is all I'm asking for here.

ATTORNEY BERDON: Your Honor, I think our friends have vastly misrepresented the information that was provided on October 8th. It was a list of parties that had been contacted or had contacted us to discuss the potential for funding the portfolio in the event that there was a consensual resolution of this matter or a judgment in this matter. The representation that we disclosed a group of companies that we were discussing asset sales with has no basis in fact.

I can tell you that the reason why we have been unable to reach agreement with Rigmora with respect to a status quo order here in Delaware is because they have refused to represent in that order that they would not seek the very *ex parte* relief that we had disagreed on back on September the 19th.

In addition, they made a condition precedent to it that we surrender the financial control of the fund for all matters over $50,000 during the period in question.

And so it is not a lack of trying on ATP's part, Your Honor. And I think that the status

quo here that we're looking to maintain, we have no intention whatsoever of selling assets without giving ample notice and seeking Court approval of an asset sale. We have no interest in hiding the ball on that. But what we are looking for is the ability to litigate this matter through to judgment without PLs being appointed that would take control of the fund before this Court has the opportunity to rule or the defendants going to Cayman again seek*ing ex parte* relief to change the status quo.

So we are willing to continue talking, but the factual substrate that you just heard from the other side is something that we cannot agree with.

THE COURT: Thank you.

All right. So here's what we're going to do. I believe your reply on the status quo is coming in on Sunday night; is that correct?

ATTORNEY BARLOW: Yes, Your Honor.

THE COURT: I'm going to read it. I assume we're on the breakneck pace that Mr. Barlow proposed. That puts your opening brief next Wednesday; is that right?

ATTORNEY BARLOW: Yes, Your Honor.

THE COURT: So that's more harmful for

them in the interim than you all.

If I read the papers or determine that there are other reasons to relax the briefing schedule, I will.

Be on call on Monday. After I read the papers, I may get you on the phone for a hearing. I'd also like to know whether there have been any developments in your meetings to determine whether you can stipulate to a different schedule that's less extreme.

Look, I do my best to render these judgments quickly, but it's very, very hard for me personally to marshal this amount of evidence into a thoughtful and cogent factual set of findings on the pace that you've proposed.

What I heard Dr. Harrison say, that he felt the funds could limp along until the end of the year, in my mind, I thought that meant that I would have until through November to issue a post-trial decision that gave you all sufficient time to appeal. Now I'm hearing that events in the Caymans could eclipse my ability to do so in a meaningful way, which makes me a little concerned.

So I really hope that you all can

agree to a schedule that gives everyone time to do what they need, including me.

But is there anything else we can accomplish?

ATTORNEY BARLOW: No. We appreciate the accommodation of the Court and, as always, its staff.

THE COURT: All right. All right. Look -- you may sit down, Mr. Barlow -- we all worked very hard to get through this trial and I appreciate it. I know it hasn't been easy for anyone, not the witnesses, certainly not the attorneys, and certainly not the people who have been here assisting the attorneys. I'm grateful. Thank you.

I hope that you express the same gratitude to the court staff that you did in court earlier. Make sure to thank them on the way out. They work extremely hard to make these days happen. I wish you all safe travels. I hope you all enjoy Wilmington this evening and try to relax, if only for a few hours.

With that, we are adjourned. Thank you.

(Court adjourned at 4:54 p.m.)

I N D E X

WITNESSES:	Page
YURI BOGDANOV	
Direct Resumed by Attorney Born	290
Cross by Attorney Berdon	311
DMITRY RYBOLOVLEV	
Direct by Attorney Selden	344
Cross by Attorney Epstein	379
MICHAEL EHLERS	
by Video Deposition	400
ILONNA RIMM	
Direct by Attorney Taft	425
Cross by Attorney Bonacorsi	441
Redirect by Attorney Taft	458
WILLIAM ENGELS	
by Video Deposition	459
ALEXEY YAKOVLEV	
Direct by Attorney Dutz	465
Cross by Attorney Reese	474

CERTIFICATE

We, DENNEL NIEZGODA, KAREN SIEDLECKI, KATHY CORTOPASSI and TINA ALFARO, Official Reporters for the Court of Chancery of the State of Delaware, do hereby certify that the foregoing pages numbered 290 through 490 contain a true and correct transcription of the proceedings as stenographically reported by us at the hearing in the above cause before the Chancellor of the State of Delaware, on the date therein indicated.

IN WITNESS WHEREOF we have hereunto set our hands at Wilmington, this 17th day of October, 2025.

/s/ Dennel Niezgoda
Official Court Reporter

/s/ Karen Siedlecki
Official Court Reporter

/s/ Kathy Cortopassi
Official Court Reporter

/s/ Tina Alfaro
Official Court Reporter

EXHIBIT L

Entire Exhibit Filed Under Seal

EXHIBIT M

A T P

Presentation for January 20, 2026 Hearing

***Apple Tree Life Sciences, Inc., et al.*, (Case no. 25-12177)**

UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF DELAWARE

HONORABLE LAURIE S. SILVERSTEIN

January 20, 2026

Funding Motion

Funding the Portfolio Companies

- The primary purpose of these Chapter 11 Cases is to save, preserve and maximize the value of the Portfolio Companies.
- Prior to the Petition Date, the Partnership Debtor provided funding to each Portfolio Company.
  - The aggregate commitment amount was $501.2 million and the Partnership Debtor funded, in the aggregate, $340.6 million.
- Without funding, the Portfolio Companies will cease operations.
  - "**The negative impacts of a funding default for early-stage life sciences companies can be fatal**," and although companies can "ramp up" research "upon receipt of funding," they "cannot stay in a holding pattern indefinitely." Delaware Chancery Judgment at 66.
- Certain Portfolio Companies are engaged in active pharmaceutical trials, in which they provide treatments to human test subjects. Funding is necessary to continue these treatments.
- Specifically, **pursuant to the Funding Motion, the Partnership Debtor would provide a total of approximately $13.9 million to seven Portfolio Debtors and two non-Debtor Portfolio Companies**.

EXHIBIT N

Contents

VOLUME 3: CHAPTER 11 CASE ADMINISTRATION 1

CHAPTER 3.1.0: KEY TERMS 1

CHAPTER 3-1: GENERAL POLICY CONSIDERATIONS 1

CHAPTER 3-2: VOLUNTARY CASE ADMINISTRATION 2

3-2.1 FILING REQUIREMENTS 2
3-2.2 CASE FILING NOTIFICATION AND DOCUMENT RECEIPT 3
3-2.3 INITIAL REVIEW 3
3-2.3.1 Signature Requirements 3
3-2.3.2 Authorization for Filing 3
3-2.3.3 Debtor Eligibility 4
3-2.4 REPRESENTATION OF DEBTOR BY COUNSEL 5
3-2.5 CASES COMMENCED BY RECEIVER 5
3-2.6 GENERAL CASE REVIEW 6
3-2.7 MONITORING BANK ACCOUNTS 6
3-2.8 REVIEW OF INITIAL PLEADINGS 6
3-2.8.1 Bankruptcy Rule 6003; Relief that Cannot be Granted within 21 Days 7
3-2.8.2 Employment of Professionals 7
3-2.8.3 Employment of Other Professionals 8
3-2.8.4 Limitation on Executive Compensation 9
3-2.8.5 Cash Collateral Use and Financing Orders 13
3-2.8.6 Early Payments to Pre-Petition Creditors 22
3-2.8.7 Requests for Approval of Responsible Persons 27
3-2.8.8 Joint Administration and Substantive Consolidation 29
3-2.8.9 Small Business Chapter 11 Cases 29

CHAPTER 3-3: INITIAL DEBTOR INTERVIEWS, OPERATING GUIDELINES, AND MONTHLY OPERATING REPORTS 30

3-3.1 INITIAL DEBTOR INTERVIEWS (IDIs) 30
3-3.1.1 Procedure for Setting Up the IDI 30
3-3.1.2 United States Trustee's Initial Assessment of the Case 31

3-3.1.3 FAMILIARIZING THE DEBTOR WITH ITS NEW FIDUCIARY OBLIGATIONS 32
3-3.2 OPERATING GUIDELINES 33
3-3.2.1 GENERAL PROVISIONS 33
3-3.2.2 BANK ACCOUNTS 33
3-3.2.3 INSURANCE 34
3-3.3 FINANCIAL REPORTS 34
3-3.3.1 SMALL BUSINESS CASES 35
3-3.3.2 OTHER CASES 35
3-3.3.3 CASH RECEIPTS AND DISBURSEMENTS STATEMENT 35
3-3.3.4 STATEMENT OF OPERATIONS 36
3-3.3.5 BALANCE SHEET 36
3-3.3.6 SCHEDULE OF POST-PETITION LIABILITIES 36
3-3.3.7 POST-PETITION TAXES PAYABLE (TAX RECONCILIATION) STATEMENT 37
3-3.3.8 ADDITIONAL REPORTING REQUIREMENTS 37

CHAPTER 3-4: COMMITTEES 37

3-4.1 STATUTORY BASIS: 11 U.S.C. § 1102 AND 1103 37
3-4.2 THE SOLICITATION OF, AND NOTICE TO, CREDITORS 38
3-4.2.1 THE SOLICITATION PACKAGE 38
3-4.2.2 TIMING 40
3-4.3 SIZE AND COMPOSITION OF THE COMMITTEE 40
3-4.3.1 SIZE 40
3-4.3.2 COMPOSITION 40
3-4.4 MEMBERSHIP ISSUES 42
3-4.4.1 UNIONS 42
3-4.4.2 LANDLORDS 43
3-4.4.3 SECURED CREDITORS 43
3-4.4.4 COMPETITORS 44
3-4.4.5 PROFESSIONALS FORMERLY EMPLOYED BY THE DEBTOR 44
3-4.4.6 GOVERNMENTAL UNITS 44
3-4.4.7 INSIDERS 45
3-4.4.8 CONTINGENT, UNLIQUIDATED, OR DISPUTED CLAIMS 45
3-4.4.9 INDENTURE TRUSTEES 46
3-4.4.10 EQUITY SECURITY HOLDERS 47
3-4.4.11 PRIORITY RECLAMATION CLAIMS UNDER SECTION 503(B)(9) 47
3-4.4.12 CRITICAL VENDORS 47
3-4.5 CONDUCTING A FORMATION MEETING 47
3-4.5.1 TIMING 47
3-4.5.2 CONDUCTING THE FORMATION MEETING 48
3-4.5.3 PROXIES 49
3-4.5.4 CONCLUSION OF THE FORMATION MEETING 50
3-4.6 NOTICE OF THE COMMITTEE APPOINTMENT 51
3-4.7 INITIAL COMMITTEE MEETING AND COMMITTEE DUTIES, POWER, AND RESTRICTIONS 51

3-4.7.1 ORGANIZATION 51
3-4.7.2 POWERS AND DUTIES 51
3-4.7.3 RESTRICTIONS ON TRADING 52
3-4.8 CERTIFICATIONS OF CLAIMS HELD 53
3-4.9 PRE-PETITION COMMITTEES 54
3-4.10 ATTEMPTS TO PRE-EMPT THE SELECTION PROCESS 55
3-4.11 SMALL BUSINESSES - REQUESTS NOT TO FORM A CREDITORS'COMMITTEE 55
3-4.12 INVOLUNTARY CASES 55
3-4.13 NUMBER OF COMMITTEES 55
3-4.14 EQUITY SECURITY HOLDERS' COMMITTEE 58
3-4.15 MODIFICATION OF COMMITTEE MEMBERSHIP 59
3-4.15.1 CONSIDERATIONS 59
3-4.15.2 SUBSTITUTIONS 61
3-4.15.3 REMOVAL OF MEMBERS 61
3-4.16 RULE 2019: AD HOC COMMITTEE AND OTHER CREDITOR GROUP DISCLOSURES 61
3-4.16.1 BACKGROUND AND SUMMARY OF CHANGES 61
3-4.16.2 WHO IS COVERED 62
3-4.16.3 WHAT MUST BE DISCLOSED 63
3-4.16.4 TIMING OF DISCLOSURE 64
3-4.16.5 REMEDIES AND CONSEQUENCES OF NON-DISCLOSURE 64

CHAPTER 3-5: MEETINGS OF CREDITORS 64

3-5.1 INTRODUCTION 64
3-5.2 SCHEDULING 65
3-5.3 NOTICE 65
3-5.4 SCOPE OF EXAMINATION 65
3-5.5 CONDUCTING THE MEETING 66
3-5.6 QUESTIONING THE DEBTOR 67
3-5.7 ATTENDANCE BY CREDITORS, THE MEDIA, AND THE PUBLIC 69
3-5.8 IMMUNITY, SELF-INCRIMINATION, AND REFUSAL TO ANSWER QUESTIONS 69
3-5.9 PROOFS OF CLAIM 70
3-5.10 CONTINUANCES AND ADJOURNMENTS 70
3-5.11 SPECIAL MEETINGS 71
3-5.12 CONDUCT OF SECTION 341 MEETINGS FOR HEARING-IMPAIRED DEBTORS 71
3-5.13 FOREIGN LANGUAGE INTERPRETERS 72
3-5.14 SECURITY AT MEETINGS OF CREDITORS 72
3-5.14.1 GENERAL 72
3-5.14.2 ACQUIRING MEETING ROOMS AND/OR SECURITY ON A ONE-TIME BASIS 72

CHAPTER 3-6: APPOINTMENT OF CHAPTER 11 TRUSTEES AND EXAMINERS 73

3-6.1 GROUNDS FOR APPOINTMENT 73
3-6.1.1 STATUTORY BASIS: 11 U.S.C. § 1104 73
3-6.1.2 SECTION 1104(E) CONSIDERATIONS 73
3-6.2 CHOICE OF REMEDY – TRUSTEE OR EXAMINER 74
3-6.3 THE SELECTION PROCESS 76
3-6.3.1 TIMING 77
3-6.3.2 DUTY TO CONSULT 77
3-6.3.3 THE CONSULTATION PROCESS 78
3-6.3.4 CONSIDERATION OF ADDITIONAL CANDIDATES AND CONSULTATION WITH OTHER UNITED STATES TRUSTEES 78
3-6.3.5 ELIGIBILITY AND DISINTERESTEDNESS 79
3-6.3.6 THE SELECTION 79
3-6.4 THE NOTICE OF AND APPLICATION TO APPROVE APPOINTMENT 80
3-6.4.1 NOTICE OF APPOINTMENT 80
3-6.4.2 APPLICATION TO APPROVE APPOINTMENT 80
3-6.4.3 SECURITY CLEARANCE 81
3-6.4.4 ACCEPTANCE OF APPOINTMENT AND POSTING OF BOND 81
3-6.5 TERMINATION OF A TRUSTEE'S APPOINTMENT 82
3-6.6 REMOVAL OF A TRUSTEE OR EXAMINER 83
3-6.7 ELECTION OF A TRUSTEE 84
3-6.7.1 REQUESTS FOR ELECTION 84
3-6.7.2 ELECTION PROCEDURES 86
3-6.7.3 ELIGIBLE VOTERS 87
3-6.7.4 DETERMINING ELECTION RESULTS 88
3-6.7.5 SOLICITATION OF PROXIES 88
3-6.7.6 QUALIFICATIONS OF AN ELECTED TRUSTEE 91

CHAPTER 3-7: EMPLOYMENT OF PROFESSIONALS 91

3-7.1 STATUTORY FRAMEWORK: 11 U.S.C. § 327 AND FED. R. BANKR. P. 2014 91
3-7.1.1 RETENTION OF CRISIS MANAGERS UNDER 11 U.S.C. § 363 94
3-7.1.2 11 U.S.C. § 329 AND FED. R. BANKR. P. 2016(B) AND 2017 95
3-7.1.3 DEFINITION OF PROFESSIONAL PERSON 95
3-7.1.4 AUCTIONEERS AND APPRAISERS 96
3-7.1.5 11 U.S.C. § 327(E) 96
3-7.2 THE DISINTERESTED PERSON REQUIREMENT FOR EMPLOYMENT OF PROFESSIONALS AND APPOINTMENT OF TRUSTEES AND EXAMINERS 97
3-7.2.1 STATUTORY FRAMEWORK: 11 U.S.C. § 101(14) AND 327(A) 97
3-7.2.2 U.S.C. § 101(14) (A)-(B) 97
3-7.2.3 OVERLAP OF 11 U.S.C. § 101(14) (C) AND 11 U.S.C. § 327(A) 98
3-7.3 SPECIAL PROBLEMS IN RELATED CASES 102
3-7.3.1 APPOINTMENT OF A TRUSTEE 102
3-7.3.2 RETENTION OF PROFESSIONALS 103

CHAPTER 3-8: COMPENSATION OF PROFESSIONALS 104

3-8.1 DETERMINATION OF REASONABLE COMPENSATION, 11 U.S.C. § 330 AND FED. R. BANKR. P. 2016(A) 104
3-8.1.1 FEE GUIDELINES 107
3-8.1.2 FEE GUIDELINES FOR ATTORNEYS IN LARGER CHAPTER 11 CASES 108
3-8.2 RETAINERS 109
3-8.2.1 SUCCESS FEE 112
3-8.2.2 FEE ENHANCEMENT 113
3-8.3 INTERIM COMPENSATION, 11 U.S.C. § 331 115
3-8.4 RESPONSIBILITY OF PARTIES TO CONTROL COSTS 116
3-8.5 FEE PROCEDURE ORDERS 117
3-8.6 TRUSTEE COMPENSATION 118

CHAPTER 3-9: QUARTERLY FEES 119

3-9.1 INTRODUCTION 119
3-9.2 INFORMING PARTIES OF THE FEE REQUIREMENT 119
3-9.3 FEE AMOUNT AND DUE DATE 120
3-9.3.1 CALCULATION OF THE FEE 120
3-9.4 FEE DUE DATES AND PERIODS COVERED 121
3-9.5 FEES IN JOINTLY ADMINISTERED 121
3-9.6 BILLING AND COLLECTION PROCEDURES 122
3-9.6.1 BILL GENERATION PROCESS 122
3-9.6.2 FEE PAYMENTS AND REFUNDS 122
3-9.6.3 PAYMENT ADEQUACY REVIEW 124
3-9.6.4 DELINQUENT PAYMENT REVIEW AND COLLECTION EFFORTS 125
3-9.6.5 ENCOURAGING VOLUNTARY COMPLIANCE 126
3-9.6.6 LEGAL ACTION 127
3-9.7 WRITE-OFF AND REFERRAL PROCEDURES 128
3-9.7.1 CONFIRMED CHAPTER 11 CASES 128
3-9.7.2 DISMISSED CHAPTER 11 CASES 129
3-9.7.3 CONVERTED CHAPTER 11 CASES 129
3-9.7.4 STANDARDS 129
3-9.7.5 DEBT COLLECTION BY THE TREASURY DEPARTMENT 130
3-9.7.6 DOCUMENTATION 130

CHAPTER 3-10: MONITORING THE CASE 130

3-10.1 CASE ADMINISTRATION 130
3-10.2 STANDING 131
3-10.3 OBTAINING EVIDENCE 131

3-10.3.1 SECTION 341(A) MEETING 131
3-10.3.2 FED. R. BANKR. P. 2004 EXAMINATION 131
3-10.3.3 OTHER DISCOVERY DEVICES AND ORDERS TO COMPEL ATTENDANCE FOR EXAMINATION 132
3-10.4 PROBLEMS AND RESPONSES 132
3-10.4.2 FAILURE TO ATTEND SECTION 341(A) MEETING 133
3-10.4.3 FAILURE TO DESIGNATE CORPORATE OFFICIAL 133
3-10.4.4 FAILURE TO FILE OPERATING REPORTS 133
3-10.4.5 FAILURE TO MAINTAIN INSURANCE OR PAY ADMINISTRATIVE TAXES 134
3-10.4.6 FAILURE TO FILE REORGANIZATION PLAN AND/OR DISCLOSURE STATEMENT 134
3-10.4.7 FAILURE TO GIVE PROPER NOTICE OF SETTLEMENT AGREEMENT, DISPOSITION OF PROPERTY, OR CASH COLLATERAL/ADEQUATE PROTECTION AGREEMENT 135
3-10.4.8 FAILURE TO DEPOSIT OR INVEST FUNDS AS REQUIRED BY 11 U.S.C. § 345 135
3-10.4.9 CONTINUING LOSSES OR OTHER DIMINUTION OF THE ESTATE 136
3-10.4.10 IMPROPER POST-PETITION TRANSFERS 136
3-10.4.11 FAILURE TO COMPLY WITH COURT ORDER 137
3-10.4.12 UNAUTHORIZED POST-PETITION PAYMENTS TO PROFESSIONALS 137
3-10.4.13 ONGOING INSOLVENCY PROCEEDINGS IN ANOTHER FORUM 137
3-10.4.14 SALE OF SUBSTANTIALLY ALL OF A DEBTOR'S ASSETS 138
3-10.4.15 FAILURE TO PAY QUARTERLY FEES AND POST-CONFIRMATION PERFORMANCE 140
3-10.4.16 ENVIRONMENTAL PROBLEMS 141
3-10.5 CHOICE OF REMEDY – DISMISSAL OR CONVERSION 142
3-10.5.1 STATUTORY BASIS: 11 U.S.C. § 1112 142
3-10.5.3 CONVERSION 143

CHAPTER 3-11: REVIEW OF DISCLOSURE STATEMENTS AND PLANS 145

3-11.1 INTRODUCTION 145
3-11.2 THE CONCEPTUAL FRAMEWORK 147
3-11.2.1 ITEMS TO INCLUDE 147
3-11.2.2 "SAFE HARBOR," 11 U.S.C. § 1125(E) 147
3-11.2.3 FACTORS AFFECTING ADEQUACY OF DISCLOSURE 147
3-11.3 CONDUCTING THE REVIEW 148
3-11.3.1 STANDARD LANGUAGE 148
3-11.3.2 DESCRIPTION OF THE DEBTOR'S BUSINESS 148
3-11.3.3 REASONS FOR FINANCIAL DIFFICULTIES AND CORRECTION OF THOSE FACTORS 149
3-11.3.4 HISTORICAL AND CURRENT FINANCIAL INFORMATION 149
3-11.3.5 MATERIAL POST-PETITION EVENTS 150
3-11.3.6 OUTLINE OF THE PLAN 150
3-11.3.7 MEANS OF EFFECTUATING THE PLAN 151
3-11.3.8 SECURITIES TO BE ISSUED 152
3-11.3.9 PROJECTIONS 153
3-11.3.10 MANAGEMENT, 11 U.S.C. § 1129(A)(5) 154
3-11.3.11 CONTROLLING PERSONS 154
3-11.3.12 INSIDER CLAIMS 155

3-11.3.13 Transactions with Insiders 155
3-11.3.14 Disputed Claims 155
3-11.3.15 Legal Proceedings 156
3-11.3.16 Tax Consequences 156
3-11.3.17 Trustee or Examiner 156
3-11.3.18 Creditors' Committees and Equity Security Holders' Committees 157
3-11.3.19 Information Regarding Plan Proponent 157
3-11.3.20 Liquidation Analysis 157
3-11.3.21 Vote Required for Acceptance 158
3-11.3.22 Cram Down 159
3-11.3.23 Miscellaneous Matters 160
3-11.3.24 Summary and Table of Contents 160
3-11.3.25 Notice 160
3-11.4 PLAN MODIFICATION 160
3-11.5 REVIEW OF PLAN AND CONFIRMATION 161
3-11.6 POST-CONFIRMATION MONITORING 162
3-11.7 CASE CLOSURE UNDER SECTION 350(a) AND RULE 3022 163

CHAPTER 3-12: CHAPTER 11 CASES FILED BY INDIVIDUALS 164

3-12.1 SPECIAL CONSIDERATIONS FOR CASES FILED BY INDIVIDUALS 164
3-12.1.1 Property of the Estate Includes After-Acquired Wages and Property 164
3-12.1.2 Funding a Plan with Post-Petition Earnings 164
3-12.1.3 Plan Confirmation Requires Debtor to Pay All Post-Petition Domestic Support Obligations in Full 164
3-12.1.4 Debtors Must Meet Disposable Income Test if Unsecured Creditor Objects to Confirmation 165
3-12.1.5 Modification of Cram Down Standards for Individual Chapter Debtors 167
3-12.1.6 An Individual Chapter 11 Debtor Does Not Receive a Discharge until after All Plan Payments Have Been Completed 168
3-12.1.7 The Plan Can Be Modified Post-Confirmation 168
3-12.1.8 Individual Debtor Can Be a Small Business Debtor at the Same Time 168
3-12.2 PRE-CONFIRMATION MONITORING OF CHAPTER 11 CASE FILED BY AN INDIVIDUAL 168
3-12.3 CLOSURE OF CHAPTER 11 CASE FILED BY AN INDIVIDUAL 170

CHAPTER 3-13: PRE-PETITION ACCEPTANCE OR REJECTION OF THE PLAN 173

3-13.1 STATUTORY FRAMEWORK: 11 U.S.C. § 1126(b) AND BANKR. RULE 3018(b) 173
3-13.2: SECTION 341 MEETINGS IN PRE-PACKAGED CHAPTER 11 CASES 175
3-13.3 CREDITORS' COMMITTEES IN PRE-PACKAGED CHAPTER 11 CASES 177
3-13.4 POST-PETITION DISCLOSURE AND SOLICITATION 177

CHAPTER 3-14: SMALL BUSINESS CHAPTER 11 CASES 178

3-14.1 STATUTORY FRAMEWORK 178
3-14.2 DEFINITION OF A SMALL BUSINESS 179
3-14.3 SMALL BUSINESS DEBTOR DESIGNATION 180
3-14.4 CREDITORS' COMMITTEE FORMATION 180
3-14.5 INITIAL FILING REQUIREMENTS AND DEBTOR REQUIREMENTS 180
3-14.6 EXCLUSIVITY PERIODS, AND THE PLAN AND DISCLOSURE STATEMENT 181

CHAPTER 3-15: INVOLUNTARY CHAPTER 11 CASE ADMINISTRATION 183

3-15.1 INTRODUCTION 183
3-15.2 STATUTORY AND BANKRUPTCY RULE PROVISIONS 184
3-15.3 APPOINTMENT OF TRUSTEE PRIOR TO ENTRY OF ORDER FOR RELIEF 185
3-15.4 PROFESSIONAL FEES DURING THE GAP PERIOD 185
3-15.5 DISMISSAL 186

CHAPTER 3-16: RAILROAD REORGANIZATIONS 186

3-16.1 INTRODUCTION 186
3-16.2 APPOINTMENT OF A TRUSTEE 187
3-16.3 OPERATIONS DURING THE GAP PERIOD 188
3-16.4 OTHER PROVISIONS APPLICABLE ONLY TO RAILROAD REORGANIZATIONS 188

CHAPTER 3-17: SUBCHAPTER V CHAPTER 11 CASES 189

3-17.1 INTRODUCTION 189
3-17.1.1 STATUTORY FRAMEWORK 189
3-17.1.2 ROLE OF THE UNITED STATES TRUSTEE IN GENERAL 190
3-17.2 SUBCHAPTER V ELECTION BY THE DEBTOR 190
3-17.3 ROLE OF THE SUBCHAPTER V TRUSTEE 191
3-17.4 CREDITORS' COMMITTEE ONLY ON ORDER OF COURT 193
3-17.5 SUBCHAPTER V DEBTOR'S DUTIES 193
3-17.6 UNITED STATES TRUSTEE'S OVERSIGHT OF SUBCHAPTER V CASES 194
3-17.7 SUBCHAPTER V EXCLUSIVITY PERIODS AND DISCLOSURE REQUIREMENTS 196
3-17.8 SUBCHAPTER V PLAN REQUIREMENTS 197
3-17.9 SUBCHAPTER V PLAN CONFIRMATION 197
3-17.9.1 CONSENSUAL PLANS 198
3-17.9.2 NON-CONSENSUAL PLANS 198
3-17.10 SUBCHAPTER V POST-CONFIRMATION 200

3-17.10.1 Final Decree and Case Closing 201
3-17.11 MODIFICATION OF SUBCHAPTER V PLANS 201
3-17.11.1 Modification before Confirmation 201
3-17.11.2 Modification after Confirmation 202
3-17.11.3 Reappointing a Subchapter V Trustee Post-confirmation 202
3-17.12 TRANSACTIONS WITH PROFESSIONALS IN SUBCHAPTER V CASES 202
3-17.13 SUBCHAPTER V TRUSTEE QUALIFICATIONS FOR APPOINTMENT 203
3-17.13.1 Qualifications and Acceptance 203
3-17.13.2 A Trustee Must Not Have Conflicts of Interest 203
3-17.13.3 Background Investigation 204
3-17.14 SUBCHAPTER V TRUSTEE RECRUITMENT 204
3-17.15 TRUSTEE COMPENSATION AND BENEFITS 205
3-17.15.1 Effect of Disposition of the Case 205
3-17.15.2 Case-by-Case Trustee Compensation 206
3-17.15.3 Standing Trustee Compensation 206
3-17.16 SUPERVISION OF SUBCHAPTER V TRUSTEES 207
3-17.16.1 Banking 208
3-17.16.2 Bonding 210
3-17.16.3 Reporting 211
3-17.16.4 [Reserved] 212
3-17.16.5 Audits, Periodic Reviews, and Evaluations 212
3-17.16.6 Enforcement Actions Against Subchapter V Trustees 214

VOLUME 3: CHAPTER 11 CASE ADMINISTRATION

CHAPTER 3.1.0: KEY TERMS

"BAPCPA" means the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005.

"Department" means Department of Justice, unless otherwise indicated.

"EOUST" means Executive Office for U.S. Trustees in Washington, D.C.

"IDI" means initial debtor interview.

"KERP" means key employee retention program.

"PBGC" means Pension Benefit Guaranty Corporation.

"Program" means U.S. Trustee Program.

"SEC" means Securities and Exchange Commission.

"USTP" means U.S. Trustee Program.

CHAPTER 3-1: GENERAL POLICY CONSIDERATIONS

The United States Trustee is charged with responsibility for supervising the administration of chapter 11 cases. Chapter 11 cases present a wide array of issues and challenges, and the statutes accord the United States Trustee broad discretionary authority to act in these cases. Responsible and efficient use of the U.S. Trustee Program (USTP or Program) resources requires that priorities be established and maintained. The following basic principles can serve to guide Program employees in the reasoned exercise of their discretion in chapter 11 cases.

One of the most important functions of the United States Trustee in a chapter 11 case is to ensure the integrity of the chapter 11 process. This can be accomplished by both monitoring and, when warranted, commenting on the actions of parties to the case, as well as by ensuring that the bankruptcy system itself functions effectively and efficiently. The integrity of the process depends on the involvement of all parties with an interest in the case. The United States Trustee should strive to facilitate creditor involvement. A creditors' committee must be formed promptly, if possible.

During the initial stages of a case, the United States Trustee should focus on certain principal administrative responsibilities. The debtor and its counsel should be contacted and provided with guidance and instruction regarding their statutory responsibilities and fiduciary obligations. The first meeting of

creditors must be scheduled within the time limits established by the Federal Rules of Bankruptcy Procedure.

The United States Trustee may, at his or her discretion, limit his or her involvement in those chapter 11 cases with significant creditor interest and activity. In many instances, the presence of competing interests will serve to ensure that significant issues in a case are raised and resolved by the parties themselves, and will assist in moving the case forward without significant involvement by the United States Trustee. The United States Trustee should not seek to substitute his or her business judgment for that of creditors or other parties in interest. For example, creditors vote on plans of reorganization. They have the right to make their determinations as to what constitutes an acceptable return under the terms of the plan.

Regardless of the level of creditor activity, however, the United States Trustee has a statutorily defined role in chapter 11 cases. When the United States Trustee deems it appropriate, he or she shall monitor applications for compensation and reimbursement, plans and disclosure statements, and applications for the retention of professionals. See 28 U.S.C. § 586(a)(3)(A), (B), and (H). The United States Trustee should take the necessary steps to ensure that the office receives copies of all significant pleadings and orders in order to meet its statutory duties.

Chapter 11 cases often present circumstances requiring the United States Trustee to take a more active role. For example, creditor involvement may be limited or non-existent. Issues involving the fundamental integrity of the bankruptcy system, such as conflicts of interest or allegations of criminal misconduct, must be addressed quickly and thoroughly by the United States Trustee. Issues of national significance or designated as priorities for the United States Trustee Program must be addressed. The United States Trustee should exercise good judgment and appropriate discretion in the optimum allocation of resources to meet these needs.

Decisions regarding the degree of involvement necessary in a particular chapter 11 case ultimately are committed to the sound discretion of the Program's managers and professionals. The exercise of that discretion should be guided by the principles enunciated in this manual, as well as by consideration of available resources and priorities in other areas.

CHAPTER 3-2: VOLUNTARY CASE ADMINISTRATION

3-2.1 FILING REQUIREMENTS

To commence a voluntary chapter 11 case, the debtor must file a bankruptcy petition, as well as items set forth in Fed. R. Bankr. P. 1007, which items include a list of creditors and, if the debtor is a corporation, a corporate ownership statement. Schedules and statement of financial affairs, as well as a list of any equity security holders, must be filed within 14 days of filing the petition. In an

individual chapter 11 case, the debtor must also file a statement of current monthly income (Fed. R. Bankr. P. 1007(b)(5)) within 14 days of filing the petition. The official forms prescribe the content of many of these documents. Local bankruptcy court rules or procedures may require additional information or otherwise change the official requirements. The United States Trustee should ensure that the required documents are filed in a timely manner.

3-2.2 CASE FILING NOTIFICATION AND DOCUMENT RECEIPT

The clerk of the court shall transmit a copy of the bankruptcy petition to the United States Trustee. Fed. R. Bankr. P. 1002(b). The clerk also shall transmit copies of lists, schedules, and statements to the United States Trustee, Fed. R. Bankr. P. 1007(l), as well as amendments. Fed. R. Bankr. P. 1009(d). The United States Trustee should establish a procedure with the clerk to ensure that copies of these documents are transmitted promptly.

3-2.3 INITIAL REVIEW

3-2.3.1 Signature Requirements

The United States Trustee should review the petition and related documents to ensure that they have been signed. In districts with electronic case filing, the United States Trustee should review the court docket to ensure that the debtor has filed a declaration regarding electronic filing. Ensuring that all documents are signed is important in the event of a subsequent perjury investigation

3-2.3.2 Authorization for Filing

State law is pertinent to the issue of the appropriate authority for filing bankruptcy. The Supreme Court has held in the corporate context that applicable nonbankruptcy law determines whether authority exists for a particular debtor to commence a bankruptcy case. *See* Price v. Gurney, 324 U.S. 100 (1945). Courts have followed this rule in the partnership context as well. *See e.g., Jolly v. Pittore*, 170 B.R. 793 (S.D.N.Y. 1994); *In re Century/ML Cable Venture*, 294 B.R. 9 (Bankr. S.D.N.Y. 2003). The law of some states may require the consent of all general partners for a voluntary partnership bankruptcy filing. In these states, if fewer than all of the partners consent, the filing is an involuntary petition against the partnership. 11 U.S.C. § 303(b)(3)(A).

State law often requires a board of directors' resolution as authorization for a corporate bankruptcy case, and, in these cases, the United States Trustee should ensure that a resolution has been adopted. If an appropriate resolution has not been passed, the United States Trustee should file a motion to dismiss the case. Case law supports dismissal under these circumstances. *In re Moni-Stat, Inc.*, 84 B.R. 756, 757 (Bankr. D. Kan. 1988); *In re Farner, Boring & Tunneling, Inc.*, 26

B.R. 29 (Bankr. E.D. Tenn. 1982); *In re Autumn Press, Inc.*, 20 B.R. 60 (Bankr. D. Mass. 1982).

Challenges to proper authorization should be made promptly. Local bankruptcy rules in some jurisdictions establish short deadlines for filing such challenges.

3-2.3.3 Debtor Eligibility

The United States Trustee should ensure that each chapter 11 debtor satisfies the eligibility requirements for filing a case as set forth in 11 U.S.C. § 109. This includes ensuring in an individual chapter 11 case that such individual has, during the 180-day period preceding the date of the filing of the petition, received credit counseling from an approved agency. See 11 U.S.C. § 109(h)(1).

Certain entities are not eligible for relief. Stockbrokers and commodity brokers specifically are precluded from filing a chapter 11 petition. 11 U.S.C. § 109(d). Certain foreign, federal, or state regulated businesses, including insurance companies, banks, savings banks, cooperative banks, savings and loan associations, and credit unions, also are not eligible for chapter 11 relief. 11 U.S.C. § 109(b) and (d). Railroads, however, expressly are authorized to file for chapter 11 relief. 11 U.S.C. § 109(d). Certain provisions of chapter 11 apply only to railroads. 11 U.S.C. § 103(g); 11 U.S.C. § 1161. *See* Manual 3-16.

Trusts present special eligibility questions. With one exception, a trust is not eligible for relief under title 11. *In re Medallion Realty Trust*, 103 B.R. 8, 10 (Bankr. D. Mass. 1989), *aff'd*, 120 B.R. 245 (D. Mass. 1990). A business trust is included within the definition of a corporation set forth in section 101(9)(A)(v), and it therefore is eligible for relief. *See generally*, *In re Secured Equip. Trust of Eastern Airlines*, 38 F.3d 86 (2d Cir. 1994); *In re General Growth Properties, Inc.*, 409 B.R. 43 (Bankr. S.D.N.Y. 2009). A variety of tests have been applied to determine whether an entity is a business trust. *See discussion in General Growth*, 409 B.R. at 70-72. In general, a business trust is one "created for the purpose of carrying on some kind of business, whereas the purpose of a non-business trust is to protect and preserve the trust res." *In re Secured Equip.*, 38 F.3d at 89. It is not necessary for debtors to engage in business to qualify for relief. *Toibb v. Radloff*, 501 U.S. 157 (1991).

The United States Trustee should review cases to ensure that all joint petitions are properly filed. A joint petition is filed appropriately only by an individual that

may be a debtor and that individual's spouse.[1] 11 U.S.C. § 302(a). Cases naming an individual and a corporation as debtors, cases naming two or more corporations as debtors, cases naming a partnership and one or more individuals as debtors, or cases naming two or more unmarried individuals, as defined by state law, as debtors are not authorized. The United States Trustee should promptly move to dismiss these cases.

3-2.4 REPRESENTATION OF DEBTOR BY COUNSEL

A corporate debtor involved in proceedings before a court must be represented by licensed counsel and may not appear *pro se.* *See Osborn v. Bank of U.S.*, 22 U.S. 738 (1824). This rule applies to bankruptcy cases. *See* Fed. R. Bankr. P. 9010; *In re Dick Tracy Ins. Agency, Inc.*, 204 B.R. 38, 39 (Bankr. W.D. Mo. 1997). The United States Trustee should promptly move to dismiss cases involving a corporate debtor appearing *pro se.* *But see In re IFC Credit Corp.*, 420 B.R. 471 (Bankr. N.D. Ill. 2009), *appeal dism'd*, 2010 WL 1337142 (N.D. Ill., Mar. 31, 2010) (where the court found that an amended petition filed the next day and signed by an attorney was valid). Challenges to proper authorization should be made promptly. Local bankruptcy rules in some jurisdictions establish short deadlines for filing such challenges.

3-2.5 CASES COMMENCED BY RECEIVER

A custodian, such as a state court receiver, may file a voluntary bankruptcy case if applicable nonbankruptcy law, including his or her order of appointment, authorizes the receiver to do so and the filing is not prohibited by bankruptcy law. *See In re Milestone Educ. Inst., Inc.*, 167 B.R. 716, 720-21, 724 (Bankr. D. Mass. 1994) (suspending bankruptcy proceedings to permit appeal to state court regarding receiver's authority under state law to file bankruptcy); *In re Monterey Equities-Hillside*, 73 B.R. 749 (Bankr. N.D. Cal. 1987) (state law authorized partnership bankruptcy filing, but filing prohibited by Fed. R. Bankr. P. 1004(a) because general partner did not consent). Cases commenced by receivers trigger certain rights and responsibilities including the turnover of property, filing of an accounting, and the potential right to payment of reasonable compensation as set forth under 11 U.S.C. § 543. In administering cases commenced by a receiver, the United States Trustee may encounter motions to excuse compliance with certain turnover requirements of Section 543. Even if a court grants a motion to

[1]The USTP interprets the terms "spouse," "marriage," and "husband and wife" in the Bankruptcy Code and Bankruptcy Rules to include same-sex married couples. The USTP also interprets these terms to refer to individuals who are lawfully married under any state law, including individuals married to a person of the same sex who were legally married in a state that recognizes such marriages, but who are domiciled in a state that does not recognize such marriages. Thus, the USTP will apply the relevant Bankruptcy Code and Bankruptcy Rule provisions to same-sex spouses just as it would apply them to opposite-sex spouses.

excuse the turnover requirements, a receiver may not exercise the rights of a trustee or debtor-in-possession. The court is not permitted to appoint a receiver to control the estate. See 11 U.S.C. § 105(b). Instead, United States Trustees should consider whether a motion to convert, dismiss or appoint a chapter 11 trustee may be proper when the court has excused turnover.

3-2.6 GENERAL CASE REVIEW

As soon as case documents are received, the United States Trustee should review the documents to become generally familiar with the debtor and its business, as well as to identify any problems requiring immediate attention. The schedules and statement of financial affairs should be reviewed to determine the nature of the debtor's business and the extent of its assets and liabilities. The United States Trustee should determine whether the debtor controls or owns at least 20 percent interest of any entity, and, if so, a periodic report as required by Fed. R. Bankr. P. 2015.3 must be filed. The first periodic report must be filed no later than seven days before the first date set for the meeting of creditors under 11 U.S.C. § 341. Potential problems relating to insiders, such as loans or related entity control, should be identified. The attorney disclosure statements filed pursuant to Fed. R. Bankr. P. 2014 and 2016 should be reviewed and any apparent or potential problems regarding disinterestedness, conflicts of interest, or the terms of any retainer agreement noted.

3-2.7 MONITORING BANK ACCOUNTS

United States Trustees should establish procedures to ensure that all trustees and debtors comply with all requirements of 11 U.S.C. § 345 to safeguard estate funds from loss. *See* Manual Volume 7.

3-2.8 REVIEW OF INITIAL PLEADINGS

The chapter 11 debtor frequently files a variety of pleadings either with the petition or shortly after the case is commenced. These pleadings often request an expedited hearing, affording interested parties little notice or opportunity for review. Such a request may be appropriate and interim relief for a limited period may be necessary in order to guarantee the debtor's uninterrupted operations. The United States Trustee should seek to ensure that parties in interest are provided the best notice possible in these circumstances and are not precluded from raising and litigating these issues at a later date. The United States Trustee should be familiar with local rules, administrative orders and specific procedures for the filing, noticing, and hearing of initial requests for relief. Often these procedures embody specific guidance on the content and handling of such motions.

Initial requests typically include applications to employ attorneys, accountants, and other professionals, applications regarding payments to officers and

employees, applications for cash collateral, applications for financing, and applications to allow payments to pre-petition creditors. Administrative requests typically include applications to jointly administer or procedurally consolidate two or more cases and applications to continue cash management systems.

3-2.8.1 Bankruptcy Rule 6003; Relief that Cannot be Granted within 21 Days

Bankruptcy Rule 6003 provides that three enumerated types of relief cannot be granted within 21 days after the filing of the petition, except to the extent that relief is necessary to avoid immediate and irreparable harm. This rule was designed to prevent creditors from being prejudiced to creditors by actions taken in the first days of a case, before a creditors' committee has been formed and before important parties in interest are informed about the filing of the case and have had time to react to it. As a result, the United States Trustee should object when relief is sought contrary to Rule 6003.

The three types of relief that are not to be granted within 21 days of the filing of the petition are:

1. retention of professionals;

2. the use, sale, lease or incurrence of an obligation of property of the estate, including payment of part or all of a pre-petition claim; and,

3. the assumption or assignment of an executory contract or unexpired lease.

The rule does not prevent rejection of executory contracts or unexpired leases. The rule provides no guidance as to whether such motions should be granted once the 21 days has expired. Other principles of bankruptcy law guide the court in those decisions. Rule 6003 does not prohibit filing first-day motions as to various matters described in the rule; rather, it only prohibits the court from granting the relief until after 21 days has passed.

The Committee Note indicates that the language "except to the extent that relief is necessary to avoid immediate and irreparable harm" was taken from Rules 4001(b)(2) and (c)(3) governing the use of cash collateral and financing orders. Decisions under those rules provide guidance on how a court should interpret this provision. When a claim is made that an emergency requires relief on matters covered by Rule 6003, the United States Trustee should ensure that the relief is necessary and argue for the narrowest form of relief possible during the 21-day period to avoid the harm. For example, relief could be requested on an interim basis, with the final hearing to take place after the 21-day period.

3-2.8.2 Employment of Professionals

Applications to employ professionals, typically attorneys and financial advisors, are often presented for court approval shortly after a case is filed. 11 U.S.C.

§ 1107(a) and 327. As stated above, these applications should not be granted during the first 21 days of the case. Fed. R. Bankr. P. 6003. The employment applications, at a minimum, must specify the name of the professional to be employed; the reason for selection; the services to be performed; the proposed compensation terms; and the professional's connections with the debtor, creditors, any other party in interest, their respective attorneys and accountants, the United States Trustee, or any person employed by the Office of the United States Trustee. Fed. R. Bankr. P. 2014(a). The application must be accompanied by a verified statement of the person to be employed setting forth the connections with the parties listed above. Fed. R. Bankr. P. 2014(a).

The United States Trustee should examine the application and verified statement, as well as the disclosures required by Fed. R. Bankr. P. 2016 and question 9 of the statement of financial affairs, which relates to contact with and payments to attorneys, to determine whether the applicant is precluded from employment by virtue of the Bankruptcy Code or applicable ethical rules. Any concerns should be addressed at the first opportunity.

In appropriate cases, the United States Trustee also may wish to initiate or participate in a fee-budgeting process for professionals. If the court is amenable, appointment orders may be drafted to provide that fees may not exceed a specific amount absent further court order.

See below at Manual 3-7 and 3-8 for further discussion of issues regarding the employment and compensation of professionals.

3-2.8.3 Employment of Other Professionals

Debtors may seek to employ a range of other professionals. Several issues warrant United States Trustee examination.

3-2.8.3.1 Classification as a Professional

There may be an issue as to whether the person to be employed is a professional and thus subject to the employment and compensation requirements of the Bankruptcy Code. If the persons to be employed will be actively involved in case administration, the United States Trustee should assert that they are professionals. *See, e.g.*, *In re North Star Management, LP*, 308 B.R. 906, 911 (8th Cir BAP 2004); *In re Bartley Lindsay Co.*, 120 B.R. 507 (Bankr. D. Minn. 1990), *aff'd*, 137 B.R. 305 (D. Minn. 1991) (management consultant is a professional); *In re Grimes*, 115 B.R. 639 (Bankr. D.S.D. 1990) (farm consultant denied compensation and required to disgorge amounts paid); *In re WFDR, Inc.*, 22 B.R. 266 (Bankr. N.D. Ga. 1982) (management consultant denied compensation when employment not approved). *See also U.S. ex rel. Kraft v. Aetna Cas. and Sur. Co.*, 43 B.R. 119 (M.D. Tenn. 1984) (appraiser); *In re Neidig Corp.*, 117 B.R. 625 (Bankr. D. Colo. 1990) (operator of radio station was a professional person – the operator provided specialized services and acted with

relatively unfettered autonomy and discretion); and *In re Providence Television Ltd. Partnership*, 113 B.R. 446 (Bankr. N.D. Ill. 1990) (media broker). If a business regularly has employed a professional person on salary, that person may be compensated and may be retained or replaced without court approval if the employment is necessary to the operation of the business. *See* 11 U.S.C. § 327(b); *Park Terrace v. Wilds*, 852 F.2d 1019 1022-23 (7th Cir. 1988).

United States Trustees should comply with the *Jay Alix Protocol*, which allows for the retention of a crisis manager under 11 U.S.C. § 363, rather than 327. *See* Manual 3-8.1.1.

3-2.8.3.2 Duties and Compensation

If other professionals are to be employed by the debtor, the United States Trustee should request a specific delineation of duties and, where appropriate, an automatically executing termination date. To ensure no duplication of services, all professionals should be required to keep detailed time records documenting their services. Monthly or total caps on compensation also may be advisable. When the person or firm to be employed is essentially performing the functions of management, the United States Trustee should oppose any compensation package that exceeds those typical in the industry. The United States Trustee should ensure that all professionals are aware of the requirements of the Bankruptcy Code regarding compensation and reimbursement of expenses. See 11 U.S.C. § 330 and 331. *See* Manual 3.8.1 *et seq*.

3-2.8.4 Limitation on Executive Compensation

The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. 109-8, 119 Stat. 23 (Apr. 20, 2005) (BAPCPA) amended the Bankruptcy Code to add new section 11 U.S.C. § 503(c), which restricts the allowance and payment of administrative expenses to a debtor's officers, managers, and consultants. The addition of section 503(c) to the Code was spurred by public concern that excessive compensation, particularly bonus compensation, was being paid to management of chapter 11 debtors in possession. In drafting the BAPCPA, Congress sought to limit a debtor's use of a particular bonus program known as a "key employee retention program" (KERP) in chapter 11 cases – a plan that paid bonuses to management for remaining in the employ of the debtor.

In contrast to prior practice when KERP and similar programs generally were approved under a relaxed "business judgment" standard, section 503(c) establishes a series of objective restrictions on the persons who may receive the benefit of a KERP or severance benefits, places a cap on the amount of certain payments, and, in the case of retention bonuses, establishes a stringent test that must be satisfied before the debtor can make payments to its insiders. United States Trustees must raise appropriate objections to ensure compliance with these provisions.

Section 503(c) significantly alters pre-BAPCPA management compensation practices. Subsection (c)(1) restricts "transfer[s] made to, or obligation[s] incurred for the benefit of, an insider of the debtor." Subsection (c)(2) addresses "severance payment[s] to an insider of the debtor." Subsection (c)(3) applies to "transfers or obligations [other than those referenced in subsections (c)(1) and (c)(2)] that are outside the ordinary course of business and not justified by the facts and circumstances of the case." In light of these significant alterations to the Bankruptcy Code, the United States Trustee should closely scrutinize any request for approval of bonus, severance or compensation plans, or employment agreements to determine whether such request complies with the new limitations set forth in the Bankruptcy Code.

3-2.8.4.1 Informational Deficiencies

Motions filed by debtors in possession seeking authority to make payments or incur obligations under section 503(c) often may raise more questions than they answer. Occasionally, debtors in possession will file motions seeking approval of executive compensation or severance plans with nothing more than a "broad brush" overview of the plan that omits critical information necessary to evaluate the plan's merits, such as who is covered by the plan, whether the covered persons are "insiders," the performance criteria for receiving a bonus, and the specific amounts proposed to be paid to each employee. The proposed plans may seek to pay amounts to "insiders" which, upon initial review, appear to be excessive. In addition, prior to bankruptcy filings, debtors may make questionable retention payments or incur questionable severance obligations to insiders. The review of these payments or transfers often will require the United States Trustee to engage in formal or informal discovery to elicit sufficient information to properly evaluate the merits of the proposed payments. To evaluate the debtor's proposal, the United States Trustee may elect to request a range of documents, such as spreadsheets detailing performance versus projections on a quarterly basis, board of directors meeting minutes, board compensation committee minutes, historical compensation and salary information and compensation expert reports.

3-2.8.4.2 Transfers to Insiders

Given that sections 503(c)(1) and (2) restrict debtors in possession from making certain payments and incurring certain obligations to "insiders," some debtors in possession may propose a narrow construction of the term "insider" to avoid the limitations set forth in subsections (c)(1) and (2). The term "insider" is defined in 11 U.S.C. § 101(31). If the debtor is a corporation, the term "insider" includes, among other entities, a "director," an "officer," a "person in control" and a "managing agent" of the debtor. The United States Trustee should be generally aware that the term "insider" may include management employees other than "by-law" officers, depending on the facts of a particular case. A person performing the functions of an officer may be found to be an "insider" even though the person was not formally appointed as a corporate officer pursuant to the by-laws. *See*

Official Committee of Unsecured Creditors v. ABC Capital Markets Group (In re Capital Metals Co., Inc.), 228 B.R. 724, 727 (B.A.P. 9th Cir. 1998) (the person who functioned as the Chief Financial Officer was the Chief Financial Officer, even without a corporate resolution to that effect).

In cases that involve pre-petition transfers to insiders, 11 U.S.C. § 548(a)(1)(B)(ii)(IV) was added to clarify that transfers to or for the benefit of insiders under employment contracts outside of the ordinary course of business are avoidable as fraudulent transfers provided that the statutory elements are satisfied.

3-2.8.4.3 Disguised Retention Plans

The United States Trustee must closely scrutinize proposed bonus plans to determine whether such plans have a retentive purpose. Debtors will frequently seek approval of compensation plans that are designated incentive plans but in reality are veiled retention plans. These plans generally take two forms:

1. Debtors in possession may frame events along the time line of a chapter 11 case as benchmarks or payment "triggers" under an "incentive program." *See In re Dana Corp.*, 351 B.R. 96, 102 (Bankr. S.D.N.Y. 2006) ("Completion Bonus" that was payable upon the debtors' emergence from bankruptcy protection was an impermissible "retention bonus" under section 503(c)(1)); and

2. Debtors in possession may attempt to evade application of the restrictive statutory standard by setting benchmarks or payment "triggers" at a level such that meeting the benchmarks is not an achievement. (Essentially, all that an employee has to do to collect the incentive payment is to be employed at the end of the relevant measuring period.) The case law that has developed under section 503(c)(1) suggests that, for a debtor to avoid running afoul of section 503(c)(1)'s restriction on retention pay, the debtor must demonstrate that its bonus plan is tied to significant hurdles that are difficult to achieve. *See In re Dana Corp*., 358 B.R. 567, 582 (Bankr. S.D.N.Y. 2006) (court found that benchmarks for the debtors' long-term incentive plan "are difficult targets to reach and are clearly no 'lay-ups'"). United States Trustees should carefully review proposed incentive programs to determine whether the benchmarks or payment triggers are true hurdles as opposed to a *fait accompli*.

3-2.8.4.4 Severance Plans

All proposed severance payments made to "insiders" are governed by section 503(c)(2). The United States Trustee must be vigilant in reviewing all severance programs, employment contracts, and first-day wage motions to evaluate whether a request for severance payable to insiders contained in any of the above violates section 503(c)(2). Moreover, United States Trustees should strongly oppose any attempts to circumvent section 503(c)(2) through the inclusion of an improper term in a chapter 11 plan. *See In re AMR Corp.*, 497 B.R. 690, 696-99 (Bankr. S.D.N.Y. 2013) (sustaining objection of United States

Trustee and refusing to approve $19.8 million severance payment to departing chief executive officer based upon a finding that the debtors could not circumvent section 503(c)(2) through a chapter 11 plan).

Compliance with section 503(c)(2) requires that the court find the existence of a severance program generally applicable to all full-time employees, and find that the amount of any payments to the person designated as an "insider" is not greater than 10 times the amount of severance pay given to non-management employees during the calendar year in which the payment is made. Severance payments to "insiders" are limited based upon the mean severance pay given to non-management employees during the calendar year in which the payment is made. The precise amount of the severance benefit is contingent upon the calendar year in which the severance payment is made and the amount of severance pay given to non-management employees during the calendar year in which the payment is made. Accordingly, assuming that the proposed severance payment to an insider is "part of a program that is generally applicable to all full-time employees," the calculation of the benefit must wait until the termination event so the calculation can be completed. The language in the plan or order approving the severance payment should mirror the text of section 503(b)(2)(B).

3-2.8.4.5 Other Compensation outside the Ordinary Course of Business

Section 503(c) serves as an additional restriction on a court's ability to approve certain transfers and obligations as administrative expenses. Section 503(c)(3) applies to compensation and bonus payments made outside the ordinary course of business to which subsections (c)(1) and (2) are not applicable. Section 503(c)(3) states that "notwithstanding subsection (b), there shall neither be allowed nor paid . . . other transfers or obligations that are outside the ordinary course of business and not justified by the facts and circumstances of the case including transfers made to, or obligations incurred for the benefit of, officers, managers, or consultants hired after the date of the filing of the petition." It should be noted that section 503(c)(3) applies to transfers by way of compensation to all employees of the debtor, whether insiders or not. Section 503(c)(3) is not properly read to apply only to officers, managers, or consultants hired after the filing of the case. It applies only to transfers made or obligations "incurred outside of the ordinary course of business." If, therefore, a debtor had a standing severance plan applicable to all employees, non-insider employee severance payments would not be subject to section 503(c)(3).

If section 503(c)(3) is applicable, the transfer or obligation must be "justified by the facts and circumstances of the case." The evaluation of whether a transfer or obligation is prohibited under section 503(c)(3) involves the making of specific factual findings by the court related to the justification for the proposed plan or agreement. Approval of any such compensation plan requires specific findings by the court that such plan is justified by the facts and circumstances of the case. In making its determination, the court should evaluate the debtor's historical compensation practices, the work performed by the individual, the proposed

metrics under the plan, and compensation practices of other similarly situated companies. The court's determinations should not rest solely on the exercise of the debtor's business judgment, or lack thereof, in making the transfer or incurring the obligation at issue; the appropriate exercise of that judgment may not be sufficient justification for the transfer or obligation. *See GT Advanced Technologies Inc. v. Harrington,* 2015 WL 4459502, at *7 (D.N.H. July 21, 2015) ("§ 503(c)(3) directs courts to give plans such as the KERP in this case more scrutiny than is required by the § 363(b)(1) business judgment test"); *see also In re Pilgrim's Pride Corp.,* 401 B.R. 229, 237 (Bankr.N.D .Tex. 2009) ("Section 503(c)(3) is intended to give the judge a greater role: even if a good business reason can be articulated for a transaction, the court must still determine that the proposed transfer or obligation is justified in the case before it"); *but see In re Global Home Prods., LLC,* 369 B.R. 778, 783 (Bankr. D. Del. 2007) ("If the proposed plans are intended to incentivize management, the analysis utilizes the more liberal business judgment review under § 363").

3-2.8.5 Cash Collateral Use and Financing Orders

Motions addressing the use of cash collateral and other financing issues frequently are heard by the court within the first week after a petition is filed. These motions can have a substantial impact on the interests of unsecured creditors. It is virtually impossible, however, to form a creditors' committee prior to the interim hearings on these motions. The United States Trustee should raise and attempt to preserve issues that will likely be of concern to a committee once it is formed. Specifically, the United States Trustee should:

1. determine whether the transaction properly is characterized as use of cash collateral as opposed to post-petition financing;
2. insist on adequate notice and opportunity for interested parties to be heard;
3. alert the court to substantive issues that should be preserved until interested parties are able to be heard; and
4. where necessary, take substantive positions to prevent overreaching.

To avoid the high standard for paying bonuses to executives during bankruptcy, some debtors have paid significant bonuses to executives shortly before filing bankruptcy. These payments may be avoidable under section 548 of the Bankruptcy Code, which could provide some recovery to general unsecured creditors if the committee is granted derivative standing to pursue claims that only a debtor in possession or trustee may assert but which the debtor in possession is unlikely to assert. But debtors often seek authorization to grant liens over avoidance actions as interim relief before a committee is formed. The United States Trustee should object to this request to preserve the cause of action.

3-2.8.5.1 Cash Collateral Versus Post-Petition Financing

Like the use of cash collateral, post-petition borrowing provides a source of operating funds to a debtor in possession. Post-petition financing, however, involves the infusion of new money into the estate, while cash collateral is defined in the Bankruptcy Code as "cash . . . or other cash equivalents" in which the estate has an interest but which is subject to a security interest. 11 U.S.C. § 363(a). While the distinction between the two seems straightforward, in practice it can blur, particularly where the entity providing the post-petition financing is an existing secured creditor. It is important to distinguish between cash collateral use and obtaining new financing in a proposed financing order since they have very different consequences for the bankruptcy estate.

Section 363 deals with the use of cash collateral, while 11 U.S.C. § 364 addresses obtaining new credit. Under section 363, the court can order that cash collateral be used, over a creditor's objection, so long as the debtor provides "adequate protection," as defined in 11 U.S.C. § 361. By contrast, since a potential lender cannot be ordered to extend funds, section 364 affords "an escalating series of inducements that the debtor in possession may offer while attempting to obtain credit for use in the reorganization." *In re Photo Promotion Assocs., Inc.*, 87 B.R. 835, 839 (Bankr. S.D.N.Y. 1988) (providing overview of provisions of 11 U.S.C. § 364), *aff'd*, 881 F.2d 6 (2d Cir. 1989). Among the inducements of section 364 are super-priority status (giving priority over 11 U.S.C. § 503(b) and 507(b) administrative expenses); granting a lien on unencumbered property or a junior lien on encumbered property; and granting a priming lien. 11 U.S.C. § 364(c) and (d). *See also In re Defenders Drug Stores, Inc.*, 145 B.R. 312, 316-18 (B.A.P. 9th Cir. 1992) (upholding payment of enhancement fee under section 364); *In re Southern Soya Corp.*, 251 B.R. 302 (Bankr. D.S.C. 2000). Section 364(e) also provides a "safe harbor" on appeal, assuring lenders that even if the authorization to obtain credit under section 364 is reversed or modified on appeal, the validity of the debt to a good faith lender, as well as any priority or lien granted to secure the debt, is not affected.

Because of the enhanced protections available for post-petition financing, creditors often attempt to characterize their financing arrangement as post-petition financing. For example, a typical situation might involve a pre-petition lender who has a lien on inventory to secure the debt. The debtor may agree to pay down the secured interest from the sale of the inventory in exchange for the lender extending "new credit" that is secured by a lien on the debtor in possession's post-petition inventory. Functionally, this arrangement is indistinguishable from an agreement to use cash collateral with adequate protection in the form of a lien on post-petition assets. However, if the transaction is characterized as post-petition financing rather than the use of cash collateral, the lender may be entitled to a super-priority, as well as the "safe harbor" on appeal. The parties' characterization of the arrangement should not end the inquiry regarding the actual nature of the relationship. For a more complete discussion of this issue,

see Warfield, *Is It Use of Cash Collateral or Post-Petition Borrowing: How Much Protection Does the Creditor Deserve*, 94 Commercial L. J. 369 (1989).

3-2.8.5.2 Notice and Hearing Requirements

In addition to determining whether the motion is for use of cash collateral or for post-petition financing, the United States Trustee must consider whether the appropriate parties have received adequate notice of the proceedings. Local bankruptcy court rules or procedures may address notice and hearing requirements, including requirements that certain provisions of an order are highlighted to the court. The United States Trustee should ensure that the local rules are followed.

1. General Requirements

The rules governing the scope and timing of notice for cash collateral motions, Fed. R. Bankr. P. 4001(b), and post-petition financing motions, Fed. R. Bankr. P. 4001(c), are virtually identical. Both require at least 14 days notice to any appointed or elected committees or their authorized agents, or, if there is no committee, to the 20 largest unsecured creditors, and to such other entities as the court may direct. The United States Trustee also must receive notice. Fed. R. Bankr. P. 9034. The only difference is that for cash collateral motions, the entity with an interest in the cash collateral also must be served.

Where there has been agreement to use cash collateral or where the debtor and a secured creditor have agreed to the creation of new liens to facilitate post-petition financing, the Code does not require a hearing. Instead, there must be notice of the motion and a 14-day period for the served parties to object (Fed. R. Bankr. P. 4001(d)(1), (2), and (3)). If no objection is filed, the court can approve or disapprove the agreement without conducting a hearing. If there is objection and the court determines that a hearing is appropriate, then a hearing may be held with no less than seven days notice to the appropriate parties. Fed. R. Bankr. P. 4001(d)(3).

2. Interim Relief

If requested, the court can conduct a preliminary hearing with less than 14 days' notice, but it may only authorize the use of that amount of cash collateral or credit as is necessary "to avoid immediate and irreparable harm" to the estate pending a final, adequately noticed hearing. Fed. R. Bankr. P. 4001(b)(2) and 4001(c)(2); *see also* In re Colad Group, Inc., 324 B.R. 208, 218 (Bankr. W.D.N.Y. 2005) (rejecting financing agreement where the "order failed to reflect any effort to limit the conditions of credit only to those which would be absolutely necessary to avoid immediate and irreparable harm"). Occasionally a debtor, arguing exigent circumstances, will seek approval of a financing order on the day the case is filed. The question then becomes whether it is necessary to conduct a hearing at all and how much, if any, notice is required.

Under sections 363 and 364, the court can issue an interim order only "after notice and a hearing." However, 11 U.S.C. § 102(1), which defines the phrase "after notice and a hearing," provides that there need not be an actual hearing if there is notice and if "there is insufficient time for a hearing to be commenced before such act must be done, and the court authorizes such act." The section also states that notice means "such notice as is appropriate in the particular circumstances."

In *In re Blumer*, 66 B.R. 109, 113-14 (9th Cir. BAP 1986), *aff'd*, 826 F.2d 1069 (9th Cir. 1987), the court held that, whether or not a hearing takes place, notice is always required. The court noted that while the Bankruptcy Code permits shortened notice "as is appropriate in the particular circumstances," it does not permit dispensing with notice altogether, as is expressly allowed for relief from stay requests or motions to prohibit or condition the use, sale, or lease of property in Fed. R. Bankr. P. 4001. *See also In re Monarch Circuit Industries, Inc.*, 41 B.R. 859, 861 (Bankr. E.D. Pa. 1984).

In *Blumer*, the court held that notice is not only a statutory requirement, but also is dictated by the due process clause of the Fifth Amendment. Relying on Supreme Court holdings that the bankruptcy power is subject to the Fifth Amendment, *United States v. Security Indus. Bank*, 459 U.S. 70, 75 (1982), and that the right to due process before property is taken is meaningless without notice, *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950), the court concluded that the United States Constitution requires at least some notice before a court can order even interim relief on a cash collateral or financing motion.

The amount of notice required will depend on the circumstances. In *Blumer*, the court noted "in an emergency situation, telephonic notice may suffice." 66 B.R. at 113; *In re Ellingsen Maclean Oil Co.*, 65 B.R. 358 (W.D. Mich. 1986), *aff'd*, 834 F.2d 599 (6th Cir 1987). *But see In re Center Wholesale, Inc.*, 759 F.2d 1440 (9th Cir. 1985) (holding that one day's notice was inadequate in light of the facts and circumstances present). The determination of whether a hearing is necessary and what constitutes adequate notice – whether or not there is a hearing – is a matter of balancing the asserted need for emergency relief against the necessity of preserving the due process rights of the parties involved.

3. Notice Issues

The United States Trustee should review the proof of service to determine whether notice of cash collateral and financing motions is appropriate. Any deficiencies should be brought to the court's attention.

A proposed interim order may fail to specify that a final hearing will be held or that appropriate parties will have an opportunity to object. A final hearing, or at least an opportunity to object, is always required even when all parties received appropriate notice of the interim hearing. At the interim hearing, the United States Trustee should ensure that the order approving financing or use of cash

collateral is not final and that appropriate notice of a final hearing is served in accordance with the Federal Rules of Bankruptcy Procedure.

4. Scheduling of the Final Hearing

Although Fed. R. Bankr. P. 4001(b) and (c) establish a 14-day requirement before a final hearing can be held, this is a minimum rather than a maximum time for holding the hearing. In many cases, the creditors' committee will have been recently appointed. To assure that the unsecured creditors are able to participate, the United States Trustee should request that the final hearing not be set until after the duly appointed unsecured creditors' committee has had an opportunity to review the terms of the proposed cash collateral or financing order.

In the alternative, the United States Trustee may request that the unsecured creditors' committee, when appointed, be permitted to request reconsideration within a reasonable time of court rulings on such issues as super-priorities, cross-collateralization, and the validity of the secured creditors' liens. Such an arrangement also would provide the committee an opportunity to express its viewpoint.

3-2.8.5.3 United States Trustee's Role on Substantive Issues

1. Overview

The United States Trustee is principally concerned with preserving the right of the unsecured creditors to review and comment on the early financing motions that can have a substantial impact on the future conduct of the case. Assuring adequate notice and the opportunity for creditors' committee input before a final ruling are essential in this regard, but these generic concerns may not be enough to convince the court to burden the debtor with the delay that such considerations may necessitate. Thus, whenever possible, the United States Trustee should highlight those specific issues that are likely to raise concerns for unsecured creditors at the interim hearing, thereby bolstering the argument for preserving the creditors' opportunity for review. Once the interested parties have responded, the United States Trustee generally should refrain from asserting positions.

The situation is more complex when, in a given case, it is apparent that it will not be possible to appoint a committee and no creditors are actively involved in the case. In such circumstances, the United States Trustee must determine whether the terms of the financing arrangement raise concerns significant enough to justify taking a substantive position.

2. Relevant Substantive Issues

A. Review by the United States Trustee to Prevent Overreaching

In reviewing whether the substantive provisions of a proposed financing order are objectionable, the United States Trustee should focus on the effect that the order will have on the general creditor body. This usually involves balancing the benefit to the estate from obtaining the financing against the detriment to the

creditor body of providing special benefits to a particular creditor. This is inherent in the requirement established in sections 364(c) and (d)(1)(A) that the trustee must be unable to obtain the credit otherwise.

The need for financing may be so desperate that the debtor in possession will agree to almost any terms the creditor demands, which can lead to overreaching by the creditor. *See e.g.*, *In re Tenney Village Co.*, 104 B.R. 562 (Bankr. D.N.H. 1989). In *Tenney* the debtor agreed to a provision waiving pre-petition fraudulent conveyance and preference claims against a secured creditor, as well as to automatic relief from stay upon "termination events," cross-collateralization, limitations on compensation of debtor's counsel, and the right to designate the debtor's counsel and Chief Executive Officer. The court determined that such sweeping concessions evidenced a breach of the debtor's fiduciary duty to the estate, as well as overreaching by the secured creditor.

While it is difficult to establish a formula for determining when a particular arrangement constitutes overreaching, the following discussion of considerations related to various substantive provisions should provide some guidance.

B. Adequate Protection – Cash Payments

Many interim cash collateral and financing orders contain some provision for adequately protecting the secured creditor by making "a cash payment or periodic cash payments" under 361(1). The United States Trustee should consider whether a cash payment is even appropriate. Is the creditor under-secured? If so, the creditor is not entitled to interest payments. Some courts have held that where a creditor is over-secured, the equity cushion is sufficient protection. The United States Trustee may want to argue that any payment should be provisional pending a determination of the value of the collateral.

The United States Trustee should also consider whether the proposed amount is appropriate in light of the debtor's ability to pay based on the projections of operations during the interim period. It may be appropriate to request that the debtor and secured creditor be required to present evidence on these issues. If the evidence indicates that the size of the payments will inhibit the debtor's ability to operate, the United States Trustee should consider objecting.

C. Cross-Collateralization

The most contentious issue in many financing orders is whether an existing creditor can, post-petition, secure its existing debt with additional security. The United States Trustee should be concerned when a pre-petition creditor who is under-secured attempts to "bootstrap" its status by acquiring liens on either unencumbered assets or post-petition assets, such as avoidance actions, to secure its pre-petition debt. Because this increased security would come at the expense of other unsecured creditors, it is unlikely to be in the best interests of the general creditor body.

Some courts have taken the position that cross-collateralization is impermissible. *In re Saybrook Mfg. Co.*, 963 F.2d 1490 (11th Cir. 1992); *In re Monach Circuit Indus., Inc.*, 41 B.R. 859 (Bankr. E.D. Pa. 1984) (cross-collateralization constitutes an illegal preference); *cf. In re Ellingsen MacLean Oil Co.*, 834 F.2d 599, 601 (6th Cir. 1987), *cert. denied*, 448 U.S. 817 (1988) (section 364 priority appears limited to newly incurred debt).

However, the majority view seems to find cross-collateralization provisions acceptable under certain limited circumstances. In *In re Vanguard Diversified, Inc.*, 31 B.R. 364, 366 (Bankr. E.D.N.Y. 1983), the court established a four-part test that has met with general acceptance:

1. the business will not survive without the financing;
2. the debtor cannot obtain alternate financing on acceptable terms;
3. the lender will not accept less favorable terms; and
4. the proposed financing is in the best interest of the general creditors.

See also In re Adams Apple, Inc., 829 F.2d 1484, 1490 (9th Cir. 1987) (cross-collateralization may provide only means of saving debtor); *In re Mid-State Raceway, Inc.*, 323 B.R. 40 (Bankr. N.D.N.Y. 2005); *In re Ames Dept. Stores, Inc.*, 115 B.R. 34, 39-40 (Bankr. S.D.N.Y. 1990) (where debtor demonstrated that unsecured financing was unavailable, cross-collateralization was permitted).

Even among courts that accept cross-collateralization, it is a disfavored means of financing. *See Vanguard Diversified*, 31 B.R. at 366 (cross-collateralization is a disfavored means of financing and is to be authorized only after hearing with notice to creditors). It is important to ensure that creditors have adequate notice and opportunity to object to the financing order. At a minimum, the United States Trustee should emphasize the disfavored status of such financing provisions and seek to have the court apply the four-part test set forth in *Vanguard*.

D. Super-Priority Provisions

The granting of "super-priority" status pursuant to 11 U.S.C. § 364(c)(1), which gives the unsecured creditor priority over most other administrative expenses, raises many of the same concerns as cross-collateralization. Accordingly, it is appropriate to consider the *Vanguard* factors in determining whether super-priorities should be approved.

It may be consistent with the interests of the general creditor body to consider carving out certain classes of claims from a grant of super-priority status. For example, provisions should be made for the payment of fees for debtor's counsel and for counsel to the creditors' committee. If a financing order is entered before any official committees are appointed, the United States Trustee should object to any carve-out for professional fees that does not include fees for

committee professionals. If these professionals cannot be paid, the interests of general unsecured creditors and other parties in interest may go unrepresented.

Under 11 U.S.C. § 1129(a) (12), the United States Trustee's quarterly fees must be paid on or before the effective date of any plan as a condition of confirmation. The United States Trustee should insist that a carve-out be provided for quarterly fees from any super-priorities or liens. If the case converts to chapter 7, the United States Trustee's quarterly fees and chapter 7 administrative expenses take priority over chapter 11 administrative expenses. 11 U.S.C. § 726(b). *In re Endy*, 104 F.3d 1154, 1157 (9th Cir. 1997); *In re Juhl Enterprises*, 921 F.2d 800, 803 (8th Cir. 1990).

E. Validation of Pre-Petition Liens and Waiver of Claims

Other provisions that frequently appear in proposed financing orders are the validation of pre-petition liens and the waiver of claims against a pre-petition creditor. The United States Trustee should argue that such provisions should become effective only after other parties in interest have been provided with notice and an opportunity to object. This is consistent with the policy of preserving issues for the creditors' review and would obviate due process concerns.

F. Priming of Liens

The interim order may provide for priming the new lender's liens over existing liens. 11 U.S.C. § 364(d). It is particularly important to ensure that junior lienholders receive adequate notice of such priming. The junior lienholders are in the best position to address the issue of whether they are adequately protected.

G. Roll-Ups

Because of their dire need for funding to continue operations and pay expenses related to the chapter 11 filing, potential post-petition lenders are able to exact broad concessions from debtors in possession that often are injurious to efforts to reorganize and compromise provisions of the Bankruptcy Code. In larger chapter 11 cases, a secured lender at times may seek to convert the entirety of its prepetition claim into post-petition debt protected by a super priority claim and priming liens. This is referred to as a "roll-up." Most simply, a roll-up involves the payment of prepetition debt with proceeds from a post-petition loan. *In re Capmark Financial Group, Inc.,* 438 B.R. 471, 511 (Bankr. D. Del. 2010).

In the motion for interim and final post-petition financing under 11 U.S.C. § 364, there may be a provision that seeks to permit the debtor in possession to borrow money that not only will fund post-petition operations but will be used to fully repay all prepetition claims owed to the secured lender either at once or over time. In this way, the lender's prepetition secured claim is fully converted to post-petition debt and enjoys the post-petition protections of 11 U.S.C. § 364(c) and/or (d) as well as the terms of the DIP order. *Id. at 511.*

Some bankruptcy courts have local rules or procedures that require a debtor to highlight the existence of a roll-up provision in its post-petition borrowing motion and forbid the inclusion of such provision in an interim request for relief. *See* LBR 4001-2(a)(7) (Bankr. S.D. N.Y. August 1, 2013); LBR 4001-2(a)(i)(E) (Bankr. D. Del. February 1, 2014). The United States Trustee should verify that any motion for relief under 11 U.S.C. § 364 follows applicable local rules in this regard.

The United States Trustee should object to any attempt to achieve a roll-up through an interim order for financing under 11 U.S.C. § 364 and preserve all rights to object to the roll-up when the final hearing is conducted. Also, the United States Trustee should ensure that parties in interest, including the official committee of unsecured creditors, retain the right to review and object to the validity and priority of any prepetition debt that is ultimately paid off through post-petition borrowing.

H. Default Provisions with Automatic Remedies

The United States Trustee should carefully review any provision in a proposed financing order that purports to grant an automatic remedy in the event of default. For example, a requirement that the case be automatically dismissed or converted to chapter 7, without the notice required under Fed. R. Bankr. P. 2002(a)(4), is not appropriate. Likewise, relief from stay should not be permitted without notice as required by Fed. R. Bankr. P. 4001(a). *See In re Tenney Village Co.*, 104 B.R. 562, 569 (Bankr. D.N.H. 1989) (finding that agreement to provisions containing automatic remedies may constitute a breach of the debtor's fiduciary duties). Similarly, a provision that all terms of a financing order will be binding on any subsequently appointed trustee may impair a chapter 7 Trustee's administration of the estate.

I. Conclusion

The primary role of the United States Trustee with respect to interim cash collateral and financing orders is to ensure that creditors have an opportunity to review the issues and present their views to the court. The United States Trustee should raise objections if adequate notice is not given and should attempt to preserve as many issues as possible until a creditors' committee is in a position to participate.

It will, at times, be appropriate for the United States Trustee to take steps to preserve issues so that others are not later prevented from objecting to interim orders. On occasion, the United States Trustee may be called upon to take a position on the substance of a cash collateral or financing order. In these circumstances, the guiding concern should be what is in the best interests of the estate. *See generally* Stripp, *Balancing of Interests in Orders Authorizing the Use of Cash Collateral in Chapter 11*, 21 Seton Hall L. Rev. 562 (1991).

3-2.8.6 Early Payments to Pre-Petition Creditors

One of the matters that frequently arises immediately after the filing of a case is a request by the debtor to pay certain pre-petition creditors. The debtor often seeks authority to pay these creditors on an emergency basis with shortened notice to a limited number of creditors. The nature of the requests vary from payment of employee wages to payment of unsecured supplier creditors. Most requests are accompanied by a representation that the payments are essential for the continued existence and/or viability of the debtor's business. While payment to unsecured creditors may seemingly be beyond the scope of the provisions of the Bankruptcy Code, several courts authorize such payments by invoking the necessity of payment doctrine.

3-2.8.6.1 Background of the Doctrine of Necessity

The doctrine of necessity is an equitable principle that evolved originally from two related common law rules applied in railroad reorganizations – i.e., the necessity of payment rule and the six-month rule. *See* Eisenberg & Gecker, *The Doctrine of Necessity and Its Parameters*, 73 Marq. L. Rev. 1, 2-5 (1989). The necessity of payment rule allows a court to authorize the payment of certain pre-existing claims, if such payments are essential to the railroad's continued existence. *See In re Boston and Maine Corp.*, 634 F.2d 1359 (1st Cir. 1980), *cert. denied*, 450 U.S. 982 (1981); *In re Ionosphere Clubs, Inc.*, 98 B.R. 174 (Bankr. S.D.N.Y. 1989). The six-month rule authorizes administrative expense priority treatment to creditors supplying services and goods to railroads within the six- month period prior to case filing. *In re B&W Enters., Inc.*, 713 F.2d 534, 536 (9th Cir. 1983) (six month rule now codified at 11 U.S.C. § 1171(d)).

In the chapter 11 reorganization field, the doctrine of necessity is now used in non-railroad cases, though its use is generally restricted to instances where the payments of pre-petition claims are essential and necessary to the debtor's continued existence. Compare *In re EqualNet Comm'ns Corp.*, 258 B.R. 368 (Bankr. S.D. Tex. 2000) (permitting payments to customers with billing credits arising from pre-petition billing and service errors) with *In re Zenus is Jewelry, Inc.*, 378 B.R. 432, 433-34 (Bankr. D.N.H. 2007) (denying critical vendor motion in light of alternative feasible vendor sources).

The doctrine of necessity attempts to reconcile two otherwise opposing objectives of chapter 11– i.e., the reorganization of business entities (with attendant creditor recoveries and job preservation) vis–a-vis the equal treatment of creditors. *In re United American, Inc.*, 327 B.R. 776, 782 (Bankr. E.D. Va. 2005). The pre-confirmation payment of select creditors violates the equal treatment principle. *Id.* Thus, some courts have refused to apply the doctrine on the grounds that payments would constitute preferential treatment over similarly classified creditors, and that the equitable powers granted to the bankruptcy court under section 105 confer the court with the power to override the Bankruptcy Code's priority scheme. *In re Kmart Corp.*, 359 F.3d 866 (7th Cir. 2004) (stating that

the doctrine of necessity is just a fancy name for power to depart from the Bankruptcy Code, and holding that section 105 does not grant bankruptcy court the power to override the Code's rules regarding priority and distribution).

Bankruptcy courts have recognized that the doctrine of necessity "should only be invoked in extraordinary circumstances and it is a device to be used only in rare cases." *Zenus*, 378 B.R. at 433 (internal quotes omitted). In recent years, reported decisions have focused on setting standards governing critical vendor motions. See *Kmart*, 359 F.3d at 873 (the debtor must show that disfavored creditors will be as well off with reorganization as with liquidation, and that favored creditors would have ceased providing goods and services if their old debts were left unpaid during the pendency of pre-petition litigation; and *In re United American, Inc.*, 327 B.R. 776, 782 (Bankr. E.D. Va. 2005) (the vendor must be necessary for the debtor's successful reorganization, the payment must be in the debtors' sound business judgment, and payment of the critical vendor must not prejudice other unsecured creditors).

Federal Rule of Bankruptcy Procedure 6003, which became effective in 2007, also regulates requests for the early payment of pre-petition creditors. The rule provides, in relevant part, that "except to the extent that relief is necessary to avoid immediate and irreparable harm, the court shall not, within 21 days after the filing of the petition, grant relief regarding – (b) a motion to incur an obligation regarding property of the estate, including a motion to pay all or part of a claim that arose before the filing of the petition." Fed. R. Bankr. P. 6003(b). The rule is intended to prevent the court from rendering pivotal rulings without complete consideration and to provide all parties in interest with a meaningful opportunity to be heard. Debtors seeking the entry of a critical vendor order within the first 21 days of the case must comply with Rule 6003(b).

3-2.8.6.2 Statutory References

1. 11 U.S.C. § 105(a)

The statute most frequently cited to support application of the doctrine of necessity is 11 U.S.C. § 105(a), which empowers a bankruptcy court to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title." The courts invoking section 105(a) for this purpose rationalize that since the fundamental purpose of chapter 11 is to allow a debtor to reorganize, section 105 may be used to avert the consequences of a failed reorganization that may result if the payment to pre-petition creditors is not allowed. *See, e.g.*, *In re Ionosphere Clubs, Inc.*, 98 B.R. 174, 175-177 (Bankr. S.D.N.Y. 1989). Some courts have reasoned that section 105(a) must be used in conjunction with another provision of the Code (e.g., section 363 or 507) that at least impliedly authorizes critical vendor payments. *In re CEI Roofing, Inc.*, 315 B.R. 50, 59 (Bankr. N.D. Tex. 2004).

Courts refusing to apply section 105(a) rely upon limitations imposed by concepts of the Bankruptcy Code. These courts usually rule that pre-petition creditor

payments upset the priority scheme of section 507 and/or the principle, embodied in 11 U.S.C. § 1122-1129, that similarly situated creditors be similarly treated. *See, e.g.*, *Official Comm. of Equity Sec. Holders v. Mabey*, 832 F.2d 299, 302 (4th Cir. 1987), *cert. denied*, 485 U.S. 962 (1988) (clear language of Bankruptcy Code and Rules does not authorize payment or advance of monies to or for the benefit of unsecured creditors prior to approval of plan). Courts using section 105(a) counter that sections 507 and 1122-1129 are not inflexible, and that the latter statutes apply only in the plan confirmation context. *See, e.g.*, *In re Chateaugay Corp.*, 80 B.R. 279, 287 (S.D.N.Y. 1987) (rigid application of section 507 would be inconsistent with fundamental purpose of reorganization, which is to permit the debtor's survival and payment to creditors).

2. 11 U.S.C. § 363

Some courts cite 11 U.S.C. § 363(b) or 363(c)(1), which permit the debtor to use property of the estate in the operation of the business, as a basis for application of the doctrine of necessity. By viewing the debtor's application to pay certain pre-petition claims as a request for authority to expend funds outside of the ordinary course of business pursuant to section 363, some early courts have required that the debtor articulate a sound business reason for the decision to do so. *See, e.g.*, *In re Ionosphere Clubs, Inc.*, 98 B.R. at 175-176. To the extent a critical vendor order is desired within 21 days of the commencement of the case, the invocation of section 363 as the basis for a critical vendor motion is governed by Rule 6003. *See infra*.

3. 11 U.S.C. § 507

Courts may approve payments to pre-petition creditors on the theory that 11 U.S.C. § 507(a), which defines administrative expenses, provides priority status to the requested payments. *See In re Structurlite Plastics Corp.*, 86 B.R. 922, 933 (Bankr. S.D. Ohio 1988). While section 507 does not authorize immediate payment of priority claims, these courts apparently rationalize that the claims will ultimately be paid in full and that no one is harmed by early payment. *See also* section 503(b)(9) (granting administrative expense priority for the value of goods received by the debtor within 20 days before the commencement of the case when the goods have been sold to the debtor in the ordinary course of the debtor's business).

3-2.8.6.3 Types of Requests

1. Employees (Non-Management)

The most common use of the doctrine of necessity concerns pre-petition employee payroll and benefits claims. Typical requests include seeking authorization to pay pre-petition payroll and work benefits and to reimburse employee expenses. These types of requests are often granted, particularly if the payments requested fall within the section 507(a) priority parameters. *See* Eisenberg & Gecker, *supra*, at 12-15; *see also In re The Colad Group*, 324 B.R.

208, 214 (Bankr. W.D.N.Y. 2005) (granting first-day order for payment of pre-petition wages and benefits not to exceed priority limits of sections 507(a)(3) and (a)(4); and *CEI Roofing*, 315 B.R. at 60 (granting authority for debtors to pay, prior to plan confirmation, pre-petition employee wage claims, to the extent that such individual claims qualify as priority wage claims under section 503(a)(3).

An issue may arise, however, as to whether payments must be made to all creditors within a specific priority classification. *See In re Chateaugay Corp.*, 80 B.R. 279 (S.D.N.Y. 1987) (debtor that received authorization to pay employee and workers' compensation claims was not required to pay workers' compensation claims in all states); *In re Ionosphere Clubs, Inc.*, 98 B.R. 174 (Bankr. S.D.N.Y. 1989) (debtor that received authorization to pay pre-petition claims of active employees was not required to pay claims of non-active striking employees whose claims enjoyed same priority status).

Some debtors request authorization for payment of terminated employee wages and benefits on the grounds that nonpayment of these claims would adversely affect current employee morale and/or the public image of the debtor. *See, e.g.*, *In re Structurlite Plastics Corp.*, 86 B.R. at 924.

2. Management

Requests for authorization to pay pre-petition wages sometimes include requests to pay management salaries, expenses, or benefits. Occasionally, authorization for payments to pre-petition creditors is sought on the ground that payment of these creditors will allow management to focus its attention on the debtor's reorganization. Payments to creditors to whom management may be personally liable, such as taxing entities or holders of guaranteed debt, may be requested under this theory. *See, e.g.*, *In re Revco D.S., Inc.*, 91 B.R. 777 (Bankr. N.D. Ohio 1988) (denying request to pay only pre-petition trust fund taxes but no other taxes entitled to section 507(a)(7) priority so that principals could avert threat of personal assessment). Payments of the claims of pre-petition insiders should be evaluated for conformity with section 503(c). *See* Manual 3-2.8.4.

3. Customers

Courts that allow use of the doctrine of necessity generally approve requests that preserve customer good will. The doctrine may be used to authorize payment of warranty claims, return of customer deposits, honoring customer gift certificates, or payment of customer referral commissions. *See EqualNet*, 258 B.R. at 368 (permitting payments to customers with billing credits arising from pre-petition billing and service errors).

4. Suppliers

Some courts authorize payments to critical suppliers or service providers. *See, e.g.*, *Eagle-Picher Indus., Inc.*, 124 B.R. at 1021, 1023 (Bankr. S.D. Ohio 1991) (payments to pre-petition unsecured toolmakers authorized). Payments may be sought for several reasons. The debtor may allege that a creditor will not supply

essential supplies, will go out of business to the debtor's economic detriment, or will ruin the debtor's reputation if the pre-petition debt is not paid. With increasing frequency, the bankruptcy courts are requiring that, in exchange for the payment of their pre-petition claims, the favored suppliers must agree to continue providing goods and services to the debtors for a specified period. *See, e.g.*, *In re CoServ, LLC*, 273 B.R. 487, 500 (Bankr. N.D. Tex. 2002).

5. Foreign Creditors

The doctrine of necessity may be used to justify payments to foreign creditors. Eisenberg & Gecker, *supra* at 16-17. Utilization of the doctrine may avoid expensive legal proceedings and preserve the debtor's image abroad where perceptions of bankruptcy may differ. Application of the doctrine also avoids testing the validity of the automatic stay in other countries and the initiation of self-help or other legal remedies available in the foreign creditor's country.

6. Sales and Use Taxes

Payroll taxes, sales and use taxes collected from the debtor's customers, and other "trust fund" taxes entitled to priority pursuant to section 507(a)(8) may also be the subject of motions made under the doctrine of necessity. The bankruptcy courts have granted such motions on the grounds that the payments are otherwise entitled to priority status. *See Colad*, 324 B.R. at 214.

3-2.8.6.4 United States Trustee's Position on Doctrine of Necessity Requests

The United States Trustee should endeavor to ensure the broadest possible notice of doctrine of necessity requests. The scope and length of the notice urged should generally be evaluated in the context of the case, and should specifically be tailored in light of the time sensitivities involved, the nature and amounts of the payments requested, the costs of notice, and the existence of effective creditor advocates, such as an active creditors' committee. Fed. R. Bankr. P. 4001 and Fed. R. Bankr. P. 6003 offer general guidance on the minimal length of notice appropriate for emergency and non-emergency situations.

The United States Trustee should also endeavor to ensure that debtors fulfill the evidentiary burdens associated with the extraordinary relief requested in first-day motions, particularly Rule 6003. This will help ensure compliance with established precedent, and as applicable, Congressional intent, in this regard. Specifically, the United States Trustee should make sure debtors disclose specific amounts to be paid and identify the recipients. Also, debtors should not receive blanket approval to pick and choose recipients and payment amounts based solely on their discretion. Finally, the United States Trustee should consider requiring debtors to report on all payments made pursuant to doctrine of necessity requests on their post-petition monthly operating reports.

Discretion, however, should be exercised in determining substantive positions on case-specific doctrine of necessity requests. Factors that may suggest decreased scrutiny by the United States Trustee include active creditor participation, the

consent of parties in interest (which may include the creditors' committee and secured creditors whose collateral may be used for the payments), full notice with an adequate objection period, requests involving minimal expenditures in comparison with case size, requests to pay creditors entitled to priority pursuant to section 507 (which are likely to be paid in full in any event), and payments that are obviously essential to the debtor's continued existence. On the other hand, factors that may suggest increased United States Trustee scrutiny include requests favorable to the debtor's management, requests for payments where there is an absence of evidence that the payments are essential, and requests for payments to creditors whose class is not likely to be paid in full through the bankruptcy process.

United States Trustees should also consider the difficulty of evaluating the economic consequences of nonpayment and the probability of uncontroverted testimony from the debtor's management. Unless presented with egregious or obviously overreaching requests, such as when insider or creditor intimidation is indicated, the United States Trustee should rely on pecuniarily-affected parties to challenge doctrine of necessity requests on substantive grounds.

3-2.8.7 Requests for Approval of Responsible Persons

One of the major controversies during the legislative debates leading to the enactment of the Bankruptcy Code in 1978 was how debtors reorganizing under the new chapter 11 would be governed. Some argued that an independent trustee should be appointed in every case involving a public company. Others believed that chapter 11 debtors should generally be permitted to remain in possession and to control their own reorganization destinies. As enacted, the Bankruptcy Code reflected a compromise between these two views. By default, a chapter 11 debtor is a "debtor in possession," 11 U.S.C. § 1101(1), and has virtually all the rights, powers and duties of a trustee. 11 U.S.C. § 1107(a). If, however, the court finds that "cause" exists for the appointment of a trustee, or that such an appointment is in the interests of creditors, equity security holders, and other interests of the estate, the court is directed to order the appointment of a trustee. 11 U.S.C. § 1104(a)(1), (2). *See* Manual 3-6 for a full discussion of chapter 11 trustee appointments.

Nowhere in the Bankruptcy Code does a "responsible person" appear as an alternative to a debtor in possession or chapter 11 trustee. Consequently, United States Trustees should object to motions brought to the bankruptcy court for approval of appointment of a "responsible person." The Bankruptcy Code is conspicuously silent on who has the power to govern a non-individual debtor in possession. For instance, while a corporation can be a debtor under chapter 11, the definition of a "corporation" in 11 U.S.C. § 101(9) provides no hint regarding who controls a corporate debtor in possession. This is by design. With very few exceptions, corporations and other artificial entities are creatures of state statutory law.

Whether a corporate debtor may irrevocably turn its affairs over to a responsible person must therefore be determined under state law. If such a permanent devolution of corporate management authority to an individual is permissible under state law, the bankruptcy court need not be involved in the selection or approval process. Because, however, few if any state statutes permit such a management structure, parties seeking the appointment of a responsible person to ward off a trustee appointment must enlist the aid of the bankruptcy court.

The typical factual scenario is that a company, usually either a corporation or limited liability company, has serious problems and there may be allegations of wrongdoing. Investors and others may have commenced lawsuits against the company and its principals, alleging widespread financial misdeeds and abuse. State and federal securities regulators may have commenced enforcement actions and taken steps to seek the appointment of receivers. Usually as part of the first-day motions, the debtor asks the court to approve the appointment of a named individual as the "responsible person" for the debtor in possession. The responsible person will have all of the rights, powers, and duties of a chapter 11 trustee and will be subject to removal only by court order. United States Trustees should be alert to these situations and should object to such relief, because the Bankruptcy Code only provides for the appointment of a chapter 11 trustee. Pursuant to section 1104(d), if the court orders the appointment of a trustee, then the United States Trustee shall appoint a disinterested person to serve in that capacity.

Parties seeking responsible person appointments advance a variety of practical rationales for why such an appointment is preferable to a trustee appointment: the suggested candidate is above reproach; a responsible person will cost less than a trustee; a trustee appointment would terminate the debtor's exclusivity rights. These concerns are almost always overstated. U.S. Trustees are obligated to consult with parties in interest in selecting persons to appoint as chapter 11 trustee, and creditors may elect a trustee of their choice if they are unhappy with an appointment. 11 U.S.C. § 1104(b). A chapter 11 trustee's compensation must be reasonable, and must be determined under the same standards that govern compensation of professional persons. 11 U.S.C. § 330(a)(3). Although a trustee appointment will terminate the debtor's exclusive right to file a plan, 11 U.S.C. § 1121(c)(1), there is no reason for exclusivity to continue when a responsible person with no prior relationship with the debtor assumes complete control of the debtor's affairs. That person is a trustee in all but name, and the Congressional intent to enable creditors and other parties to file plans to protect their interests upon the appointment of a trustee should not be so easily circumvented.

Chapter 11 governance provisions have remained largely unchanged since the 1986 reform act assigned the trustee appointment duty to United States Trustees. The provisions dealing with the appointment of trustees are not discretionary. If grounds exist for the appointment of a trustee, then a trustee must be appointed, and United States Trustees should not consent otherwise.

See Walter W. Theus, Jr, "*Who's Responsible Here? 'Responsible Persons' in Chapter 11 Cases,"* Am. Bankr. Inst. J., May 2008, at 12 for a more detailed exposition of the arguments and case law that may be cited in support of United States Trustee opposition to the appointment or continuation of a responsible person as a substitute for a trustee.

3-2.8.8 Joint Administration and Substantive Consolidation

Fed. R. Bankr. P. 1015(b) allows the court to order the joint administration of two or more related cases. Joint administration is a procedural device meant to simplify case administration, and affects procedural matters only. *See In re Reider*, 31 F.3d 1102, 1109 (11th Cir. 1994). A joint administration order may be entered if it enables the estates to be administered more efficiently, expeditiously, and/or with less cost. It allows hearings, pleadings, notices, or other matters involving several distinct cases to be combined. *See Unsecured Creditors Comm. v. Leavit Structural Tubing Co.*, 55 B.R. 710, 712 (N.D.Ill. 1985), *aff'd*, 796 F.2d 477 (7th Cir. 1986). One of the most common advantages of joint administration is the procedural combination of the estates with a single docket number. This facilitates the filing of proofs of claims, the combining of notices to creditors of different estates, the joint handling of administrative matters, and calendaring.

Joint administration must be distinguished from substantive consolidation of cases. Unlike joint administration, substantive consolidation is an "extreme and unusual remedy" that results in asset and liability pooling and may substantially affect the rights of creditors. *See In re Pacific Lumber Co.*, 584 F.3d 229, 249 (5th Cir. 2009); *In re Owens Corning*, 419 F.3d 195 (3d Cir. 2005), *cert. denied* 547 U.S. 1123 (2006). The United States Trustee should oppose substantive consolidation if it is requested on limited or shortened notice. *See, e.g.*, *In re Auto Train Corp.*, 810 F.2d 270, 278 (D.C. Cir. 1987) (consolidation motion required reasonable notice and opportunity for hearing). Complete and appropriate notice of any such request should be provided to all creditors. In certain situations, United States Trustees may consider opposing substantive consolidation on substantive grounds, particularly where the movant has failed to meet the controlling legal standard in a given jurisdiction and when the request is used to circumvent other Bankruptcy Code provisions (including any restrictions on the representation of multiple estates by a single professional firm).

3-2.8.9 Small Business Chapter 11 Cases

Chapter 11 contains a number of provisions applicable only to small business debtors. *See* Manual 3-14 for a discussion of those provisions.

CHAPTER 3-3: INITIAL DEBTOR INTERVIEWS, OPERATING GUIDELINES, AND MONTHLY OPERATING REPORTS

3-3.1 INITIAL DEBTOR INTERVIEWS (IDIs)

Immediately following the entry of an order for relief, the United States Trustee should schedule an initial debtor interview (IDI) with the principals of the debtor and debtor's counsel. Section 1116 of the Bankruptcy Code specifically provides that debtors in small business cases, through their senior management and counsel, shall attend IDIs. *See* Manual 3-14.5 below concerning initial case requirements for small business debtors in chapter 11 cases.

The general purpose of the IDI is two-fold:

1. to provide the United States Trustee with vital information so that an early assessment can be made of the accuracy of the debtor's schedules and statements and of the debtor's financial ability to confirm a plan; and

2. to ensure that the debtor is aware of its new fiduciary obligations and of the United States Trustee's role in the administration of chapter 11 cases.

Generally speaking, IDIs should be conducted at the United States Trustee's office. However, the United States Trustee may sometimes choose to conduct an IDI at the debtor's place of business when it might help the United States Trustee understand the debtor's operations and chances for reorganization. Under section 1121(7), a small business debtor is required to allow a United States Trustee representative to inspect the debtor's premises after reasonable prior notice.

3-3.1.1 Procedure for Setting Up the IDI

The United States Trustee should advise the debtor's principals and debtor's counsel, in writing, that an IDI has been set at a tentative date and time. Reasonable effort should be made to accommodate the various individuals' schedules. While a personal meeting is preferable, factors such as the small size or lack of complexity of a case, as well as the resources available in the local office, may warrant alternative arrangements. For example, a telephone conference with the debtor can be conducted. Regardless of the method employed, it is vital that contact with representatives of the debtor be promptly initiated and that the IDI be held before the section 341 meeting.

Before the IDI, the United States Trustee should make a written request for certain financial and other information pertaining to the debtor's business or affairs. The request can vary depending on the nature or size of the business. Typically, financial statements, pre-petition bank statements and cancelled checks, federal tax returns, material lawsuits, and executory contracts should be requested. In small business cases, debtors are required to file their most recent balance sheet, statement of operations, cash flow statement, and federal income

tax return with the court or a statement that those documents do not exist. 11 U.S.C. § 1116(1). The debtor should also be asked to provide documentation such as proof of a debtor in possession account and evidence of insurance to ensure the case is in administrative compliance. Regardless of the debtor's complete compliance, the IDI should proceed. The debtor's failure to timely provide information or to attend the IDI constitutes cause for dismissal or conversion of the case to chapter 7. 11 U.S.C. § 1112(b)(4)(H).

Because of restrictions covering contact between attorneys and represented clients, the United States Trustee should inquire from debtor's counsel whether United States Trustee staff may communicate directly with the debtor or its employees regarding administrative matters such as insurance coverage, bank account information, monthly operating reports, quarterly fees, and post-confirmation reporting. Any approval for direct communication should be in writing.

3-3.1.2 United States Trustee's Initial Assessment of the Case

The primary focus of the IDI is to gather key financial and background information on the debtor's business, focusing on the past, the present, and the future. The debtor should be encouraged to provide a historical background of the business, its principals, and its products or services. Key customers, primary creditors, major contracts, and significant lawsuits, if any, should be identified and discussed. The immediate and underlying reason(s) for the filing of the chapter 11 bankruptcy case should be fully addressed. The debtor and debtor's counsel should be asked to identify the immediate hurdles that must be overcome to stabilize the business. Questions about how the debtor plans to proceed through chapter 11 and, ultimately, resolve the case, including a tentative timetable, should be raised.

The United States Trustee may also discuss the debtor's accounting controls. The debtor's schedules and statements should be reviewed carefully with the debtor and debtor's counsel to identify any inconsistencies or omissions based upon the information disclosed during the IDI.

The United States Trustee should also consider and inquire about, in appropriate cases, whether the debtor is a health care business under 11 U.S.C. § 101(27A) or a small business debtor under 11 U.S.C. § 101(51C)-(51D). The United States Trustee should also inquire, as appropriate, about whether the debtor has a retirement plan for its employees and the status of that retirement plan, and whether the debtor is considering selling or leasing personally identifiable information about individuals to persons not affiliated with the debtor. 11 U.S.C. § 363(b)(1).

If the debtor is an individual, the United States Trustee should ascertain whether the debtor received a briefing from an approved nonprofit budget and credit counseling agency pursuant to 11 U.S.C. § 109(h) before filing the case, is subject

to a domestic support obligation, and filed the Form 22B, Statement of Current Monthly Income.

The United States Trustee should also inform the debtor about the requirement to file, seven days before the first date set for the section 341 meeting, a Report of Financial Information on Entities in Which a Chapter 11 Estate Holds a Controlling or Substantial Interest for any entity in which the debtor controls or owns at least a 20 percent interest. Fed. R. Bankr. P. 2015.3. The report must be submitted on Official Form B26 (12/08).

At the conclusion of the IDI, the United States Trustee should make an initial assessment of the accuracy of the debtor's schedules and statements, whether financial reorganization is a viable option for this debtor, and what case management tools and alternatives should be considered given the circumstances of the case. The key information gathered at the IDI and the initial assessment should be set forth in a written report so that it can be more readily used by the United States Trustee case attorney for reference during the section 341 meeting and for general case management purposes.

3-3.1.3 Familiarizing the Debtor with its New Fiduciary Obligations

At the IDI, the United States Trustee should set forth the statutory duties and obligations of a debtor in possession. The debtor's representatives should be provided with a copy of the United States Trustee Program's chapter 11 operating guidelines and monthly report forms, which should be explained and discussed. The procedures for calculating and paying the quarterly fee assessed pursuant to 28 U.S.C. § 1930(a)(6) should be explained. The United States Trustee should ensure that the debtor has closed its former bank accounts and established separate debtor in possession bank accounts. The debtor should be required to provide proof that appropriate insurance coverage is being maintained. The United States Trustee should inform the debtor that it may not, without court authority:

1. use, sell, or lease property of the estate outside the ordinary course of business (section 363(b));
2. use cash collateral without consent from the creditor with an interest in the cash collateral (section 363(c)(2); or
3. incur secured debt (section 364).

The role of the United States Trustee in the administration of chapter 11 cases should be explained to the debtor. The debtor should be advised that the United States Trustee will take appropriate measures to protect creditors' interests and be advised of the circumstances under which the United States Trustee will take such action.

Information and commitments regarding either compliance matters or document requests that are obtained from the debtor's representatives at the IDI should be

documented and retained in the case file. A specific time frame within which any outstanding deficiencies or issues will be resolved should be established before the conclusion of the IDI. The debtor's failure to adhere to any such agreement should result in prompt action by the United States Trustee.

3-3.2 OPERATING GUIDELINES

The operating guidelines for chapter 11 debtors are an important facet of the United States Trustee's efforts to monitor the administration of chapter 11 cases. They address the subject areas discussed in the following subsections.

3-3.2.1 General Provisions

The debtor should be advised of its obligation to comply with the Bankruptcy Code, the Federal Rules of Bankruptcy Procedure, local rules, and any court order, and that post-petition debts must remain current and pre-petition unsecured debts may not be paid, unless otherwise ordered by the court. The debtor should be instructed to close its books and records as of the date of filing and to open new post-petition books and records. Finally, the debtor should be advised of the consequences of failing to comply with the operating guidelines and reporting requirements. The United States Trustee should explain to the debtor how to determine the amount of fees owed to the United States Trustee for each quarter the debtor is in chapter 11 and where the debtor should send each payment.

3-3.2.2 Bank Accounts

The operating guidelines contain a requirement that the debtor close its pre-petition bank accounts and open new debtor in possession accounts. Absent court authorization, the accounts may be maintained only in depositories that agree to post a bond or pledge securities for all deposits not insured or guaranteed by the United States or by a department, agency, or instrumentality of the United States, or backed by the full faith and credit of the United States. 11 U.S.C. § 345(b). The debtor should establish a separate general account for the purpose of paying bills incurred during the administration of the case. The debtor should, where appropriate, also establish a separate tax trust account so that it may escrow the necessary funds for the payment of post-petition taxes including, for example, payroll and sales or excise taxes, when such liabilities are incurred.

The debtor may also be required to establish separate accounts for such items as payroll and payments to secured creditors. Savings accounts and certificates of deposit may be maintained as well, pursuant to the statutory obligation to obtain a safe, yet reasonable, return on estate funds for the benefit of creditors. *See* 11 U.S.C. § 345(a).

3-3.2.3 Insurance

A debtor must maintain appropriate insurance coverage, and documentation regarding the existence of the coverage must be provided to the United States Trustee as early in the case as possible.

The dollar amount of the insurance coverage must be sufficient to cover the fair market value of the estate's property. Information about the fair market value of the property can be derived from such sources as the testimony of the debtor's principal, the schedules and statement of financial affairs, and appraisals prepared in connection with financing or valuation hearings.

The extent of coverage must be adequate, given the circumstances of the case. Depending on the case, the debtor may be required to maintain all or a combination of fire and extended liability insurance, general liability insurance, worker's compensation and unemployment insurance, employee health insurance (especially if pursuant to a collective bargaining agreement or retirement plan; *see* 11 U.S.C. § 1113 and 1114), malpractice insurance, product liability insurance, and liquor or dramshop insurance. The debtor should instruct its insurance companies and agents to include the Office of the United States Trustee as a notice party on any insurance policies so that the United States Trustee receives prior notification regarding any change, cancellation, or expiration of a debtor's insurance policy. A debtor should also be required to provide separate notice to the United States Trustee regarding any change in insurance coverage.

3-3.3 FINANCIAL REPORTS

The debtor in possession should file operating reports each month throughout the pendency of the case. The timely filing of reports of operations is crucial to the efficient administration of chapter 11 cases. These reports are designed to provide the United States Trustee, the court, creditors, and other parties in interest with reliable information regarding the current status of a case. The United States Trustee should use the information contained in the reports to identify cases lacking a realistic prospect of reorganization and to evaluate the feasibility of a proposed plan of reorganization.

The United States Trustee retains the discretion to waive or modify the reporting requirements. The rationale underlying any such decision, however, should be documented in writing and maintained in the file. Moreover, this discretion should be exercised sparingly, given the importance of timely and accurate financial information in the reorganization process, as well as the need to avoid the appearance that a debtor is receiving disparate treatment. The debtor's obligation to file monthly operating reports ends when a case is converted or dismissed. Post-confirmation, the United States Trustee should require submission and filing of reports pursuant to 11 U.S.C. § 1106(a)(7). *See* Manual 3-9.7.

3-3.3.1 Small Business Cases

Chapter 11 debtors designated as small businesses have a separate form Monthly Operating Report. This form should be required by the United States Trustee in all small business cases. Additional information about the small business debtor's ongoing financial condition should be required only as made necessary by the particular circumstances of the case.

3-3.3.2 Other Cases

Different reporting formats may be used for different types of cases. For example, the operating report form used for a case involving an ongoing manufacturing concern may be different from the form more suitable for use in a real estate case. Generally, the debtor's operating reports should be premised on the accrual basis of accounting. Under this method, revenue is considered earned in the period in which sales are made or services are rendered regardless of when payment is collected, and expenses are considered in the period in which they are incurred regardless of when they are paid.

The operating report form used in a standard business reorganization under chapter 11 should generally encompass the elements described in the following subsections.

3-3.3.3 Cash Receipts and Disbursements Statement

The United States Trustee should require the submission of a schedule of cash receipts and disbursements of the debtor, as well as a separate bank account reconciliation statement for each of its bank accounts, e.g., general account, tax escrow account, and payroll account. The information contained in these statements will reflect whether the debtor's operations are generating a positive cash flow. The information should be analyzed with appropriate consideration given to the seasonality of the debtor's business and any historical information that is relevant.

Aside from the income and other items comprising cash receipts, the schedule of cash receipts and disbursements should contain the debtor's expenditures for inventory, salaries, taxes, and so forth. The United States Trustee can use the information to discover:

1. whether the debtor is making unauthorized payments to professionals;
2. whether the debtor is improperly paying pre-petition debts;
3. whether the debtor has sufficient cash flow to effectively reorganize;
4. whether inordinate payments are being made for travel, entertainment, or other employee benefits; and
5. whether improper payments are being made by the debtor that will hamper its ability to reorganize.

3-3.3.4 Statement of Operations

The debtor should provide a monthly statement of operations (income statement) that indicates whether the debtor is generating sufficient funds to reorganize. The statement of operations form is a comparative statement designed to allow the United States Trustee to review all the information from a particular debtor on one spreadsheet.

A detailed review and analysis of this statement is important, as it provides a different picture of a debtor's operations than does the schedule of cash receipts and disbursements. Many expenses are paid less frequently than on a monthly basis. In addition, there are non-cash accounts (e.g., depreciation and amortization) that do not appear on a cash statement, yet must be taken into account in analyzing the ongoing viability of the debtor. For example, although depreciation is a non-cash item, the debtor will eventually need to buy new machinery and equipment or pay for other capital improvements.

The accrual income statement is also important since it indicates the cost of goods sold. This requires a beginning inventory figure based upon a physical or perpetual inventory. The beginning inventory figure is critical since it is only after purchases have been added and ending inventory deducted that one arrives at the cost of goods sold. This will determine the debtor's gross profit margin.

3-3.3.5 Balance Sheet

The debtor is required to provide a balance sheet on a monthly basis to allow the United States Trustee to review the debtor's changing assets and debts.

Careful analysis of the balance sheet is required, as it can uncover whether the debtor is making payments on pre-petition debts, whether assets are being dissipated, and whether the debtor is accumulating unpaid post-petition liabilities and uncollected post-petition accounts receivable. If any of these occur, the United States Trustee should take appropriate action.

3-3.3.6 Schedule of Post-Petition Liabilities

The debtor should provide an accounting of the amount of obligations unpaid since the commencement of the case, as well as an aging schedule for these sums. If the total amount of unpaid obligations increases and the amounts owed are becoming further past due, it may indicate a negative cash flow and/or administrative insolvency. However, there will almost always be certain post-petition obligations that have not been paid simply because they have not become due in the ordinary course of business or because their payment is not yet authorized, such as payment of attorney or accountant fees.

3-3.3.7 Post-Petition Taxes Payable (Tax Reconciliation) Statement

The taxes payable or tax reconciliation statement provides a means for monitoring and verifying that a debtor is current with its post-petition tax obligations. Aging information about these obligations should be provided. Close scrutiny of this form is critical and prompt remedial action should be undertaken by the United States Trustee if unpaid post-petition obligations accumulate.

3-3.3.8 Additional Reporting Requirements

In addition to the five standard forms previously discussed, the United States Trustee retains the discretion to request the debtor to submit to the United States Trustee or file with the court additional reports necessary to ensure that a case is properly monitored and administered. Examples include:

1. A list of inventory;
2. A list of employees and their current salaries;
3. Aging statements regarding accounts receivable;
4. A rent roll in a real estate case; and
5. A check register.

CHAPTER 3-4: COMMITTEES

3-4.1 STATUTORY BASIS: 11 U.S.C. § 1102 AND 1103

Section 1102 of the Bankruptcy Code directs and authorizes the United States Trustee to appoint an official unsecured creditors' committee and provides the United States Trustee with the discretion to appoint additional committees, including equity security holders' committees. Each of section 1102's three subsections addresses a specific function of the United States Trustee with regard to committee formation.

In all chapter 11 cases, the United States Trustee **must** endeavor to appoint a committee of creditors holding unsecured claims "as soon as practicable after the order for relief. . . and may appoint additional committees of creditors or of equity security holders as the United States trustee deems appropriate." 11 U.S.C. § 1102(a)(1) (emphasis added). "On request of a party in interest, the court may order the appointment of additional committees . . . if necessary to assure adequate representation of creditors or of equity security holders." 11 U.S.C. § 1102(a)(2). With respect to small business cases, "on request of a party in interest in a case in which the debtor is a small business as defined in section 101(51C)] and for cause, the court may order that a committee of creditors not be appointed." 11 U.S.C. § 1102(a)(3).

It has been held that a court could not use its equitable powers to override the United States Trustee's decision to appoint an additional committee. *In re Caesars Entm't Operating Co., Inc.,* 526 B.R. 265, 269 (Bankr. N.D. Ill. 2015) (*citing In re New Life Fellowship, Inc.,* 202 B.R. 994, 996 (Bankr. W.D. Okla. 1996)).

Section 1102(b)(1) provides that "a committee of creditors . . . shall **ordinarily consist** of the persons, willing to serve, that hold the seven largest claims against the debtor of the kinds represented on such committee . . . ." (emphasis added). The legislative history, as well as the context of the statute itself, makes clear that this is precatory language. H.R. Rep. No. 595, 95th Cong., 1st Sess. 401 (1977).

On request of a party in interest, the court may order the appointment of additional committees or may order a change in an already appointed committee's membership if either is necessary to assure "adequate representation" of creditors or equity security holders. 11 U.S.C. § 1102(a)(2) and (4). The United States Trustee will not appoint a creditors' committee in a small business case unless the court directs such an appointment for cause. 11 U.S.C. § 1102(a)(3) (as amended by the SBRA).

The powers and duties of a creditors' committee are set forth in 11 U.S.C. § 1103(c). As part of those powers and duties, the committee may:

1. review and investigate the acts, conduct, and financial condition of the debtor;
2. consult with the debtor concerning the administration of the case; and
3. participate in the formulation of the plan of reorganization. 11 U.S.C. § 1103.

As part of their obligation to represent creditor interests as a whole, members of a committee have fiduciary obligations. *See Woods v. City Nat'l Bank & Trust Co.*, 312 U.S. 262, 268-269 (1941), *reh'g denied*, 312 U.S. 715 (1941).

Forms exist for use in soliciting creditor interest and forming official committees of unsecured creditors.

3-4.2 THE SOLICITATION OF, AND NOTICE TO, CREDITORS

3-4.2.1 The Solicitation Package

The notice used to solicit creditor interest in serving on a committee will vary slightly based on whether a formation meeting will be held. In large cases (where a large number of creditors may be interested in serving), the United States Trustee will generally appoint a committee after holding a formation meeting. In smaller cases (where fewer creditors may be interested in serving), the United States Trustee will usually appoint a committee without holding a

formation meeting. But the solicitation package for creditors should always include the following:

(1) Notice to creditors regarding the United States Trustee's interest in forming a committee, including a deadline for the creditor to act if it wants to be considered for committee membership. If a formation meeting will be held, the package should include notice of where and when the meeting will be held. If a committee will be formed without a meeting, the solicitation letter should state the deadline for returning the completed package.

(2) A questionnaire seeking information about the creditor, its claim, and its connections with the debtor. The questionnaire should elicit enough information so that the United States Trustee can evaluate a creditor's eligibility to serve and can appoint a committee that adequately represents the unsecured creditor constituencies in the case, such as trade creditors and unsecured bondholders, for example. In designing the questionnaire, the United States Trustee should consider what information will assist in appointing a representative committee and avoiding appointments of those unsuited or unqualified for service. See discussion below, Composition of the Committee.

(3) An information sheet about the purpose, powers, duties, role, and governance of, and restrictions on, the committee and its members. This information sheet should also include information regarding the committee's employment of professional persons and the prohibition and consequences of trading in the debtor's securities or claims absent an order of the bankruptcy court.

The solicitation package should typically be sent to all creditors on the List of Creditors Holding 20 Largest Unsecured Claims. However, there is no restriction on soliciting unsecured creditors beyond those 20 largest identified by the debtor, and many cases may require solicitation of a larger pool if the United States Trustee has the information to do so. For example, debtors in large cases frequently identify more than 20 creditors, notwithstanding the official form's requirement to identify only 20. Unsolicited creditor applications may also be considered, and the United States Trustee should obtain the information elicited through the questionnaire upon receiving an unsolicited expression of interest to serve on a committee.

The solicitation package should not represent or imply that returning the completed questionnaire results in automatic appointment to the committee. Rather, the form should be clear that the United States Trustee will determine the membership of the committee only after reviewing the information provided.

During the solicitation process the United States Trustee may be contacted by professionals who are interested in representing the committee. The United States Trustee should not ask to receive or accept advertising or promotional material from professionals seeking to be retained by the committee. The United States Trustee should not serve as a conduit for this information to committee

members. It is not the role of the United States Trustee to recommend particular professionals to the committee or its members.

To assist United States Trustees in their statutory duties to appoint and monitor official committees, template forms A through F are available on the Program's Web site.

3-4.2.2 Timing

Because the statute requires appointment "as soon as practicable after the order for relief," the United States Trustee should act as quickly as possible after filing to contact creditors and appoint a committee. This can include phone calls as well as e-mailing, faxing or mailing the solicitation package. Many critical issues arise early in the case, and it is important that a committee be formed as soon as the United States Trustee is reasonably able to do so. In most instances, particularly larger cases, the committee should be formed before the section 341 meeting of creditors. Case circumstances, however, may often require more expedited formation, particularly if significant "first day" (or even "second day") motions will be heard early in the case. Ideally, a committee should be formed within the first 10 to 14 days of a case if there are creditors willing to serve.

3-4.3 SIZE AND COMPOSITION OF THE COMMITTEE

3-4.3.1 Size

Although section 1102(b)(1) suggests a committee should "ordinarily" consist of seven members, it is certainly not a statutory or Program requirement. Rather, a committee of only three members is often adequately representative. Rarely, a large and complex case may warrant a committee with more than seven members, but larger committees can be unwieldy and increase costs to the estate. It is not at all unusual to have committees of three or five members.

3-4.3.2 Composition

When determining the composition of the committee, the relative size of the potential committee members' claims is one factor, but it is certainly not the dispositive factor, as discussed below. Nevertheless, the value of a creditor's claim is a starting point. Appointing only those with the largest claims will not necessarily result in a representative committee, and the statute's "ordinarily" language recognizes the United States Trustee's need for flexibility in the appointment process. Conversely, appointing too many members with relatively small claims may result in an unbalanced committee. Valuing the creditors' claims may be challenging early in the case, particularly if there is a dispute between the debtor and creditor on the claim's value or if the claim results from a complex transaction.

Appointing an adequately representative committee also requires understanding the nature of the creditor constituencies present in a case. Thus, the United States Trustee needs to become familiar with the debtor's financial structure and the various kinds of unsecured claims, such as trade creditors, unsecured bondholders (including different tranches among the bondholders), employees, pension funds, or utilities, for example. In addition, the United States Trustee should consider appointing a small business concern in appropriate circumstances, consistent with section 1102(a)(4).

It is also important to know whether a potential committee member has a potentially disqualifying conflict or status. Thus, in addition to the size and kind of the creditor's claim, the United States Trustee should also determine whether a potential committee member:

- also has an administrative, reclamation, or section 503(b)(9) claim
- is under-secured rather than unsecured, or holds both a secured and unsecured claim
- will be paid as a critical vendor
- has an executory contract, such as a lease, that the debtor has already decided to assume and cure
- is or was an "insider"
- holds equity in the debtor
- is a governmental entity that may not serve or is a governmental entity within the exceptions that may serve in some circumstances (such as PBGC or FDIC)
- is a competitor of the debtor
- has purchased its claim post-petition or has purchased it at a significant discount
- is a potential purchaser of some or all of the debtor's assets
- is a vendor that wants to continue doing business with the debtor
- has an ongoing business relationship with the debtor
- is an indenture trustee or agent of a creditor with authority to act rather than the creditor itself
- has credit insurance or other hedges that limit its exposure and may affect the true holder of the claim
- executed any agreement limiting its ability to act as a fiduciary or to consider more than one plan, such as an inter-creditor or "lock-up" agreement with the debtor
- voted for any plan solicited pre-petition
- intends to trade in claims against the debtor or the debtor's securities

Not all of these are disqualifying per se, and the United States Trustee should request additional information from any creditor who has one or more of these issues before appointing it to a committee.

The Code defines a "creditor" as an entity that holds a "claim," and a "claim" includes a contingent, unliquidated, or disputed claim. 11 U.S.C. § 101(5),

101(10). Accordingly, holders of disputed, unliquidated, and contingent claims may serve on a committee, as may those in litigation with the debtor or even those hostile to reorganization. Any rule otherwise could give the debtor control of committee membership by simply labeling a claim as disputed.

The United States Trustee should then use this information to appoint an adequately representative and properly balanced committee. Most of this information should be sought in the questionnaire, but information can also be obtained at a formation meeting, if one is held, in a telephone call to the creditor, and in consultations with the debtor. *See* § 3-4.4 *infra* (Membership Issues).

The same considerations apply when the United States Trustee appoints committees in cases having multiple, related debtors. Debtors having jointly administered cases may have consolidated financial affairs, the debtors may confront many common issues during the case, and their cases may ultimately be resolved through the confirmation of one, joint chapter 11 plan. Just as such debtors may often be represented by a single law firm, in many instances it may be appropriate to appoint one committee to represent the diverse interests of the unsecured creditors in the various cases. While the United States Trustee may determine that it is appropriate to form one committee in such circumstances, that committee must nonetheless still provide adequate representation of the various kinds of claims that are present in the cases. *See generally*, *In re Enron Corp.*, 279 B.R. 671 (Bankr. S.D.N.Y. 2002), *aff'd sub nom. Mirant Americas Energy Marketing, L.P. v. Official Committee of Unsecured Creditors of Enron Corp.*, No. 02 Civ. 6274, 2003 WL 22327118 (S.D.N.Y. Oct. 10, 2003). Regardless of whether the United States Trustee appoints one or multiple committees in jointly administered cases, care must be taken in reviewing the overall structure of the corporate enterprise, including its debt structure. It may also be necessary to solicit creditors beyond those listed on the debtors' twenty largest creditors list, particularly if that list is filed on a consolidated basis.

3-4.4 MEMBERSHIP ISSUES

3-4.4.1 Unions

Unions are eligible for appointment to creditors' committees. *See In re Altair Airlines, Inc.*, 727 F.2d 88 (3d Cir. 1984); *In re Barney_s Inc.*, 197 B.R. 431 (Bankr. S.D. N.Y, 1996). If the union's entire claim is entitled to priority treatment pursuant to sections 507(a)(3) and (4), however, then the union should not be appointed to the unsecured creditors' committee, as its interest is fundamentally different from that of the general unsecured creditors. *But see In re Plabell Rubber Prods.*, 140 B.R. 179 (Bankr. N.D. Ohio 1992) (United States Trustee ordered under section 105 to add union to committee, where none of the extant members represented a similar claim).

When considering the appointment of labor representatives to the committee, the United States Trustee must consider the impact of any "first day orders" that may permit the debtor in possession to pay pre-petition wages in the ordinary course of the debtor's post-petition operations and that may permit the debtor in possession to honor pre-petition obligations for employee benefits in the ordinary course. In *In re Barney_s, Inc.*, 197 B.R. 431 (Bankr. S.D.N.Y. 1996), a benefit fund representative was appointed. *See* Manual 3-4.41.6 for a discussion of the participation of the Pension Benefit Guarantee Corporation (PBGC) on creditors' committees.

3-4.4.2 Landlords

The claims of landlords for unpaid rent may be substantial in certain cases, such as that of a department store chain. These claims may increase if leases are rejected pursuant to section 365. To the extent the debtor intends to reject a number of its leases in the bankruptcy proceeding, the presence of a landlord will be helpful to the committee in analyzing particular dispositions. If, however, the particular landlord's lease is assumed and all defaults are cured, the landlord is no longer a creditor. The landlord should be informed by the United States Trustee that if the landlord's lease is assumed, the landlord should resign from the committee. This analysis is equally applicable when dealing with franchisers, licensors, and other parties to executory contracts. The United States Trustee may consult with the debtor prior to the committee formation to determine if it has made a determination regarding assumption or rejection of leases.

When analyzing the candidacy of landlords for committee membership, the United States Trustee may wish to consider three distinct types of landlord claims: claims for rent that is actually delinquent as of the petition date; claims for items other than base rent, such as Common Area Maintenance payments or percentage rents, which are actually delinquent as of the petition date; and possible claims of the particular candidate for rejection damages later in the case.

3-4.4.3 Secured Creditors

Fully secured creditors should, of course, not be appointed to a committee of unsecured creditors. *Accord In re America West Airlines*, 142 B.R. 901, 903 (Bankr. D. Ariz. 1992) (United States Trustee acted properly in removing a creditor from the creditors' committee after it extended post-petition financing on terms that effectively secured most of its pre-petition claim. The creditor's motion for reinstatement was denied because the creditor no longer represented an unsecured claim). Creditors holding claims that are only partially secured, however, are eligible. *In re Walat Farms, Inc.*, 64 B.R. 65 (Bankr. E.D. Mich. 1986).

3-4.4.4 Competitors

The fact that a creditor is a competitor of the debtor does not disqualify the creditor from membership on the creditors' committee, but the better part of wisdom may be not to make such an appointment. *In re MAP Int'l., Inc.*, 105 B.R. 5 (Bankr. E.D. Pa. 1989); *In re Plant Specialties, Inc.*, 59 B.R. 1 (Bankr. W.D. La. 1986). But see *In re Wilson Foods Corp.*, 31 B.R. 272 (Bankr. W.D. Okla. 1983). If the debtor expresses concern about such an appointment, the United States Trustee should emphasize the fiduciary obligations of committee members and highlight that information received at committee meetings is generally confidential and may not be used for an individual's pecuniary gain. The party seeking to exclude a creditor from serving on the creditors' committee bears the burden of proving that the creditor's appointment will be detrimental to the debtor's reorganization. *See In re MAP Int'l, Inc.*, 105 B.R. at 6. A violation of this standard of conduct may subject the creditor to sanctions similar to the damages awarded plaintiffs in cases involving violations of the "insider trading" provisions of the securities laws. To guard against this problem, the committee bylaws can allow for particular members to be excluded from certain deliberations.

3-4.4.5 Professionals Formerly Employed by the Debtor

Former counsel to a debtor may be a significant creditor in a case. If such counsel is one of the largest creditors and wishes to serve on the creditors' committee, the United States Trustee should caution counsel concerning certain issues that may arise. For example, the attorney may have information that is subject to the attorney-client privilege. This places the attorney in an awkward position vis-a-vis meeting his or her fiduciary obligation as a member of the creditors' committee. Of course, the debtor may waive the privilege. This same analysis is applicable to accountants, even though no accountant-client privilege exists under federal law.

3-4.4.6 Governmental Units

A governmental unit is generally ineligible to serve on a creditors' committee unless it qualifies as a "person." Only persons are eligible to serve pursuant to section 1102(b)(1), and the term "person" is defined to exclude governmental units, except to the extent that a governmental unit:

1. has acquired an asset from a person as a result of a loan guarantee agreement or as a receiver or liquidating agent of a person;
2. is a guarantor of a pension benefit payable by or on behalf of a debtor or an affiliate of the debtor; or
3. is the legal or beneficial owner of an asset of an employee pension benefit plan that is a governmental plan as defined by the Internal Revenue Code or

an eligible deferred compensation plan as defined in the Internal Revenue Code. 11 U.S.C. § 101(41). *See also Matter of Gates Engineering Co., Inc.*, 104 B.R. 453 (Bankr. D. Del. 1989); *In re Mansfield Tire & Rubber Co.*, 39 B.R. 974 (N.D. Ohio 1983); *In re VTN, Inc.*, 65 B.R. 278 (Bankr. S.D. Fla. 1986); *In re Baldwin-United Corp.*, 38 B.R. 802, 806 (Bankr. S.D. Ohio 1984).

As a practical matter, this exception usually comes into play with regard to the participation of the PBGC on unsecured creditors' committees. The claims of the PBGC and certain analogous state agencies are often of two types. The first is a pre-petition claim for actual underfunding of a benefit plan, i.e., pre-petition arrearages. The second is for termination liability, i.e., the long-term exposure suffered by the PBGC should the benefit plan be terminated in the bankruptcy case. Since this sum represents a long- term stream of payments to a group of beneficiaries, the amount of the claim oftentimes dwarfs other claims against the estate. When analyzing the candidacy of this type of entity, the United States Trustee may wish to consider the probability of plan termination.

Unless there is current underfunding, the debtor in possession may not identify the PBGC as one of the 20 largest unsecured creditors at the commencement of the case. The policy of the United States Trustee Program is that United States Trustees should carefully consider any PBGC request for membership. Further, United States Trustees should not decline to place the PBGC on a committee based upon the debtor's bare assertion that it has no unfunded pension liability and no present intention to terminate an extant plan. The United States Trustees must consult with the Office of the General Counsel (OGC) regarding any PBGC request for membership on the unsecured creditors' committee.

3-4.4.7 Insiders

The claims of insiders are not required to be listed among the 20 largest unsecured creditors (Fed. R. Bankr. P. 1007(d)) because insider claims are generally not representative of the kinds found on the committee. In considering the formation and role of committees, Congress considered the natural tension that exists between the debtor and its creditors, a tension absent if the creditor is an insider. The presence of insiders on the committee would permit the debtor, in effect, to negotiate a plan with itself. *In re Swolsky*, 55 B.R. 144 (Bankr. N.D. Ohio 1985); *In re Glendale Woods Apartments, Ltd.*, 25 B.R. 414 (Bankr. D. Md. 1982). But see *In re Vermont Real Estate Inv. Trust*, 20 B.R. 33 (Bankr. D. Vt. 1982).

3-4.4.8 Contingent, Unliquidated, or Disputed Claims

The mere fact that a creditor holds a claim that is contingent, unliquidated, or disputed does not disqualify the creditor from appointment to the committee. This is clear from the definitions of "claim" and "creditor" set forth in the Code.

11 U.S.C. § 101(5), (10). *See generally In re Barney's, Inc.*, 197 B.R. 431 (Bankr. S.D.N.Y. 1996).

3-4.4.9 Indenture Trustees

The Trust Indenture Act of 1939, 15 U.S.C. § 77aaa-77bbbb, defines an "indenture" as any mortgage, deed of trust, trust, or other indenture under which securities are outstanding or are to be issued, whether or not any property, real or personal, is or is to be pledged, mortgaged, assigned, or conveyed thereunder. 15 U.S.C. § 77ccc (7). The Bankruptcy Code defines an indenture similarly at section 101(28). The indenture defines the relationship between an issuer of securities, often a debtor in bankruptcy, and the indenture trustee, typically a financial institution that has agreed to serve for the equal and ratable benefit of the holders of the securities. In the event of a default by the issuing company under the indenture, the indenture trustee typically undertakes to exercise the rights given it by contract with the same degree of care and skill as a prudent person in the conduct of his or her own affairs. The failure to exercise this degree of care on behalf of the holders can subject the indenture trustee to liability for negligence.

The indenture trustee rarely has a direct claim of any consequence against the debtor at the time the case is commenced, except perhaps for certain expenses incurred incident to its trusteeship. However, given the indenture trustee's potential exposure to liability, the indenture trustee is typically one of the first volunteers to serve on an unsecured creditors' committee. The Bankruptcy Code recognizes that an indenture trustee may often make a substantial contribution to a chapter 11 case. *See* 11 U.S.C. § 503(b)(3)(D) and (b)(5). It may be useful to communicate with the indenture trustee in connection with the committee formation process to determine the amounts outstanding under the given indenture, the relative priority of the debt, whether there is any collateral securing repayment of the issue, and the identity of the beneficial holders of the bonds. Frequently, it will be difficult to penetrate beyond the "street name" holders of record to the real beneficial owners of the securities. If beneficial owners of significant amounts of the outstanding debt can be identified, the participation of the indenture trustee as a voting member of the creditors' committee may not be necessary. The United States Trustee may wish to attempt to place actual holders of the securities on the committee given the precatory language of section 1102(b)(1).

On the other hand, the appointment of an indenture trustee as a voting member may be the only way to assure adequate representation of the public debt holders where large institutional investors cannot be identified or do not exist. (The United States Trustee does not appoint non-voting (*ex officio*) members to a committee.) Accordingly, the policy with respect to the appointment of indenture trustees to unsecured creditors' committees as members cannot be expressed as a *per se* rule, but rather must depend on the circumstances of the case and the need

to include or exclude indenture trustees in order to assure adequate representation. *See In re Value Merchants, Inc.*, 202 B.R. 280, 290 (E.D. Wis. 1990) (district court affirmed bankruptcy court's finding that United States Trustee acted arbitrarily and capriciously in excluding indenture trustees from voting membership on unsecured creditors' committee).

3-4.4.10 Equity Security Holders

In certain cases, large unsecured creditors who also hold stock of the debtor will seek membership on the committee. In this type of situation, the United States Trustee may wish to undertake an analysis akin to that utilized for undersecured creditor candidates and discussed in *In re Walat Farms, Inc.*, 64 B.R. 65 (Bankr. E.D. Mich. 1986). Factors that may be relevant include, but are not limited to, the type of stock held, e.g., preferred or common; voting or non-voting; the size of the shareholding relative to all issued and outstanding shares; the value of the shares; and the length of time held.

3-4.4.11 Priority Reclamation Claims under Section 503(b)(9)

Under section 503(b)(9), an administrative claim priority is given to claims for the value of any goods received by the debtor within 20 days before the date of commencement of a case where goods were sold to a debtor in the ordinary course of business. Such claimants should not be included on the committee of general unsecured creditors.

3-4.4.12 Critical Vendors

Parties who obtain orders and are to be paid as "Critical Vendors" should not be included on the committee of general unsecured creditors. *See* Manual 3-2.8.6. *et seq. supra*.

3-4.5 CONDUCTING A FORMATION MEETING

3-4.5.1 Timing

If a formation meeting will be held, the United States Trustee should generally seek to conduct the meeting within approximately 10 to 14 days after the commencement of the case. However, often, the circumstances of the case require more expedited formation, particularly if significant "first day" motions will be heard early in the case. If the formation meeting notice is served with less than 10 days' notice, then the United States Trustee should consider serving the notice by e-mail or facsimile to the extent practicable. The United States Trustee may request that the debtor's counsel provide e-mail addresses and facsimile numbers for the creditors to be solicited, particularly with "first day" binders.

3-4.5.2 Conducting the Formation Meeting

The formation meeting will be attended by the debtor, its creditors, and various professionals. The debtor should attend to give a short presentation to the creditors. Creditors will attend because they want to serve on the committee, although attendance at the meeting is not required for appointment. Because the committee typically holds its first meeting immediately following the formation meeting, professionals often attend, seeking to represent the committee once appointed.

The representative of the United States Trustee should announce the case and then introduce the United States Trustee personnel and the debtor's representative. Any creditor questionnaires not received before the meeting should be collected. The Program attorney conducting the meeting should explain the role of the United States Trustee and the creditor's committee in the bankruptcy process, including the committee members' fiduciary obligation to the entire unsecured creditor body and the committee's powers and duties set forth in section 1103(c). Creditors should also be reminded that they will not be appointed to the committee absent an agreement not to trade in claims or securities of the debtor without court authorization.

The debtor should then make a short presentation to the creditors regarding the events that led to filing the case and respond to limited inquiries by creditors. This presentation generally covers matters publicly revealed in the early days of the case. This is not an occasion for extensive questioning, and the debtor's representative is not placed under oath.

After the debtor makes its initial presentation, the United States Trustee should meet privately with the individual creditors (and their counsel) seeking appointment to the committee to discuss their particular claims or interests and any other relevant information. The United States Trustee's consultations with individual creditors should be private so that the parties can speak openly without fearing public disclosure of sensitive or confidential information. Such information may be very useful in evaluating the case and ensuring a representative committee. In addition, if the United States Trustee has not already done so, she should consult with the debtor regarding its debt structure and any other information pertinent to appointing a balanced and representative committee.

Although the consultations with individual creditors and the deliberation process should be conducted privately, the United States Trustee should, absent unusual circumstances, allow the public and press to attend the remaining portions of the formation meeting, including her representative's introduction and announcement of committee appointments (discussed below), as well as the debtor's presentation. The United States Trustee's representative should monitor attendance at the formation meeting and may wish to use separate sign-in sheets for creditors and professionals. In addition, recording devices should not be permitted in any part of the formation meeting.

3-4.5.3 Proxies

Creditors seeking committee membership may authorize someone else to appear on their behalf at the formation meeting. Bankruptcy Rule 9010 specifically permits the use of proxies. Fed. R. Bankr. P. 9010.[2] Thus, there is no per se prohibition on a proxy holder appearing at a creditors' committee formation meeting. Anyone appearing for an absent creditor must have a valid proxy granting authority to act on behalf of the absent creditor at the meeting, which the United States Trustee should carefully scrutinize both for the appropriate grant of authority and the extent of that authority. Rule 9010 requires that a proxy be in writing, conform substantially to the appropriate official form, and be acknowledged before a state or federal official authorized to administer oaths. Although a creditor may participate in the committee formation meeting by proxy, the creditor itself is appointed to the committee, not the proxy holder. This is important because the United States Trustee seeks creditor members who will actively participate and not defer to proxy holders or "professional committee sitters."

The circumstances surrounding the proxy's execution and solicitation require further inquiry to ensure the integrity of the committee formation process. Determining the legitimacy of the creditor's and proxy holder's motives is difficult but critical. Sometimes creditors and proxy holders seek to influence the selection of committee counsel or other committee professionals for an undisclosed quid pro quo arrangement. *See generally In re Universal Building Products*, No. 10-12453, 2010 WL 4642046, at *1 (Bankr. D. Del. Nov. 4, 2010). Proxy holders themselves may also seek to be retained by the committee. If the proxy holder seeks to be retained by the committee and its creditor has been selected for committee membership, then the proxy holder should not participate in the interviews of professionals and any retention decisions. *See generally In re ABC Automotive Products Corp.*, 210 B.R. 437 (Bankr. E.D. Pa. 1997).

Accordingly, when presented with a proxy, the United States Trustee should inquire about and determine the following:

(1) the nature and extent of the proxy holder's relationship with the creditor;

(2) whether a proxy holder who is a professional will seek to be retained by the committee;

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[2]Bankruptcy Rule 2006, Solicitation and Voting of Proxies in Chapter 7 Liquidation Cases, does not generally apply in chapter 11 cases. Rule 2006's limits on proxy use and solicitation apply in chapter 11 cases only when the court reviews an official committee consisting of members of a committee organized by creditors before the commencement of the case, Fed. R. Bankr. P. 2007(b)(2), or creditors seek to elect a trustee. Fed. R. Bankr. P. 2007.1(b)(2).

(3) whether the proxy holder has committed to vote for a particular professional's retention by the committee;

(4) whether the proxy was obtained by improper solicitation, including:
   a. whether it was solicited by the proxy holder rather than sought by the creditor;
   b. whether it was solicited for the purpose of being retained as a committee professional; and
   c. if an attorney solicited the proxy, whether the attorney has a prior family, personal, or professional relationship with the creditor;[3]

(5) whether the proxy holder is familiar with the creditor and its claim, and is able to answer any questions about them;

(6) any agreements regarding compensation, retention, or employment between the creditor and proxy holder; and

(7) the creditor's interest in serving and actively participating on the committee.

If it appears that a proxy holder obtained the proxy improperly or for an improper purpose, or that the creditor is not genuinely interested in serving, those facts should be considered in the committee appointment process.

3-4.5.4 Conclusion of the Formation Meeting

After considering the information contained in the questionnaire and gathered at the formation meeting from the debtor and creditors, the Office of the United States Trustee typically announces the creditors being appointed to the committee and concludes the formation meeting. The deliberation process should be conducted privately, following the conclusion of which the United States Trustee's representative should rejoin the formation meeting to publicly announce the appointments. The United States Trustee or Assistant United States Trustee (if specifically authorized by the United States Trustee) must approve all creditor committee appointments before they are announced.

The conclusion of the formation meeting, in turn, can serve as a transition to the first meeting of the committee itself (discussed below). Professionals who hope to be retained by the committee often remain available nearby because the committee may interview professionals during its initial meeting.

[3]United States Trustees should also be aware of applicable ethics rules on attorney solicitation, which can vary by jurisdiction. Many jurisdictions ban attorneys from soliciting prospective clients unless the attorney and prospective client have a prior family, close personal, or professional relationship. *See* Rule 7.3 of the Model Rules of Professional Conduct.

3-4.6 NOTICE OF THE COMMITTEE APPOINTMENT

Regardless of whether a committee is appointed after a formation meeting or after written solicitation and phone calls, the United States Trustee must prepare and file a Notice of Appointment with the bankruptcy court and send a copy to the debtor and each committee member. The notice should include each committee member's name, address, telephone number, facsimile number, and e-mail address, except that an individual creditor should generally be listed by name only.

If a committee cannot be appointed because of a lack of eligible or interested creditors, it may be good practice to file a notice with the court regarding the inability to appoint after the United States Trustee makes that determination. In addition to demonstrating the effort to comply with the statutory duty to appoint, the notice of no appointment may result in previously reluctant creditors agreeing to serve.

3-4.7 INITIAL COMMITTEE MEETING AND COMMITTEE DUTIES, POWER, AND RESTRICTIONS

3-4.7.1 Organization

If a committee is appointed after a formation meeting, the committee usually holds its first meeting immediately thereafter. If a committee is formed by other means, the United States Trustee should consider convening the first meeting by telephone conference. In either event, the United States Trustee needs to discuss with the committee members their need to select a chairperson and adopt committee by-laws or procedural rules for their governance (e.g., quorum, voting, recusal, and claims trading and information sharing restrictions).

3-4.7.2 Powers and Duties

The United States Trustee must also reiterate to the committee members their powers and duties set forth in 11 U.S.C. § 1103(a) and (c), including their fiduciary duties to the entire unsecured creditor body, and the disclosures that must be filed under Federal Rule of Bankruptcy Procedure 2019. The committee has authority to:

- retain attorneys, accountants, and other professionals to represent the committee
- consult with the debtor in possession (or trustee) concerning the administration of the case
- investigate the acts, conduct, assets, liabilities, and financial condition of the debtor
- investigate the operation of the debtor's business and the desirability of the continuance of such business

- investigate any matters relevant to the formulation of a plan
- participate in the formulation of a plan, advise those represented by such committee of such committee's determinations as to any plan formulated, and collect and file with the court acceptances or rejections of a plan
- request the appointment of a trustee or examiner

In addition, the committee may perform such other services as are in the interest of those represented, which may include:

- reviewing and possibly objecting to any applications for administrative expense, including but not limited to professional fees
- negotiating executive compensation issues
- negotiating bid procedures in a proposed sale of substantially all the assets of the estate
- acquiring the right to pursue avoidance and other chapter 5 claims or other claims on behalf of the estate
- investigating the bona fides of pre-petition secured debt

Effective December 1, 2011, some, but not all, of revised Bankruptcy Rule 2019 applies to official committees. Fed. R. Bankr. P. 2019. Rule 2019, as amended, requires each member of an official committee to file a verified statement disclosing its name, its address, and the nature and amount of each "disclosable economic interest" held in relation to the debtor on the date the committee was formed. If information previously disclosed materially changes, the committee must file a verified supplemental statement updating the earlier information when taking a position before the court or soliciting votes on a plan.

Further guidance concerning amended Rule 2019 and its application to other groups is located in section 3-4.16.

3-4.7.3 Restrictions on Trading

In addition to whatever duties may be imposed on a creditor engaging in trading activities under applicable federal and state law, the United States Trustee must ensure that a creditor engaging in trading activity is not appointed to the committee without securing from the creditor its agreement not to trade while on the committee (unless the creditor obtains court approval for such trading). The United States Trustee must ensure that the committee members can and will fulfill their fiduciary duties to the unsecured creditor body. Committee members should be advised that they will likely have access to material, non-public information ("inside information") about the debtor, and any transactions they or their businesses engage in during the case related to the debtor may raise allegations of a breach of fiduciary duty or at least an appearance of improper conduct.[4] Accordingly, committee members must agree prior to accepting a

[4]These concerns about the sharing of a debtor's confidential information also suggest caution when a debtor's competitor seeks committee membership. Nevertheless, the creditor's status as a competitor is not, *per se*, disqualifying.

position on the committee that they will not engage in trading activities absent bankruptcy court authorization. Absent court approval of a trade or transfer, this trading prohibition applies so long as the creditor remains a member of the committee. The United States Trustee may also require certifications of claim holdings by committee members (described in the following section of this manual).

Sometimes a committee member, or the committee itself, may file a "blocking motion" or other motion that permits some trading in the debtor's claims or securities. Blocking motions typically establish specific screening walls or blocking procedures to prohibit a committee member's trading personnel from contacting the member's personnel who serve on the committee. If such an order is entered, the order's procedures should be specific, but it should not insulate the creditor from liability for any breach of fiduciary duty simply because of compliance with the blocking order's procedures.

3-4.8 CERTIFICATIONS OF CLAIMS HELD

The United States Trustee may require committee members to agree to provide certifications with respect to the claims that they hold. In addition to an initial certification regarding claims, the United States Trustee may require each committee member to certify quarterly all its claims against, or interests in, the debtor. The certification requirement seeks, among other things, to ensure that a committee member remains a creditor of the debtor and that the creditor is not using material non-public information obtained through committee membership for personal gain. Creditors who fail to satisfy such requirements may be removed from the committee. If the United States Trustee requires quarterly certifications, they should be provided until the earlier of (1) the effective date of a confirmed plan, (2) dismissal, (3) conversion, (4) the members' resignation from the committee, or (5) disbandment of the committee.[5]

Irrespective of whether an ongoing quarterly certification procedure is used, the United States Trustee may also require that committee members notify the United States Trustee immediately (the same day) in writing of any material changes in the amount of total debt owned or managed by the committee member. The written notice may specify the amount of debt involved and the reason for the change (for example, a transfer of claim, or consummation of any type of credit protection transaction). Upon receipt, the United States Trustee may evaluate the information to determine whether the trade or assignment of the claim violates a

[5]Even after the committee ceases to exist or the creditor resigns, the creditor might nonetheless continue to face restrictions on trading under applicable state or federal law, based on its possession of inside information.

trading order or the committee by-laws or sufficiently reduces the creditor's interest in the case, any of which may require removal from the committee.

3-4.9 PRE-PETITION COMMITTEES

Creditors may form a committee prior to the commencement of a case. If such a committee was fairly chosen and is representative of the various kinds of claims presented, the United States Trustee must give strong consideration to appointing the members of the pre-petition committee to the committee of unsecured creditors in the case. 11 U.S.C. § 1102(b)(1). The standards for determining whether a pre-petition committee was fairly chosen are set forth in Fed. R. Bankr. P. 2007(b) and require consideration of additional factors including:

1. whether a meeting was called;
2. who called the meeting;
3. who was invited to the meeting;
4. what creditors were told regarding the purpose of the meeting;
5. who attended the meeting;
6. what transpired at the meeting;
7. who expressed a desire to serve on the creditors_ committee; and
8. who was selected and why.

As a practical matter, the "safe harbor" provisions of Fed. R. Bankr. P. 2007(b) are so difficult for the creditors to satisfy – and for the United States Trustee to verify – that it is appropriate for the United States Trustee to schedule a formation meeting following the standard procedures and to invite the pre-petition committee members to declare themselves as candidates. Care should be exercised to ensure that creditors who did not participate on the pre-petition *ad hoc* committee are not dissuaded from becoming candidates for the official committee.

The information set out above should be supplied to the United States Trustee in affidavit form by member(s) of the pre-petition committee. Other documentation may be relied upon; for example, a copy of the sign-in sheet for the meeting may be used to determine who was in attendance.

The appointment of a pre-petition committee as the official committee of unsecured creditors can greatly facilitate efficient case administration during the period immediately following the filing of a petition. The members of the committee are already familiar with the circumstances confronting the debtor and can immediately apply their knowledge and expertise to the reorganization effort. Conversely, if a pre-petition committee was not fairly chosen or is not adequately representative, its appointment as the official committee may significantly impede early case administration efforts.

If the United States Trustee appoints the pre-petition committee and an objection is raised, the court, after notice and hearing, may determine whether the requirements of section 1102(b)(1) have been met. Fed. R. Bankr. P. 2007(a). If a determination is made that the requirements of section 1102(b)(1) have not been met, the court will direct the United States Trustee to vacate the appointment of the committee and may order other appropriate action. Fed. R. Bankr. P. 2007(c).

3-4.10 ATTEMPTS TO PRE-EMPT THE SELECTION PROCESS

Creditor attempts to preempt the United States Trustee's role in the appointment process following the entry of an order for relief in a voluntary case should be closely scrutinized. These attempts are often organized by attorneys seeking employment as committee counsel and, as a result, are not entitled to great deference by the United States Trustee.

3-4.11 SMALL BUSINESS CASES - CREDITORS'COMMITTEE NOT APPOINTED ABSENT COURT ORDER

11 U.S.C. § 1102(a)(3) provides:

> Unless the court for cause orders otherwise, a committee of creditors may not be appointed in a small business case or a case under subchapter V of this chapter.

The SBRA amended section 1102(a)(3) to effectively eliminate committees in small business cases. The USTP should request committees sparingly, given the congressional intent to effectuate cost savings. Creditors and other parties in interest will have a better grasp of the facts that might warrant a court finding of "cause."

3-4.12 INVOLUNTARY CASES

Creditors may organize meetings after the commencement of an involuntary case, but before the entry of an order for relief. The United States Trustee's authority to appoint an official committee is operative only after the entry of an order for relief. 11 U.S.C. § 1102(a)(1).

3-4.13 NUMBER OF COMMITTEES

The Bankruptcy Code mandates that the United States Trustee form a committee of unsecured creditors in all chapter 11 cases and permits the United States Trustee to appoint additional committees of creditors or equity security holders as appropriate. *See* 11 U.S.C. § 1102(a)(1). Usually, one committee will be sufficient. But other committees can be appointed to represent varieties of or significantly different interests. *See* 11 U.S.C. § 1102(a)(2). *See also In re Wang Labs., Inc.*, 149 B.R. 1 (Bankr. D. Mass. 1992).

Section 1102(a)(1) authorizes the appointment by the United States Trustee of additional committees, including a committee of equity security holders. The United States Trustee is authorized to appoint such additional committees as the United States Trustee "deems appropriate." This language signifies that the United States Trustee has considerable discretion in deciding whether to appoint additional committees.

The court may order the appointment of such a committee by the United States Trustee. 11 U.S.C. §1102(a)(2). While there is no statutory requirement that they do so, practitioners should be encouraged to submit requests for additional committees first to the United States Trustee prior to moving for relief from the court, as this may achieve the desired result without the need for litigation and its associated costs to the parties and the estate.

If a party in interest moves the court for an order directing the appointment of an additional committee, the court can grant the relief only upon a finding that the appointment of the additional committee is "necessary to assure adequate representation" of the movant's interests. 11 U.S.C. § 1102(a)(2); *see also In re Edison Bros. Stores, Inc.*, 1996 WL 534853 (D. Del. Sept. 17, 1996); *In re Johns-Manville*, 68 B.R. 155 (S.D.N.Y. 1986), *appeal dismissed,* 824 F.2d 176 (2nd Cir. 1989). The requirement of "necessity" is a high standard "that is far more onerous than if the statute merely provided that a committee be 'useful'." *In re Kasper A.S.L., Ltd.*, Oral Opinion, Case No. 02-10497 (LAG) (Bankr. S.D.N.Y. July 15, 2003) as cited in *In re Oneida, LTD.*, 2006 WL 1288576 (Bankr. S.D.N.Y. 2006).

As noted, tension among creditors is inherent in all cases and is necessary for the case to move forward. *See In re Baldwin-United Corp.*, 45 B.R. 375, 376 (Bankr. S.D. Ohio 1983). The mere presence of a potential conflict of interest among creditors does not automatically require the appointment of separate committees. *See In re McLean Indus., Inc.*, 70 B.R. 852, 861 (Bankr. S.D.N.Y. 1987). *See also In re Salant Corp.*, 53 B.R. 158 (Bankr. S.D.N.Y. 1985); *In re Baldwin-United Corp.*, 45 B.R. at 376.

The appointment of several separate committees can lead to posturing among the creditor groups that might not otherwise arise. Moreover, counsel for a single committee may be more apt to encourage creditors to resolve their differences, as opposed to counsel for separate committees who may be inclined to litigate such matters. The proliferation of committees to serve special interests has an adverse impact on the efficient administration of a case. *See In re Baldwin-United Corp.*, 45 B.R. at 376. Rather than striving to resolve creditor differences, separate committees tend to prolong the process of reconciling differences into a consensus in support of a plan of reorganization. Compelling creditors with diverse interests to serve on the same committee may create opportunities for creditors to resolve their differences consensually.

Another important factor militating against appointing separate committees is the cost factor. The appointment of additional committees inevitably means the retention of additional attorneys, accountants, and other professionals. *See In re*

Saxon Indus., Inc., 39 B.R. 945, 947 (Bankr. S.D.N.Y. 1984). With the increase in the number of professionals comes a concomitant decrease in the accountability and delineation of responsibility. Courts have denied requests for additional committees based in large part upon their concern for escalating administrative costs. *See In re Sharon Steel Corp.*, 100 B.R. 767, 778 (Bankr. W.D. Pa. 1989); *In re Texaco, Inc.*, 79 B.R. 560, 567 (Bankr. S.D.N.Y. 1987); *In re Baldwin-United Corp.*, 45 B.R. at 376. *But see In re Beker Indus. Corp.*, 55 B.R. 945, 949 (Bankr. S.D.N.Y. 1985).

The appointment of a separate committee may be appropriate, however, if conflicts among creditors are of such a magnitude as to impair the ability of a committee to function effectively. *In re McLean Indus., Inc.*, 70 B.R. 852, 861 (Bankr. S.D.N.Y. 1987). *See also In re Johns-Manville Corp.*, 38 B.R. 331 (Bankr. S.D.N.Y. 1983). This is especially true in a large, complex case in which the debtor's business is extremely unstable. As such a case progresses, the interests of creditors may diverge and they may take more extreme positions than would otherwise be expected. For example, in the *Beker Indus. Corp.* case, the debtor's survival depended upon obtaining additional financing. 55 B.R. at 949. The financing agreement would have affected various creditor groups in materially different ways. The court, therefore, directed the appointment of an additional committee of debenture holders due to the unstable nature of the case and the need for the active participation of the debenture holders to protect their interests. *Accord In re Dow Corning Corp.*, 194 B.R. 121, 143-45 (Bankr. E.D. Mich. 1996) (a case involving trade creditors, tort claimants, and insurance and indemnity claims relating to breast implants merited appointment of multiple committees because no single committee could adequately represent all of their conflicting interests). *Cf. In re Hills Stores Co.*, 137 B.R. 4 (Bankr. S.D.N.Y. 1992) (court denied a request to appoint a separate committee of subordinated bondholders absent evidence that a conflict among creditors would impede the extant committee's ability to function).

If more than one committee is appointed, they should be advised that no two committees should retain the same counsel. *See In re Proof of the Pudding, Inc.*, 3 B.R. 645 (Bankr. S.D.N.Y. 1980). With regard to accountants, the United States Trustee might suggest that, if appropriate under the facts of the case, provisions be made for the free flow of information between the accountants for the separate committees.

If a party in interest challenges a decision by the United States Trustee to appoint an additional committee, the United States Trustee should emphasize the "deems appropriate" language of section 1102(a)(1). A court should not disband an additional committee appointed by a United States Trustee under section 1102(a)(1) because it would not have ordered the appointment of the committee under section 1102(a)(2).

In responding to a motion under section 1102(a)(4) to change the composition of a committee, the United States Trustee should generally focus on the representativeness issue and not on how the United States Trustee arrived at the

appointment decision. Accordingly, any response should analyze the kinds of creditors present in the case and show how the membership adequately represents those interests. Any further discussion of the appointment process runs the serious risk of waiving an important governmental privilege, the deliberative process privilege. A government official's pre-decision and deliberative processes are often shielded from disclosure, but the privilege can be waived. The Office of General Counsel should be consulted prior to taking any action that may waive the privilege.

3-4.14 EQUITY SECURITY HOLDERS' COMMITTEE

United States Trustees should appoint equity committees as a rare exception and not in every case. "Appointment of committees of equity holders is the rare exception rather than the rule in chapter 11 cases." *Exide Technologies v. State of Wisconsin Investment Board*, 2002 WL 32332000 (D.Del. 2002); *In re Williams Communications Group, Inc.*, 281 B.R. 216, 224 (Bankr. S.D.N.Y. 2002). *See also* 7 King, *Collier on Bankruptcy* ¶ 1102.03[2] at 1102-22 (15th ed. Rev. 2001). The appointment of an equity security holders' committee is an extraordinary remedy. *In re Dana Corp.*, 344 B.R. 35, 38 (Bankr. S.D.N.Y. 2006); *In re Winn-Dixie Stores, Inc.*, 326 B.R. 853, 857 (Bankr. M.D. Fla. 2005); *Enron Corp.*, 279 B.R. at 685. The movant has the burden of establishing that its class of equity security holders is not adequately represented. *Dana Corp.*, 344 B.R. at 38; *Winn-Dixie*, 326 B.R. at 857; *Enron Corp.*, 279 B.R. at 685. To meet its burden, the movant must "establish that (i) there is a substantial likelihood that they will receive a meaningful distribution in the case under a strict application of the absolute priority rule, and (ii) they are unable to represent their interests in the bankruptcy case without an official committee." *Williams Communications*, 281 B.R. at 223. Equity security holders' committees should not be appointed when the estate is "hopelessly insolvent." *In re Emons Indus., Inc.*, 50 B.R. 692, 694 (Bankr. S.D.N.Y. 1985). Inadequacy of representation is not demonstrated simply because the interests of equity security holders differ from those of unsecured creditors. There are many sources of adequate representation aside from the appointment of an official committee. *Johns-Manville*, 68 B.R. at 163; *In re Hill Stores Co.*, 137 B.R. 4 (Bankr. S.D.N.Y. 1992). Generally, the board of directors acts for the equity security holders. Once a company becomes insolvent or files for bankruptcy protection, the directors still owe a fiduciary duty to the equity security holders. *Commodity Futures Trading Commission v. Weintraub*, 471 U.S. 343, 355 (1985). Upon commencement of a bankruptcy case, the board's fiduciary duty is extended to the creditors. *Commodity Futures Trading Commission*, *supra.* Pure speculation that a debtor's board and management will sacrifice the interests of the equity security holders to placate the creditors is insufficient to establish the need for an official equity security holders' committee. *Edison Bros. Stores, Inc.*, *supra.* At times, even the official creditors' committee has been found to represent the interests of the equity security holders when their interests are sufficiently aligned. *Williams Communications*, 281 B.R. at 222; *In re Leap Wireless Int_l, Inc.*, 295 B.R. 135,

139-140 (Bankr. S.D. Cal. 2003). Finally, even unofficial committees can provide adequate representation of the interests of equity security holders without burdening the estate with the costs of such a committee's professionals. *Johns-Manville*, 68 B.R. at 162-4.

The United States Trustee may consider all relevant factors in determining whether or not to appoint an equity security holders' committee. Factors to consider may include whether the debtor is hopelessly insolvent *(In re Emons Indus., Inc.*, *supra*); whether the stock is publicly traded and widely held (*In re Wang Labs, Inc.*, 149 B.R. 1 (Bankr. D. Mass. 1992) and *Johns-Manville*, 68 B.R. 155 (S.D.N.Y. 1986)); whether a case is financially complex (*In re Edison Bros. Stores, Inc.*, *supra*); timeliness of the request for the committee (*In re Kalvar Microfilm, Inc.*, 195 B.R. 599, 600 (Bankr. D. Del. 1996)); additional cost to the estate, *id*; and alternative sources of representation (*In re Edison Bros. Stores, Inc.*, *supra*; *In re Hill Stores Co.*, *supra*).

If an equity security holders' committee is to be appointed, the United States Trustee should seek to obtain a list of the largest beneficial holders of the debtor's securities. As a starting point, United States Trustees should consult the list of equity security holders that a chapter 11 debtor is required to file. *See* Fed.R.Bankr.P. 1007(a)(3). Large blocks of stock are often held in a "street name" by brokerage houses or "in trust" at financial institutions, making it difficult to determine the identity of the beneficial interest holders. The regional office of the SEC may be able to assist in this process. The list should contain the names of at least the 40 largest beneficial holders, as potential members often reside throughout the country and it may, therefore, be difficult to find equity security holders willing to serve.

Section 1102(b)(2) provides that committees of equity security holders will ordinarily consist of the persons holding the seven largest amounts of equity securities of the debtor. When appointing members to an equity security holders' committee, inquiry should be made whether the holders acquired their interest before or after the commencement of the case. If the interest was acquired post-petition, the holder may well be designated as a "speculator" and potentially afforded different treatment under a plan. *In re Four Seasons Nursing Ctrs., Inc.*, 472 F.2d 747 (10th Cir. 1973). Because the appointment of these members may distort the "representativeness" of the committee, this circumstance should be considered by the United States Trustee in making the appointment.

3-4.15 MODIFICATION OF COMMITTEE MEMBERSHIP

3-4.15.1 Considerations

Proper supervision of an estate requires a continuing review of its circumstances. A modification of a committee's structure may at some point become necessary. Nothing in the Code limits the power of the United States Trustee to alter committee appointments after they are initially made. Accordingly, the United States Trustee has the authority to remove committee members as well as to

appoint committee members and otherwise to alter the composition of the committee after it has been created. However, this authority is subject to the court's power under section 1102(a)(4).

Section 1102(a)(4) provides that the court may, on request of a party in interest and after notice and a hearing, order the United States Trustee to change the membership of a committee appointed under section 1102 if the court determines that the change is necessary to ensure adequate representation of creditors or equity security holders.

The court's authority to adjust committee membership is not unfettered. With the exception noted below, the court may order a change in the composition only if the court determines that doing so is necessary to ensure adequate representation of creditors or equity security holders. The court does not appoint any replacement members. The court can only order the United States Trustee to change membership on the committee, but appointment of replacement members is still a decision that will be made by the United States Trustee.

Section 1102(a)(4) also permits the court to order the United States Trustee to increase the number of members of a committee to include a creditor that is a small business concern as defined in the Small Business Act, 15 U.S.C. § 631 *et seq*. The court may only do so, however, if it determines that the creditor holds claims the aggregate amount of which is disproportionately large. The effect of this section is to allow a smaller creditor to serve on a committee if the amount owed to that creditor will have a significant impact on the creditor's business, even if the creditor is not the holder of a large claim. The matter is discretionary and a court may decline to order the expansion of a committee to include such a creditor, even if the case will have a severe impact on the creditor's business.

Creditors seeking to modify a committee should be urged to first request such modification from the United States Trustee. Indeed, absent an issue of adequacy of representation, it has been held that questions concerning committee membership must, in the first instance, be directed to the United States Trustee. *In re First RepublicBank Corp.*, 95 B.R. 58 (Bankr. N.D. Tex. 1988). When reviewing such requests, the United States Trustee should consider the same factors that are relevant to the initial appointment of the committee – for example, the representativeness of the committee, the ability of its members to cooperate effectively in pursuing a reorganization, the impact financially on the estate, and any disruption that may result. A paramount consideration is whether the committee structure is moving the case forward, e.g., the effect of a modification on the operation of the current committee and on the conduct of the case. Before reconstituting or adding a committee, a determination must be made that the change will move the case toward resolution.

Bankruptcy Rule 2020 provides that a proceeding to contest any act or failure to act by the United States Trustee is governed by Bankruptcy Rule 9014. The effect of this rule is to establish that challenges to decisions by the United States Trustee are determined by motion. Nothing in Bankruptcy Rule 2020 has an

impact on whether particular actions are subject to judicial review or who may seek review of such actions.

3-4.15.2 Substitutions

Being ever mindful of the statutory requirement that the official unsecured creditors' committee be representative of the entire body of unsecured creditors entitled to such representation, in those cases where a creditor resigns or no longer wishes to serve, the United States Trustee may substitute another creditor with a similar claim if doing so would preserve the necessary balance of the committee's membership. A creditor who resigns from the committee should notify the United States Trustee in writing of its resignation, so that the United States Trustee may undertake any actions that may be appropriate.

3-4.15.3 Removal of Members

The United States Trustee has the authority to remove, as well as to appoint, members of official committees. *In re America West Airlines*, 142 B.R. 901 (Bankr. D. Ariz. 1992). The decision to remove a member should be premised upon a change in status as a creditor, or a breach of or inability to perform fiduciary duties. Conflicts within a committee on issues of strategy or objectives ordinarily would not constitute cause for removal. These conflicts are intrinsic to the committee process and should be resolved within the committee.

The decision to remove or not to remove a committee member is committed to the discretion of the United States Trustee. No court approval of the removal is required. Unless that discretion is exercised arbitrarily or capriciously, the scope of judicial review of the United States Trustee's decisions in this area is extremely limited. *See* Campos-Guardado v. I.N.S. 809 F.2d 285, 289 (5th Cir. 1987), *reh'g denied*, 814 F.2d 658 (5th Cir. 1987), *cert. denied*, 484 U.S. 826 (1987).

3-4.16 RULE 2019: AD HOC COMMITTEE AND OTHER CREDITOR GROUP DISCLOSURES

3-4.16.1 Background and Summary of Changes

Before December 1, 2011, Bankruptcy Rule 2019 required "every entity or "unofficial" committee representing more than one creditor" in chapter 9 and chapter 11 cases to file a verified statement disclosing, among other things, the identities of all creditors represented and financial details about each creditor's holdings. But courts reached inconsistent results when enforcing this section, especially as applied to entities such as claims traders, hedge funds, and other distressed debt investors, who often form *ad hoc* committees to act in concert but who do not purport to represent any creditors other than themselves. Rule 2019, effective December 1, 2011, clarifies who must disclose what information and expands the disclosures required.

3-4.16.2 Who is Covered

Rule 2019 plainly applies to groups and committees that "consist of"—and not just those that "represent"—creditors and equity holders. Fed. R. Bankr. P. 2019(b)(1). The added "consists of" language clarifies that the Rule applies to *ad hoc* committees and groups acting only for themselves. The amended rule also adds a definition of "represent," which means "to take a position before the court or to solicit votes regarding the confirmation of a plan on behalf of another." Fed. R. Bankr. P. 2019(a)(2).

The discussion below explains those who are included in and excluded from the rule's requirements, along with certain limited exceptions.

Included, subject to the exceptions below: The rule applies to the following who work together ("in concert") to advance common interests:

(1) any group, committee, or entity *representing* more than one creditor or equity security holder, or

(2) any group or committee *consisting* of more than one creditor or equity security holder.

Thus, the rule applies to any group acting together regardless of whether the group calls itself a committee—official, unofficial, *ad hoc*, informal, or otherwise, making the amended rule broader than the prior rule. Because the rule also applies to entities that represent creditors and equity security holders, a law firm that represents multiple creditors or equity security holders must file Rule 2019 disclosures if: (1) its multiple clients are acting in concert; and (2) the firm is advocating for the clients in court or soliciting votes on a plan. Assuming that the Bankruptcy Code's definition of entity, which includes persons, applies equally to the Bankruptcy Rules, then Rule 2019 applies to attorneys and not just law firms if the other requirements of the rule are triggered.

A law firm that is merely consulted by a group of creditors but does not advocate for them in court or solicit votes on a plan need not file the Rule 2019 statement.

Included, but not subject to all of the rule's disclosure requirements: Official committees. *See* section 3-4.7.2 for official committee requirements.

Excluded: Groups composed entirely of affiliates and insiders of one another, such as related companies jointly represented.

Excluded, but with possible exceptions: "Unless the court orders otherwise," Rule 2019 does not apply "solely because" of one's status as an indenture trustee, credit agreement agent, class action representative, or governmental unit. Fed. R. Bankr. P. 2019(b)(2). Although the Advisory Committee note to subsection (b)(2) states that these entities are excluded, the language of the rule itself is not so absolute. Rule 2019 provides that indenture trustees do not file the statement unless ordered to do so. Before December 1, 2011, indenture trustees had to file the verified statement unless ordered *not* to do so.

3-4.16.3 What Must Be Disclosed

Rule 2019(b) requires every group, committee, or entity covered by the Rule to file a verified statement disclosing certain information. The information that must be disclosed varies depending on who is making the disclosure: (1) a group or committee acting only for the members; (2) a group or committee representing other parties in addition to the members; (3) an entity representing others; or (4) an official committee. In addition, creditors or equity security holders who are represented (but not by an official committee) must disclose certain information.

*a. Disclosures required of **all groups or committees** (except official committees):*

- pertinent facts and circumstances regarding the formation of the group or committee
- name of each entity at whose instance the group or committee was formed or each entity for whom the group or committee has agreed to act
- name and address of each member
- nature and amount of each member's disclosable economic interest held on the date the group or committee was formed
- copy of the instrument, if any, authorizing the group or committee to act for creditors or equity security holders

*b. Additional disclosures required of **all groups or committees representing others** (except official committees):*

- for each member of the group or committee, the year and quarter the member acquired each disclosable economic interest (unless acquired more than one year before the petition date)

*c. Disclosures required of **all entities representing others**:*

- pertinent facts and circumstances regarding the employment of the entity
- name of each creditor or equity security holder who arranged the entity's employment
- name and address of the entity
- copy of the instrument, if any, authorizing the entity to act for creditors or equity security holders

*d. Disclosures required of **each creditor or equity security holder represented by an entity, group, or committee** (except those represented by official committees):*

- name and address of the creditor or equity security holder

- nature and amount of each member's disclosable economic interest held on the date of the verified statement

The term "disclosable economic interest" is broadly defined in subdivision (a) to include not just claims or interests but all economic rights and interests that could affect the legal and strategic positions that a stakeholder takes in a case, including options, liens, pledges, participations, derivative instruments, or any economic interested affected by the value, acquisition, or disposition of a claim or interest. Moreover, each member of a group must disclose information on an individual basis, rather than reporting information in the aggregate for all members.

The rule reflects a deliberate decision not to require disclosure of the purchase price or specific date of acquisition for each disclosable economic interest. Nevertheless, Rule 2019 is not a bar to obtaining this information, if relevant, through discovery or a Rule 2004 examination.

3-4.16.4 Timing of Disclosure

The Rule sets no time for filing the initial verified statement, but it is reasonable to infer that it must be filed before appearing before the court or soliciting votes on a plan. Under Rule 2019(d), if any fact in a verified statement changes materially, the statement must be supplemented with the material changes before taking a position before the court or soliciting votes on the confirmation of a plan.

3-4.16.5 Remedies and Consequences of Non-Disclosure

Any party in interest may file a motion challenging compliance with the rule. The court may also find a failure to comply on its own motion. The court is authorized to grant any appropriate relief as a sanction, including refusing to permit the group, committee, or entity to be heard or holding invalid any authority, acceptance, rejection, or objection given, procured, or received by the sanctioned group, committee, or entity. Fed. R. Bankr. P. 2019(e).

CHAPTER 3-5: MEETINGS OF CREDITORS

3-5.1 INTRODUCTION

The United States Trustee shall convene and preside at a meeting of creditors within a reasonable time after the order for relief in a case. 11 U.S.C. § 341(a). The meeting of creditors is the statutory forum where the debtor must appear and answer questions under oath about the case unless the court orders otherwise. 11 U.S.C. § 343; Fed. R. Bankr. P. 2003(b).

3-5.2 SCHEDULING

The United States Trustee must schedule a meeting of creditors to be held not fewer than 21 nor more than 40 days after the order for relief. Fed. R. Bankr. P. 2003(a). However, if the United States Trustee designates a place for the meeting that is not regularly staffed by the United States Trustee, then the meeting may be scheduled not more than 60 days after the order for relief. The enlargement or reduction of these time periods is prohibited. Fed. R. Bankr. P. 9006(b)(2) and 9006(c)(2). If there is an appeal from or a motion to vacate the order for relief, or if there is a motion to dismiss the case, the United States Trustee may schedule a later date for the meeting. Fed. R. Bankr. P. 2003(a). The meeting may be held at a regular place for holding court or at any other place designated by the United States Trustee within the district convenient for the parties in interest. Fed. R. Bankr. P. 2003(c).

3-5.3 NOTICE

Notice of the meeting must be provided to all parties of interest and, unless the court orders otherwise, shall include the debtor's employer identification number, Social Security number, and any other federal taxpayer identification number. Fed. R. Bankr. P. 2002(a)(1). Notice of the meeting of creditors is given by the clerk of the court or some other person as the court may direct, such as the debtor or an outside service, pursuant to Fed. R. Bankr. P. 2002(a)(1). At least 21 days notice of the meeting by ordinary mail is required under Fed. R. Bankr. P. 2002(a). Notice can be given by publication if notice by mail is impracticable or is desirable to supplement the notice. Fed. R. Bankr. P. 2002(1). The 21-day notice period may be modified by order of the court. Fed. R. Bankr. P. 9006.

The United States Trustee should provide the clerk with the location, date, and time of the meeting well in advance of the noticing period to permit the clerk to notice the meeting in a timely fashion. The United States Trustee should ensure that committees, trustees, and examiners appointed after the noticing of the meeting or after the initial meeting are advised of the meeting or any adjourned meeting.

3-5.4 SCOPE OF EXAMINATION

The scope of examination of the debtor pursuant to section 343:

> may relate only to the acts, conduct, or property or to the liabilities and financial condition of the debtor, or to any matter which may affect the administration of the debtor's estate, or to the debtor's right to a discharge. . . . The examination may also relate to the operation of any business and the desirability of its continuance, the source of any money or property acquired or to be acquired by the debtor for purposes of consummating a plan and the consideration given or offered therefor, and any other matter relevant to the case or to the formulation of a plan. Fed. R. Bankr. P. 2004(b).

Questioning should not be allowed to deteriorate to a level constituting harassment or to focus on the dischargeability of a particular debt. Parties who wish to examine the debtor regarding dischargeability of particular debts or regarding other matters beyond the scope of the examination should be advised to consider alternate means of discovery. *In re Nixon Elec. Supply, Inc.*, 85 B.R. 988 (Bankr. W.D. Tex. 1988). A meeting of creditors is not a substitute for discovery in connection with an adversary proceeding.

3-5.5 CONDUCTING THE MEETING

The United States Trustee presides at the meeting. 11 U.S.C. § 341(a). The United States Trustee includes any designee of the United States Trustee. 11 U.S.C. § 102(9) and Fed. R. Bankr. P. 9001(11).

The meeting must be recorded electronically by the United States Trustee. Fed. R. Bankr. P. 2005(c). The record of the meeting must be preserved by the United States Trustee and be available for public access until two years after the conclusion of the meeting. At an entity's request, the United States Trustee shall certify and provide a copy or transcript of the recordings at the entity's expense. Fed. R. Bankr. P. 2003(c).

An individual debtor must present:

1. an original government-issued photo identification, or any other identifying information that establishes the debtor's identity; and
2. confirmation of the Social Security number listed on the section 341 meeting notice issued by the clerk of court and provided to the debtor and creditors in the case. Fed. R. Bankr. P. 4002(b)(1).

If the debtor fails to provide the required forms of identification or supporting documentation that is satisfactory to the United States Trustee, or provides an incorrect Social Security number, the presiding officer may proceed with the meeting, but, before concluding the meeting, should determine what corrective action should be required of the debtor.

Acceptable forms of picture identification (ID) include: driver's license, U.S. government ID, state ID, passport (and current U.S. visa, if not a U.S. citizen), military ID, resident alien card, and identity card issued by a national government authority (if authorized by the United States Trustee). Acceptable forms of proof of Social Security number include: Social Security card, medical insurance card, pay stub, W-2 Form, IRS Form 1099, and Social Security Administration (SSA) Statement. When debtors state that they are not eligible for a Social Security number, further inquiry is necessary to verify identity.

The presiding officer should make an introductory statement. A suggested introductory statement is:

> "My name is _____. I am an (attorney/analyst/etc.) in the Office of the United States Trustee, a component of the United States

> Department of Justice. The United States Trustee supervises the administration of bankruptcy cases under the Bankruptcy Code. The debtor is required to appear and to be examined under oath regarding the bankruptcy case. The examination will be recorded. All persons questioning the debtor must state their names and indicate who they represent. An appearance sheet will be circulated. If you wish to receive notice of any adjourned meeting, you must fill out the appearance sheet."

The presiding officer should state the case name and number and the date and time of the meeting, and should inform creditors that they will be given an opportunity to ask questions of the debtor.

Appearances should be noted on the record, particularly the appearance of counsel representing the debtor or other parties in the case. Debtors or debtors' representatives should be asked to raise their right hands so that the oath or affirmation can be administered as follows:

> "Do you swear or affirm to tell the truth, the whole truth, and nothing but the truth?"

The presiding officer has the authority to administer oaths or affirmations. There is no requirement that the presiding officer be a notary. 11 U.S.C. § 343; Fed. R. Bankr. P. 2003(b)(1) and 9012. After administering the oath, the presiding officer must ask the debtor to verify that the debtor signed an original petition and schedules, that the debtor reviewed the documents before signing them, that the debtor affirms that the documents are accurate, and that the debtor affirms that no changes need to be made to the documents.

The United States Trustee should respond only to inquiries regarding administrative or procedural matters. The United States Trustee should never give legal advice at the section 341 meeting, but should refer parties with legal questions to their attorneys.

3-5.6 QUESTIONING THE DEBTOR

The debtor or a designated representative of a partnership or corporation must attend the meeting of creditors and submit to examination under oath. 11 U.S.C. § 343; *In re Steinmetz Group, Ltd.*, 85 B.R. 633 (Bankr. S.D. Fla. 1988). The person appearing on behalf of the debtor should be prepared to respond effectively to the examination and to verify the accuracy of the schedules and statements. If the debtor is a corporation, the representative may include any or all of its officers, members of its board of directors or trustees, or similar controlling body, a controlling stockholder or member, or any other person in control. If the debtor is a partnership, the representative may include any or all of its general partners or, if designated by the court, any other person in control. Fed.R. Bankr. P. 9001(5). If a chapter 11 trustee has been appointed, the trustee may also give a report, but should not be sworn or subjected to examination.

When spouses have filed a joint petition, they must both be present. If only one debtor appears, the United States Trustee may elect to examine the attending debtor and continue the section 341 meeting for the examination of the other.

If the debtor or debtor's representative fails to appear at the meeting, the United States Trustee may either continue the meeting, file a motion for an order of the court designating a person to attend the meeting on behalf of the partnership or corporate debtor pursuant to Fed. R. Bankr. P. 9001(5), file a motion for the appointment of a trustee, or file a motion to convert or dismiss the case. The provisions of Fed. R. Bankr. P. 2005 may also be used to apprehend the debtor and compel his or her attendance at the meeting.

When a debtor's attorney fails to appear, the United States Trustee should generally seek to determine if counsel is delayed or unable to appear for some reason. If counsel is not readily available, the United States Trustee should consider continuing the meeting to a later date. The decision regarding whether to grant a continuance should be based upon a review of the following conditions:

1. whether the reason for non-attendance is one that rendered appearance impossible, e.g., illness or sudden emergency, or whether non-attendance merely involved a scheduling conflict;
2. whether the United States Trustee was notified in advance of the non-appearance;
3. whether creditors appearing at the section 341 meeting traveled a great distance, and how many were in attendance; and
4. whether the particular attorney has failed to attend previous creditors' meetings for other debtors.

The continued date should be announced to all parties in attendance.

The United States Trustee should review the debtor's schedules and statements and other documents in the file prior to the section 341 meeting of creditors. The person questioning the debtor should also confer with the person who conducted the IDI and review the information obtained and the IDI report. The United States Trustee may also request that the debtor bring specific documents to the meeting and follow up on information required and not produced at the IDI. The examination should be flexible, incisive, and responsive to the circumstances of the proceeding and the case. The examination should be sufficiently detailed so that the United States Trustee has an understanding of the debtor's business and its operations. The meeting also provides the opportunity to remind debtors of their duties and to question them regarding compliance with those duties, such as filing operating reports and paying United States Trustee quarterly fees. The United States Trustee should take notes of the meeting and maintain a written record either in the form of a minute report or a memo to the file in the case file. The United States Trustee should obtain the spelling of the names of parties in the event a transcript of the meeting is requested at a later date. Creditors and other

parties in interest must also be given an opportunity to ask questions and examine the debtor. *See In re Kincaid*, 146 B.R. 387 (Bankr. W.D. Tenn. 1992). The Federal Rules of Evidence do not apply to examinations conducted at a meeting of creditors and objections predicated upon those rules should not be entertained. However, the presiding officer must maintain control over the proceeding and preserve the professional atmosphere and decorum appropriate to the situation.

3-5.7 ATTENDANCE BY CREDITORS, THE MEDIA, AND THE PUBLIC

Meetings are open to the public, except that the court may not attend. 11 U.S.C. § 341(c). Representatives of the media are permitted to be present, but not to televise, record, or photograph the proceedings or to ask questions at the meeting. *See In re Astri Inv., Management and Sec. Corp.*, 88 B.R. 730 (D. Md. 1988). Only those entities identified in section 343, e.g., creditors, any indenture trustee, any trustee or examiner in the case, or the United States Trustee, may examine the debtor. Debtors, creditors, indenture trustees, equity security holders, committees, or other parties may be represented by an authorized agent, attorney in fact, or proxy. Fed. R. Bankr. P. 9010(a).

3-5.8 IMMUNITY, SELF-INCRIMINATION, AND REFUSAL TO ANSWER QUESTIONS

Immunity may be granted under part V of title 18 of the United States Code to persons required to submit to examination, to testify, or to provide information in a bankruptcy case. 11 U.S.C. § 344. The operative sections for granting immunity are 18 U.S.C. § 6002 and 6003. Pursuant to these sections, the debtor or other witness may refuse to testify based upon the privilege against self-incrimination, but may be compelled to do so under a grant of immunity from the United States Attorney. *Hoffman v. United States*, 341 U.S. 479 (1951); *In re Save More Foods, Inc.*, 96 B.R. 1 (D.D.C. 1989); *In re Hulon*, 92 B.R. 670 (Bankr. N.D. Tex. 1988). Under the Bankruptcy Code, if the debtor testifies without claiming the privilege, it may be waived. *See Melaragno v. Ciotti (In re Ciotti),* 442 B.R. 412 (Bankr. W.D. Pa. 2011); *In re Mudd*, 95 B.R. 426 (Bankr. N.D. Tex. 1989). Once the debtor or another witness has claimed the privilege against self-incrimination, immunity may be granted only by order of the district court upon the request of the United States Attorney for the district in which the case was filed. 18 U.S.C. § 6003.

If the debtor asserts the Fifth Amendment privilege against self-incrimination in response to a question, the United States Trustee should proceed with the meeting and continue to question the debtor. A "blanket" assertion of the privilege is inappropriate and the debtor should be compelled to assert the privilege in response to each question propounded. A debtor's discharge may not be denied for properly invoking the privilege against self-incrimination. 11 U.S.C. § 727(a)(6)(C). *United States v. Kras*, 409 U.S. 434 (1973); *In re Krohn*, 886 F.2d 123 (6th Cir. 1989); *In re French*, 127 B.R. 434 (Bankr. D. Minn. 1991).

See also *In re McCormick*, 49 F.3d 1524 (11th Cir. 1995) (confirmation of a chapter 11 debtor's plan of reorganization cannot be denied solely because the debtor invoked his Fifth Amendment privilege in an adversary proceeding). The failure to answer questions at a section 341 meeting, however, may be cause to dismiss or convert the case or to order the appointment of a trustee. *Cf. In re Connelly*, 59 B.R. 421 (Bankr. N.D. Ill. 1986). Alternatively, the United States Trustee may seek an order from the court compelling the debtor to testify.

If the debtor refuses to answer a question, the meeting should continue and, at the end of the meeting, the parties should seek a resolution from the court. The presiding officer may, however, state for the record an opinion on the propriety of the question and whether or not it appears to fall within the permissible scope of examination. In addition, the United States Trustee may subsequently wish to appear in court and state a position on this issue. This is especially so in a case where the United States Trustee asked or would have asked the question, and it has a direct bearing on the ability of the United States Trustee to supervise the case because the debtor is making insufficient disclosure.

If the debtor or other witness is granted immunity by the United States Attorney, he or she can be required to testify.

3-5.9 PROOFS OF CLAIM

A proof of claim must be filed with the clerk. However, if a creditor insists upon filing the proof of claim at the section 341 meeting, Fed. R. Bankr. P. 5005(c) establishes a procedure. The presiding officer should note on the claim the date of receipt and transmit it forthwith to the clerk of the bankruptcy court.

3-5.10 CONTINUANCES AND ADJOURNMENTS

After notice of the section 341 meeting has been given, continuances should rarely be granted. If a request for a continuance is made, the United States Trustee may allow the request and continue the meeting if the continuance could not have been avoided. The party requesting the continuance must provide the debtor, the trustee (if any), all creditors and indenture trustees, as well as the clerk of the court, with notice of the continued date and time and provide the United States Trustee with proof of service of such notice. The failure of the debtor to file schedules is not cause to continue the meeting. The initial meeting should be held and adjourned until some date after the filing of the schedules. *But see In re Vance*, 120 B.R. 181 (Bankr. N.D. Okla. 1990).

The United States Trustee may file a motion under 11 U.S.C. § 329(b) to compel turnover or refund of the fees received by an attorney who repeatedly fails to appear without justification.

Fed. R. Bankr. P. 2003(e) provides that "the meeting may be adjourned from time to time by announcement at the meeting of the adjourned date and time without

further written notice." If no further information is necessary, the meeting should be concluded. Any adjournment of the meeting and the length of time of any adjournment will be determined after taking into consideration such matters as the need to examine the debtor, the necessity to resolve matters that are still open at the conclusion of the prior meeting, and the need to monitor the particular case closely. At the conclusion of the section 341 meeting, an announcement should be made by the presiding officer regarding the date and time of the next meeting, unless later written notification will be made. Where no further notice will be given, the attendees should be so notified.

Fed. R. Bankr. P. 4003(b) provides that a trustee or creditor may file objections to claimed exemptions within 30 days after the conclusion of the meeting. Adjournment of the meeting may improperly impede an individual debtor's right to establish his or her exemptions, unless the court fixes a date certain to object to such claimed exemptions. *In re Vance*, 120 B.R. 181 (Bankr. N.D. Okla. 1990).

3-5.11 SPECIAL MEETINGS

The United States Trustee may call a special section 341 meeting on request of a party in interest or on the United States Trustee's own initiative pursuant to Fed. R. Bankr. P. 2003(f). Special meetings may be called to address a situation that has come to the United States Trustee's attention and requires close supervision. The United States Trustee should notify all appropriate parties in interest of the date, time, and location of the special meeting.

An example of a special meeting is a meeting of creditors to elect a chapter 11 trustee. 11 U.S.C. § 1104(b)(1). The election must be requested by a party in interest within 30 days after the court orders the appointment of a trustee under section 1104(a). The United States Trustee convenes the meeting for the purpose of electing one disinterested person to serve as a trustee in the case. The clerk or some other person as the court directs must give at least 21 days notice by mail of the meeting date, time, and location. The notice must include the debtor's employer identification number, Social Security number and any other federal taxpayer identification number. Fed. R. Bankr. P. 2002(a).

3-5.12 CONDUCT OF SECTION 341 MEETINGS FOR HEARING-IMPAIRED DEBTORS

The United States Trustee should have procedures in place to address the special needs of debtors. This includes making arrangements for sign interpreters for debtors or creditors. The cost of providing a sign interpreter is paid for by the Program.

3-5.13 FOREIGN LANGUAGE INTERPRETERS

The United States Trustee should follow Program policy when conducting a meeting for non-English speaking or Limited English Proficient debtors.

3-5.14 SECURITY AT MEETINGS OF CREDITORS

3-5.14.1 General

Each leased meeting of creditors site should meet minimum General Services Administration security requirements as determined by the Facilities Management Division of the EOUST when the property is leased. Duress alarms are generally provided, and all persons presiding at section 341 meetings of creditors should be trained in their use.

If the United States Trustee is made aware in advance that there may be security problems at a particular meeting, the United States Marshal's Service should be notified. It may also be possible to request that the debtor in possession hire security guards to be present at the meeting to deter potential security problems.

3-5.14.2 Acquiring Meeting Rooms and/or Security on a One-Time Basis

On occasion, offices have had a need for larger meeting room space, or additional security from the Federal Protective Service, on a one-time basis for a section 341 meeting. When such circumstances arise, offices should adhere to the following USTP Policy to secure funding approval:

1. Identify the requirement sufficiently in advance of the meeting so that arrangements can be made to handle larger than normal participation and/or potential security issues.
2. If after discussion with the United States Trustee it is determined that additional space or security is justified, check first with the bankruptcy court to determine if the meeting can be moved to court-controlled space. If the bankruptcy court is not an option, identify other possible free space that may be used on a one-time basis for the meeting.
3. Submit a UST-6 to the Assistant Director for Administration, signed by the United States Trustee, that justifies the request and provides sufficient detail concerning the issue(s) at least 72 hours in advance. The UST-6 should note that bankruptcy court space and other free space were pursued. It should also include rental costs for at least one alternative location, where practical, and/or an estimate from the Federal Protective Service for the additional security.
4. After review and approval, the EOUST will issue a purchase order for the meeting room or a work authorization for additional security.

CHAPTER 3-6: APPOINTMENT OF CHAPTER 11 TRUSTEES AND EXAMINERS

3-6.1 GROUNDS FOR APPOINTMENT

3-6.1.1 Statutory Basis: 11 U.S.C. § 1104

Section 1104 sets forth the statutory provisions regarding the appointment of a trustee or examiner. Section 1104(a)(1) requires the court, upon request by the United States Trustee or a party in interest, to order the appointment of a trustee "for cause, including fraud, dishonesty, incompetence, or gross mismanagement of the affairs of the debtor by current management, either before or after the commencement of the case, or similar cause . . . ."

In the alternative, the court can order the appointment of a trustee pursuant to the provisions of section 1104(a)(2). This subsection provides that the court shall order the appointment of a trustee if such an appointment is determined to be in the interests of creditors, any equity security holders, and other interests of the estate.

Finally, the court may order the appointment of a trustee if grounds exist for conversion or dismissal of the case but the court determines that the appointment of a trustee is in the best interests of the creditors and the estate. 11 U.S.C. § 1104(a)(3).

If the court does not order the appointment of a trustee, section 1104(c) permits the court, on request of a party in interest or the United States Trustee, to order the appointment of an examiner. Such an appointment shall be ordered:

1. if it is determined to be in the interests of creditors, any equity security holders, and other interests of the estate; or

2. if the debtor's fixed, liquidated, unsecured debts, other than debts for goods, services, or taxes, or owing to an insider, exceed $5,000,000.

If the court orders the appointment of a trustee or examiner, the United States Trustee shall, after consultation with parties in interest, select one disinterested person to serve in the position. 11 U.S.C. § 1104(d).

3-6.1.2 Section 1104(e) Considerations

Pursuant to section 1104(e), the U.S. Trustee shall move to appoint a trustee if there are reasonable grounds to believe current company officials participated in actual fraud, dishonesty, or criminal conduct in the "management of the debtor or the debtor's public financial reporting." This provision applies to chapter 11 cases commenced on or after April 20, 2005. It applies to all chapter 11 debtors, not just publicly held companies, and it applies to both pre-petition conduct and post-petition conduct. Note that section 1104(e) only provides for the *filing* of a

motion under certain circumstances; it does not change the grounds for granting the motion.

3-6.2 CHOICE OF REMEDY – TRUSTEE OR EXAMINER

Trustees and examiners perform distinct functions. A trustee displaces the debtor in possession and assumes responsibility for estate assets and for the operation of the business. An examiner reviews specific transactions or circumstances as directed by the order authorizing appointment. Accordingly, a determination of whether to request the appointment of a trustee or an examiner will depend on the results desired.

One factor the United States Trustee must take into account is if sufficient admissible evidence is available to establish grounds for the appointment of a trustee. Mere suspicion or allegations of wrongdoing are not sufficient. Admissions by the debtor or its agents in public filings, in schedules and statements of financial affairs, or at the section 341 meeting may be used to support a motion. Discovery is available. Third parties or whistle-blowers might also provide the United States Trustee with evidence.

Questions have arisen over the burden of proof that must be met to establish cause for the appointment of a trustee. Many courts have ruled that a trustee motion must be proven with "clear and convincing" evidence. *See, e.g.*, *In re Marvel Entertainment Group, Inc.*, 140 F.3d 463, 471 (3rd Cir. 1998). In the absence of controlling circuit authority, United States Trustees should contend that the appropriate burden of proof is "preponderance of the evidence." *See In re Keeley & Grabanski Land P'ship,* 455 B.R. 153, 163 (B.A.P. 8th Cir. 2011) ("If a preponderance of the evidence standard is a sufficient standard for the denial of discharge based on a debtor's fraud, it should likewise be sufficient for the appointment of a trustee based on allegations of the debtor's fraud or misconduct."); *see also Tradex Corp. v. Morse (In re Tradex Corp.)*, 339 B.R. 823 (D. Mass. 2006). United States Trustees faced with this issue should contact the Office of the General Counsel.

Section 1104(a)(1) enumerates several specific grounds, including fraud, dishonesty, and incompetence, which constitute cause and require the appointment of a trustee. This list of factors constituting cause is not exclusive. *See* 11 U.S.C. § 102(3). Other situations that may constitute cause include the debtor's violation of a court order or breach of fiduciary duties, failure of the debtor to cooperate with the United States Trustee's efforts to supervise the administration of the case, or internal dissension in the corporate hierarchy resulting in failure to operate properly. *See In re Colorado-Ute Elec. Ass_n, Inc.*, 120 B.R. 164, 175-76 (Bankr. D. Colo. 1990); *In re Sullivan*, 108 B.R. 555, 556 (Bankr. E.D. Pa. 1989); *In re St. Louis Globe-Democrat, Inc.*, 63 B.R. 131, 137-38 (Bankr. E.D. Mo. 1985).

It should be noted that the examples of "cause" included in section 1104(a)(1) all involve "current management." Generally speaking, if management that has

engaged in misconduct has been truly displaced by competent and honest management, the appointment of a trustee may not be warranted. The United States Trustee should, however, inquire into the relationships between ousted management and those currently operating the debtor. Former management may retain the right under state law to replace current management if former management controls the equity interests of the debtor. Furthermore, the debtor's board of directors or similar governing body may still be composed of persons on whose watch the misconduct occurred. Under these circumstances, the United States Trustee should consider seeking a trustee appointment.

Under section 1104(a)(2), a trustee may also be appointed if it is in the interest of creditors, equity security holders, and other interests of the estate. The language of the statute provides little guidance on how it is to be applied. It is clear, however, that the court is called upon to weigh the interests of all constituencies in the case, and not just those of creditors. Where the debtor's business affects such a large segment of the general public, consideration of the public interest becomes a greater factor in deciding whether to order the appointment of a trustee under section 1104(a)(2). *See In re Ionosphere Clubs, Inc.*, 113 B.R. 164 (Bankr. S.D.N.Y. 1990). Courts have also considered factors such as the trustworthiness of the debtor, its past and present performance and prospects for rehabilitation, and the confidence, or lack thereof, of the business community and creditors in present management.

The United States Trustee should consider seeking the appointment of an examiner to investigate any questionable management activities or any unexplained irregularity in the debtor's financial history. *See In re Gilman Servs., Inc.*, 46 B.R. 322, 327-28 (Bankr. D. Mass. 1985).

Section 1104(c)(2) requires the court to order the appointment of an examiner if a request for the appointment is made by the United States Trustee or other party in interest, and the debtor's fixed, liquidated, unsecured debts (other than debts for goods, services, taxes, or owing to an insider) exceed $5 million. The appointment of an examiner is mandatory if the dollar threshold is met. *See In re Revco D.S., Inc.*, 898 F.2d 498, 500-01 (6th Cir. 1990). The United States Trustee should not automatically request the appointment of an examiner in every case having the requisite amount of qualifying debt. In deciding whether to seek an examiner appointment, the United States Trustee should carefully consider all relevant factors, including whether pre-petition or post-petition events involving the debtor warrant an independent investigation and report.

Courts occasionally direct the appointment of a mandatory examiner under section 1104(c)(2) but severely constrain the scope of examination. Some courts have directed that an examiner perform no investigation at all. The United States Trustee should consult with OGC if either of these circumstances occurs or appears to be imminent. Furthermore, a party arguing or court finding that section 1104(c)(2) is not mandatory should immediately be brought to OGC's attention.

The United States Trustee may take a position on another party's motion for the appointment of a trustee or an examiner; the United States Trustee should not, however, file joint pleadings with other parties in interest. Nor should the United States Trustee adopt verbatim the allegations and arguments contained within the pleadings filed by other parties. A separate pleading setting forth the position advocated by the United States Trustee should be filed.

The statutory duties of both chapter 11 trustees and examiners are set out in section 1106. Section 1106(a)(3), which is made applicable to examiners by section 1106(b), requires an investigation into the acts, conduct, assets, liabilities, and financial condition of the debtor, the operation of the debtor's business and desirability of the continuance of such business, and any other matter relevant to the case or to the formulation of a plan. That subsection also grants the court the authority to restrict the scope of the investigation. Court-imposed limitations on the permissible scope of an examination are most frequently set forth in the same order that authorizes the appointment of the trustee or examiner. The United States Trustee should ensure that any restrictions and limitations contemplated by the court are clearly set forth in the order. This will avoid the delay and expense that would be engendered by having to return to the court for clarification of the original order.

Section 1106(b) also allows for the expansion of an examiner's duties to encompass any other duties of a trustee that the court orders the debtor in possession not to perform. Again, the United States Trustee should ensure that the precise scope of the expanded duties contemplated for the examiner is clearly set forth in the order of appointment.

3-6.3 THE SELECTION PROCESS

The procedures set forth below apply to the United States Trustee's appointment of a chapter 11 trustee or examiner in any chapter 11 case. In summary, in a chapter 11 case, once the court has determined that a trustee or examiner should be appointed, the authority to select and appoint the trustee or examiner is vested in the United States Trustee. 11 U.S.C. § 1104(d); *In re Plaza de Diego Shopping Center, Inc.*, 911 F.2d 820, 829 (1st Cir. 1990).

Section 1104 of the Bankruptcy Code lists four basic conditions that must be satisfied when the United States Trustee appoints a trustee or examiner:

- the United States Trustee must "consult with parties in interest;"
- the person appointed must be "disinterested;"
- the person appointed may not be the United States Trustee; and
- the appointment must be submitted to the Bankruptcy Court for approval.

11 U.S.C. § 1104(d).

In addition, Federal Rule of Bankruptcy Procedure 2007.1 provides that the order approving the appointment must be made on application of the United States

Trustee and lists certain information that must be included in that application. The application must also be accompanied by a verified statement by the person appointed listing his or her connections with other parties and participants in the bankruptcy case. Fed. R. Bankr. P. 2007.1(c).

3-6.3.1 Timing

The process of selecting a trustee or examiner should occur as promptly as possible once the court has ordered that a trustee or examiner be appointed. Before making the appointment, the United States Trustee must engage in a meaningful consultative and deliberative process, taking into consideration that in some cases timing of the appointment may be affected by the potential risk to estate assets from undue delay. In some larger and more complex cases, and when expediency may require it, the United States Trustee should begin identifying candidates even before the entry of the order directing the appointment if it is reasonably certain an appointment will be ordered. Although an order directing the appointment of a trustee creates a 30-day window in which any party in interest may request that a creditors' meeting be held to elect a trustee, 11 U.S.C. § 1104(b)(1), the United States Trustee is not required to–and should not– wait before appointing a trustee because of the prospect of an election. *See* 11 U.S.C. § 1104(b)(2)(B)(ii) (service of trustee appointed under subsection (d) terminates once election of different trustee under subsection (b) is certified). As a result, the United States Trustee should not delay the appointment process even if there is reason to believe that a request for election may be forthcoming.

3-6.3.2 Duty to Consult

The United States Trustee's first step in the selection of a trustee or examiner is to solicit the views of "parties in interest," as section 1104(d) requires. Although the Bankruptcy Code does not specify the parties the United States Trustee should consult, at a minimum, the United States Trustee should confer with the debtor, any official committees, the pre-petition and post-petition lenders, and any key creditors, including governmental authorities, who are expected to play an active role in the chapter 11 case. It is better to be over-inclusive than under-inclusive in the consultation process.

Because the duty to consult is an important statutory duty, the United States Trustee should never agree to appoint a particular candidate. Rather, during the consultation process parties in interest should be assured that their views and any suggested candidates will be duly considered. Despite the statutory requirement to consult with parties in interest, the decision to make the best appointment for the case ultimately rests within the discretion of the United States Trustee. Indeed, for this reason, it is inappropriate for any court order directing the appointment of a trustee or examiner to specify who should be appointed or to condition the order on the appointment of a particular person.

3-6.3.3 The Consultation Process

There is no required form that the section 1104(d) consultation should take. The United States Trustee should solicit both general input and specific nominations. Parties in interest should be asked to identify any specialized skills, experience, or qualifications that they believe the trustee or examiner should have. Parties should also be encouraged to submit the names and contact information for any individuals they believe would be well qualified to serve. During the consultation process, the United States Trustee should not ask the parties in interest to react to or express an opinion about particular candidates the United States Trustee may be considering for the appointment.

In smaller cases, informal methods of consultation are often preferable. In particular, if counsel for all major constituencies are present when the court directs the appointment of a trustee or examiner, it may be most effective to consult with parties orally in the courtroom immediately after the hearing. In more complex cases, or in cases where there are a large number of parties to consult, the United States Trustee may send a letter soliciting input from parties in interest.

3-6.3.4 Consideration of Additional Candidates and Consultation with Other United States Trustees

The United States Trustee is obligated to appoint the most qualified individual to serve in the particular case. Therefore, although the nominations of parties in interest are an important resource for identifying candidates, the United States Trustee has discretion to and should consider candidates from other sources as well.

In certain cases, one source for additional trustee candidates may be the local panel of chapter 7 trustees. Appointing a panel trustee, however, should not be the automatic or default choice, even if the case is not complex or involves a liquidation. Moreover, the determination that a panel trustee is appropriate for appointment as trustee in a particular case does not eliminate the United States Trustee's statutory duty to consult with parties in interest. During the consultation process, the United States Trustee should never take or voice the position that the choice of candidates is limited solely to panel trustees.

The Executive Office for United States Trustees also maintains a directory of trustee and examiner candidates. The trustee and examiner portal is a resource that United States Trustees can use to both identify other skilled, qualified candidates beyond local panel trustees and the bar and to determine whether potential candidates have been vetted by other United States Trustees. The searchable résumé database contains information on candidates in a variety of fields and geographic locations. It is not, and should not be viewed as, the sole source of information to consider, and it is not a list of approved candidates. However, United States Trustees should consult the portal any time he or she has an appointment decision, and if a preferred candidate is included in the portal, it is

imperative that United States Trustees consult with the United States Trustee who either appointed or considered that candidate in other cases to determine whether the candidate is appropriate for the appointment currently under consideration.

3-6.3.5 Eligibility and Disinterestedness

Although section 321 of the Bankruptcy Code arguably permits appointment of corporations and firms as well as individual persons to serve as trustee or examiner, the USTP's policy is to appoint individuals only and to avoid the appointment of professional firms or corporations. In addition, the Bankruptcy Code prohibits the United States Trustee from appointing multiple persons to serve as co-trustees or co-examiners. *See* 11 U.S.C. § 1104(d) (appoint "one disinterested person"). Anyone that has previously served as an examiner may not thereafter serve as a trustee in the same case. *See* 11 U.S.C. § 321(b). Unlike cases arising under chapters 7, 12, and 13, there is no statutory geographic limitation on who may be appointed as a chapter 11 trustee. *See* 11 U.S.C. § 321(a).

Under section 1104(d), the trustee or examiner must be a "disinterested person," as that term is defined in section 101(14) of the Bankruptcy Code. The test is the same one that applies to the debtor's professionals. That test disqualifies from service, among other persons, creditors, equity holders, former directors and officers (within the past two years), and persons in control, as well as any person who is directly or indirectly "materially adverse" to the debtor for any reason. *See* 11 U.S.C. § 101(14)(A), (B), (C) and 101(31)(B).

In some cases, parties may request that the United States Trustee appoint as trustee a person who has already been appointed as the receiver of the debtor in another proceeding. Any receiver, whether sought by a creditor or governmental entity such as the SEC, is a "custodian." *See* 11 U.S.C. § 101(11). Section 543 provides that, unless the court directs otherwise, any custodian holding the debtor's property must turn over that property to the debtor-in-possession or chapter 11 trustee. 11 U.S.C. § 543. In many cases, these receivers cannot be appointed as trustee because they do not meet the disinterestedness test of the Bankruptcy Code, either because they are currently acting as an officer of the debtor or are otherwise "in control" of the debtor, or because their fiduciary duties as receiver could conflict with their duties as trustee or examiner. While there is no per se rule disqualifying receivers from consideration as trustee or examiner, nominations of current or past receivers should be scrutinized carefully for conflicts issues. Before appointing any receiver as trustee, the United States Trustee should consult with OGC.

3-6.3.6 The Selection

Once a pool of qualified candidates has been identified, the United States Trustee should act quickly to contact each of the candidates to confirm their interest in serving, immediately identify any obvious disqualifying conflicts and instruct them to commence their preliminary conflict checks, and otherwise determine

their eligibility and suitability to serve. The United States Trustee should request from each candidate a recent and detailed curriculum vitae.

The United States Trustee, or her staff in appropriate cases, should interview the candidates who appear most qualified to serve, including those candidates with whom the United States Trustee is already familiar, to determine their suitability for appointment in the particular case. While the law requires consultation with the parties in interest, it does not require the United States Trustee to interview every recommended candidate, although this may be preferable in cases in which the number of candidates is few. The candidate ultimately chosen for appointment must be interviewed. Whether to conduct interviews in person or by telephone or video teleconference may be dictated by the exigencies of the case.

All appointees must conduct conflicts checks and complete and submit to the United States Trustee affidavits regarding their background, connections, and conflicts. These affidavits consist of: (1) the candidate's verified statement of connections pursuant to Rule 2007.1; and (2) a chapter 11 security affidavit.

The verified statement must "set forth the person's connections with the debtor, creditors, any other party in interest, their respective attorneys and accountants, the United States trustee, or any person employed in the office of the United States trustee." Fed. R. Bankr. P. 2007.1(c). A verified statement is required even if the candidate is a panel or case trustee. The format and content of the verified statement should be identical to that of a Rule 2014 statement of a professional retained under 11 U.S.C. § 327. The candidate must also provide to the United States Trustee a chapter 11 security affidavit.

In addition, the United States Trustee should ask the selected trustee or examiner to make periodic informal reports to the United States Trustee in appropriate cases.

3-6.4 THE NOTICE OF AND APPLICATION TO APPROVE APPOINTMENT

3-6.4.1 Notice of Appointment

The appointment should not be made until the United States Trustee has received and reviewed the Rule 2007.1 verified statement and chapter 11 affidavit and confirms the candidate's eligibility and disinterestedness. Upon making a selection, the United States Trustee must serve a notice of appointment on the trustee or examiner.

3-6.4.2 Application to Approve Appointment

After making the appointment, the United States Trustee should immediately file with the court an application to approve the appointment. Fed. R. Bankr. P. 2007.1(c). The application should set forth the following information: (1) the name of the trustee or examiner; (2) a list of all parties in interest with whom the United States Trustee consulted; and (3) a statement that, to the best of the United States Trustee's knowledge, the proposed trustee or examiner is disinterested.

The application typically includes three documents: the United States Trustee's notice of appointment, the trustee or examiner's Rule 2007.1 verified statement, and a proposed order.

1. Notice of appointment

The notice of appointment is served on the trustee or examiner and is filed with the court as an exhibit to the application. If a trustee will be required to post a case-specific bond, see infra Section 3-6.4.4.2, the notice should also state the amount of the bond. Fed. R. Bankr. P. 2008.

2. Verified statement

The application must be accompanied by the appointee's verified statement "setting forth the person's connections with the debtor, creditors, any other party in interest, their respective attorneys and accountants, the United States trustee, or any person employed in the office of the United States trustee." Fed. R. Bankr. P. 2007.1(c). *See supra* section 3-6.3.6.

3. Order

The order approving the appointment is typically limited to a statement that the United States Trustee's application is granted. It is not necessary for this order to incorporate any substantive terms from the order directing appointment.

3-6.4.3 Security Clearance

In addition, all persons appointed as chapter 11 trustees or examiners must undergo a security clearance. Full background checks are not required for any individual for whom a background investigation is already in progress or has been completed within the preceding five years in connection with another examiner or trustee appointment. The United States Trustee should contact the Office of Oversight in EOUST upon identifying a candidate for trustee or examiner in order to determine if the candidate has a full background check already on file. If a security clearance is required, the candidate must complete and submit to the United States Trustee a standard packet of background investigation forms. The United States Trustee should monitor the trustee or examiner to ensure that these forms are timely completed and, upon receipt and review, should forward the completed forms to the Office of Oversight in EOUST.

3-6.4.4 Acceptance of Appointment and Posting of Bond

3-6.4.4.1 Acceptance of Appointment

Under Federal Rule of Bankruptcy Procedure 2008, within seven days of the receipt of the notice of appointment, a trustee must provide written notice of acceptance to both the court and the United States Trustee. Fed. R. Bankr. P. 2008. A chapter 11 trustee who fails to provide such notice is deemed to reject the appointment. This is a critical distinction from trustee appointments in most cases under chapters 7, 12, and 13, where the failure to file a rejection (in most circumstances) is deemed acceptance of the trustee appointment. The letter

transmitting the notice of appointment to the trustee might include a reminder of this requirement and instructions of how to return the written acceptance. Rule 2008 does not apply to examiners.

3-6.4.4.2 Posting of Bond

To qualify as a chapter 11 trustee, the trustee must post a bond in favor of the United States of America and file it with the court no later than six days ("before seven days") after selection. 11 U.S.C. § 322(a). The United States Trustee must determine both the initial amount and sufficiency of the bond. 11 U.S.C. § 322(b)(2). The United States Trustee should evaluate the assets of the estate when initially setting the amount of the bond. The bond should be set at a level sufficient to ensure the confidence of the parties, while considering that the estate will bear the cost of the bond premium. *See* United States Trustee Program Policies and Practices Manual § 7-2.2.4 (Chapter 11 Trustees and Examiners). Thereafter, the chapter 11 trustee must monitor the amount of funds on hand and ensure that the bond is maintained in an adequate amount, generally at least one and one-half times (150%) of the average monthly balance of funds on hand.

The surety on any bond written in favor of the United States of America must be authorized by the Secretary of the Treasury. 31 U.S.C. § 9304 and 9308. The Treasury Department publishes Treasury Circular 570, a list of companies holding certificates of authority as acceptable sureties on federal bonds, every July 1 in the Federal Register. The Circular is also posted on the Internet, available at https://www.fiscal.treasury.gov/fsreports/ref/suretyBnd/c570.htm. The United States Trustee may only approve those companies appearing on this list as sureties on trustee bonds, and should consult the Circular before approving any trustee bond to ensure coverage falls within authorized underwriting limits, which are on a per-bond basis. If a bond exceeds authorized underwriting limits, it cannot be approved absent proper coinsurance or reinsurance. *See* United States Trustee Program Policies and Practices Manual § 7-2.1.2 (Sufficiency of the Surety).

An examiner ordinarily need not obtain a bond. But if the examiner is given expanded powers despite the United States Trustee's objection and has access to assets of the estate, the United States Trustee should request that a bond be posted. *Id.* at § 7-2.2.4 (Chapter 11 Trustees and Examiners).

This discussion is intended as a summary and is not exhaustive. United States Trustees should consult Volume 7 of the United States Trustee Program Policies and Practices Manual for additional information and guidance regarding bonding requirements and procedures governing fiduciaries of estate assets.

3-6.5 TERMINATION OF A TRUSTEE'S APPOINTMENT

Under 11 U.S.C. § 1105, the court, on request of the United States Trustee or a party in interest and after notice and a hearing, may terminate the trustee's appointment and restore the debtor to possession. That authority should be exercised carefully and sparingly. *See In re Taub,* 441 B.R. 211, 215 (Bankr. E.D.N.Y. 2010) ("But possessing the authority to terminate a trustee's

appointment does not mean that courts freely exercise that power. This is reflected in the careful and infrequent application of Section 1105."). Section 1105 is intended to address instances in which the debtor's situation has changed and the need for a trustee no longer exists. The removal of the trustee may reflect a change in the circumstances under which the appointment was made. *See In re Eastern Consol. Utils., Inc.*, 3 B.R. 591, 592-93 (Bankr. E.D. Pa. 1980). Disagreement with a trustee's business judgment is not sufficient evidence of an improvident appointment or changed circumstances. *Taub*, 441 B.R. at 216. While the result of this order would place the debtor in possession back in control of the operation of the business, the court may nevertheless order the operation of the business to cease under 11 U.S.C. § 1108.

3-6.6 REMOVAL OF A TRUSTEE OR EXAMINER

Pursuant to 11 U.S.C. § 324(a) the court may, for cause, remove a trustee or an examiner. Notice and a hearing regarding the matter must be provided as required by section 102(1).

The Bankruptcy Code does not list specific grounds constituting cause for removal. Determining whether circumstances warrant the removal of a trustee or examiner is necessarily left to the court on a case-by-case basis. Many of the reported decisions on the application of section 324 arise in the context of chapter 7 cases. As with chapter 7 trustees, the United States Trustee must ensure that chapter 11 trustees and examiners are appropriately supervised and held accountable for their actions. To the extent that these individuals are not filing reports or otherwise complying with their fiduciary obligations, a motion seeking their removal should be filed. Unless the court orders otherwise, the removal of a trustee or an examiner in any one bankruptcy case effects the trustee's or examiner's removal in all other cases in which the trustee or examiner is then serving. 11 U.S.C. § 324(b).

In the event of an allegation of loss of estate funds held by the chapter 11 trustee, the United States Trustee should follow guidance set forth in Manual Volume 2, on chapter 7 case administration.

A trustee who has been removed must still file a final report and account of the administration of the estate. *See* 11 U.S.C. § 704(a)(9) made applicable to chapter 11 trustees by 11 U.S.C. § 1106(a)(1). The removed trustee must also turn over all books, records, and other assets of the estate to a successor trustee, and indeed can be compelled to do so if necessary. *See* 11 U.S.C. § 542(a); *In re Grand Jury Proceedings*, 119 B.R. 945, 952-55 (E.D. Mich. 1990); *Matter of Jim's Garage*, 118 B.R. 949, 951-53 (Bankr. E.D. Mich. 1989). The successor trustee appointed in any such case must also file an accounting of the prior administration of the estate. Fed. R. Bankr. P. 2012(b)(2).

3-6.7 ELECTION OF A TRUSTEE

Section 1104 allows creditors to elect a trustee in chapter 11 cases. Pursuant to section 1104(b)(1), the election of the chapter 11 trustee is to be conducted in the same manner as the election of a chapter 7 trustee**.** *See* Fed. R. Bankr. P. 2007.1 for procedures for the election of a chapter 11 trustee.

3-6.7.1 Requests for Election

Any party in interest may request the election of a trustee after the court orders the appointment of a trustee under section 1104(a). The request must be made no later than 30 days after the court orders the appointment. *See* 11 U.S.C. § 1104(b)(1) and Fed. R. Bankr. P. 2007.1(b)(1).

If a timely request for election is made, the United States Trustee must convene a section 341 meeting. *See* 11 U.S.C. § 1104(b)(1). In the event that the section 341 meeting initially convened in the case has been concluded, section 1104(b)(1) and Rule 2003(f) (Special Meetings) provide authority for the United States Trustee to convene another meeting of creditors for the purpose of holding a trustee election. Notice should be given in the same manner as for any section 341 meeting. *See* Fed. R. Bankr. P. 2002(a)(1) and 2007.1(b)(2). Parties should be able to request the court to shorten the normal 21-day notice period. *See* Fed. R. Bankr. P. 9006(c)(1).

There appears to be a conflict in the statute regarding the determination of the number of creditors required to request an election. The first sentence of section 1104(b) indicates that an election shall be held "on the request of a party in interest." This would seem to indicate an election should be held even if only one eligible creditor requests the election. However, the second sentence of section 1104(b) further states, "the election of a trustee shall be conducted in the manner provided in subsections (a), (b), and (c) of section 702 of this title." 11 U.S.C. § 702(b) provides that:

> Creditors may elect one person to serve as trustee in the case if election of a trustee is requested by creditors that may vote under subsection (a) of this section, and that hold at least 20 percent in amount of the claims specified in subsection (a)(1) of this section that are held by creditors that may vote under subsection (a) of this section.
>
> *Id.*

As the language of section 1104(b) specifically refers to section 702(b), it would appear that Congress intended that eligible voters holding at least 20 percent in the amount of claims must request the election at the meeting convened upon the request of a party in interest. Therefore, although any single party in interest may request the United States Trustee to convene a meeting of creditors for the purpose of electing a trustee, the 20 percent "requesting" requirement of section 702(b) must also be met before the election may proceed. This interpretation comports with the policy underlying the enactment of section 702(b), namely, "to insure that a trustee is elected only in cases in which

there is true creditor interest, and to discourage election of a trustee by attorneys for creditors." H.R. Rep. No. 595, 95th Cong., 1st Sess. 102 (1977).

In chapter 11 cases, as in chapter 7 cases, the right to vote is determined pursuant to Fed. R. Bankr. P. 2003(b)(3). *See* Fed. R. Bankr. P. 2007.1(b)(2). Rule 2003(b)(3) provides that an unsecured creditor is only entitled to vote if, at or before the meeting, the creditor has filed a proof of claim or a writing setting forth facts evidencing a right to vote. An objection may be made to the claim at the election. If an objection is made to the amount or allowability of a claim for the purposes of voting, the United States Trustee shall tabulate the votes for each alternative presented by the dispute, and if resolution of such dispute is necessary to determine the result of the election, the tabulations for each alternative shall be reported to the court. *See* Fed. R. Bankr. P. 2003(b)(3).

A claim or interest is deemed allowed unless a party in interest objects. 11 U.S.C. § 502(a). A proof of claim executed and filed in accordance with the Bankruptcy Rules constitutes *prima facie* evidence of the amount and validity of the claim. *See* Fed. R. Bankr. P. 3001(f). Accordingly, most courts have concluded that a claim that is *prima facie* valid may not be denied the right to vote because of a mere general assertion that the claim is invalid. *See, e.g.*, *In re Poage*, 92 B.R. 659, 664 (Bankr. N.D. Tex. 1988). The party objecting to the claim for voting purposes must go forward with the evidence to establish the invalidity of the claim. *See In re Metro Shippers, Inc.*, 63 B.R. 593, 599 (Bankr. E.D. Pa. 1986).

Unlike in chapter 7, a creditor in chapter 11 does not need to file a proof of claim unless the claim is disputed, contingent, or unliquidated. *See* Fed. R. Bankr. P. 3003(c)(2). The schedules constitute *prima facie* evidence of the validity and the amount of the claim. *See* Fed. R. Bankr. P. 3003(b)(1). Accordingly, an eligible unsecured creditor who holds a claim that is not disputed, contingent, or unliquidated should be deemed to have the right to vote.

The first step in determining whether a sufficient number of creditors has made a request for an election is to determine the proper "claims base" against which the 20 percent "requesting" requirement may be measured. The proper time to compute this universe of voting creditors is as of the time of an election. *In re Williams*, 277 B.R. 114, 117 (Bankr. C.D. Cal. 2002). From a review of Schedule F and filed proofs of claim, the total claims universe eligible to vote in the election should be calculated. This process, which reduces the total universe of claims asserted in the case, may involve:

1. eliminating all Schedule F claims that are superseded by filed proofs of claim;
2. eliminating all Schedule F claims listed in "unknown" amounts;
3. eliminating all Schedule F claims listed as "contingent," "unliquidated" or "disputed";

4. eliminating all filed claims that are superseded by duplicate or amended proofs of claim;
5. eliminating all claims (or portions thereof) filed as "secured" or "priority";
6. eliminating all filed claims listed as "contingent," "unliquidated" or "disputed";
7. eliminating all filed claims that have been paid and satisfied under bankruptcy court orders;
8. eliminating all filed claims as to which objections have been filed or made otherwise; and
9. eliminating all claims filed after the court-ordered bar date. *See In re American Eagle Mfg., Inc.*, 231 B.R. 320, 329-331 (Bankr. 9th Cir. 1999).

3-6.7.2 Election Procedures

The United States Trustee convenes and presides at the election. See 11 U.S.C. § 1104(b)(1) and Fed. R. Bankr. P. 2007.1(b)(2). The meeting should be recorded, as is done with the section 341 meeting. *See* Fed. R. Bankr. P. 2003(c). The following information should be obtained and recorded:

1. the case name and number;
2. the date of the meeting;
3. the names of all parties in attendance;
4. the name of the individual requesting the election and the claim represented, including the amount of the claim;
5. the name of the claimant requesting an election, a copy of the claim, and a copy of any proxy or power of attorney; and
6. if an attorney is voting a claim, a statement from the attorney that the claimant is a regular client of that attorney or a solicitation statement from the attorney.

If an eligible disinterested trustee is elected, the United States Trustee must file a report certifying that election. *See* 11 U.S.C. § 1104(b)(2)(A). Furthermore, upon completion of an undisputed election, the United States Trustee shall promptly file with the court a report of the election, including the name and address of any person elected as trustee and a statement that the election is undisputed. *See* Fed. R. Bankr. P. 2007.1(b)(3)(A). If creditors elect a trustee under section 1104(b)(1), the report filed by the United States Trustee effectively serves as the selection and appointment of such person by the United States Trustee under section 1104(d), and the service of the original chapter 11 trustee appointed by the United States Trustee terminates. *See* 11 U.S.C. § 1104(b)(2)(B).

If it is necessary to resolve a dispute regarding the election:

The United States Trustee shall promptly file a report stating that the election is disputed, informing the court of the nature of the dispute, and listing the name and address of any candidate elected under any alternative presented by the dispute. The report shall be accompanied by a verified statement by each candidate elected under each alternative presented by the dispute, setting forth the person_s connections with the debtor, creditors, any other party in interest, their respective attorneys, the United States Trustee, and any person employed in the office of the United States Trustee. Fed. R. Bankr. P. 2007.1(b)(3)(B).

The United States Trustee must deliver a copy of the report and each verified statement to all parties in interest who either have made a request to convene a meeting under section 1104(b), or requested a copy of the report. *Id.* All committees appointed under section 1102 also are to be served with the report and verified statement. *Id.*

A motion to resolve the dispute must be filed within 14 days after the date the United States Trustee files the report. *Id.* If such a motion is not filed within the 14-day period, the person appointed by the United States Trustee in accordance with section 1104(d) and approved in accordance with Fed. R. Bankr. P. 2007.1(c) shall serve as trustee. *Id.* If a motion to resolve the dispute is filed within the 14-day period, the court must resolve the dispute. *See* 11 U.S.C. § 1104(b)(2)(C). Rule 2007.1 does not provide procedures for judicial resolution of a disputed election in a chapter 11 case. *See* Fed. R. Bankr. P. 2001.1. However, the procedures applicable in disputed chapter 7 elections may be used as guidance. *See* Fed. R. Bankr. P. 2003(d)(2). To avoid a gap in service, pending disposition by the court of the disputed election, the interim trustee shall continue in office. *See* Fed. R. Bankr. P. 2007.1(b)(1).

3-6.7.3 Eligible Voters

Eligible voters are those unsecured creditors who have allowable, undisputed, fixed, liquidated claims that would be entitled to distribution under 11 U.S.C. § 726(a)(2), 726(a)(3), 726(a)(4), 752(a), 766(h), or 766(i). See 11 U.S.C. § 702(a)(1) and 1104(b)(1). Given that these provisions of chapter 7 are not applicable in chapter 11 cases, some confusion regarding this portion of section 702(a)(1) may arise. It would appear that Congress intends to allow unsecured, non-priority creditors to be eligible to vote.

Priority unsecured creditors and secured creditors clearly are not eligible to vote. *See In re Aspen Marine Group, Inc.*, 189 B.R. 859, 863 (Bankr. S.D. Fla. 1995); *In re USA Capital, LLC*, 251 B.R. 883, 889-90 (Bankr. D. Colo. 2000). An undersecured creditor should be allowed to vote the unsecured portion of its claim. *See* 7 *Collier on Bankruptcy*, ¶ 1104.02[8][b][iv], at 1104-29 (16th ed. 2009); *In re Tartan Constr. Co.*, 4 B.R. 655, 658 (Bankr. D. Neb. 1980); *but see In re Lindell Drop Forge Co.*, 111 B.R. 137 (Bankr. W.D. Mich. 1990).

An unsecured creditor with an interest materially adverse to the interests of other unsecured creditors may not vote in a trustee election. 11 U.S.C. § 702(a)(2). For example, an unsecured creditor has a material adverse interest when facts

indicate that the creditor has received a voidable preferential transfer. *See In re Lang Cartage Corp.*, 20 B.R. 534, 536 (Bankr. E.D. Wis. 1982). However, the suspicion of an avoidable preference is insufficient to prohibit a creditor from voting. *See In re Poage*, 92 B.R. 659, 665 (Bankr. N.D. Tex. 1988).

However, a creditor with a small equity position is not automatically excluded from voting solely because of the equity interest. 11 U.S.C. § 702(a)(2). The equity interest may be disregarded if it is *de minimus* when compared with the unsecured claim. *See* H.R. Rep. No. 595, 95th Cong., 2d Sess. 378 (1977). A creditor who is an insider of the debtor is not eligible to vote. *See* 11 U.S.C. § 702(a)(3).

3-6.7.4 Determining Election Results

The election is void unless creditors holding at least 20 percent in the amount of eligible claims actually vote. 11 U.S.C. § 702(c)(1). The successful candidate must receive votes from creditors holding a majority in the amount of claims that are held by creditors actually voting. 11 U.S.C. § 702(c)(2). The number of creditors voting for or against a candidate is irrelevant, as only the dollar amount of the claim is counted for voting purposes.

The 20 percent "requesting" requirement of section 702(b) is independent of the 20 percent "quorum" requirement of section 702(c)(1). *See In re Oxborrow*, 913 F.2d 751, 753-54 (9th Cir. 1990). At least 20 percent of eligible creditors must request an election regardless of the number of creditors who actually cast votes at an election. *Id.*

3-6.7.5 Solicitation of Proxies

In most cases, not all creditors who wish to vote for a trustee will be in attendance. It is likely that in cases with a significant number of creditors the election will be requested by one or more creditors holding proxies. A proxy is defined in Fed. R. Bankr. P. 2006(b)(1) as a "written power of attorney authorizing any entity to vote the claim or otherwise act as the owner's attorney in fact in connection with the administration of the estate." The validity of a proxy is determined under Fed. R. Bankr. P. 9010(c).

Proxy holders who have solicited proxies for voting at the election of a trustee must follow the rules set forth in Fed. R. Bankr. P. 2006. The court may reject any proxies, on motion of a party in interest or on its own motion, if there has been a failure to comply with this rule. Fed. R. Bankr. P. 2006 applies in chapter 11 trustee elections. *See* Fed. R. Bankr. P. 2007.1(b)(2).

The strict rules regulating the solicitation of proxies must be enforced to ensure that a trustee is elected only in cases where there is true creditor interest. The Advisory Committee Note to Fed. R. Bankr. P. 2006 states:

> Creditor control was a basic feature of the Act and is continued, in part, by the Code. Creditor democracy is perverted and the congressional objective frustrated, however, if control of administration falls into the hands of

> persons whose principal interest is not in what the estate can be made to yield to the unsecured creditors but in what it can yield to those involved in its administration or in other ulterior objectives.

Id.

Any communication concerning a proxy for electing a trustee is deemed solicitation unless the communication is between a creditor and an attorney acting for the creditor. Fed. R. Bankr. P. 2006(b)(2). A communication between an attorney and his/her regular client would not be a solicitation. *Id.*

The requirements for an authorized solicitation are set forth in Fed. R. Bankr. P. 2006(c). The solicitation must be in writing. Fed. R. Bankr. P. 2006(c)(2).

A proxy may be solicited only by the following individuals or committees:

(A) a creditor owning an allowable unsecured claim against the estate on the date of the filing of the petition; (B) a committee elected pursuant to § 705 of the Code which does not apply in chapter 11 cases; (C) a committee of creditors selected by a majority in number and amount of claims of creditors (i) whose claims are not contingent or unliquidated, (ii) who are not disqualified from voting under § 702(a) of the Code, and (iii) who were present or represented at a meeting of which all creditors having claims of over $500 or the 100 creditors having the largest claims had at least five days notice in writing and of which meeting written minutes were kept and are available reporting the names of the creditors present or represented and voting and the amounts of their claims; or (D) a bona fide trade or credit association, but such association may solicit only creditors who were its members or subscribers in good standing and had allowable unsecured claims on the date of the filing of the petition. Fed. R. Bankr. P. 2006(c)(1).

A committee of unsecured creditors appointed under section 1102 is also entitled to solicit a proxy for the purposes of the election of a chapter 11 trustee. See Fed. R. Bankr. P. 2007.1(b)(2).

The purpose of these restrictions is to protect creditors from the loss of control of the administration of the case to holders of proxies having interests different from the general unsecured creditors. This rule restricts solicitation to those who were creditors at the commencement of the case. Advisory Committee Note, Rule 2006(c).

Fed. R. Bankr. P. 2006(d) expressly prohibits solicitation by five types of persons. First, any entity holding any interest other than that of a general creditor is prohibited from soliciting proxies. Under this provision, secured and priority creditors and the debtor are prohibited from solicitation. Solicitations are prohibited by or on behalf of any custodian. Further, the interim trustee appointed under section 701 is prohibited from soliciting proxies. (Of course, this prohibition is not applicable in a chapter 11 case.) Under that same subdivision, any entity not entitled to vote under section 702 is prohibited from

solicitation. Solicitation is not permitted by or on behalf of a transferee of a claim for collection only.

In addition, the solicitation of proxies is not permitted by or on behalf of an attorney at law. Fed. R. Bankr. P. 2006(d). This rule does not regulate communications between an attorney and his or her regular client. Fed. R. Bankr. P. 2006(b)(2). Any other communication between an attorney and any other person or group requesting a proxy from a creditor, however, is a regulated solicitation.

The case of *In re Darland Co.*, 184 F. Supp. 760 (S.D. Iowa 1960), is cited in the Advisory Committee Note to Fed. R. Bankr. P. 2006. In that case, the district court stated that the solicitation of a proxy by an attorney from a creditor who was not a client may be objectionable as unethical conduct. *Id.* at 763-64. The Advisory Committee Note further states that solicitation by an attorney "carries a substantial risk that administration will fall into the hands of those whose interest is in obtaining fees from the estate rather than securing dividends for creditors."

Several bankruptcy courts have refused to recognize proxies that were solicited by attorneys at law. *See, e.g.*, *In re Oxborrow*, 104 B.R. 356, 362 (E.D. Wash. 1989), *aff'd*, 913 F.2d 751 (9th Cir. 1990). These courts recognize that the drafters of the Bankruptcy Rules made a conscious and deliberate decision to prohibit solicitation by attorneys. *But see In re Diva Jewelry Design, Inc.*, 367 B.R. 463, 475-76 (Bankr. S.D.N.Y. 2007) (attorney is not barred from assisting the solicitation efforts of a creditor or committee, provided it is clear that the attorney, in his or her personal capacity, is not the solicitor and that the solicitation is not on behalf of the attorney in that capacity).

A solicitation statement must be filed with the court and served upon the United States Trustee by a holder of two or more proxies prior to the time voting commences at any meeting of creditors. Fed. R. Bankr. P. 2006(e). Delivering the proxy statement to the presiding official at the meeting is not the equivalent of filing the statement with the clerk of the court. *See In re Brent Indus., Inc.*, 96 B.R. 193, 196 (Bankr. D. Iowa 1989). The solicitation statement must include the following:

1. a copy of the solicitation;
2. identification of the solicitor, the forwarder, . . . and the proxy holder. . . . If the solicitor, forwarder, or proxy holder is an association, there shall also be included a statement that the creditors whose claims have been solicited . . . were members in good standing and had allowable unsecured claims . . . ;
3. a statement that no consideration has been paid or promised by the proxy holder for the proxy;
4. a statement as to whether there is any agreement . . . for the payment of any consideration in connection with voting the proxy, or for the sharing of compensation with any entity, other than a member or regular associate of the proxy holder's law firm, which may be allowed the trustee . . . ;

5. if the proxy was solicited by an entity other than the proxy holder . . . . a statement signed and verified by the solicitor or forwarder that no consideration has been paid or promised . . . ;
6. if the solicitor, forwarder, or proxy holder is a committee, a statement signed and verified by each member as to the amount and source of any consideration paid or to be paid . . . .Fed. R. Bankr. P. 2006(e).

3-6.7.6 Qualifications of an Elected Trustee

An elected trustee must be "disinterested." 11 U.S.C. § 1104(b). In addition, the elected trustee must meet the qualifications of section 321. The person elected to be trustee must be competent to perform the duties. 11 U.S.C. § 321(a)(1). If the elected trustee is a corporation, the corporation must be authorized by the corporation's bylaws or charter to act as a trustee. 11 U.S.C. § 321(a)(2). Additionally, the person cannot have served as an examiner in the case. 11 U.S.C. § 321(b). The elected trustee must post a bond in favor of the United States. 11 U.S.C. § 322(a). The amount of the bond and sufficiency of the surety shall be determined by the United States Trustee. 11 U.S.C. § 322(b)(2).

If the elected trustee has provided no indication of his or her ability or intent to comply with the Bankruptcy Code and Rules and to adhere to fiduciary standards, the court may refuse to certify the election. *See In re Shubov*, 187 F.3d 648 (9th Cir. 1999) (upholding bankruptcy court's rejection of elected chapter 7 trustee, where individual elected lacked experience in chapter 7 cases, the estate was small relative to the resources needed to educate the individual, and the individual lacked financial resources and demonstrated financial irresponsibility).

CHAPTER 3-7: EMPLOYMENT OF PROFESSIONALS

3-7.1 STATUTORY FRAMEWORK: 11 U.S.C. § 327 and FED. R. BANKR. P. 2014

Sections 327, 1103, and 1107 govern the employment of professionals in connection with a chapter 11 case. For professionals employed by creditors' committees pursuant to section 1103, *see* Manual 3-4.2. The following discussion is primarily directed at the employment of professionals by debtors in possession and chapter 11 trustees. Unless the professional comes within the limited exception provided for by section 327(b), prior court approval of the employment of a professional person is necessary.

The retention process is designed to ensure public confidence in the bankruptcy system, prevent abuses, and achieve some degree of economy in the administration of the case by limiting the retention of professionals to only those instances where it can be demonstrated that the services are necessary. Furthermore, the requirements of section 327 "serve the important policy of ensuring that all professionals appointed pursuant to the section tender undivided

loyalty and provide untainted advice and assistance in furtherance of their fiduciary responsibilities." *Rome v. Braunstein*, 19 F.3d 54, 58 (1st Cir. 1994). 28 U.S.C. § 586(a)(3)(I) specifically requires the United States Trustee to monitor employment applications and, when appropriate, to file with the court comments with respect to the approval of such applications.

Court approval of a professional person's employment is contingent upon a finding that the applicant has met a two-pronged test:

1. the professional must be disinterested, pursuant to section 327(a); and
2. the professional must not hold or represent an interest adverse to the estate.

The question of whether a professional meets the standards of the law is one for the court to adjudicate after a full disclosure of the facts. A failure to disclose constitutes an independent basis for disqualification.

A professional's conflict of interest may render him or her ineligible to serve as a professional under section 327(a). Despite the requirements of that section and the definition of a "disinterested person" that appears in section 101(14), a professional is not necessarily disqualified from employment because of representation of both the trustee and a creditor. Section 327(c) requires the presence of an actual conflict of interest; however, the statute does not define an actual conflict of interest. Whether the professional's representation is precluded is dependent on a detailed consideration of the relevant circumstances. Few *per se* rules exist in this area, but case law can provide some guidance regarding specific situations.

Some courts require an actual conflict of interest to render counsel not disinterested. Other courts find a potential conflict is disabling. Some courts find that there is no distinction between a potential or an actual conflict. Generally, a finding of actual conflict warrants disqualification of a professional under section 327(a). In addition, under the appropriate circumstance, the appearance of impropriety or an appearance of potential conflict can be grounds for disqualification of counsel.

Pursuant to section 328(c), the court may deny allowance of compensation for services and reimbursement of expenses to a professional employed pursuant to section § 327 or 1103 if the court finds that at any time during the employment the professional was not a disinterested person or held or represented an interest adverse to the estate.

The United States Trustee should promptly examine the application for employment and its accompanying verified statement not only to determine if the proposed professional service is necessary, but also to ascertain if any disclosures suggest questionable relationships, divided loyalties, or disqualifying adverse interests. Issues that may warrant closer scrutiny include multiple debtor representation, simultaneous representation of a limited partnership and a general partner, representation of a corporation and an affiliate or shareholder, receipt of a preference or unpaid fees, security interests taken to secure the payment of fees or other unusual arrangements for compensation, and prior or concurrent

representation of a major creditor. Where appropriate, the United States Trustee should require further disclosure or comment on any unusual aspects of the application. The United States Trustee should object to the employment when the services are unnecessary or duplicative, the applicant is not disinterested, or representation of adverse interests warrants disqualification.

Bankruptcy Rule 6003(a) provides that applications to employ professionals cannot be granted within 21 days of the filing of the petition, except to the extent that relief is necessary to avoid immediate and irreparable harm. The United States Trustee should object when relief is sought contrary to Rule 6003(a).

Fed. R. Bankr. P. 2014(a) requires that a copy of the employment application be transmitted to the United States Trustee, but it does not specify any additional parties that must be served. The issue of notice may be addressed by local rule or customary practice. When appropriate, however, the United States Trustee may suggest that only interim orders authorizing employment be entered *ex parte* pending notice and opportunity for objection by parties in interest before the order is permitted to become final.

The contents of an employment application are dictated by Fed. R. Bankr. P. 2014. It must contain all of the following elements:

1. specific facts showing the necessity of the employment;
2. the name of the person to be employed;
3. the reasons for the selection;
4. the professional services to be rendered;
5. any proposed arrangement for compensation; and
6. all of the person's connections with the debtor, creditors, any other party in interest, their respective attorneys and accountants, the United States Trustee, or any person employed in the Office of the United States Trustee.

Fed. R. Bankr. P. 2014 disclosure requirements are to be strictly construed. All facts that may have any bearing on the disinterestedness of a professional must be disclosed. It is the responsibility of the professional, not of the court, to ensure that all relevant connections have been brought to light. Failure to disclose relevant connections is an independent basis for the disallowance of fees or disqualification.

The best practice is for the professional to file an application for employment as soon as possible after the petition date or retention, whichever comes first, even though Rule 6003 does not permit the court to enter the order approving the retention in the first 21 days of the case absent "immediate and irreparable harm." Rule 6003 bars entry of the order in the first 21 days, not the filing of the application. Once the court enters the order, it can be effective as of the date of the employment application.

Professionals perform services at their peril before they file an application for employment. Any approval of employment seeking an effective date before the

application was filed should be considered as a request for *nunc pro tunc* approval. Some circuits enforce a rule denying compensation to professionals for work done prior to the filing of an application for employment unless, as a matter of fundamental fairness, the court approves a *nunc pro tunc* application. Some courts limit entry of *nunc pro tunc* employment orders to extraordinary circumstances and not merely because the approval requirement was overlooked. Mere oversight and inadvertence of counsel are not extraordinary circumstances.

Courts permitting a liberal *nunc pro tunc* approach generally consider if:

1. the application would have been approved originally by the court;
2. evidence appears in the record that demonstrates that the court and other interested parties had actual knowledge of the services being rendered;
3. an application seeking an order *nunc pro tunc* has been filed as soon the matter is brought to the applicant's attention; and
4. a sustainable objection has not been filed to the application for fees.

The Supreme Court has criticized the use of a *nunc pro tunc* order as an "Orwellian vehicle for revisionist history" when reviewing a *nunc pro tunc* order in a non-employment setting. *Roman Catholic Archdiocese of San Juan, Puerto Rico v. Acevedo Feliciano*, 140 S. Ct. 696, 701 (2020). Although the better interpretation of *Acevedo Feliciano* is that *nunc pro tunc* retention may be appropriate depending on the facts of the case, bankruptcy courts may apply the decision differently. For instance, one bankruptcy court has interpreted the reasoning of *Acevedo Feliciano* to preclude any *nunc pro tunc* relief for professional retention. *See In re Benitez*, No. 8-19-70230-REG, 2020 WL 1272258, at *2 (Bankr. E.D.N.Y. Mar. 13, 2020) ("[T]his Court will no longer require or grant nunc pro tunc retentions.")

The United States Trustee should enforce the requirement of prior court approval and object to the entry of *nunc pro tunc* orders, if appropriate.

3-7.1.1 Retention of Crisis Managers under 11 U.S.C. § 363

In some cases, the debtor may seek to retain a crisis manager, restructuring adviser, or chief restructuring officer (collectively, "crisis manager"). Although the specific terms of the retention and duties of these persons will vary from case to case, the hallmark of such engagements is that the crisis manager predominantly will assume duties that, outside of bankruptcy, typically would be performed by an officer or full-time employee of the debtor.

Because the nature of the crisis manager's duties arguably renders him or her non-disinterested, and therefore ineligible to be retained as a professional under section 327, debtors frequently seek to authorize the employment of such persons as a non-ordinary course transaction under section 363(b).

Although the USTP has never conceded that crisis managers fall outside the scope of section 327, which governs the retention of professionals, it has been the policy of the USTP not to object to applications to retain crisis managers under section 363(b) as long as certain conditions are observed. These conditions are memorialized in the *Jay Alix Protocol*, a 2003 stipulation between the United States Trustee for Region 3 and a crisis manager.

Among other key terms, the *Jay Alix Protocol* requires the crisis manager to limit itself to a single function in the bankruptcy case. The crisis manager may not fully supplant the debtor's existing management, but must remain answerable to the debtor's independent board of directors. In addition, the *Jay Alix Protocol* requires the crisis manager to file fee applications under procedures similar to those applicable to professionals under section 330 and limits the indemnification rights that the crisis manager's firm may receive. An individual crisis manager may be indemnified to the same extent as state law, the bylaws or other documents of corporate governance permit the indemnification of individual officers or directors, along with insurance coverage under the debtor's D&O policy. The firm or corporate entity for which the crisis manager works may not be indemnified. The *Jay Alix Protocol* does not have the force of law. Rather, it is a compromise that the USTP historically has offered to debtors and crisis managers. As a result, if the debtor or crisis manager rejects any term of the *Jay Alix Protocol*, the United States Trustee retains the right to object to all issues regarding the crisis manager's employment, including the request to be retained under section 363 rather than section 327.

3-7.1.2 11 U.S.C. § 329 and Fed. R. Bankr. P. 2016(b) and 2017

Every attorney for a debtor must file the statement required by section 329 within 14 days of the order for relief setting forth the compensation paid or agreed to be paid for services rendered or to be rendered in contemplation of or in connection with the bankruptcy case and the source of such compensation. Fed. R. Bankr. P. 2016(b) also requires disclosure of any agreement to share compensation with any other entity, other than a member or regular associate of the attorney's law firm. Fed. R. Bankr. P. 2017 permits the court on the motion of a party in interest or on its own initiative to determine whether any payment or transfer to an attorney is excessive. Pursuant to section 329(b), the court may order the return of any excessive payments to the estate or the entity that made the payment.

3-7.1.3 Definition of Professional Person

Professional persons employed pursuant to section 327 or 1103 may be awarded compensation pursuant to sections 330 and 331. Clearly, the statute recognizes that attorneys, accountants, appraisers, and auctioneers are professional persons for whom prior court approval of employment would be required. Occasionally, it is necessary for the trustee, debtor in possession, or committee to contract with outside firms or individuals who do not fall within these categories for assistance in the performance of their statutory duties. In these circumstances, the question sometimes arises whether an order of employment is required. The classic

definition of professional person for purposes of section 327(a) limits the term to "persons in those occupations which play a central role in the administration of the debtor proceeding." *In re Marion Carefree Ltd. Partnership*, 171 B.R 584 (Bankr. N.D. Ohio 1994); *In re Seatrain Lines, Inc.*, 13 B.R. 980, 981 (Bankr. S.D.N.Y. 1981). The degree of autonomy and discretion exercised by the firm or individual in question is also a relevant consideration in determining whether the requirements of section 327(a) apply. *In re Bicoastal Corp.*, 149 B.R. 216 (Bankr. M.D. Fla. 1993); *In re Park Ave. Partners Ltd. Partnership*, 95 B.R. 605 (Bankr. E.D. Wis. 1988).

3-7.1.4 Auctioneers and Appraisers

The court must approve the retention of appraisers and auctioneers who must meet the same statutory requirements as other professionals. 11 U.S.C. § 327(a). Fed. R. Bankr. P. 6005 requires that the order of retention fix the amount or rate of compensation. The rule further provides that no employee or officer of the judiciary or of the Department may act as an appraiser or auctioneer, and provides that no residence or licensing requirement is to be required, even though most states require an auctioneer to be licensed and bonded. It is not unusual for an appraiser to be compensated on a per diem basis and an auctioneer to be compensated at a percentage of the gross proceeds of sale. Local rules may govern the maximum allowable percentage to auctioneers. The appraiser and the auctioneer should not be the same person. An obvious conflict arises where the same person appraises items that he or she will be auctioning, and the United States Trustee should object if it is proposed that one person be employed in both capacities.

Auctioneers must be bonded since they handle significant amounts of cash belonging to estates. The amount may be set by local rules, but the United States Trustee should require a bond of an amount sufficient to protect the estate. The bonds are generally filed with the clerk of the court. All proceeds of an auction sale are to be delivered to the trustee or the attorney for the debtor in possession as soon as they are received.

All auction sales are to be noticed pursuant to Fed. R. Bankr. P. 6004(a), and the auctioneer must submit an itemized statement of the property sold, the name of each purchaser, and the price received. Fed. R. Bankr. P. 6004(f)(1).

3-7.1.5 11 U.S.C. § 327(e)

An attorney who may be ineligible for employment under section 327(a) because of the attorney's prior representation of the debtor may be hired under section 327(e) if the employment is for a specified special purpose, other than to "represent the trustee in conducting the case," provided that the employment is in the best interest of the estate and the attorney does not hold or represent an interest adverse to the estate with respect to the particular matter for which such attorney is employed. Note that section 327(e) applies only to attorneys. *See* 3 COLLIER ON BANKRUPTCY § 327.04[9][a] ("The exception for the retention of

special purpose services applies exclusively to attorneys"). Accountants and other professional persons are not eligible for employment pursuant to that section. *See In re Andover Togs, Inc.,* 2001 U.S. Dist. LEXIS 2690 (S.D.N.Y. Mar. 13, 2001).

An analysis of whether special counsel qualifies for employment under section 327(e) should begin with an understanding of applicable ethical regulations. Certain potential conflicts are capable of being waived after full disclosure and consent. Most often, the question will become whether the conflicting interest that makes counsel ineligible for employment under section 327(a) is such that counsel is rendered incapable of exercising independent professional judgment on behalf of the client. If the employment necessarily requires that one interest be served at the expense of the other, an adverse interest exists that should disqualify counsel for employment pursuant to section 327(e).

3-7.2 THE DISINTERESTED PERSON REQUIREMENT FOR EMPLOYMENT OF PROFESSIONALS AND APPOINTMENT OF TRUSTEES AND EXAMINERS

The disinterested person requirement of the Bankruptcy Code applies when professionals are employed pursuant to 11 U.S.C. § 327(a), and in the appointment of trustees and examiners, 11 U.S.C. § 701, 1104, 1202(a), and 1302(a).

3-7.2.1 Statutory Framework: 11 U.S.C. § 101(14) and 327(a)

Disinterested person" is defined at section 101(14) as a person that:

(A) is not a creditor, an equity security holder, or an insider;

(B) is not and was not, within two years before the date of the filing of the petition, a director, officer, or employee of the debtor; and

(C) does not have an interest materially adverse to the interest of the estate or of any class of creditors or equity security holders, by reason of any direct or indirect relationship to, connection with, or interest in, the debtor or for any other reason.

Section 327(a) of the Bankruptcy Code involves the application of a two-pronged test. First, the professional must be disinterested as defined in section 101(14). Second, the professional must not hold or represent an interest adverse to the estate. Failure to meet either condition of employment can result in disqualification.

3-7.2.2 U.S.C. § 101(14) (A)-(B)

The language of section 101(14) (A)-(B) mandates a literal approach to the disinterested person requirement and sets forth in detail a series of characteristics that disqualify a person from being "disinterested." These paragraphs do not call

for any "weighing" or "balancing" of the impact of disqualification. A judicial determination that a person's characteristics would pose problems for the administration of the bankruptcy estate is not a prerequisite for disqualification. Each paragraph refers to characteristics of a person that are either carefully defined within the Bankruptcy Code or are easily understood. *See, e.g.*, 11 U.S.C. § 101(10) ("creditor"), (17) ("equity security holder"), and (31) ("insider"). If a professional has the characteristic, then disqualification is automatic. The fact that the interest in question may arguably be considered *de minimus* is of no importance in the analysis. Since the language of the statute is clear, it must be applied as written.

An agreement to subordinate a claim to payment of all other claims in a case will not cure a disinterestedness problem. However, waiver of the claim will render an applicant disinterested and thus in compliance with the statute.

3-7.2.3 Overlap of 11 U.S.C. § 101(14) (C) and 11 U.S.C. § 327(a)

A more difficult inquiry must be undertaken to determine whether the professional meets the adverse interest standard of sections 101(14) (C) and 327(a). Subparagraph (C) of section 101(14), the so-called "catch-all" provision, provides that a person is disinterested if the person:

> does not have an interest materially adverse to the interest of the estate or of any class of creditors or equity security holders, by reason of any direct or indirect relationship to, connection with, or interest in, the debtor or for any other reason.

Section 327(a) provides that the trustee may employ professionals "that do not hold or represent an interest adverse to the estate, and that are disinterested persons. . . ." There is thus some overlap between the no adverse interest requirement of section 327(a) and the materially adverse interest standard of section 101(14)(C). Viewed practically, persons failing one of the requirements will often fail the other as well.

The conclusion that retention is improper requires a careful consideration and weighing of the totality of the circumstances presented; it is not, however, a balance of impropriety against the alleged disruption disqualification will create. If the circumstances reveal a conflict impeding the exercise of independent judgment by the professional, an objection to the retention should be made.

There are differences between sections 327(a) and 101(14)(C). Section 327(a) refers merely to an interest that is "adverse," whereas section 101(14)(C) refers to a "materially adverse" interest. This would suggest that a somewhat broader standard is contained in section 327(a). Subparagraph (C) of section 101(14), however, appears to be more stringent than section 327(a) in one regard. The adverse interest clause of section 327(a) merely precludes the employment of persons holding or representing an interest adverse to the estate, whereas subparagraph (c) expands the proscription to include interests that are materially

adverse not only to the estate, but also to any class of creditors or equity security holders.

These statutory distinctions complicate the analysis that must be undertaken. Further complexity results from the provision of section 327(c) that states that a professional is not disqualified for employment "solely because of such person's employment by or representation of a creditor, unless there is an objection by another creditor or the United States trustee, in which case the court shall disapprove such employment if there is an actual conflict of interest." Thus, a professional is not ineligible for employment simply because he/she represents a creditor, absent an actual conflict. Furthermore, section 1107(b) provides that, notwithstanding the requirements of section 327(a), a person is not disqualified for employment by a debtor in possession solely because of such person's employment by or representation of the debtor before the commencement of the case. Proper application of these varied statutory provisions demands a painstaking analysis of the unique facts and circumstances presented in each case.

3-7.2.4 2019 Disclosure Principles Memorandum

On December 4, 2019, the Director issued a memorandum setting forth four guiding principles for the USTP to follow when reviewing and objecting to professional employment applications. The contents of that memorandum are incorporated below.

Pursuant to 28 U.S.C. § 586(a)(3)(I), the USTP has an important responsibility to review applications in chapter 11 cases to employ law and other professional firms ("professional firms")[6] that will seek payment from the bankruptcy estate. Due to the multiplicity of interests in a case—from large to small creditors, from employees to other stakeholders—the Bankruptcy Code and Rules mandate that professional firms disclose their connections to other parties in the case and satisfy conflict of interest standards.

Although all parties in a case may object to the adequacy of a professional firm's disclosures and to a professional firm's retention because of potential or actual conflicts, it is usually only the USTP that makes inquiries or files objections. Our role as the "watchdog" of the bankruptcy system is to faithfully read and apply the Code and Rules and to raise issues that we have identified so that the court may make the ultimate determination on a professional firm's employment.

The organizational structure of many professional firms seeking to be retained in bankruptcy cases has grown more complex in recent years. Some professional firms are affiliates of larger businesses that provide a variety of services to clients, both inside and outside of the bankruptcy system. In addition, some professional firms (including parents and affiliates) sponsor funds that invest in their business clients, in distressed debt that may be at issue in a bankruptcy case, or in

[6] As used herein, this term also includes the individual professionals of the professional firm.

industries (including competitors of their business clients) to which they provide services.

The increasingly complex profile of professional firms subject to the disclosure and conflict provisions of 11 U.S.C §§ 327 and 1103 and Fed. R. Bankr. P. 2014 makes both our review of employment applications and the court's decision on such applications more challenging. Accordingly, set forth below are the general principles that should guide you, as USTP personnel, in reviewing applications to employ professional firms in bankruptcy cases.

1. **Enforce the Law**. The USTP's responsibilities start and stop with a textual reading and expert application of the Bankruptcy Code and Rules. Although professional firms may adopt internal protocols that guide their processes for compliance, these internal protocols cannot change substantive law. Nor can these protocols provide a safe harbor for a firm that does not meet the strict legal requirements governing disclosures and conflicts.

2. **Disclose Connections on the Public Record.** It is the USTP's position that relevant bankruptcy law requires professional firms to disclose on the public record their connections to a case, even if they have a contractual arrangement to keep client information, including client names, confidential. The USTP will argue that a professional firm required to disclose information must either publicly disclose on the record the withheld information or file a properly supported motion to seal under Bankruptcy Code section 107 for the court to adjudicate. Should the professional firm choose to file a motion to seal rather than publicly disclose the required information on the record, the USTP has a responsibility to object to any motion that does not satisfy the high bar for sealing.

3. **Disclose Affiliate Connections**. It is the USTP's position that a professional firm being employed must disclose the connections of all its affiliates. Every case is fact specific and, in some circumstances, a professional firm may be able to show that it is sufficiently separate from its affiliates to excuse affiliate disclosure.[7] The applicant seeking to employ the professional firm bears the burden of proof and only the court has authority to excuse affiliate disclosure.

4. **Disclose Connections Based on Investments**. Investments by the professional firm's investment affiliates or by their individual professionals may

[7]Separate incorporation may not be dispositive of whether affiliate disclosure may be excused. Professional firms routinely disclose connections of their separately incorporated affiliates when, for example, the separate legal entities belong to an international cooperative.

create conflicts, and depending on the circumstances, those conflicts can be just as serious as conflicts created by working for clients with adverse interests. It is the USTP's position that relevant bankruptcy law requires the professional firm to disclose connections that extend to investments in clients and other entities that may be a party in interest in the case, such as a stalking horse bidder, DIP lender, or other creditor. Investments include direct investments in such entity, as well as investments made through third parties.

In deciding whether investments must be disclosed, the USTP will analyze two key factors: (1) knowledge; and (2) control. If the professional firm knew or could have known about the investment in a particular entity that may be involved in the case or an investment in the debtor's industry, then it is the USTP's position that the investment should be disclosed. Or if the professional firm controlled or could have controlled the selection of the investment in a relevant entity or industry, then it is the USTP's position that the investment must be disclosed. Thus, for example, a typical investment in a diversified mutual fund that is managed by an independent outside advisor need not be disclosed. But a professional firm that sponsors pooled investments in clients who may be parties in interest in the case may be required to disclose those investments.

It is vital that the USTP acts consistently from district to district in this, as in other, legal matters. Please ensure that all staff who review chapter 11 retention applications are familiar with these general disclosure principles. Each case will have unique facts that should be considered in a manner consistent with these principles.

The Office of the General Counsel should be consulted if there are any questions regarding these principles or their application in specific cases.[8] These principles are internal directives to guide USTP personnel in carrying out their duties, but the ultimate determination on the obligations of professionals under sections 327 and 1103 and Fed. R. Bankr. P. 2014 resides solely with the court. Nothing in these disclosure principles has any force or effect of law, and nothing stated in them imposes on parties outside the USTP any obligations that go beyond those set forth in the Bankruptcy Code and Rules.

[8]Nothing in this internal guidance: (1) limits the USTP's discretion to request additional information necessary for the review of a particular application; (2) limits the USTP's discretion to file comments or objections to applications, including as to whether a professional firm is disinterested or otherwise satisfies the statutory standards for retention in the case; or (3) creates any private right of action on the part of any person enforceable against the USTP or the United States.

3-7.3 SPECIAL PROBLEMS IN RELATED CASES

3-7.3.1 Appointment of a Trustee

A trustee appointed in a chapter 11 case must meet the disinterested person requirement. 11 U.S.C. § 1104(d). Notwithstanding this requirement, when multi-debtor partnerships or related corporate debtors are involved, the responsibilities of the trustee to pursue assets and resist claims within the context of these entities may raise added concerns about potential conflicts. The determination of whether one or more trustees should be appointed in these circumstances rests upon a careful evaluation of the overall potential for conflict, i.e., the need for the varied interests involved in the cases to be separately administered.

The definition of a disinterested person proscribes various types of disqualifying interests. As a general matter, section 101(14) does not disqualify persons because of whom they represent, but rather because of the nature of their personal status – for example, because they personally are creditors of the debtor or they personally "have an interest" that is "materially adverse" under subparagraph (C). Therefore, the mere fact that a trustee may assert a claim against one estate in his or her representative capacity for another estate does not make him or her a "creditor" in an individual sense for purposes of applying 11 U.S.C. § 101(14)(A). *In re BH & P, Inc.*, 949 F.2d 1300 (3d Cir. 1991).

Moreover, the "materially adverse" requirement of section 101(14)(C) should not be read to prevent a single trustee from serving in related cases. A standard that automatically disqualifies a trustee from serving in jointly administered cases where there are inter-debtor claims is overbroad. Indeed, the provisions of Fed. R. Bankr. P. 2009 specifically allow the appointment of a single trustee for jointly administered cases. The United States Trustee must weigh a number of competing interests when deciding whether a single trustee can serve in such cases. A single trustee is often able to maximize the return to jointly administered estates through increased economy and efficiency. Moreover, jointly administered estates will virtually always have inter-debtor claims or potential claims. Were the use of a single trustee precluded in jointly administered estates, these cases would be exposed to increased costs and inefficiency. *In re BH & P, Inc.*, 949 F.2d 1300 (3d Cir. 1991).

However, there are circumstances where the appointment of one trustee in multiple cases may be inappropriate. Fulfilling fiduciary obligations to one estate may require that the trustee take actions that adversely impact the others. Genuine conflicts may arise. The presence and size of assets to pursue in the related estates, the disputed nature of the claims, and the relationship of the various classes of unsecured creditors must be examined. The issue to be resolved is whether the need for advocating competing interests among and between the estates is such that it interferes with the ability of the trustee to exercise independent judgment on behalf of one or more class of creditors. If creditors of the different estates will be prejudiced by conflicts of interest of a

common trustee, the court should order the appointment of separate trustees for jointly administered cases. See Fed. R. Bankr. P. 2009.

There are related corporate debtor circumstances where multiple representation by trustees is allowed. The case of *In re O.P.M. Leasing Services, Inc.*, 16 B.R. 932 (Bankr. S.D.N.Y. 1982), is illustrative. In *O.P.M.*, a single trustee was appointed for two related debtors, a parent company and its subsidiary, in reorganization cases under chapter 11. Notably, different trustees had been appointed for the individual owners of the parent company in their liquidation cases. Objections were made to the multiple representation at late points in the cases during contested adversary proceedings between the corporate debtors and individual stockholders. The bankruptcy court found that the corporate debtors possessed a decisive "unity of interest and singleness of purpose" in prevailing in the adversary proceedings against the individual shareholders, even though there was a potential conflict between the parent and the subsidiary as to their respective rights to share in proceeds of the litigation and even though there were other inter-corporate claims. *In re O.P.M.*, 16 B.R. at 938.

In cases involving multiple representation of related debtors, steps can be taken to cure conflicts. The *O.P.M.* court noted that the potential conflict regarding the debtors' respective rights to litigation proceeds did not require the appointment of different trustees because apparent conflicts of interest "might be resolved in a number of ways," including the appointment of special counsel. *In re O.P.M.*, 16 B.R. at 939 (quoting *In re General Economics Corp.*, 360 F.2d 762, 766 (2d Cir. 1966)). The appointment of separate or special counsel has been endorsed by several courts as an acceptable remedial measure.

O.P.M. illustrates the pragmatic approach of having a single trustee administer related debtor cases with inter-affiliate claims, particularly where an objection is raised late in the case. The issue is resolved by balancing the degree to which the circumstances interfere with the ability of the trustee to provide independent judgment against the impact that disqualification will have on the administration of the estate. The reality of the circumstances must be examined, not the hypothetical. Consideration must be given to the economic costs of appointing different trustees.

Finally, to the extent the United States Trustee decides to appoint one trustee, the trustee must be made aware of his or her own independent obligation to be on the lookout for any real or apparent conflicts and to make such disclosure or to take whatever steps are necessary and appropriate.

3-7.3.2 Retention of Professionals

In related cases, the professional's representation of all the debtors ultimately depends upon whether the professional's capacity for independent judgment and the vigorous pursuit of the interests of a particular debtor are infringed upon. As with the case of the multiple debtor trustee, the cost of obtaining different professionals, as well as the expense that accrues when a professional is employed late in a case, are significant factors. The nature of disclosure at the time of

retention, whether the interests of related estates are parallel or conflicting, and the type of the inter-debtor claims are also significant. The size and nature of inter-debtor claims, whether they are disputed or hold priority status, and whether the various debtor interests diverge in some material way must also be examined. Ultimately, the efficiency and economy that favors multiple representation must be weighed against the need that the interests of each of the estates be adequately represented.

CHAPTER 3-8: COMPENSATION OF PROFESSIONALS

3-8.1 DETERMINATION OF REASONABLE COMPENSATION, 11 U.S.C. § 330 AND FED. R. BANKR. P. 2016(a)

Section 330(a) authorizes the court, after notice and a hearing, to award to a trustee, an examiner, or other professional person employed under section 327 or 1103 –

(A) reasonable compensation for actual, necessary services rendered by the trustee, examiner, professional person, or attorney and by any paraprofessional person employed by any such person; and

(B) reimbursement for actual, necessary expenses.

The court is also authorized to award less than the amount of compensation requested. 11 U.S.C. § 330(a)(2).

Section 330(a)(3) provides:

In determining the amount of reasonable compensation to be awarded, the court shall consider the nature, the extent, and the value of such services, taking into account all relevant factors, including –

(A) the time spent on such services;

(B) the rates charged for such services;

(C) whether the services were necessary to the administration of, or beneficial at the time at which the service was rendered toward the completion of, a case under this title;

(D) whether the services were performed within a reasonable amount of time commensurate with the complexity, importance, and nature of the problem, issue, or task addressed; and

(E) whether the compensation is reasonable based on the customary compensation charged by comparably skilled practitioners in cases other than cases under this title.

Fed. R. Bankr. P. 2016(a) prescribes that any entity seeking interim or final compensation for services or reimbursement of expenses shall file a detailed statement of the services rendered, the time expended, the expenses incurred, and the total amount requested. If the amount requested exceeds $1,000, Fed. R.

Bankr. P. 2002(a)(6) requires at least 21 days notice to creditors and parties in interest of the hearing set to consider the application. This period may be reduced for cause pursuant to Fed. R. Bankr. P. 9006(c)(1).

Section 330(a)(4)(A) establishes limitations on the award of compensation:

Except as provided in subparagraph (B), the court shall not allow compensation for –

(i) unnecessary duplication of services; or

(ii) services that were not –

(I) reasonably likely to benefit the debtor's estate; or

(II) necessary to the administration of the case.

These guidelines grew out of court decisions beginning with *Johnson v. Georgia Highway Exp., Inc.*, 488 F.2d 714, 717-19 (5th Cir. 1974), a civil rights case. In that case, the court identified the following twelve factors to be considered in awarding reasonable compensation:

1. the time and labor required;
2. the novelty and difficulty of the questions;
3. the skill requisite to perform the legal service properly;
4. the preclusion of other employment by the attorney due to acceptance of the case;
5. the customary fee;
6. whether the fee is fixed or contingent;
7. time limitations imposed by the client or the circumstances;
8. the amount involved and the results obtained;
9. the experience, reputation, and ability of the attorneys;
10. the "undesirability" of the case;
11. the nature and length of the professional relationship with the client; and
12. awards in similar cases.

The *Johnson* factors were deemed applicable to bankruptcy cases in *In re First Colonial Corp. of America*, 544 F.2d 1291, 1299 (5th Cir. 1977), *cert. denied*, 431 U.S. 904 (1977), in which the Fifth Circuit stated as follows:

> Bankruptcy judges . . . may abuse their discretion either by failing to apply proper legal standards and follow proper procedures in making the determination . . . or by basing the award upon findings of fact that are clearly erroneous.

* * *

> In order to establish an objective basis for determining the amount of compensation that is reasonable for an attorney's services, and to make meaningful review of that determination possible on appeal, we held in *Johnson* . . . that a district court must consider. . . twelve factors in awarding attorneys' fees. . . . Although *Johnson* involved a suit brought under 42 U.S.C.A. § 2000e et seq., the guidelines we established there are equally useful whenever the award of reasonable attorneys' fee is authorized by statute. *Id.* at 1298-99 (citations omitted).

Courts generally apply the *Johnson* factors in conjunction with a "lodestar" analysis. The "lodestar" is obtained by multiplying the "reasonable" number of hours times a "reasonable" hourly rate. The resulting lodestar may then be adjusted up or down according to the special circumstances of the case. *See Lindy Bros. Builders, Inc. v. Am. Radiator & Sanitary Corp. (Lindy Bros. I)*, 487 F.2d 161, 168 (3d Cir. 1973); *Lindy Bros. Builders, Inc. v. Am. Radiator & Sanitary Corp. (Lindy Bros. II)*, 540 F.2d 102, 117 (3d Cir. 1976). In the context of federal fee-shifting statutes, the Supreme Court has held that there is "a strong presumption that the lodestar figure – the product of reasonable hours times a reasonable rate – represents a "reasonable" fee." *Pennsylvania v. Delaware Valley Citizens Council for Clean Air (Delaware Valley I)*, 478 U.S. 546, 565 (1986). The *Johnson* factors assist in determining the initial "reasonable" hourly rate, as well as the final adjustments to the lodestar. *See In re Manoa Fin. Co.*, 853 F.2d 687, 691 (9th Cir. 1988); *In re Casco Bay Lines, Inc.*, 25 B.R. 747, 755 (B.A.P. 1st Cir. 1982) (the lodestar theory serves to "provide an analytical framework for the trial court's application of the *Johnson* . . . criteria"). *See also Grant v. George Schumann Tire & Battery Co.*, 908 F.2d 874, 878-79 (11th Cir. 1990); *In re Peoples Sav. & Inv., Inc.*, 103 B.R. 264, 271 (Bankr. E.D. Okla. 1989); *In re Stable Mews Assocs.*, 49 B.R. 395, 398 (Bankr. S.D.N.Y. 1985). On recalculating the lodestar, *see In re Narragansett Clothing Co.*, 160 B.R. 477, 482-83 (Bankr. D.R.I. 1993).

What is a reasonable hourly rate? "Congress expressed its intent that there should be no distinction between fees set in bankruptcy cases and those set in non-bankruptcy cases." *Grant v. George Schumann Tire & Battery Co.*, 908 F.2d at 878. *See also In re UNR Indus., Inc.*, 986 F.2d 207, 209-10 (7th Cir. 1993). Therefore "the starting point for the calculation of fees is the applicant's 'normal billing rate'." "Generally, so long as the rates being charged are the applicant's normal rates charged in bankruptcy or non-bankruptcy matters alike, they will be afforded a presumption of reasonableness." *In re Jefsaba, Inc.*, 172 B.R. 787, 798 (Bankr. E.D. Pa. 1994) (citations omitted). As the rate must be reasonable "so must the time spent by the professionals on the various tasks to be performed." *Id.* Indeed,

> We review fee applications paying particular attention to the level of professional . . . billing time *viz-a-viz* the complexity of the task being

> performed. The nature, extent and complexity of the task . . . determines the level of professional . . . who should perform the task, and, consequently, the reasonableness of the fees charged . . . It is unreasonable for a senior attorney to perform routine tasks such as preparing a debtor_s schedules . . . . Consequently, fees charged at a senior attorney's hourly rate for such services are unreasonable.

Id. at 796-97 (citation omitted).

The determination of the reasonable hourly rate is a matter of proof of comparable rates charged to non-bankruptcy clients. *See, e.g.*, *In re Busy Beaver Bldg. Ctrs., Inc.*, 19 F.3d 833, 853 (3d Cir. 1994); *In re Jefsaba*, 172 B.R. at 798. *See also In re River Landings, Inc.*, 180 B.R. 701, 704 (Bankr. S.D. Ga. 1995), where the court noted that applying counsel "met her burden of showing comparable rates by presenting the testimony and affidavits of four local attorneys of comparable skill, experience, and reputation in bankruptcy and other commercial matters."

The United States Trustee faces an interesting challenge when presented with a fee application by non-local counsel who seek rates comparable to their home jurisdiction and usually well in excess of local rates. Rigid enforcement of a policy allowing only local rates is inappropriate, as each situation has its own facts and circumstances that must be taken into account. Some courts may require that reasonable rates for attorneys should be the rate for comparable competence and services in a comparable community. *See, e.g.*, *In re El Paso Refinery, L.P.*, 257 B.R. 809, 827 (Bankr. W.D. Tex. 2000). At a minimum, this may require billing rates comparable to those in the community where the attorneys and other timekeepers live and work, if circumstances require the use of professionals outside the community where the case has been filed. *See id.* at 832; *In re Western Co. of North America*, 123 B.R. 546, 549 (N.D. Tex. 1991). In determining reasonable compensation allowable to non-local counsel, the courts should begin with counsels' customary rates, and then make reductions based on other factors if necessary. *See Zolfo, Cooper & Co. v. Sunbeam-Oster Co., Inc.*, 50 F.3d 253, 260-61 (3d Cir. 1995).

3-8.1.1 Fee Guidelines

Section 586(a)(3)(A) of title 28 was amended in 1994 to require review of applications for compensation and reimbursement under section 330 "in accordance with procedural guidelines adopted by the Executive Office of the United States trustee (which guidelines shall be applied uniformly by the United States trustee except when circumstances warrant different treatment) . . . ." The guidelines were promulgated and, after an opportunity for comment had passed, were published as Appendix A to 28 C.F.R.§ 58 (*see* http://www.justice.gov/ust/eo/rules_regulations). The guidelines established a policy favoring project billing that simplifies the review process. The guidelines do not take the place of local rules or precedent. However, many courts have

adopted the guidelines, in whole or in part, as a local rule. In addition, some United States Trustees have established exceptions to the guidelines for small fee applications.

The review of fee applications is time-consuming and complex. The Bankruptcy Code abandons the principle of economy and conservation of the estate that was the philosophy of the Bankruptcy Act, H.R. Rep. No. 595, 95th Cong., 1st Sess. 330 (1977), yet requires an analysis of benefit to the estate, not in hindsight but tested from the point of view at the time the service was rendered. The courts are obligated to review the applications yet have little time to do so. It is the role of the United States Trustee to assist in the fulfillment of their duty by identifying the problem areas, thus preventing abuse of the system.

The fee guidelines set out the elements that the United States Trustee should look for in evaluating an application for compensation. If the application is deficient such that the United States Trustee cannot analyze it efficiently and effectively, then the United States Trustee must decide whether to file a comment or an objection. The deficiencies usually fall into the following categories:

1. failure to obtain prior court approval of the employment;
2. inadequate disclosure of relationships or possible conflicts;
3. non-compliance with timing or format requirements;
4. inadequate descriptions of services rendered;
5. services performed outside the scope of employment;
6. inappropriate rounding or lumping of time;
7. duplication of effort, inefficient delegation, or excess time spent in performance of a given task;
8. services not reasonably likely to benefit the estate or not necessary to the administration of the case;
9. overhead items inappropriately billed or expensed;
10. inadequate documentation of expenses; and
11. excessive charges for preparing the fee application.

Before filing an objection or comment to a fee application, the United States Trustee should generally confer with the applicant not only to confirm the facts warranting objection, but also to determine if the deficiency can be remedied either by amendment of the application or by voluntary adjustment of the request.

3-8.1.2 Fee Guidelines for Attorneys in Larger Chapter 11 Cases

The United States Trustee Program has guidelines for reviewing attorney compensation in larger chapter 11 cases. These Guidelines are formally titled

"Appendix B–Guidelines for Reviewing Applications for Compensation and Reimbursement of Expenses Filed Under 11 U.S.C. § 330 for Attorneys in Larger Chapter 11 Cases." Appendix B to 28 C.F.R.§ 58 (*see* http://www.justice.gov/ust/eo/rules_regulations). They are posted in the Federal Register at 78 FR 36248 and at 78 FR 40507 (date correction only). For purposes of these Appendix B Guidelines, a larger chapter 11 case is defined as a chapter 11 case with $50 million or more in assets and $50 million or more in liabilities, aggregated for jointly administered cases and excluding single asset real estate cases as defined in 11 U.S.C. § 101(51B). These Appendix B Guidelines are a statement of the USTP's policy governing its review of attorney fee applications in larger chapter 11 cases. They communicate to professionals and the general public the criteria used by United States Trustees in the review of fee applications, the USTP's expectations of professionals, and possible bases for USTP objections to the payment of fees and reimbursement of expenses. These Appendix B Guidelines do not supersede local rules, court orders, or other controlling authority.

Although the Appendix B Guidelines technically relate to the review of fee applications filed under sections 330 and 331 of the Bankruptcy Code, the United States Trustee's duties under the Appendix B Guidelines extend well beyond the fee application phase of the case. The Appendix B Guidelines will have an impact in connection with the retention and compensation of attorneys, and the Appendix B Guidelines consequently should be consulted throughout the case, from the petition date until the filing of the final fee applications. Reference should be made to the Appendix B Guidelines and accompanying step-by-step guide for full information. United States Trustees must notify the Executive Office, both the AGC for Chapter 11 and the Assistant Director for Planning and Evaluation, when a case is filed subject to the Appendix B Guidelines.

3-8.2 RETAINERS

A retainer has been defined as the fee that a client pays when he or she employs an attorney to act for him or her, thereby preventing that attorney from working for an adversary. *Black's Law Dictionary* 1183 (5th ed. 1979). Section 328(a) permits the court to authorize the employment of professional persons on any reasonable terms and conditions, including a retainer.

The United States Trustee must scrutinize retainers for several reasons:

1. to assure that the amount of a retainer is not so substantial as to drain a chapter 11 debtor of all of its working capital;
2. to prevent overreaching by counsel who might be taking advantage of a debtor who is not in a position to effectively negotiate the terms of its representation;

3. to review whether the amount of a retainer is likely to give one administrative claimant a preference over other administrative claims in the event of liquidation;
4. to assure that the retainer is paid from a proper source; and
5. to analyze any potential conflicts.

Of course, not all of these concerns will be present in each case. For example, in a large chapter 11 case, it is likely that the debtor will be able to negotiate an arms-length agreement for its legal representation. In small cases, however, the same equality of bargaining power may not exist. As a general rule, the United States Trustee should view retainer agreements as contractual agreements that have been negotiated at arm's length between parties with equal bargaining positions and, absent facts that tend to raise questions as described in a specific case, the United States Trustee should not object to retainers.

Pursuant to section 329 and Fed. R. Bankr. P. 2016(b) and 2017, the amount and source of pre-petition retainers must be disclosed. Post-petition retainers that are paid from the estate may result in an unauthorized transfer under section 549 unless they are paid after the 21-day notice requirements of Fed. R. Bankr. P. 2002(a)(6) or court order and authorized in compliance with the substantive provisions for compensation found in sections 330 and 331 and Fed. R. Bankr. P. 2016(a). Post-petition retainers paid from some source other than the estate must be disclosed as required by Fed. R. Bankr. P. 2016(b) and 2017. Post-petition retainers may implicate cash collateral. In those cases, sections 363 and 364 apply.

So-called "evergreen" retainers present special problems. These arrangements can take several forms. For example, counsel may propose that it receive a pre-petition retainer to hold throughout the pendency of a case, while any interim fee awards to counsel are paid from the debtor's operating funds. The retainer is, thus, held in reserve as a form of guarantee against the risk of nonpayment. Alternatively, counsel who has received and exhausted a pre-petition retainer may seek to replenish that fund by requesting an additional lump sum cash payment. Arguably, these arrangements place an additional strain on a debtor's already precarious cash position. While it has been held that the payment of an evergreen retainer is not objectionable *per se* (*In re Benjamin's-Arnolds, Inc.*, 123 B.R. 839, 840 (Bankr. D. Minn. 1990)), such retainers should be closely scrutinized by the United States Trustee to ensure that they are not improvident under the circumstances. *See In re Pan American Hosp. Corp.*, 312 B.R. 706, 709-11 (Bankr. S.D. Fla. 2004).

Payments may be made by debtors to their counsel or other professionals during the "gap" period following the filing of an involuntary proceeding and prior to entry of an order for relief pursuant to Section 303(f). Section 549(b) allows attorneys who provide services to a gap period putative debtor to be paid for

contemporaneous services during the gap period, without court order. There is no need for counsel to seek court authorization for employment until an order for relief is entered and the debtor becomes a debtor in possession.

From the practitioners' viewpoint, one of the most critical issues is whether retainers can be used by the professional without the necessity of obtaining a court order. The issue turns on whether the funds used to pay the retainer are considered to be property of the estate. Case law is sharply divided on this issue.

Perhaps the most thorough analysis holding that pre-petition retainers do not constitute property of the estate is set forth in *In re McDonald Brothers Constr., Inc.*, 114 B.R. 989, 998-1003 (Bankr. N.D. Ill. 1990). The *McDonald Brothers* court looked to state law to determine what type of retainer was negotiated by the parties. *Id.* If state law permits a pre-petition retainer to be fully earned at the time of payment, then those funds would not have been owned by the debtor at the time of its filing and, thus, would not become part of the debtor's estate. *Id.*

The reasoning of those cases holding that pre-petition retainers are property of the estate is set forth in *In re NBI, Inc.*, 129 B.R. 212 (Bankr. D. Colo. 1991). The *NBI, Inc.* court suggested that the *McDonald Brothers* decision was based on two erroneous assumptions – first, that the "reasonableness" of a contractual agreement between the debtor and its counsel is governed in a bankruptcy proceeding by the same factors applicable under state law that govern in non-bankruptcy settings, and second, that counsel and the debtor may, through a pre-petition retainer contract, remove funds from the estate and, in so doing, eliminate the requirement that counsel present formal fee applications. *In re NBI, Inc.*, 129 B.R. at 221-22. Taken to its logical conclusion, pre-petition retainers, as property of the estate, are simply held in trust by counsel and may not be taken into income absent compliance with the procedures and substantive requirements governing all fee requests. The rationale enunciated in *In re NBI, Inc.* is the better view and reflects the Program's position on this issue.

If a retainer is construed to be property of the estate, there are additional considerations. For example, a final fee application would be necessary even if the amount requested did not exceed the amount of the retainer. In a failed chapter 11 case that is converted to an administratively insolvent chapter 7 case, a professional who received a retainer could be required to repay the retainer into the estate due to the administrative priority accorded to chapter 7 expenses by section 726(b).

Questions have arisen concerning whether pre-petition retainer contracts that contain "fully earned upon receipt" clauses can be sustained in chapter 11 cases. The *NBI, Inc.* court held that such clauses are *per se* contrary to the Bankruptcy Code. *Id.* at 222-23. Even the *McDonald Brothers* court recognized the court's power to invalidate a "fully earned upon receipt" clause. *In re McDonald Bros. Constr.*, 114 B.R. at 995-96.

Pre-petition retainers also may trigger a preference analysis. Frequently, counsel may be owed money for pre-petition services not rendered in connection with the chapter 11 filing. Counsel who receives payment prior to a filing needs to determine how the funds will be applied. If counsel deems this payment as a retainer for future services, counsel will likely have to waive his or her pre-petition claim in order to be disinterested. If, on the other hand, counsel applies all or a portion of this payment to pre-petition services, counsel is subject to potential preference actions, as well as disqualification, since counsel arguably would be required to advise the debtor as to whether or not to pursue that potential preference. *In re Pillowtex*, 304 F.3d 246, 252-55 (3d Cir. 2002).

In some jurisdictions, counsel receives security interests in some or all of a debtor's assets as a retainer. The issue that arises in this situation is whether counsel can qualify as "disinterested," notwithstanding his or her security interest. In *In re Carter*, 116 B.R. 123, 126 (Bankr. E.D. Wis. 1990), the court noted the split in the two circuits that have addressed this issue. The Eighth Circuit (*In re Pierce*, 809 F.2d 1356, 1362-63 (8th Cir. 1987)) has adopted a *per se* rule that counsel cannot be disinterested in such circumstances, while the First Circuit (*In re Martin*, 817 F.2d 175, 183 (1st Cir. 1987)) provides a more flexible approach requiring the analysis of numerous factors. These cases are not as inapposite as they might first appear. *Pierce* involved a mortgage interest that was taken to secure the pre-petition claim of debtor's counsel, and it represents the traditional view that a creditor is disqualified to serve as a professional. *Martin* addresses the far more difficult situation that is presented when counsel acquires a security interest in consideration for its agreement to represent the debtor in a bankruptcy proceeding. This will most likely occur when debtors are cash poor and unable to pay a retainer. Assuming that only bankruptcy-related services are involved, counsel who receive security interests in property are not totally unlike those who receive a cash retainer insofar as both guarantee payment for services rendered or to be rendered in connection with the bankruptcy case.

Security interests in property are far more suspect than cash retainers. In the case of a security interest, counsel becomes a stakeholder in the reorganization process, and may be particularly concerned with negotiations and plans that involve its collateral. As a result, counsel may be unable to exercise independent judgment. Such arrangements also create the potential for overreaching by counsel. For these reasons, the taking of such security interests must be closely scrutinized.

3-8.2.1 Success Fee

Professionals, particularly investment bankers and financial advisors, may include a base fee based on hourly or flat rates plus a success fee that may also be referred to as a bonus, transaction fee, completion fee, or incentive fee. The employment order should specify that the success fee is subject to review under section 330

rather than pre-approved under section 328, and the success fee should be defined by measurable standards establishing that the professional added value to the case. *See Matter of Texas Securities, Inc.*, 218 F.3d 443, 445-446 (5th Cir. 2000), citing *Matter of National Gypsum*, 123 F.3d 861 (5th Cir. 1997). *See also In re Amberjack Interests, Inc.*, 326 B.R. 379, 386-87 (Bankr. S.D. Tex. 2004); *In re Nucentrix Broadband Networks*, *Inc.*, 314 B.R. 574, 578-80 (Bankr. N.D. Tex. 2004).

3-8.2.2 Fee Enhancement

Reasonable compensation in general and fee enhancement in particular are within the sound discretion of the court. In cases that have boasted rare or exceptional results, such as unexpected full payment plans following protracted and litigious chapter 11 cases, where the debtor initially appeared to be on the brink of administrative insolvency, professionals employed under section 327 have sought court approval under Section 330(a) for fee enhancements. Generally, courts have taken the view that such applications must be based on "rare and extraordinary" circumstances that justify increasing fees calculated pursuant to standard or market rates charged by the professionals for bankruptcy and non-bankruptcy work. The starting point for any enhancement request is the "lodestar" fee, discussed above. The basis for a court's granting an enhancement must be founded upon measurable standards establishing the extent to which an applicant's representation of the debtor or official committee was superior to that which one would reasonably expect in light of the fees charged during the bankruptcy case. *See El Paso Refinery L.P.*, 257 B.R. at 835-836. Work well done with excellent results, but which do not exceed the expectations from the professionals may not warrant a fee enhancement. *Id.* at 842.

Reasonable compensation in general and fee enhancements in particular are within the discretion of the court. However, as stated above, absent specific evidence to the contrary, there is a strong presumption that the lodestar constitutes reasonable compensation. *See Pennsylvania v. Delaware Valley Citizens_ Council For Clean Air*, 478 U.S. 546, 565 (1986); *In re Celotex Corp.*, 232 B.R. 484, 487 (M.D. Fla. 1998)(denial of fee enhancement to official committee due to foreseeability of complexity of litigation at the commencement of representation).

The United States Supreme Court has revisited the issue of fee enhancements in the context of a civil rights fee shifting case arising under 42 U.S.C. § 1988. In *Perdue v. Kenny A.*, 130 S. Ct. 1662, 559 U.S. 542 (April 21, 2010), the Supreme Court reversed an enhancement of 75 percent granted by the district court and affirmed by the Eleventh Circuit. The Supreme Court acknowledged that the lodestar has "achieved dominance in the federal courts" since 2002, and held that the calculation of an attorney's fee based on the lodestar may be increased due to superior performance, but only in rare and extraordinary circumstances. The

lodestar permits a meaningful judicial review that was not possible under the factors enumerated by the Fifth Circuit in *Johnson v Georgia Highway Express*, a civil rights case, discussed above at Manual 3-8.1. Like *Johnson*, bankruptcy courts should find *Perdue* to be equally useful to bankruptcy fee enhancement requests. *But see In re Pilgrim's Pride Corp.,* 690 F.3d 650, 662-63 (5th Cir. 2012) ("The Trustee argues that we should extend *Perdue* to the bankruptcy arena because the decision clarifies how to apply the lodestar method, cabins the discretion of bankruptcy judges, and leads to more uniform and predictable results. We decline this invitation because *Perdue* did not unequivocally, *sub silentio* overrule our legion of precedent in the field of bankruptcy.").

The Supreme Court set forth six important rules behind its decision in *Perdue*:

1. A "reasonable" fee is one that is sufficient to induce a capable attorney to undertake the case. Perdue, 130 S. Ct. at 1672-73;
2. There is a "strong" presumption that the lodestar fee is sufficient to achieve this goal. *Id.* at 1673;
3. Although the Supreme Court has never sustained an enhancement fee based on performance, there may still be rare and exceptional circumstances that support an enhancement. *See Id.*; and
4. The lodestar calculation includes most, if not all, relevant factors constituting a reasonable fee, and an enhancement should not be awarded based on a factor subsumed in the lodestar calculation. For example, novelty and complexity of a case are fully reflected in the number of billable hours while the special skills, experience, and quality of an attorney's performance are normally reflected in the reasonable hourly rate. *See Id.;*
5. The burden of proving the justification for an enhancement is borne by the applicant. *See Id.; and*
6. The applicant must produce "specific evidence" that supports the award requested. *See Id.*.

The Supreme Court also made clear that the quality of the attorney's performance should not be treated separately from any outstanding results obtained. The two elements are to be treated as a single factor for purposes of evaluating an enhancement request. Superior results are relevant only to the extent they are the product of superior attorney performance. Otherwise, the results have no relevance. *See Id.* at 1674.

Once the court determines that facts and circumstances warrant an enhancement, there is little guidance concerning the amount of the enhancement. Case law reflects awards from flat dollar amounts to percentages of fees charged during the bankruptcy case. Again, *Perdue* may be instructive as the Supreme Court addressed three examples of when an enhancement may be proper:

1. When the lodestar calculation does not adequately measure the attorney's true market value, e.g., when the hourly rate is determined by a formula that fails to consider anything other than the number of years since the attorney's admission to the bar. *See Id.*;
2. When the attorney's performance includes an extraordinary outlay of expenses during exceptionally protracted litigation. *See Id.*; and
3. When extraordinary circumstances dictate that the attorney's performance required exceptional delays in the payment of fees. *See Id.* at 1675.

Although the foregoing list of examples may not be exhaustive, it certainly limits rare and exceptional enhancement awards to adjusting hourly rates to compensate for the time value of money, and prevents enhancement request from serving as vehicles for financial windfalls to professionals in the chapter 11 case.

3-8.3 INTERIM COMPENSATION, 11 U.S.C. § 331

Section 331 provides that

> A trustee, an examiner, a debtor's attorney, or any professional person employed under Section 327 or 1103 of this title may apply to the court not more than once every 120 days after an order for relief . . . or more often if the court permits, for such compensation for services rendered before the date of such an application or reimbursement for expenses incurred before such date as is provided under Section 330 . . . .

This statute reflects Congressional acknowledgment that bankruptcy professionals should not be in the position of financing the reorganization effort by being required to defer payment of their fees. *In re UNR Indus., Inc.*, 30 B.R. 613, 617 (Bankr. N.D. Ill. 1983).

An interim application filed pursuant to section 331 must be evaluated on the same basis as a final application under section 330, i.e., the nature, extent, and value of the services, the time spent, and the cost of comparable services. The value of the services cannot be fully ascertained until the conclusion of the case when the overall results obtained are quantifiable. As a result, many courts impose a holdback on interim fees rather than allow interim compensation in the full amount sought. *See In re Bank of New England Corp.*, 134 B.R. 450, 458-59 (Bankr. D. Mass. 1991). A holdback serves several purposes. First, it is not always possible to predict administrative solvency at the conclusion of the case, particularly if super-priorities pursuant to section 364 have been granted in connection with post-petition financing. Interim fee allowances are always subject to reexamination and adjustment at the final hearing. 11 U.S.C. § 330(a)(5). However, interim payment percentages should be crafted to guard against the unpleasant task of seeking the disgorgement of fees already paid in the event of administrative insolvency. *See, e.g.*, *U.S. Trustee v. Johnston*, 189 B.R.

676, 677 (N.D. Miss. 1995); *In re Gherman*, 114 B.R. 305, 307 (Bankr. S.D. Fla. 1990). Second, although professionals need not finance the case, the allowed percentages should be balanced against the debtor's need for working capital. It may be that certain debtors simply cannot afford to reorganize and pay the fees associated with the effort at the same time. Third, the holdback may provide an incentive to the professional to pursue the case diligently to a conclusion so that the amounts held back can finally be awarded and paid.

Professionals are allowed to apply for interim compensation every 120 days pursuant to section 331. However, not all chapter 11 cases are appropriate candidates for use of this procedure. Where the hardship visited upon the professional by the deferral of fees is slight due to relatively little investment of time and other resources balanced against the debtor's dubious prospects for successful reorganization, lack of available cash, questionable interim results, or other reasons, it may be advisable to oppose any payment of interim fees.

Professionals engaged in a large reorganization case will generally seek at an early stage of the case court approval for interim payment procedures at intervals more frequent than once every 120 days. For example, in *In re Knudsen Corp.*, 84 B.R. 668, 671-72 (B.A.P. 9th Cir. 1988), professionals were allowed to receive monthly payments on account pending court approval at periodic formal fee hearings. In an instance where substantial professional time is devoted to a case on a monthly basis, it is consistent with the purpose and intent of section 331 for the United States Trustee to participate in the negotiation of an appropriate fee review procedure order. Any such order should provide for a United States Trustee review of invoices prior to payment and preserve the right of objection at all stages of the procedure. Formal court approval should be provided for at regular periodic intervals after notice and a hearing. Holdbacks on fees should be provided for in an appropriate case.

3-8.4 RESPONSIBILITY OF PARTIES TO CONTROL COSTS

The United States Trustee should seek to establish a structure that encourages the parties in a case to actively supervise the work of the professionals. The parties themselves are in the best position to control costs. *See, e.g.*, *In re S.T.N. Enters., Inc.*, 70 B.R. 823 (Bankr. D. Vt. 1987). To achieve this goal there must be an obligation placed on the debtor and the creditors' committees to review and evaluate the proposed actions of professionals. Similarly, the professionals should have a corresponding obligation to delineate their proposed actions and the prospective costs. Particular attention should be directed toward eliminating duplicate efforts. The point is to persuade both the professionals and the parties to make a judgment as to the potential costs and benefits a particular effort will entail.

Whether at the initial debtor interview, the initial organizational meeting of creditors, or at a specific meeting called by the United States Trustee to discuss fees, the United States Trustee should seek to have the parties structure a mechanism that will evaluate the work of the professionals before it is commenced. The debtor and creditors' committee should review the proposed actions of any professional, although there will be an exception for those matters where the need to maintain confidentiality with the client is such to limit the review to the client. Failing such an agreement, the United States Trustee should consider moving for the entry of an order requiring such a structure.

3-8.5 FEE PROCEDURE ORDERS

In larger reorganization cases, various bankruptcy courts have issued administrative orders that address procedural and, to some extent, substantive requirements for all fee applications in a given case. Fee procedure orders structured for a particular case serve the same function as the United States Trustee's guidelines. The orders set forth the law of the case and, to the extent the terms of the orders are inconsistent with the United States Trustee's guidelines, the terms of the order obviously control. The underlying rationale favoring these orders is that the orders promote judicial economy while providing the practitioners with a clearer understanding of the requirements pertaining to all fee applications. The common items addressed in these orders include the deadlines and scheduling for filing fee applications; the court's requirements as to the detail necessary for substantiating various expenses; the court's views as to certain recurring problems (e.g., inter-office conferences, lumping time entries, general legal research, etc.); the frequency or intervals at which the court will entertain fee applications; and the dates set aside for hearings on fee applications. In concept, the United States Trustee should support such orders as they fulfill the stated goals of judicial economy and reduction of costs to the estate.

These orders are also used as a vehicle for allowing interim compensation without the necessity of full hearings. Particularly in larger cases, orders tend to be entered that provide that interim fees can be awarded at various pre-determined percentages subject to the applicant periodically filing complete fee applications. Arguably, this assists both the fee applicant and the reviewer. The fee applicant is assured of prompt payment of his or her fee requests, subject to a later review, and the reviewer is encouraged to scrutinize the time entries on a more frequent basis.

"Automatic" payment procedures are arguably allowed by the "more often if the court permits" language of section 331. The United States Trustee should discourage the use of this procedure except in rare instances. To the extent that professionals insist on such procedures, the United States Trustee should request safeguards, which may include:

1. A holdback of a percentage of the fees requested, which could range from 20 percent to more than 50 percent depending on the projected solvency of the estate;
2. An opportunity to object and request hearings based on reviews of the "automatic" fee petitions;
3. A provision in the order directing debtor's counsel to review all interim fee requests and to file a written analysis of its review;
4. A provision in the order requiring all applicants to file formal applications periodically, and prohibiting the debtor from paying any applicant who is not in compliance with that provision of the order; and
5. Other safeguards as appear necessary.

3-8.6 TRUSTEE COMPENSATION

A trustee's compensation is determined under section 330 and the statutory cap set out in 11 U.S.C. § 326(a). That section provides that:

> In a case under chapter 7 or 11, the court may allow reasonable compensation under section 330 of this title to the trustee for the trustee's services, payable after the trustee renders such services, not to exceed 25 percent on the first $5,000 or less . . . and reasonable compensation not to exceed 3 percent of such moneys in excess of $1,000,000, upon all moneys disbursed or turned over in the case by the trustee to parties in interest, excluding the debtor, but including holders of secured claims.

The United States Trustee must review a trustee's application to determine that the requested compensation does not exceed the statutory limitation and is reasonable. For example, in *In re H & S Motor Freight, Inc.*, 23 F.3d 1431 (8th Cir. 1994), the trustee attempted to charge the statutory rate increased by amendment although the case had been filed long before. The United States Trustee objected and prevailed on appeal.

Many trustees view the maximum fee as a minimum. But unlike chapter 7 trustees who are paid on commission based upon section 330(a)(7), chapter 11 trustees are explicitly included in section 330(a)(3), which requires that the court consider "the time spent on such services" and "the rates charged for such services" in determining reasonable compensation. Consequently, evidentiary support for any fee requested is required.

There are instances where a reasonable fee is clearly less than the maximum allowed. "The fact is that the Bankruptcy Code provides no formula for determining the minimum compensation that a trustee is entitled to be paid . . . . Nowhere has § 326 been construed to create an entitlement to the maximum amount provided for under that section . . . ." *In re Draina*, 191 B.R. 646, 648

(Bankr. D. Md. 1995). *See also In re Dorn*, 167 B.R. 860, 866 n.11 (Bankr. S.D. Ohio 1994).

A trustee may seek an interim payment of compensation and expenses pursuant to section 331, although there appears to be some statutory conflict with section 326 if there has not been a distribution. *See In re Heatherly*, 179 B.R. 872, 874-75 (Bankr. W.D. Tenn. 1995); *In re Tom Carter Enters*, 49 B.R. 243, 245-46 (Bankr. C.D. Cal. 1985). In *Heatherly*, the court read the distribution as modifying the limitation on the fee and not on eligibility for an interim allowance.

Fed. R. Bankr. P. 2016 applies to trustees. The trustee must file a detailed statement of the work performed, time expended, and expenses incurred and bears the burden of proving the application. *See In re Evangeline Refining Co.*, 890 F.2d 1312, 1326 (5th Cir. 1989). The United States Trustee guidelines are applicable to the trustee's request for fees. As a matter of practice, therefore, the trustee should maintain contemporaneous time records. *Id.*

Interim awards are interlocutory and subject to full review and adjustment at a later date. *See In re Hutter*, 45 Fed. Appx. 71 (2nd Cir. 2002), *citing In re Stable Mews Assocs.*, 778 F.2d 121, 123 n.3 (2d Cir. 1985).

CHAPTER 3-9: QUARTERLY FEES

3-9.1 INTRODUCTION

Pursuant to 28 U.S.C. § 1930(a)(6), every open case or every debtor in a case pending under chapter 11 must pay a fee each quarter to the United States Trustee. *See Genesis Health Ventures, Inc. v. Stapleton (In re Genesis Health Ventures, Inc.),* 402 F.3d 416 (3d Cir. 2005); *United States Trustee v. CF & I Fabricators of Utah, Inc. (In re CF & I Fabricators of Utah, Inc.)*, 150 F.3d 1233 (10th Cir. 1998). The monies generated from quarterly fee payments represent a significant source of revenue for the United States Trustee System Fund. *See generally In re Prines*, 867 F.2d 478 (8th Cir. 1989). Consequently, the monitoring and collection of quarterly fees is an integral part of the United States Trustee's oversight of chapter 11 cases. Efforts to ensure the prompt payment of fees begin at the inception of the case and continue until the case is closed, or beyond. Offices are responsible for timely and accurately entering case data into ACMS, which is then read by the centralized accounts receivable system in the EOUST. In addition, the United States Trustee must take appropriate action when quarterly fees remain unpaid.

3-9.2 INFORMING PARTIES OF THE FEE REQUIREMENT

The United States Trustee should inform the debtor and the debtor's attorney of the obligation to pay quarterly fees as soon as practicable after the case is filed.

The initial debtor interview is usually the first opportunity to discuss these requirements. The debtor's obligation to pay quarterly fees, the schedule of fees, and the consequences of nonpayment should also be incorporated in any chapter 11 operating guidelines adopted by the United States Trustee. Debtors should also be told that if their payment is not timely, then interest will be added. Chapter 11 trustees must also be advised of the fee requirement shortly after their appointment.

3-9.3 FEE AMOUNT AND DUE DATE

3-9.3.1 Calculation of the Fee

Section 1930(a)(6) of title 28 sets forth a sliding schedule of fees based on the amount of money that is disbursed during a calendar quarter. If no disbursements are made in a quarter, the minimum fee must still be paid. *See Clippard v. Kentucky Processing Co. (In re Kentucky Processing Co.)*, 418 B.R. 217 (E.D. Ky. 2009).

The Program adheres to the plain meaning of the word "disbursement," but debtors have made numerous attempts to narrow the category of disbursements that are subject to quarterly fees. Before embarking on a disbursement definition battle, the United States Trustee should consider whether the dispute will actually affect the amount of fees owed. Since the disbursement ranges set forth in 28 U.S.C. § 1930(a)(6) that determine the amount of quarterly fee owed are quite broad, differences in definition may have no practical consequence. The United States Trustee must also consult with the Office of the General Counsel in deciding whether to undertake litigation in this area.

3-9.3.1.1 Operating Expenses

Disbursements encompass all expenses paid by or on behalf of the debtor. *See In re Cash Cow Servs. of Fla., LLC*, 296 F.3d 1261 (11th Cir. 2002); *In re Charter Behavioral Health Sys., LLC*, 292 B.R. 36 (Bankr. D. Del. 2003). Disbursements subject to quarterly fees are not limited to payments to pre-petition creditors. *See United States Trustee v. Pettibone Corp.*, 251 B.R. 335 (N.D. Ill. 2000).

3-9.3.1.2 Cash Collateral/Financing Order Payments

Payments to secured creditors pursuant to cash collateral or financing orders are disbursements upon which the quarterly fee is calculated. Debtors and secured creditors often structure financing orders that are designed to permit the continued use of cash collateral. Pursuant to these arrangements, the debtor usually pays the creditor the cash collateral, which the creditor then loans back to the debtor. Regardless of how the parties may choose to characterize the debtor_s payments, they are still considered disbursements for purposes of calculating quarterly fees. *See In re Wernerstruck, Inc.*, 130 B.R. 86 (D.S.D. 1991).

3-9.3.1.3 Payments Out of Escrow or by Third Parties

Disbursements include payments made on behalf of the debtor by any third party, including an escrow company or another debtor. *See Genesis Health Ventures, Inc. v. Stapleton (In re Genesis Health Ventures, Inc.)*, 402 F.3d 416 (3d Cir. 2005); *St. Angelo v. Victoria Farms, Inc.*, 38 F.3d 1525 (9th Cir. 1994), *modified*, 46 F.3d 969 (9th Cir. 1995).

3-9.3.1.4 Non-Cash Transactions

Disbursements are calculated upon cash transfers, not transfers in kind. For example, when estate assets are sold and the purchaser assumes an obligation of the debtor as part of the sale consideration, the amount assumed is not considered a disbursement for purposes of calculating the quarterly fee.

3-9.4 FEE DUE DATES AND PERIODS COVERED

Quarterly fees are calculated on a calendar quarter basis. The fee for each quarter is payable on the last day of the month immediately following the end of the calendar quarter. 28 U.S.C. § 1930(a)(6). Every plan of reorganization must provide for payment of any unpaid fees on or before the effective date of the plan. 11 U.S.C. § 1129(a)(12).

The filing of a voluntary petition commences a case. 11 U.S.C. § 301. The obligation to pay quarterly fees commences on the date the chapter 11 case is filed. Although a case is commenced upon the filing of an involuntary petition (11 U.S.C. § 303(b)), the debtor will not be billed for quarterly fees until an order for relief is entered or a chapter 11 trustee is appointed, whichever occurs first. At that point, the fee will be assessed from the time the case was filed.

The obligation to pay quarterly fees ceases when the case is no longer pending under chapter 11, i.e., when a final decree closing the case is entered or the case is either converted, dismissed, or transferred to Alabama or North Carolina. The date the final decree or the order of dismissal, conversion, or transfer is docketed should be used as the ending date for the quarterly fee obligation, unless the decree or order contains a provision for an earlier date.

The commencement and termination of a chapter 11 case will occur at varying points within a quarter. The fee for partial quarters is calculated on disbursements that were made during the period of time the case was pending under chapter 11. The fee itself is not prorated.

3-9.5 FEES IN JOINTLY ADMINISTERED AND SUBSTANTIVELY CONSOLIDATED CASES

Jointly administered cases remain distinct. Each case must pay a quarterly fee based upon its respective disbursements. Substantively consolidated cases become one case and are subject to only one fee from the time the substantive

consolidation order is docketed. *See Genesis Health Ventures, Inc. v. Stapleton (In re Genesis Health Ventures, Inc.)*, 402 F.3d 416 (3d Cir. 2005); *In re Charter Behavioral Health Sys., LLC*, 292 B.R. 36 (Bankr. D. Del. 2003).

3-9.6 BILLING AND COLLECTION PROCEDURES

3-9.6.1 Bill Generation Process

The United States Trustee is responsible for timely and accurate entry of case data into ACMS. The EOUST issues data call memoranda to field offices specifying the dates for the field office review of quarterly fee data. The FICS Help e-mail group assists offices with generic account problems and provides information regarding reports, forms, and procedures.

3-9.6.2 Fee Payments and Refunds

3-9.6.2.1 Payment Procedures

Every month, computer-generated statements are sent to billable chapter 11 debtors. The statements contain a payment stub for use in making quarterly fee payments to the U.S. Trustee Payment Center (Atlanta, GA). Offices should maintain a supply of blank "Chapter 11 Quarterly Disbursement and Fee Report" forms in case payment stubs are lost.

Checks should be made payable to the "United States Trustees" and mailed directly to the U.S. Trustee Payment Center, along with the preprinted payment stub (or a completed Chapter 11 Quarterly Disbursement and Fee Report). If payment verification is time sensitive, the debtor should be instructed to furnish an informational copy of its remittance to the local United States Trustee's office.

Offices receiving cash, checks, or other negotiable instruments for the payment of quarterly fees must process those payments and forward them for deposit on a daily basis. The following guidelines must be observed:

1. Receipt of Cash

   All debtors should be instructed to make payments by check or money order. Cash payments should not be refused; if a debtor pays in cash, however, the payment should be immediately converted to some form of financial institution check or a money order, such as a U.S. Postal money order. Any cost incurred by an employee for the conversion of cash to a money order is reimbursable. Employees incurring such an expense shall submit a properly completed "Claim for Reimbursement for Expenditures on Official Business" (SF-1164) with supporting receipts to the Regional Administrative Office for reimbursement. Under no circumstances shall any employee deposit debtor payments into his or her own personal account, checking or otherwise, to meet the conversion requirement. Nor shall any employee request that checks or money orders be made payable

to him/her personally. All checks and money orders shall be made payable to the "United States Trustees". (U.S. Treasury Fiscal Manual; I TFM 5-2000, Section 2020; Inscription of Checks).

Chapter 11 quarterly fee payments are to be mailed to the United States Trustee Payment Center, while all other types of payments are to be mailed to the Executive Office for U.S. Trustees, Budget Formulation and Revenue Analysis Branch, for processing. As a result, chapter 11 quarterly fee cash payments must not be combined with other types of cash payments into a single check or money order.

2. Receipt of Foreign Checks

   If a debtor pays with a check drawn on a foreign bank, even if payable in United States currency, the check must be sent to the Executive Office Accounts Receivable Manager together with a payment form. Do not send foreign checks to the U.S. Trustee Payment Center.

   Processing foreign checks greatly delays crediting the payment, which may cause interest to be assessed. Payments should be drawn only on a U.S. bank.

3. Receipt of Payments Made Payable to an Employee of the United States Trustee

   As previously indicated, all debtors should be instructed to make payments by check or money order payable to the "United States Trustees." If, however, a debtor inadvertently makes his or her payment personally payable to an employee of the United States Trustee, immediately upon receipt of such a payment, the check or money order must be restrictively endorsed "For Deposit Only to the Account of the United States Trustees Without Recourse (signature of employee)." This endorsement provides appropriate internal control, as well as protection for the employee. The check or money order should then be processed according to the guidelines detailed in the next paragraph.

4. Processing Guidelines

   A standard form check register has been developed to control all cash, checks, or other negotiable items received and processed via offices of the United States Trustee. Copies of the check register form can be obtained from the USTNet at USTNet/Bankruptcy Handbooks and Manuals.

   One employee in each office should be designated to receive all incoming payments. Besides those payments received through the mail, any payments delivered in person, by courier, etc., must be given directly to the designated employee. That employee is responsible for the conversion of all cash payments received to checks or money orders. The employee must account for all payments received by completing columns 1 through 8 on the check register.

The designated employee shall deliver all payments (checks and money orders), the check register(s) documenting those payments, and any correspondence received with the payments to another employee who will be responsible for the processing and subsequent mailing of the payments. The United States Trustee should periodically review the check processing procedure that has been established. If an office is too small to permit an appropriate segregation of duties in this area, monitoring and oversight of the check processing system is an even greater necessity.

5. Mailing Quarterly Fee Payments

   One employee in each office must be designated to mail payments. If possible, this employee should be someone other than the employee designated to receive payments. The employee must mail the payment together with the payment form and complete columns 9 and 10 of the check register.

6. Verification that Payment has been Received or Processed

   One employee in each office must be designated to verify that each payment either has been received by the EOUST or processed by the payment center. Again, if possible, this employee should be someone other than the employees designated for processing and mailing payments. The proper receipt and deposit of all payments listed on the register must be verified on at least a quarterly basis throughout the year.

3-9.6.2.2 Determination of Payments

An office can determine the quarterly fees paid and the amounts credited to each quarter by examining the case in the FICS report.

3-9.6.2.3 Payment Problems

An e-mail to FICS Help should be sent if assistance is needed with procedural payment problems and questions about payment allocation.

3-9.6.2.4 Payment Refunds

Payment refund procedures established by the EOUST should be followed in the event that overpayment of quarterly fees necessitates a refund. For further instructions as to completion of the appropriate forms, FICS Help should be contacted. Credits toward future fees should be encouraged in lieu of refunds.

3-9.6.3 Payment Adequacy Review

The United States Trustee must establish a plan to verify that payments made by debtors meet those established categories of disbursements. Sources for determining the amount of quarterly fees paid include the debtor's monthly operating reports as reviewed and entered into ACMS. The debtor is advised of

the actual amount due based on disbursements reported during the applicable quarter.

The most complete review possible should be conducted. For some offices, this may include review of all payments in pending chapter 11 cases. For offices that cannot review every payment, this review can be conducted on a sampling basis.

Case review and follow-up must be documented. In addition, field offices must submit a quarterly memorandum to the regional office detailing fee adequacy review efforts. The memorandum should include:

1. the total number of chapter 11 cases billed for the quarter;
2. the number and percentage of fee payments actually reviewed for compliance with the fee schedule;
3. the number of payments found to be less than the debtor's obligation; and
4. a statement of the date on which corrective action was initiated or a date certain by which corrective action will be initiated.

3-9.6.4 Delinquent Payment Review and Collection Efforts

The United States Trustee should keep informed of quarterly fee delinquencies and attempt to obtain fee payment at every opportunity. Quarterly fee status should be specifically considered when:

1. Continued section 341 meetings are held. These meetings can be used to obtain an explanation for lack of payment and an agreement to a specific deadline for payment on the record.
2. The debtor fails to file operating reports. Failure to file reports is often indicative of other compliance deficiencies. Quarterly fee payment status should be examined.
3. Cash collateral use or financing is sought. The United States Trustee should ensure that any proposed order limiting operating budgets includes the payment of quarterly fees. Proposed orders should also be examined to ascertain whether super-priority is proposed pursuant to 11 U.S.C. § 364(c)(1). If such priority is sought, a quarterly fees exclusion should be requested.
4. A motion to transfer venue is filed. Payment of fees should be required prior to case transfer. *See In re 1606 New Hampshire Ave. Assocs.*, 85 B.R. 298, 312 (Bankr. E.D. Pa. 1988) (court conditioned transfer of venue upon payment of quarterly fees).
5. The exclusivity period terminates or a motion is filed to extend the exclusivity period. If quarterly fees are not current, the United States Trustee may oppose an exclusivity extension or request a short deadline for disclosure statement and plan submission.

6. A fee application is filed. The United States Trustee should consider opposing interim payments to professionals if there are delinquent quarterly fees.

7. A motion to use, sell, or lease property of the estate other than in the ordinary course of business is filed. Proposed transactions should be examined for the potential effect on quarterly fee liability and the availability of net proceeds to meet any such liability, particularly if voluntary case conversion or dismissal will likely be sought.

8. A motion to convert or dismiss or for the appointment of a trustee is contemplated or filed. *See* Manual 3-11.5 for an in-depth discussion of dismissal and conversion motions.

9. A plan and/or disclosure statement is filed. The United States Trustee must take affirmative action to ensure that any plan of reorganization meets the tests of section 1129(a)(12), which requires the debtor to be current on 28 U.S.C. § 1930 fees or that "the plan provides for the payment . . . on the effective date." The plan should provide for continuing payment of quarterly fees until the case is closed for quarterly fee purposes. The case must be reviewed for payment compliance by the time that confirmation objections are due. The plan's definition of the effective date should be reviewed to ensure that it is within a reasonable time after plan confirmation. The plan should also be reviewed for any other provisions affecting quarterly fees, such as a requirement to file claims and deadlines. Such requirements are generally objectionable. Otherwise, the United States Trustee must take all measures called for under the plan to ensure timely payment after confirmation.

10. A motion for entry of a final decree is filed. The United States Trustee should consider filing a motion under Fed. R. Bankr. P. 9013 asking the court to compel the debtor to comply with 28 U.S.C. § 1930(a)(6). Alternately, if local practice permits, the United States Trustee may respond to a motion for a final decree with a "response" or "statement" requesting that the court direct payment of the statutory fee. An objection should not be filed unless there are other substantive reasons to object to the closing of a case.

3-9.6.5 Encouraging Voluntary Compliance

Before filing any motion to enforce compliance with the debtor's obligation to pay quarterly fees, the U.S. Trustee should contact the debtor's counsel and seek the debtor's consensual agreement to pay the outstanding quarterly fees. Any agreement reached should be documented in a confirming letter or e-mail to the debtor's counsel, specifying when the debtor will pay and the consequences if the debtor does not.

3-9.6.6 Legal Action

If voluntary compliance with quarterly fee requirements cannot be obtained, legal action must be taken in the form of a motion to dismiss or convert although, as indicated above, other action may also be appropriate.

Failure to file monthly operating reports and nonpayment of fees are specifically enumerated grounds for dismissal or conversion pursuant to sections 1112(b)(4)(F) and (K), respectively. If operating reports are not timely filed or fees are unpaid, the case should be reviewed for other deficiencies, including failure to pay administrative creditors or lack of insurance. A motion to convert or dismiss for nonpayment of fees should include, as further grounds, all identified deficiencies.

Once a case is dismissed, unpaid quarterly fees lose their administrative priority status. Consequently, unpaid fees from an earlier case have the priority of a general unsecured claim in a later filed case. In some instances, a judgment for unpaid quarterly fees may be obtained prior to dismissal. Other remedies to collect unpaid fees can be explored, but contempt remedies or other sanctions are not favored. *See, e.g.*, *In re Patterson*, 111 B.R. 395, 399 (Bankr. N.D.N.Y. 1989) (court ordered that quarterly fees be paid prior to dismissal but denied imposition of daily fine, opining that no purpose would be served).

Offices of the United States Trustee are frequently presented with voluntary dismissal motions in cases with unpaid quarterly fees. Voluntary dismissal requests frequently accompany or follow a sale of substantial estate assets or resolution of a major dispute. When there are assets in such cases, it is appropriate to request the court to condition dismissal on the payment of quarterly fees. *See, e.g.*, *St. Angelo v. Victoria Farms, Inc.*, 38 F.3d 1525, 1528 (9th Cir. 1994), *modified*, 46 F.3d 969 (9th Cir. 1995); *In re Rose*, 86 B.R. 439, 442 (Bankr. E.D. Pa. 1988). Such requests must be timely made, however. *In re Jehle*, 72 B.R. 487, 488-89 (Bankr. D.R.I. 1987) (court denied United States Trustee's request to vacate dismissal order, where United States Trustee failed to timely object to initial dismissal motion). In these situations, thought should also be given to seeking dismissal, conditional on payment to other creditors who would be paid if the case were converted to chapter 7.

The United States Trustee should not oppose dismissal or entry of a final decree in cases where there is no money available to pay the quarterly fees and there is no reason to suggest conversion to chapter 7. *See In re Markhon Indus., Inc.*, 100 B.R. 432, 434-35 (Bankr. N.D. Ind. 1989); *In re Motorworks, Inc.*, 85 B.R. 661, 662 (Bankr. S.D. Ga. 1988).

If a case converts to another chapter, the United States Trustee must file a timely proof of claim for unpaid quarterly fees. Any claim filed in a chapter 7 case should clearly request chapter 7 administrative priority status pursuant to section 507(a)(2). The amount of the proof of claim should be calculated on the

basis of disbursements during the unpaid quarters. If disbursements are not known, the Program's billing procedures should be used to estimate the fee. *See In re Flowers by Mike & Ray, Inc.*, 95 B.R. 31, 34-35 (Bankr. D. Md. 1988) (United States Trustee must make a good faith determination of the disbursements and cannot just claim maximum fee). If all delinquent quarters are noted on the proof of claim, upward amendments to the claim can be submitted if further information develops. The time within which to file a chapter 11 claim in a subsequent chapter 7 case is governed by Fed. R. Bankr. P. 1019(6).

In chapter 7, unpaid quarterly fees have the same priority status as chapter 7 administrative claims. Section 726(a) calls for distribution first to section 507 claims, in the order of their priority. Section 507(a)(2) affords high priority to administrative expenses allowed under section 503(b) and fees and charges assessed under chapter 123 of title 28. Since the obligation to pay chapter 11 quarterly fees arises under chapter 123 of title 28, unpaid fees have priority status. Section 726(b), which subordinates section 503(b) expenses incurred during chapter 11 to section 503(b) expenses incurred during chapter 7, is inapplicable to fees arising under chapter 123 of title 28. *In re Endy*, 104 F.3d 1154, 1157-58 (9th Cir. 1997); *In re Juhl Enters., Inc.*, 921 F.2d 800, 802-03 (8th Cir. 1990); *In re Darmstadt Corp.*, 164 B.R. 465, 470-71 (D. Del. 1994); *In re Metro Transp. and Health Referral, Inc.*, 165 B.R. 832, 833-34 (Bankr. N.D. Ohio 1994); *In re K & M Printing & Lithographing, Inc.*, 135 B.R. 404, 406-07 (Bankr. D. Ore. 1992); *In re AM-PM Photo Camera Fashions, Inc.*, 116 B.R. 222 (Bankr. D. Idaho 1990). *Contra In re Wetmore*, 117 B.R. 201, 202 (Bankr. W.D. Pa. 1990). Compare *In re Rose Truck Brokers, Inc.*, 166 B.R. 179 (M.D. Fla. 1992), *rev_g* 122 B.R. 465 (Bankr. M.D. Fla. 1990) (bankruptcy court's ruling conflicts with the clear command of Congress; fees are due regardless of whether a plan is ever confirmed).

3-9.7 WRITE-OFF AND REFERRAL PROCEDURES

The United States Trustee is delegated write-off authority limited to $100,000 per case. If the debt is the subject of appellate litigation, the United States Trustee's write-off authority is further subject to the Director's approval. Permission to write off amounts in excess of $100,000 must be requested of the EOUST with submission to the Assistant Attorney General for Administration for action.

3-9.7.1 Confirmed Chapter 11 Cases

Under the provisions of section 1129(a)(12), the court shall confirm a plan in a chapter 11 case only if the pre-confirmation quarterly fees have been paid; otherwise, the plan must provide for their payment on the effective date of the plan. If pre- or post-confirmation fees remain unpaid after the effective date of a confirmed plan, the circumstances of the case are to be evaluated and a determination made as to whether to seek enforcement of the plan or pursue other remedies. The United States Trustee should first determine whether the account is uncollectible by Program personnel and whether it is appropriate for write-off according to the guidelines set forth at Manual 3-10.7.4.2. If an account is uncollectible by Program personnel, but not subject to write-off, Program policy

requires that the amount owed must be referred to the Treasury Department for collection as set forth at Manual 3-9.7.5.

3-9.7.2 Dismissed Chapter 11 Cases

The court may convert or dismiss a chapter 11 case for cause, which may include the nonpayment of quarterly fees. 11 U.S.C. § 1112(b)(4)(K). The prospect of this remedy provides a strong incentive for debtors to pay quarterly fees in order to remain in chapter 11. However, if quarterly fees are not paid and the chapter 11 case is dismissed, appropriate collection action is to be undertaken or, if the fee account is uncollectible by Program personnel, it should be written off according to the guidelines set forth in at Manual 3-10.7.4.2. If not subject to write-off, the amount owed must be referred to the Treasury Department for additional collection efforts as set forth at Manual 3-9.7.5.

3-9.7.3 Converted Chapter 11 Cases

When quarterly fees remain unpaid in a chapter 11 case that has been converted to another chapter, the United States Trustee shall file a proof of claim in the converted case and/or take whatever steps are appropriate under the laws or rules applicable in the converted chapter. The balance owing after the filing of a no-asset report in the converted case or after a distribution to creditors in the converted case will ordinarily be treated as discharged under governing bankruptcy laws. Accordingly, the United States Trustee should recommend write-off of the debt as soon as practicable following conversion, but only after ensuring that the claim will be recognized and paid in the event of a distribution. If the debtor does not receive a discharge, then the outstanding amount owed for quarterly fees should be either written off pursuant to the guidelines in Manual 3-9.7.4.2, or referred to the Treasury Department pursuant to Manual 3-9.7.5.

3-9.7.4 Standards

3-9.7.4.1 Timing of Write-Off or Referral to the Treasury Department

Write-off or referral of the debt to the Treasury Department should occur when, after pursuing all reasonable collection efforts, the United States Trustee determines that an account is uncollectible by the Program, that active collection efforts should terminate, and that the obligation should be removed as a receivable from the records. All cases not eligible for write-off must be referred to Treasury.

3-9.7.4.2 Write-Off Guidelines

The following factors should be used in evaluating the collectability of unpaid quarterly fees.

1. When the balance due is less than $25, the Assistant U.S. Trustee or the Quarterly Fee Coordinator can approve the write-off. All other write-offs must contain the approval signature of the United States Trustee.

A write-off request of less than $25 can be submitted via e-mail. The signature of the United States Trustee or Assistant U.S. Trustee is not necessary.

2. The debtor is documented to have no assets or appears to have no present or prospective ability to pay the debt, and the amount due is more than $25 but less than $600.
3. The debtor's case converted from chapter 11 to another chapter in which a discharge order was entered, or the debtor filed a new case in any chapter and a discharge order was entered that included unpaid fees in the previous case(s).

3-9.7.4.3 Effect of Write-Off

The write-off of a debt does not constitute a waiver of the United States Trustee's right to receive payments in the future; it merely signifies the termination of active collection efforts. Payments received after write-off will be treated as an offset of the amount written off. This includes payments received in the form of distributions following the conversion of a case to chapter 7, 12, or 13.

3-9.7.5 Debt Collection by the Treasury Department

Contact the Office of Administration in the EOUST for instructions on how to refer delinquent debts to the Treasury Department and how to complete Form UST 82.

3-9.7.6 Documentation

The United States Trustee is to report the write-off or referral to Treasury of all debts to FICS Help so that appropriate adjustments in the chapter 11 accounting system can be made. Standardized forms promulgated by the EOUST for these purposes shall be utilized. The write-off amount should be reconciled with quarterly disbursement and fee reports, listings, and so forth, and any discrepancies should be resolved prior to submission of the write-off.

CHAPTER 3-10: MONITORING THE CASE

3-10.1 CASE ADMINISTRATION

The United States Trustee is charged by statute with the responsibility of supervising the administration of chapter 11 cases. 28 U.S.C. § 586(a)(3). The administrative process should be designed to ensure that cases move through the system in an expeditious manner. Cases that lack a realistic prospect of reorganization within a reasonable period of time must be identified and appropriate action taken to seek the dismissal or conversion of such cases.

3-10.2 STANDING

Section 307 of the Bankruptcy Code grants the United States Trustee standing in bankruptcy cases, including those under chapter 11. Several cases have also clarified the United States Trustee's standing. *See United Artists Theater Co v. Walton* 315 F.3d 217, 225 (3rd Cir. 2003). A challenge to the United States Trustee's standing in a chapter 11 case may be sanctionable. *Hayes and Son Body Shop, Inc. v. United States Trustee*, 124 B.R. 66, 68 (W.D. Tenn. 1990), *aff'd*, 958 F.2d 371 (6th Cir. 1992).

3-10.3 OBTAINING EVIDENCE

3-10.3.1 Section 341(a) Meeting

The efficacy of the United States Trustee's enforcement actions is dependent upon the compilation of a comprehensive evidentiary record. The foundation of that record most often consists of documents such as schedules and operating reports. In some instances, however, it may be necessary to obtain additional material for use at an evidentiary hearing. Section 341 requires that the United States Trustee convene a meeting of creditors in each case.

The business of the meeting includes the examination of the debtor under oath. *See* 11 U.S.C. § 343 and Fed. R. Bankr. P. 2003(b)(1). The scope of the examination that can be conducted at the meeting is very broad. Questioning that relates to the acts, conduct, property, liabilities, and financial condition of the debtor; the administration of the estate; or the debtor's right to a discharge is permissible. The examination may also relate to the operation of the debtor's business and issues relevant to the formulation of a plan. *See* Fed. R. Bankr. P. 2004(b). As a result, the examination of the debtor at the section 341 meeting is often a vital and productive source of information and has great importance as a discovery device. Because the United States Trustee schedules and presides over the meeting, he or she may continue the meeting from time to time to allow for additional questioning, and may even convene a special meeting if necessary. *See* Fed. R. Bankr. P. 2003(e) and (f). For a further discussion of section 341 meetings, *see* Manual 3-5.1.

3-10.3.2 Fed. R. Bankr. P. 2004 Examination

Fed. R. Bankr. P. 2004 provides that the court, on motion of any party in interest, may order the examination of any entity. If a Rule 2004 exam is of an entity other than the debtor, the United States Trustee, in addition to obtaining a court order, should issue a subpoena to the person sought for examination unless the examination is by agreement. The permissible scope of an examination under Fed. R. Bankr. P. 2004 is very broad. However, the examination must not stray into matters irrelevant to the basic inquiry and cannot be utilized for purposes of abuse or harassment. *See In re M4 Enters., Inc.*, 190 B.R. 471, 475 (Bankr. N.D. Ga. 1995).

If the United States Trustee wishes to participate in a Fed. R. Bankr. P. 2004 examination scheduled by another party in interest, a separate order from the

court permitting such participation should be obtained unless all parties stipulate that the United States Trustee may participate.

A Fed. R. Bankr. P. 2004 examination may not be available if a contested matter has already been commenced. Some courts have ruled that a party to a contested matter has to use the procedures for taking a deposition rather than those for a Fed. R. Bankr. P. 2004 examination when that party seeks information after filing its motion. *See In re Ecam Publications, Inc.*, 131 B.R. 556, 559 (Bankr. S.D.N.Y. 1991). Accordingly, the United States Trustee should conduct appropriate Fed. R. Bankr. P. 2004 examinations prior to filing a motion or application.

3-10.3.3 Other Discovery Devices and Orders to Compel Attendance for Examination

Pursuant to Fed. R. Bankr. P. 9014, the discovery devices found in Fed. R. Bankr. P. 7028 through 7037 are available in all contested matters. A contested matter must have been commenced before these discovery tools can be used. However, the speed with which contested matters are set by many courts may preclude the effective use of discovery tools other than Fed. R. Bankr. P. 2004 examinations.

A debtor may attempt to avoid questioning by fleeing the jurisdiction or by evading service of a subpoena or order to appear for examination. Fed. R. Bankr. P. 2005 sets forth the procedures to be followed to obtain an order directing the apprehension and, if necessary, removal of the debtor to compel attendance at an examination.

3-10.4 PROBLEMS AND RESPONSES

This section contains a list of some of the most frequent problems encountered by the United States Trustee during the course of administering chapter 11 cases. The list is not exhaustive and the United States Trustee retains discretion to develop an appropriate response for any situation.

3-10.4.1 Failure to File Schedules

The schedules and statements contain significant information about the debtor and its financial condition as of the filing date. 11 U.S.C. § 521 and Fed. R. Bankr. P. 1007 require the debtor to file these documents within certain time frames. If the debtor fails to file timely, the United States Trustee should apply to the court for an order either fixing a date by which the schedules and statements must be filed, or dismissing or converting the case.

If the debtor seeks an extension of time within which to file schedules, the United States Trustee should assess whether an extension is justified in light of the size and complexity of the case. If the extension does not appear reasonable given the circumstances of the case, an objection should be filed.

The United States Trustee should seek to ensure that the schedules are on file prior to the first section 341 meeting. However, even if the schedules have not been filed by that date, the section 341 meeting must be conducted as scheduled.

The meeting can then be continued to a later date to allow for further examination of the debtor regarding the content of the schedules.

3-10.4.2 Failure to Attend Section 341(a) Meeting

Section 343 requires the debtor to appear and be examined by creditors, the United States Trustee, and other parties in interest at the section 341 meeting. If the debtor fails to appear, cause exists for the dismissal or conversion of the case. 11 U.S.C. § 1112(b)(4)(G). The totality of the circumstances must be considered when determining the appropriate action to take.

3-10.4.3 Failure to Designate Corporate Official

A corporate or partnership debtor must designate an official to act on its behalf during bankruptcy proceedings, as, for example, by appearing at the first section 341 meeting or a Fed. R. Bankr. P. 2004 examination, or by signing appropriate documents as required by rule or order of the court. The failure to designate a corporate official occurs most frequently in involuntary cases.

Pursuant to Fed. R. Bankr. P. 9001(5), any one of the officers, a member of the board of directors, a controlling stockholder of a corporate debtor, or any person in control may be designated by court order to perform certain acts or to appear for examination. Such an order may help lay the groundwork for a motion to dismiss a case. For example, if an order is entered compelling a corporate officer to attend a section 341 meeting and the officer fails to attend, then cause may exist to dismiss the case.

Rather than obtaining an order directing an individual to appear on behalf of the debtor, the United States Trustee may immediately move for the conversion or dismissal of the case. The debtor's failure to designate an individual may indicate significant problems with the debtor and its operations that would constitute "cause" under section 1104 or 1112.

3-10.4.4 Failure to File Operating Reports

Pursuant to sections 704(a)(7) and (8) (made applicable in chapter 11 cases by sections 1106(a)(1) and 1107(a) and Fed. R. Bankr. P. 2015), the debtor is required to file financial reports on a periodic basis. If a debtor does not file these reports, then the ability of parties in interest and the United States Trustee to monitor the operations of the debtor is impaired. For example, the United States Trustee will not be able to determine if the debtor is current with post-petition obligations, is making improper payments to professionals, or has paid the correct United States Trustee quarterly fee.

If a debtor fails to file complete financial reports, the United States Trustee may seek an order compelling the filing of the reports or may request more drastic relief, such as the appointment of a trustee or examiner, conversion, or dismissal. If the United States Trustee elects to request an order compelling filing, that order should also direct the debtor to file all future reports timely. Violation of such an order may be cause for dismissal or conversion.

The failure to file complete financial reports may constitute cause for the appointment of a trustee or an examiner. 11 U.S.C. § 1104. The failure to file reports may also constitute cause for the conversion or dismissal of a case. 11 U.S.C. § 1112(b)(4)(F).

3-10.4.5 Failure to Maintain Insurance or Pay Administrative Taxes

The chapter 11 debtor is authorized to continue to operate its business, unless the court orders otherwise. 11 U.S.C. § 1108. A debtor has all of the duties and responsibilities of a trustee, including the obligation to maintain insurance and pay taxes. 11 U.S.C. § 1107(a).

A debtor's failure to maintain proper insurance is a breach of its fiduciary obligations. The insurance required of a debtor extends beyond property insurance to protecting the tangible assets of the estate from loss. For example, if the debtor's business is open to the public and the debtor does not have liability insurance, the business should be closed until such time as insurance is obtained and written verification submitted to the United States Trustee. In order to minimize the risk to innocent third parties, any motion seeking to terminate the debtor's operations should also request an expedited hearing. If the debtor is unable to purchase insurance, then a motion to convert or dismiss is appropriate. 11 U.S.C. § 1112(b)(4)(C).

Failure to remit taxes is also a breach of the debtor's statutory obligations and fiduciary duties. See 11 U.S.C. § 346(f); 28 U.S.C. § 959 and 960. A debtor is presumed to be aware of the withholding requirements of federal and state law. *See In re WPAS, Inc.*, 6 B.R. 40, 44 (Bankr. M.D. Fla. 1980). Unpaid post-petition taxes are administrative claims, and failure to make payment prejudices the estate and creditors. A failure to remit taxes constitutes grounds for conversion or dismissal pursuant to section 1112(b)(4)(I).

3-10.4.6 Failure to File Reorganization Plan and/or Disclosure Statement

Section 1121(d) authorizes the court, for cause, to extend, shorten, or fix the time during which only the debtor may file a plan and disclosure statement. Sections 1121(b) and (e), which establish the exclusive period within which only the debtor may file a plan, do not impose any requirement that the debtor actually file a plan or suffer specific consequences. The bankruptcy court has the authority to set a deadline for the filing of a plan and disclosure statement.

In some districts, local rules or standing orders set deadlines for the filing of plans and disclosure statements. If no previous order or rule has established a deadline, then the United States Trustee may apply to the court for an order fixing a date for the debtor to file a plan and disclosure statement. Such a motion should be filed only after giving due consideration to the size and complexity of a case, as well as to the status of any outstanding litigation and ongoing negotiations. If an order is entered directing the debtor to file a plan and disclosure statement and those documents are not filed by the time set forth in the order, cause exists to convert or dismiss the case. 11 U.S.C. § 1112(b)(4)(J).

The United States Trustee may also object to an application of the debtor to extend the exclusivity period. A debtor seeking an extension of the exclusivity period must demonstrate that "cause" justifying the extension exists. *See In re Service Merchandise Co.*, 256 B.R. 744, 751 (Bankr. M.D. Tenn. 2000); *In re All Seasons Indus., Inc.*, 121 B.R. 1002 (Bankr. N.D. Ind. 1990). Cause might include an unusually large case or recalcitrance among creditors. The debtor must demonstrate some promise of probable success in the reorganization effort. S. Rep. No. 989, 95th Cong., 2d Sess. 118 (1978). A request for an extension must be made prior to the expiration of the exclusivity period. 11 U.S.C. § 1121(d). The United States Trustee should object to an untimely request for an extension. *See In re Congoleum Corp.*, 362 B.R. 198 (Bankr. D.N.J. 2007).

Section 158(a) of title 28, as amended by the Bankruptcy Reform Act of 1994, allows an immediate appeal as of right to the district court from a bankruptcy court's order extending or reducing the debtor's exclusivity period. Participation by the United States Trustee in such an appeal must be authorized by the EOUST.

3-10.4.7 Failure to Give Proper Notice of Settlement Agreement, Disposition of Property, or Cash Collateral/Adequate Protection Agreement

Fed. R. Bankr. P. 2002 and 4001 require specific notice of certain actions by the debtor. The technical requirements of these rules may be violated, intentionally or not, in three common situations: use, sale, or lease of property other than in the ordinary course of business; settlement of a controversy; or settlement of a cash collateral or adequate protection dispute.

If notice of a transaction has not been given, the United States Trustee should alert the parties involved. If these parties fail to remedy the notice problem, the United States Trustee should apply to the court for an appropriate remedy, such as setting aside the transaction. The fact that a sale may have been for full value or that the settlement is appropriate does not excuse failure to comply with Fed. R. Bankr. P. 2002 and 4001, but may influence the choice of remedial action.

3-10.4.8 Failure to Deposit or Invest Funds as Required by 11 U.S.C. § 345

Usually the debtor in possession is required to open new bank accounts in an authorized depository, which is a bank that agrees to post collateral or a bond to protect uninsured amounts or deposits and also to report on a debtor's bank activity on a monthly basis. Protection may also be provided by a deposit or investment "insured or guaranteed by the United States . . . or backed by the full faith and credit of the United States. . . ." 11 U.S.C. § 345(b). The court, for cause, may modify these requirements.

Each region should have in place an authorized depository program. Banks participating in the program must agree to pledge appropriate securities to the Federal Reserve Bank to protect any bankruptcy estate funds not covered by deposit insurance (any amount over $250,000 per debtor is not insured) or to post a bond. As required by section 345(b)(2), securities used as collateral must be of the kind specified in 31 U.S.C. § 9303. Section 9303 specifies that government obligations may be used as security. A "government obligation" in turn is

defined in 31 U.S.C. § 9301(2) as a public debt obligation of the United States Government and an obligation whose principal and interest is unconditionally guaranteed by the government. In light of this definition, only United States Treasury bills, bonds, or notes are deemed to constitute acceptable securities for purposes of the authorized depository system. *See In re Columbia Gas Sys., Inc.*, 33 F.3d 294 (3d Cir. 1994).

If a debtor fails to deposit funds in an insured account or otherwise fails to comply with section 345, the United States Trustee must take action. The United States Trustee should seek an order of the court directing the debtor to comply with the requirements of section 345. The debtor's failure to comply with such an order constitutes cause for the United States Trustee to seek conversion, dismissal, or the appointment of a trustee.

Foreign bank accounts present special problems and concerns. In cases requiring the maintenance of foreign accounts, consideration should be given to the development of investment guidelines. Such guidelines, in the form of a court order, can be utilized to establish maximum deposit levels for foreign accounts and minimum ratings for banks that the debtor proposes to utilize. The guidelines should also set forth any additional reporting or oversight procedures necessary for the United States Trustee to monitor the overseas accounts properly. *See In re Interco, Inc.*, 130 B.R. 301, 303 (Bankr. E.D. Mo. 1991).

If the depository elects to provide protection by posting a bond, the United States Trustee must ensure that the amount of the bond is adequate. It should exceed, by a healthy margin, the total of all deposits. The United States Trustee should also ensure that the surety has adequate reserves to make good on the bond. Before approving the surety, the United States Trustee should inquire as to the amount of other bonds issued for this purpose to be certain the surety is not overextended.

3-10.4.9 Continuing Losses or Other Diminution of the Estate

If the debtor is operating at a deficit during the case, the United States Trustee should consider filing a motion to convert the case. However, before filing such a motion, the United States Trustee must consider any special circumstances that exist in the case. For example, the debtor may possess assets that would return value over the long term but do not contribute much to cash flow or may possess intangible assets of value, such as tax benefits, or may be able to obtain an infusion of third party funds that would allow it to emerge successfully from chapter 11.

3-10.4.10 Improper Post-Petition Transfers

Generally, if a debtor transfers property of the estate after the commencement of the case outside the ordinary course of business and the transfer is not authorized pursuant to an order of the court or under the Bankruptcy Code, the debtor has entered into a voidable post-petition transaction. 11 U.S.C. § 549. For example, a debtor may pay all or part of its pre-petition obligations to its suppliers for fear that they might otherwise refuse to do business with the debtor. Such conduct

"raises serious questions as to the ability and motivation of the debtor in possession. . . ." *See In re E. Paul Kovacs and Co.*, 16 B.R. 203, 205 (Bankr. D. Conn. 1981).

If the debtor fails to take any corrective action, the United States Trustee should seek the appointment of a trustee to review and pursue such post-petition payments. In the alternative, such complete disregard for the requirements of the Bankruptcy Code constitutes cause for conversion or dismissal of the case under section 1112.

3-10.4.11 Failure to Comply with Court Order

If an order has been entered directing the debtor to file operating reports, schedules, a plan, and so forth, and the debtor has failed to comply with such an order, the United States Trustee should move to convert or dismiss the case or seek the appointment of a trustee. Failure to comply with a court order may demonstrate both an inability to reorganize and a lack of adherence to fiduciary standards. Such a failure has been held to be cause justifying dismissal or conversion of a case. 11 U.S.C. § 1112(b)(4). Failure to pay post-petition taxes constitutes cause to convert or dismiss under section 1112(b)(4)(I).

3-10.4.12 Unauthorized Post-Petition Payments to Professionals

If a debtor pays any of its professionals subsequent to the commencement of the case and without court approval, the United States Trustee should first ask the professional to remit the amount received. If the professional ignores the request, the United States Trustee may apply to the bankruptcy court for an order directing disgorgement of the payments. The failure to obtain court authorization before making payments to estate professionals constitutes a breach of a debtor-in-possession's fiduciary duties and serves as a basis for dismissal or conversion pursuant to 11 U.S.C. § 1112(b). *In re Hampton Hotel Investors, L.P.,* 270 B.R. 346, 359 (Bankr. S.D.N.Y. 2001) (finding unauthorized payments to professionals as a form of "gross misconduct" and a basis for conversion to Chapter 7).

3-10.4.13 Ongoing Insolvency Proceedings in Another Forum

A chapter 11 case may be commenced for or against a debtor that is already subject to similar proceedings in another state or country, or against a partnership that is already winding up its affairs pursuant to state law. 11 U.S.C. § 305 permits the bankruptcy court to abstain from hearing such a case or to suspend the proceedings in the case for a period of time.

Section 305 can be invoked when the debtor is involved in a bankruptcy case in a foreign country, or the debtor is a partnership that has dissolved pursuant to state law and is "winding up" under applicable state statutes. *See In re AXL Indus., Inc.*, 127 B.R. 482, 485 (S.D. Fla. 1991), *aff'd in part dismissed in part*, 977 F.2d 598 (11th Cir. 1992); *In re Trina Assocs.*, 128 B.R. 858, 867-68 (Bankr. E.D.N.Y. 1991). Suspension of all proceedings in a case pursuant to section 305 also suspends the debtor's obligation to pay United States Trustee quarterly fees.

3-10.4.14 Sale of Substantially All of a Debtor's Assets

The sale of all or substantially all of a debtor's assets outside the ordinary course of business can be accomplished through a plan of reorganization. However, in some instances, debtors have sought court authority to consummate such a sale by motion outside of, or in advance of, a confirmed plan. Obviously, a motion to sell can be addressed and resolved more quickly and inexpensively than a plan can be brought to confirmation. Many courts do not find a sale of most or all of a debtor's assets by motion to be objectionable. *See Stephens Indus., Inc. v. McClung*, 789 F.2d 386, 388-90 (6th Cir. 1986); *In re Lionel Corp.*, 722 F.2d 1063, 1071 (2d Cir. 1983). Other courts, however, have found such sales objectionable on the grounds that they constitute a *sub rosa* plan, but short circuit the protections for creditors crafted into the plan confirmation requirements of the Bankruptcy Code. *See Motorola, Inc. v. Official Comm. Of Unsecured Creditors*, 478 F.3d 452 (2nd Cir. 2007); *In re Braniff Airways, Inc.*, 700 F.2d 935, 939-40 (5th Cir. 1983), *reh'g denied*, 705 F.2d 450 (5th Cir. 1983); *In re Gulf Coast Oil Corp.*, 404 B.R. 407 (Bankr. S.D. Tex. 2009) (discussion of history and changes to sales in chapter 11 since 1997). Criticism for such sales often point to: lack of due process; potential abuse by the primary secured creditors in the case, including the debtor in possession's lenders; debtors' efforts to append or integrate broad releases to the purchase agreement; and inadequate marketing efforts. *See Id.* Such sales outside of a plan may also impose significant tax consequences on the estate that must be considered. *See* 11 U.S.C. §1146; *Florida Dept. Of Revenue v. Piccadilly Cafeterias, Inc.*, 554 U.S. 33 (2008).

Business justification for a sale of assets early in the chapter 11 case may include: highly perishable goods; the debtor's inevitable operational losses or inability to obtain debtor in possession financing; and the accrual of interest on secured claims. Also, under Fed. R. Bankr. Proc. 6003, debtors need to prove that a sale within the first 21 days of the case is necessary to avoid immediate and irreparable harm.

The United States Trustee must become familiar with the prevailing case law regarding this issue in his or her district(s). If significant asset sales outside the context of a plan are allowed in a district, the United States Trustee must ensure that the sales are properly noticed with a reasonable opportunity for objections, competing bids, and compliance with applicable non-bankruptcy laws. If a previous order has been entered in the case limiting notice, consider whether notice of the proposed transaction should be expanded to include all creditors and parties in interest. If the sale is a private sale, consideration should be given as to how value was determined. The United States Trustee should assess whether an auction of the assets is likely to generate more for the estate. If the sale is to an insider, corporate approvals and valuation methods should be closely scrutinized to guard against the potential for fraud and/or criminal violations, as well as to ensure that full value is provided to the estate. Similarly, greater scrutiny by the United States Trustee of valuation methods is required in cases where there is no active creditors' committee.

The essential terms of the sale should be clearly set forth in the motion seeking approval of the sale. These terms can include: a fair description of the assets, including executory contracts; purchase price; conditions to closing such as sale subject to due diligence; identity and financial strength of the purchaser or "stalking horse," if any; prior and prospective efforts regarding marketing of the assets; timing and manner of qualified competing bids; form of the proposed or actual asset purchase agreement; auction or sales procedures, if applicable; projected closing date; and procedures related to identifying qualified back-up bids. Arm's length dealings between a debtor and potential purchaser and sound business justification for a sale outside of a plan are also critical. *See In re Enron Corp.*, 291 B.R. 39 (S.D.N.Y. 2003) (sound business justification); *In re Biderman Industries, U.S.A., Inc.*, 203 B.R. 547 (Bankr. S.D.N.Y. 1997) (arm's length dealings). *See also* 11 U.S.C §363(m) (good faith).

An auction sale of the debtor's assets can occur after a bidding and sale procedures hearing, and may take place at the offices of the debtor's counsel or, if there is sufficient interest, in a public venue such as the bankruptcy court. Courts should generally approve a sale of assets for the "highest and best offer" following an auction. Although such term is not defined in the Bankruptcy Code, local case decisions should provide some guidance. In particular, the court should evaluate competing bids that are similar, i.e. apples to apples. Thus, a stalking horse offer of a cash purchase with no contingencies may or may not be superior to a higher installment sale price with financing contingencies. Also, a sale to a single purchaser may or may not be superior to a piecemeal sale of the same assets divided among multiple purchasers. The court should make a finding that the ultimate sale is in the "best interest" of the bankruptcy estate and its creditors. Conversely, to justify a private sale, the debtor needs to show that an auction is not practicable, or would not be in the best interests of the estate, for example, because it is too costly. Where the proceeds of a sale of substantially all the assets will largely go to the secured creditors and the estate is administratively insolvent, consideration should be given to conversion of the case to chapter 7. Finally, sales to "insiders" require approval by independent directors, and must be evaluated for compliance with local laws regarding interested directors.

It is also worth noting the requirements of sections 363 (f)-(k), relating to the power to sell property in which the estate is a co-owner or that is subject to a valid lien or interest in favor of a third party. For example, pursuant to section 363(k), when a sale is outside of the debtor's ordinary course of business, a lienholder is entitled to credit bid at the sale.

The motion for sale, purchase agreement, and related documents may also discuss certain protection for the stalking horse. Requirements and procedures vary among courts, so familiarity with local rules and judges is paramount. For example, many purchase contracts discuss "breakup fees" or "topping fees." A breakup or topping fee is a specified amount paid to the stalking horse in the event that it is not the successful bidder for the assets, based on the premise that the stalking horse conducted due diligence and thus makes the stalking horse bid and any subsequent bids more valuable. Put another way, "the break-up fee

covers reimbursement of the disappointed purchaser's out-of-pocket expenses related to the proposed acquisition and/or compensation for the time, efforts, resources, lost opportunity costs and risks incurred by the disappointed purchaser." *In re APP Plus,* 223 B.R. 870, 874 (Bankr. E.D.N.Y. 1998). For example, the debtor may agree to pay 3 percent of the total consideration received on the sale of assets to the stalking horse. *See, e.g., AgriProcessors, Inc. v. Fokkena (In re Tama Beef Packing, Inc.),* 321 B.R. 496, 498 (B.A.P. 8th Cir. 2005) (noting that fees in the range of 1 to 4 percent of purchase price are generally upheld as reasonable). Left unchecked, break-up fees can chill bidding and depress the ultimate sale price for a debtor's assets, thereby harming the estate. Depending on how a break-up fee is structured, an alternative purchaser may be required to submit a higher bid for a debtor's assets and pay a separate fee to the stalking horse bidder. Even if the alternative purchaser was willing to submit a higher offer for the assets, payment of the separate break-up fee may be cost-prohibitive, causing the alternative purchaser to abandon their efforts. These fees must be evaluated in the context of other similar cases and should not be a vehicle to chill competing bids by other strategic or financial buyers. Breakup fees should not simply be evaluated under a business judgment standard, but should also pass muster under the section 503(b) administrative expense standard, i.e. provide some benefit to the estate. *See, e.g.*, *In re O'Brien Environmental Energy, Inc.*, 181 F.3d 527 (3rd Cir. 1999) (adopting administrative expense standard); *AgriProcessors, Inc. v. Iowa Quality Beef Supply Network, L.L.C. (In re Tama Beef Packing, Inc.),* 290 B.R. 90, 97-98 (B.A.P. 8th Cir. 2003) (summarizing case law); *but see In re Integrated Resources,* 147 B.R. 650 (S.D.N.Y. 1992) (reviewing under modified business judgment standard). These fees may be either in addition to or in lieu of the debtor's obligations to reimburse the stalking horse bidder for its out-of-pocket expenses in the event it is not the successful bidder. In addition, there may be restrictive language regarding the debtor's ability to continue to market or shop the assets after selection of a stalking horse. These "no shop" or "window shop" provisions require great scrutiny to avoid abuses by unscrupulous purchasers. Likewise, minimum initial overbids and subsequent bidding increments should be reasonable under the circumstances.

In addition, the United States Trustee must ensure compliance with section 363(b) if the sale includes personally identifiable information. Under section 363(b)(1), sale of property of the estate that includes personally identifiable information cannot take place without the appointment of a consumer privacy ombudsman and the satisfaction of other conditions, if at the commencement of the case there was a policy in place prohibiting the transfer of personally identifiable information.

3-10.4.15 Failure to Pay Quarterly Fees and Post-Confirmation Performance

Prior to confirmation, if informal efforts to obtain payment of delinquent quarterly fees are not successful, the United States Trustee should consider filing a motion to convert or dismiss or seek an order of the court directing payment, depending on the circumstances. A debtor that is not paying quarterly fees most likely has other unpaid post-petition obligations. The motion to convert or dismiss should identify all the deficiencies. The United States Trustee should not favor

conversion over dismissal merely because quarterly fees have not been paid in full. A reorganization plan cannot be confirmed unless provision is made for the payment of all outstanding quarterly fees no later than the effective date of the plan. *See* 11 U.S.C. § 1129(a) (12).

The issue of performance by the reorganized debtor under the confirmed plan is complex. Very often creditors lose contact and are unaware that the reorganized entity is not doing what the plan requires. Creditors are also unsure as to how to remedy such a problem. Complaints to the United States Trustee may lead to temporary relief, but remedies are limited. Some courts will not entertain a motion compelling performance.

The issue of requesting conversion or dismissal as a remedy for nonperformance is more complex. The courts are split in their analysis of the effect of conversion upon a chapter 11 case with a confirmed plan. Some courts take the position that, upon conversion of a chapter 11 case post-confirmation, only those assets remaining that did not revest in the debtor become part of the chapter 7 estate. *See In re Lacy*, 304 B.R. 439, 445 (D. Colo. 2004); *In re Canal Street Ltd. P'ship.*, 260 B.R. 460, 462 (Bankr. D. Minn. 2001). In most cases, this would leave the chapter 7 trustee with nothing to administer.

Some courts, however, have found that assets in which "the Debtor had a cognizable legal or equitable ownership interest on the date of confirmation will be properties of the estate in a Chapter 7 case, but properties which are clearly acquired by the Debtor postconfirmation will not be subject to administration by the Chapter 7 trustee." *See In re Smith*, 201 B.R. 267, 273 (D. Nev. 1996), *aff'd, mem.*, 141 F.3d 1179 (9th Cir. 1998). *See also In re RJW Lumber Co.*, 262 B.R. 91, 93 (Bankr. N.D. Cal. 2001); *In re Calania Corp.*, 188 B.R. 41, 43 (Bankr. M.D. Fla. 1995).

Other cases appear to have gone even further and hold that assets acquired after confirmation but before conversion are also subject to chapter 7 administration. *See In re Midway, Inc.*, 166 B.R. 585, 590 (Bankr. D.N.J. 1994). In order to avoid this potential problem, the United States Trustee should consider language in the confirmation order that revests all property in the estate upon conversion.

In all likelihood, if a debtor is not paying post-confirmation quarterly fees, the debtor is not making payments under the confirmed plan. If, in fact, there is no money to pay anyone and there is no property for a chapter 7 estate, dismissal is most appropriate in those jurisdictions where case law would leave nothing in the estate of a converted debtor. *See In re Motorworks, Inc.*, 85 B.R. 661, 662 (Bankr. S.D. Ga. 1988).

3-10.4.16 Environmental Problems

State or federal regulatory agencies may be pursuing a debtor because the debtor's operations generate or have generated toxic waste. The debtor may be liable for cleanup costs of environmentally contaminated sites. *See generally* the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA), 42 U.S.C. § 9601 *et. seq*. If significant litigation regarding environmental problems is ongoing in another forum, parties may ask the

bankruptcy court to abstain from exercising jurisdiction in the case or to suspend all proceedings pursuant to the provisions of section 305(a). In most instances, the United States Trustee should not initiate such an action.

If the environmental problems present in a particular case are of such magnitude that the debtor has no realistic prospect of reorganization, the United States Trustee should seek dismissal of the case. Conversion would create significant problems and potential liability for a chapter 7 trustee.

3-10.5 CHOICE OF REMEDY – DISMISSAL OR CONVERSION

3-10.5.1 Statutory Basis: 11 U.S.C. § 1112

Section 1112 governs the conversion or dismissal of chapter 11 cases. Some courts have interpreted section 1112(a) to give the debtor the absolute right to convert a voluntary chapter 11 case in which the debtor remains in possession to a case under chapter 7. *In re Dieckhaus Stationers of King of Prussia, Inc.*, 73 B.R. 969, 971 (Bankr. E.D. Pa. 1987). Other courts find that the debtor's right to convert is not absolute. *See, e.g.*, *Monroe Bank & Trust v. Pinnock*, 349 B.R. 493, 496-97 (E.D. Mich. 2006); *In re Adler*, 329 B.R. 406, 408-09 (Bankr. S.D.N.Y. 2005). Section 1112(b) provides that the court, on request of a party in interest or the United States Trustee and after notice and a hearing, may dismiss or convert a chapter 11 case for "cause." The statute contains a list of 16 factors that may constitute cause, including the inability to effectuate a plan and unreasonable delay by the debtor. The list is not exclusive. Additional examples of "cause" include failure to comply with a court order, failure to timely satisfy filing or reporting requirements, failure to appear before the court or the United States Trustee for scheduled hearings or meetings, failure to pay post-petition taxes or file post-petition tax returns, and failure to act diligently in proposing a plan. The court is able to consider other factors as they arise and use its equitable powers to reach an appropriate result in a particular case. *See* H. Rep. No. 595, 95th Cong., 1st Sess. 405 (1977).

Once cause has been established, the decision whether to dismiss or convert a case is made by determining which of these remedies is in the best interest of creditors and the estate in the matter under consideration. In the event that cause is established after a plan is confirmed, additional considerations may apply. Section 1112(c) provides that the court may not convert a chapter 11 case to a case under chapter 7 if the debtor is a farmer or a corporation that is not a moneyed, business, or commercial corporation, unless the debtor requests such conversion. Section 1112(d) sets forth the conditions under which a chapter 11 case may be converted to a case under chapter 12 or chapter 13. Finally, Section 1112(f) provides that a chapter 11 case may not be converted to a case under any other chapter of the Bankruptcy Code unless the debtor is eligible to be a debtor under that chapter. *See* 11 U.S.C. § 109.

3-10.5.2 Dismissal

Dismissal of a chapter 11 case is preferable to conversion if no assets remain to be administered by a chapter 7 trustee. In addition, conversion of a case should be

avoided when such an action would subject a chapter 7 trustee to risk of liability, such as when the debtor holds property contaminated by toxic waste.

The effect of an order dismissing a bankruptcy case is governed by 11 U.S.C. § 349. Section 349(a) provides, in general, that the dismissal of a case is without prejudice. However, a dismissal with prejudice can be imposed if the court, for cause, so orders. A dismissal with prejudice bars the discharge in a later case of debts that were dischargeable in the case dismissed. Section 349(b) provides that an order of dismissal operates to undo the bankruptcy case, in so far as practicable, and restores the status quo regarding property rights that existed at the commencement of the case.

The United States Trustee should ensure that an order of dismissal is conditioned on payment of any unpaid quarterly fees. If the order conditions dismissal upon the filing of a report of all unpaid administrative expenses and the payment of those sums, the United States Trustee should ensure that those conditions are met.

3-10.5.3 Conversion

Conversion of a case from chapter 11 to chapter 7 may be appropriate if assets exist that can be liquidated for the benefit of creditors. Conversion is not appropriate if the debtor merely seeks to unburden itself of environmental problems and saddle a trustee with those liabilities.

The effect of an order converting a bankruptcy case is governed by 11 U.S.C. § 348. Section 348(a) provides that conversion constitutes an order for relief under the new chapter. However, except as provided in section 348(b) and (c), the conversion of a case does not effect a change in the filing date, the commencement of the case, or the date of the order for relief. Under section 348(d), a claim arising after the order for relief under chapter 11 but before conversion of the case under section 1112 (other than a claim specified in section 503(b)) "shall be treated for all purposes as if such claim had arisen immediately before the date of the filing of the petition."

Most claims arising in the chapter 11 case have a lower priority than those arising under the new chapter. An exception is United States Trustee quarterly fees. Conversion terminates the service of any trustee or examiner appointed in the chapter 11 case. *See* 11 U.S.C. § 348(e). However, that trustee may be reappointed as the chapter 7 trustee. *See* 11 U.S.C. § 701(a)(1).

Conversion does not negate all actions taken while the case was pending in chapter 11. The schedules, statement of financial affairs, and statement of executory contracts filed in the prior case are deemed to be filed in the converted case. If any of these documents were not filed, the debtor is required to comply with Fed. R. Bankr. P. 1007 as if an order for relief had been entered on the date of the order of conversion. *See* Fed. R. Bankr. P. 1019(1).

The conversion of a case to chapter 7 results in the immediate ouster of the debtor in possession and the appointment of an interim trustee as provided in section 701. Unless the interim chapter 7 trustee seeks a court order authorizing the continued operation of the business, the business operations of the debtor must

cease immediately upon conversion of the case. *See* 11 U.S.C. § 721. In the event the assets of a partnership debtor are insufficient to pay claims, a trustee may have a claim against the general partner to the extent of the general partner's personal liability under applicable nonbankruptcy law. *See* 11 U.S.C. § 723 and Fed. R. Bankr. P. 1007(g).

Conversion of a case to chapter 7 raises issues concerning the deadline for filing avoidance actions under section 546 and considerations for our offices in connection with the timing of motions to convert chapter 11 cases and the scheduling of chapter 7 meetings of creditors after courts enter orders converting chapter 11 cases to chapter 7. Section 546 provides:

> (a) An action or proceeding under section 544, 545, 547, 548, or 553 of this title may not be commenced after the earlier of—
>
> (1) the later of—
>
> (A) 2 years after the entry of the order for relief; or
>
> (B) 1 year after the appointment or election of the first trustee under section 702, 1104, 1163, 1202, or 1302 of this title if such appointment or such election occurs before the expiration of the period specified in subparagraph (A); or
>
> (2) the time the case is closed or dismissed.

A problem may arise for the interim chapter 7 trustee when a chapter 11 case converts to chapter 7 before the two-year deadline in section 546(a)(1)(A) expires and the chapter 7 meeting of creditors is not scheduled and concluded until after the deadline. This is due to the reference in section 546(a)(1)(B) to section 702 rather than section 701. In this circumstance, the deadline may expire shortly after the interim trustee is appointed (i.e. without the extra one year). The Seventh Circuit's opinion in *Fogel v. Shabat (In re Draiman)*, 714 F.3d 462 (7th Cir. 2013) illustrates the problem. The Seventh Circuit held that the appointment of an interim trustee does not extend the deadline for avoidance actions even if the interim trustee eventually becomes the permanent trustee. The United States Trustee should be aware of the two-year deadline and, to the extent possible, seek conversion of a case in sufficient time for a chapter 7 meeting of creditors to be held and concluded before that date.

If a case is converted to one under chapter 7, 12, or 13 pursuant to section 1112, the debtor is required to file a schedule of unpaid obligations incurred after the commencement of the chapter 11 case. *See* Fed. R. Bankr. P. 1019(5). The United States Trustee should file a proof of claim for unpaid quarterly fees in the converted case. Pursuant to section 726(b), fees assessed under 28 U.S.C. § 1930, including United States Trustee quarterly fees, are not subordinated to chapter 7 administrative expenses. *See, e.g.*, *In re Juhl Enters., Inc.*, 921 F.2d 800, 803 (8th Cir. 1990); *In re Jonick Deli Corp.*, 263 B.R. 196, 199 (S.D.N.Y.

2001); *In re Mary James, Inc.*, 225 B.R. 635, 639-40 (E.D. Mich. 1998). *See also In re Endy*, 104 F.3d 1154, 1157-58 (9th Cir. 1997).

CHAPTER 3-11: REVIEW OF DISCLOSURE STATEMENTS AND PLANS

3-11.1 INTRODUCTION

Section 586(a)(3)(B) of title 28 provides that the United States Trustee shall, whenever the United States Trustee considers it to be appropriate, monitor plans and disclosure statements filed in cases under chapter 11 and file with the court comments with respect to such plans and disclosure statements. The disclosure process is the heart of the reorganization provisions of the Bankruptcy Code. Full disclosure is required before solicitation of acceptances of a plan of reorganization, thereby enabling creditors to make an informed judgment, whether to accept or reject a plan.

As stated in the legislative history of the Bankruptcy Code:

> The premise underlying the consolidated chapter 11 of this bill is the same as the premise of the securities law. If adequate disclosure is provided to all creditors and stockholders whose rights are to be affected, then they should be able to make an informed judgment of their own, rather than having the court or the Securities and Exchange Commission inform them in advance of whether the proposed plan is a good plan. Therefore, the key to the consolidated chapter is the disclosure section.

H.R. Rep. No. 595, 95th Cong., 1st Sess. 226 (1977).

Pursuant to 11 U.S.C. § 1125(b), acceptance or rejection of a plan may not be solicited unless accompanied by a disclosure statement found by the court to contain "adequate information" regarding the plan. The practical approach to disclosure embodied in section 1125, however, is quite unlike the standardized approach to disclosure embodied in the federal securities laws. This is illustrated by section 1125(a)(1), which qualifies the sufficiency requirement with the following reasonableness standard:

> "adequate information" means information of a kind, and in sufficient detail, as far as is reasonably practicable in light of the nature and history of the debtor and the condition of the debtor's books and records, including a discussion of the potential material Federal tax consequences of the plan to the debtor, any successor to the debtor and a hypothetical investor typical of the holders of claims or interests in the case, that would enable a such a hypothetical investor of the relevant class to make an informed judgment about the plan and ... the court shall consider the complexity of the case, the benefit of additional information ... and the cost of providing additional information ..."

11 U.S.C. § 1125(a)(1). Section 1125(d) elaborates by providing that "adequate information is not governed by any otherwise applicable nonbankruptcy law, rule, or regulation. . . ."

The United States Trustee's review of disclosure statements focuses on the adequacy of disclosure. The role of the United States Trustee in reviewing disclosure statements is critical to the protection of creditors who have not directly participated in the negotiations, or when committees are inactive or have not been appointed.

The Bankruptcy Code permits the court to "approve a disclosure statement without a valuation of the debtor or an appraisal of the debtor's assets." 11 U.S.C. § 1125(b). Congress recognized that the circumstances will vary widely from one chapter 11 case to the next and, therefore, the parameters of "adequate information" will also vary. The legislative history states:

> The Supreme Court's rulemaking power will not extend to rulemaking that will prescribe what constitutes adequate information. . . . Precisely what constitutes adequate information in any particular instance will develop on a case-by-case basis. Courts will take a practical approach as to what is necessary under the circumstances of each case, such as the cost of preparation of the statements, the need for relative speed in solicitation and confirmation, and, of course, the need for investor protection. There will be a balancing of interests in each case. In reorganization cases, there is frequently great uncertainty. Therefore, the need for flexibility is greatest.

H.R. Rep. No. 595 at 409.

A review of case law illustrates what courts consider "adequate information" based on the facts of each case. *See In re Adelphia Communications Corp.*, 352 B.R. 592 (Bankr. S.D.N.Y, 2006) (once adequate information "floor" is satisfied, additional information can be included as long as accurate and not misleading). Information may vary depending upon the sophistication of the class. *See In re Bloomingdale Partners*, 155 B.R. 961, 972 (Bankr. N.D. Ill. 1993). *But see In re Walker*, 198 B.R. 476, 479-80 (Bankr. E.D. Va. 1996) (court held that the information need only be the best prediction that the debtor can make based upon information available).

The process for obtaining approval of a disclosure statement and soliciting votes for a plan of reorganization has been simplified for small business debtors. In a small business case, the court may determine the plan itself provides adequate information and that a separate disclosure statement is not necessary; may approve a disclosure statement submitted on standard forms approved by the court or adopted under section 2075 of title 28; and may conditionally approve a disclosure statement subject to final approval after notice and hearing. The conditionally approved disclosure statement must be mailed not later than 25 days prior to the date of the hearing on confirmation of the plan. The court can then hold a single hearing to consider both final approval of the disclosure

statement and plan confirmation. 11 U.S.C. § 105(d)(2)(B)(vi) and 1125(f)(1), (2), and (3); Fed. R. Bankr. P. 3016 and 3017.1.

3-11.2 THE CONCEPTUAL FRAMEWORK

3-11.2.1 Items to Include

The United States Trustee should not advocate a "checklist" approach to the review of disclosure statements. The disclosure statement certainly should discuss the elements set out in 11 U.S.C. § 1123 insofar as they are in the plan filed. Reference to case law regarding information to be included is essential. *See, e.g.*, *Mabey v. S.W. Elec. Power Co. (In re Cajun Elec. Power Co)*, 150 F.3d 503, 518 (5th Cir. 1998); *Hall v. Vance*, 887 F.2d 1041, 1043 (10th Cir. 1989); *In re Metrocraft Publ'g Servs., Inc.*, 39 B.R. 567, 568-69 (Bankr. N.D. Ga. 1984); *In re Malek*, 35 B.R. 443, 443-44 (Bankr. E.D. Mich. 1983); *In re A.C. Williams Co.*, 25 B.R. 173, 176 (Bankr. N.D. Ohio 1982).

3-11.2.2 "Safe Harbor," 11 U.S.C. § 1125(e)

Under section 1125(e), a person who solicits acceptances or rejections of a plan in good faith and in compliance with the Bankruptcy Code is not liable on account of such solicitation for the violation of any applicable law, rule, or regulation governing the offer, issuance, sale, or purchase of securities. The purpose of this section is to protect creditors, creditors' committees, counsel for committees, and others involved in a case from potential liability for use of an approved disclosure statement.

This safe harbor rule was intended to codify the result of *Ernst & Ernst v. Hochfelder*, 425 U.S. 185 (1976), *reh'g denied*, 425 U.S. 986 (1976), which held that proof of *scienter* is a prerequisite to the imposition of civil liability under the antifraud provisions of section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5. It was also intended to extend the good faith safe harbor to the imposition of injunctive liability. *See* H.R. Rep. No. 595 at 229-31.

3-11.2.3 Factors Affecting Adequacy of Disclosure

Several factors can affect the appropriate quantity and quality of disclosure in a given case, including:

1. the nature of the proposed plan of reorganization or liquidation;
2. the sophistication of the various holders of claims and interests and their familiarity with the debtor and its business;
3. whether the expense of the disclosure would substantially outweigh its anticipated benefit to creditors and stockholders;
4. the peculiarities of the debtor's business or financial condition;
5. the need for an expeditious resolution; and

6. the access of a plan proponent, other than the debtor, to factual information regarding the debtor.

An inordinately long or complex disclosure statement may confuse rather than enlighten creditors. In such cases, the deletion of certain materials or the preparation of a summary may be suggested; care must be taken, however, to ensure that significant material is not deleted.

3-11.3 CONDUCTING THE REVIEW

3-11.3.1 Standard Language

The use of some standardized language in disclosure statements is appropriate. For example, all documents should indicate that any representations made in order to secure an acceptance of the plan that are not contained in the disclosure statement are to be reported to the debtor, the creditors' committee, the United States Trustee, and the bankruptcy court for such action as may be appropriate.

Similarly, there should be a statement that the plan represents a legally binding arrangement and should be read in its entirety; the reader should not rely on the summary in the disclosure statement. Accordingly, creditors may wish to consult with their own lawyers and the creditors' committee and its lawyer to understand the plan more fully. The disclosure statement should also refer to "the right to vote for acceptance or rejection" of the plan or "the right to vote upon" the plan.

While the disclosure statement may serve the parallel purpose of solicitation, the solicitation aspect of the statement should be clearly identified as such and kept distinct from the disclosure aspect. For example, the disclosure statement may state that "as a creditor, your acceptance is important" but such a statement should not be included in a paragraph describing voting procedures. It is permissible, however, for a discussion of the voting process to state that it is important for each creditor to vote.

The disclosure statement should indicate that bankruptcy court approval of the disclosure statement is not a ruling by the bankruptcy court on the merits of the plan. The disclosure statement should indicate which classes are impaired and are, therefore, entitled to vote on the plan and should define impairment in plain language. The voting requirements under 11 U.S.C. § 1126 for acceptance must be set forth in the disclosure statement. Voters should be told where the ballots must be sent and the deadline for voting. The ballots should not be sent to the United States Trustee.

3-11.3.2 Description of the Debtor's Business

The disclosure statement should describe the nature of the debtor's business. In cases in which the plan contemplates cash payments upon confirmation, a brief narrative description should suffice. If the plan contemplates deferred payments or the issuance of common or preferred stocks to creditors and, therefore, its

implementation depends upon the future course of the business, the description should be more detailed. Items to look for in the latter case are:

1. material factors peculiar to the specific business of the debtor, such as seasonality, limited sources of supply, limited number of potential customers, patents or licenses, special capital needs, regulatory problems, or backlog;
2. principal product and services present, contemplated, or under development;
3. competitive conditions in the applicable market; and
4. material contracts and leases, including important terms such as expiration dates. Of course, if detailed information would have a detrimental impact on the debtor_s competitive position, general terms may be permissible.

3-11.3.3 Reasons for Financial Difficulties and Correction of Those Factors

The disclosure statement should give a brief narrative description of the factors leading to the debtor's financial difficulties, together with a listing of the steps already taken or to be taken by the debtor to correct the problems. This description should be reviewed from the standpoint of the assistance it will provide the holders of claims and interests in assessing the likelihood of any recurrence of prior difficulties and, thus, the feasibility of the proposed plan. In cases in which the plan has neither deferred payments nor issuance of common or preferred stock, the reasons for the debtor's financial difficulties and the correction of those factors are less important and may be dealt with summarily.

3-11.3.4 Historical and Current Financial Information

Historical financial information, such as cash flow statements and profit and loss statements (statements of operation), should, where relevant, provide the holders of claims and interests some perspective regarding the debtor's financial situation and future prospects as reflected in any projections included in the disclosure statements. *See* "Projections" *infra*.

Current financial information, such as cash flow statements, profit and loss statements (statements of operations), and balance sheets, provides holders of claims and interests with important information about the debtor's performance during the chapter 11 case. Of particular importance is the comparison of the current balance sheet with the balance sheet as of the commencement of the case.

The disclosure statement should include, as an exhibit, a summary of the results of the operations during the chapter 11 case. *In re Merrimack Valley Oil Co.*, 32 B.R. 485, 488 (Bankr. D. Mass. 1983); *In re Western Management, Inc.*, 6 B.R. 438, 442-43 (Bankr. W.D. Ky. 1980). The summary should be in a format consistent with the projections so that creditors can make a meaningful comparison of the past with future projections. The format of the summary and

the projections should be consistent with regard to time and designation of income and expense items.

The disclosure statement should also include a projection of the financial condition of the debtor upon confirmation of the plan. This information enables the court and creditors to determine if the debtor will need further financial reorganization or if the plan will be followed by a liquidation. 11 U.S.C. § 1129(a) (11).

The extent to which financial statements are prepared in accordance with generally accepted accounting principles (GAAP) will vary. The period covered by historical financial information may vary based on the nature of the plan; the condition of the debtor's books and records (11 U.S.C. § 1125(a)(1) expressly recognizes this as a variable); and the nature of the debtor_s business. Any financial statements that have not been prepared in accordance with GAAP due to the condition of the debtor_s books and records should contain appropriate disclaimers and a brief explanation of the accounting methods employed.

The American Institute of Certified Public Accountants issued Statement of Position (SOP) 90-7, on November 19, 1990, as amended by FASB Staff Position Report FSP SOP 9-7-1 (April 24, 2008). The statement provides guidance for the financial reporting of entities currently in chapter 11 that expect to reorganize as going concerns.

3-11.3.5 Material Post-Petition Events

The disclosure statement should briefly describe all material post-petition events including:

1. borrowings;
2. issuance of securities;
3. sales or transfers of assets other than in the ordinary course of business;
4. necessary regulatory approvals; and
5. lease assumptions and/or assignments or rejections, along with other executory contracts.

3-11.3.6 Outline of the Plan

The degree of detail in which the proposed plan of reorganization should be outlined in the disclosure statement will vary greatly with the complexity of the plan. In some instances, cross-references in the disclosure statement to pertinent plan provisions will suffice. In other instances, complex features of the plan may need to be separately, but briefly, described in the disclosure statement. For example, if the plan contemplates deferred payments to unsecured creditors out of retained earnings in excess of a stated figure, look for some explanation of this feature in the disclosure statement. Similarly, complex plan provisions often involve definitional problems that should be clarified in the disclosure statement.

For example, the amount of deferred payments to a particular class of creditors may be expressed as a percentage of "net sales," a term that should be defined. Any default provisions or affirmative and negative covenants contained in the plan, such as dividend restrictions, limitations on further borrowing, and board memberships, should be explained. Information on the amount of claims in each class should be provided in tabular form in order to allow computations of the possible distribution to be made under the plan. The disclosure statement should also predict when confirmation will occur.

3-11.3.7 Means of Effectuating the Plan

Information relating to the source and application of funds to effectuate the proposed plan of reorganization should appear in the disclosure statement, including an estimate of the amounts necessary for the initial payments under the plan. This number should be compared to the cash on hand. If the amount needed to confirm is greater than the cash available, there should be an explanation concerning the source of the additional funds. There should also be a brief description of the structure of any transaction related to carrying out the plan, such as the sale of stock or of assets. There should be an indication as to whether there exists any avoidable transfers (preferences and/or fraudulent conveyances) and whether the debtor or acquiring entity intends to prosecute these claims. These potential causes of action should be factored into the estimated liquidation analysis. *Harstad v. First Am. Bank,* 39 F.3d 898, 903 (8th Cir. 1994) (Creditors have the right to know of any potential causes of action that might enlarge the estate--and that could be used to increase payment to the creditors.)

The disclosure statement should contain a brief description of the terms of any material agreements relating to the effectuation of the plan that the debtor has executed or proposes to execute, such as funding agreements, security agreements, guarantees, trust indentures, and agreements for the sale of stock or assets. For example, the plan may contemplate the use of a trust indenture in connection with deferred payments to creditors. In that event, the scope of discretionary authority lodged in the indenture trustee (e.g., the discretion to pledge assets to facilitate new financing or to subordinate the security interest granted to creditors) and the identity and affiliations of the indenture trustee should be disclosed. If there are to be guarantees for debtor's obligations under the plan, the guarantors should be identified and the nature and scope of guarantees described. In addition, the guarantor's ability to support the guarantee (e.g., a net worth statement in the case of an individual guarantor) should be discussed.

If a third party, including the debtor's principal, is to provide the necessary funds for confirmation, there should be some financial information with respect to the third party. If the third party does not want to be disclosed or does not want to disclose its financial condition, there are acceptable alternatives. For instance, if the funds are deposited in an identifiable escrow account for confirmation or by an irrevocable letter of credit, financial disclosure about the third party may not be

necessary. Terms of the advance loan or contribution to capital should also be set forth. This should also be reflected in a projection that assumes confirmation of the plan.

The disclosure statement should indicate if there are any conditions that have to be met by any party in order for the plan to be confirmed. The disclosure statement should also state the likelihood of the requisite events occurring as scheduled.

3-11.3.8 Securities to be Issued

In rare instances, a case will involve the issuance of securities. If such a case arises, the disclosure statement should provide information about any securities to be issued pursuant to the plan of reorganization, where applicable, as to:

1. dividend rights, management's dividend policies, and external constraints on the payment of dividends (e.g., a negative covenant in a loan agreement);
2. liquidation rights and preferences;
3. voting rights;
4. sinking fund payments;
5. conversion features;
6. preemptive rights;
7. redemption provisions;
8. provisions relating to interest, amortization, and maturity;
9. provisions restricting the issuance of additional securities; and
10. other special rights and preferences (e.g., the right to elect a majority of the board of directors in the event of defaults on payments in respect to debentures issued or the right to veto certain corporate changes, such as recapitalization, that could adversely affect the security holders' rights).

The disclosure statement should indicate whether the issuance of the securities in question is exempt from the registration requirements of federal and state securities laws by virtue of 11 U.S.C. § 1145(a) or a different exemption, or whether it is contemplated that the securities will be registered. United States Trustees should be aware that section 1145(a) generally permits the issuance of exempt securities to those who hold claims (including administrative expense claims) and interests in the debtor and affiliates only. *See U.S. S.E.C. v. Universal Exp., Inc.,* 475 F. Supp. 2d 412, 425 (S.D.N.Y. 2007) ("The section 1145(a) exemption is available only when the offerees are receiving the securities, at least in part, in exchange for claims against or interest in the debtor which they hold.") *aff'd sub nom. U.S. S.E.C. v. Altomare,* 300 F. App'x 70 (2d Cir. 2008) (citations omitted).

It may be appropriate for the disclosure statement to include information relating to the current and anticipated post-confirmation distribution of ownership of equity securities. This information could serve to inform the holders of claims and interests as to any dilution or changes in control likely to result from the issuance of securities contemplated by the plan of reorganization. Even in those cases where existing stockholders do not have preemptive rights, if the stock is being diluted, the existing stockholders are impaired. *Cf. In re Barrington Oaks General Partnership*, 15 B.R. 952 (Bankr. D. Utah 1981).

If there is a market for the securities to be issued (or the securities into which they are convertible), the disclosure statement should identify the principal markets involved. If the securities are traded on an exchange, information as to high and low sales prices in the recent past should be included. If the principal market for such securities is not an exchange, there should be included information as to high and low bid quotations in the recent past, with disclosure of the source of those quotations. If there is no market for such securities, the disclosure statement should so state, and should also state whether it is expected that a market will exist for securities distributed under the confirmed plan. If the securities are publicly held, but not traded because of past failure to disseminate public information, that fact should be disclosed *See* Securities Exchange Act Rule 15c2-11. If it is expected that the disclosure being made will cure the deficiency so that trading can resume, then that expectation should be noted.

Finally, the disclosure statement should briefly describe applicable law relating to the resale of the securities to be issued under the plan of reorganization. There is a limited exemption in section 1145(d) from the provisions of the Trust Indenture Act of 1939.

3-11.3.9 Projections

"The essence of disclosure in a reorganization case, and the essence of valuation of a business as a going concern, is a projection of future earnings of the business." H.R. Rep. No. 595 at 230-31. If the plan of reorganization does not contemplate any deferred payments or the issuance of any equity security, such projections are unnecessary. In all other cases, projections are critical to the creditors' and shareholders' ability to assess the viability of the plan and of the debtor. It should be noted that the Securities and Exchange Commission encourages the use of projections of future economic performance. *See* Securities Act Release No. 33-5992 (November 7, 1978), 43 F.R. 53246.

The projections should include both cash flow and earnings estimates. All payments contemplated under the plan should be factored into the cash flow projections. If earlier projections are available, they should be compared in the disclosure statement with actual results for the periods covered. Creditors will then be able to assess management's powers of projection.

There may be instances in which payments under the plan are tied to specific financial measures such as net sales, pre-tax profits, retained earnings, or other

measures. In such circumstances, the projections should set forth estimates in terms of the appropriate measure.

The United States Trustee should ensure that the underlying assumptions utilized by management in developing the projections are disclosed as specifically as possible. There may exist, however, legitimate reasons for a vague statement concerning such items as the introduction of a new product or the gearing down of operations. It should be understood that the disclosure of "adequate information" may conflict with the debtor's legitimate need to protect its competitive position. For example, the disclosure of market study results for a proposed new product, while of significant informational value to creditors, might not be appropriate. Where the assumptions made relate to the factors cited as reasons for the debtor's financial difficulties and are intended to correct those factors, the connection should be made clear.

Cases may arise in which alternative sets of projections, or at least ranges of projections, would be appropriate. For example, the plan of reorganization may offer creditors two or more payment options. Alternative sets of projections or ranges of projections may be desirable to reflect the different results that would flow from the election of each option. Similarly, alternative sets of projections or ranges of projections may be appropriate when there is a reasonable prospect of a change affecting the debtor's business, such as regulatory changes, introduction of a new product, or new market entrants.

3-11.3.10 Management, 11 U.S.C. § 1129(a)(5)

Even if the plan of reorganization contemplates exclusively cash payments upon confirmation, the disclosure statement must identify the anticipated post-confirmation directors and executive officers of the debtor, and indicate the extent to which this represents a change from pre-confirmation management. The disclosure statement should contain a brief account of the business experience of each director and executive director, together with their age, tenure, and possible retirement where relevant. Information as to compensation arrangements with the debtor's directors and executive officers should also be disclosed. The disclosure statement should also include any other information relevant to the integrity and competence of management – for example, criminal or regulatory proceedings and prior bankruptcies or receiverships.

3-11.3.11 Controlling Persons

In the case of a plan of reorganization that will be implemented over time, the disclosure statement should identify any "persons" (as defined in section 101(41)) that will "control" the debtor following confirmation of the proposed plan of reorganization.

With respect to any "person" that is to "control" the debtor, the disclosure statement should provide at least the following information:

1. the nature and extent of "control" to be exercised;
2. a brief narrative description of the business of the controlling person;

3. the identity of persons that control such controlling person;
4. the identity and experience of management of the controlling person;
5. the identity of affiliates of the controlling person;
6. an outline of the transaction whereby control is to be acquired;
7. if known, the business plans of the controlling person for the debtor; and
8. pertinent financial information regarding the controlling person, if available.

3-11.3.12 Insider Claims

The disclosure statement should list any claims held by "insiders" of the debtor as defined in section 101(31) and should include:

1. the identity of the claimant;
2. the claimant's affiliation with the debtor;
3. the circumstances giving rise to the claim;
4. the amount of the claim; and
5. the treatment to be afforded the claim in accordance with the plan.

3-11.3.13 Transactions with Insiders

The disclosure statement should contain a brief description of any present or proposed material transactions of the debtor in which "insiders" of the debtor (as defined in 11 U.S.C. §§ 101(31)) have any interest. The insider should be identified, the affiliation with the debtor described, and the nature of the interest in the transaction explained. For example, rentals paid by or to the debtor should be compared to existing market rates. If any transactions have given rise to claims either on behalf of or against the debtor in the chapter 11 case, they should be disclosed.

3-11.3.14 Disputed Claims

Any material claims that the debtor disputes or proposes to dispute, in whole or in part, should be listed and there should be a disclosure of:

1. the identity of the claimant;
2. the nature of the claim;
3. the full amount of the claim and the amount subject to dispute; and
4. the grounds of the debtor's challenge to the claim (e.g., voidable preference, fraudulent transfer, or lack of collateral value). It may also be appropriate for the disclosure statement to explain the effect upon the plan of reorganization (and the related projections, if any) of the allowance or disallowance of the disputed claim.

3-11.3.15 Legal Proceedings

The disclosure statement should give a brief description of any material legal proceedings to which the debtor is a party, that the debtor contemplates instituting, or that are threatened against the debtor. This disclosure should include information as to:

1. the identity of the parties to the litigation;
2. the nature of the claims;
3. the factual basis alleged to underlie the proceedings;
4. the court in which the litigation is pending;
5. the relief sought;
6. the status of the litigation; and
7. a statement as to whether a judgment adverse to the debtor might seriously affect the debtor's business or financial conditions or the debtor's ability to effectuate the plan of reorganization.

3-11.3.16 Tax Consequences

The definition of "adequate information" requires a "discussion of the potential material Federal tax consequences of the plan to the debtor, any successor to the debtor and a hypothetical investor typical of the holders of claims or interest in the case, . . ." 11 U.S.C. § 1125(a)(1). In determining the adequacy of information, including tax consequences, "courts shall consider the complexity of the case, the benefit of additional information to creditors and other parties in interest, and the cost of providing additional information..." *Id.* The larger and more complex the case, the more detailed the discussion of all required type of information, including material tax consequences, will have to be in order to be "adequate."

3-11.3.17 Trustee or Examiner

If a trustee or an examiner has been appointed in a chapter 11 case, the identity and the reasons for the appointment of the trustee or examiner should be disclosed. Similar information regarding an elected trustee should be provided. If the trustee or the examiner has prepared a report regarding the operations of the debtor, and if it is not too voluminous, a copy should be attached to the disclosure statement. If it is not attached, it should be summarized in the disclosure statement, with directions on how to obtain a copy of the report.

3-11.3.18 Creditors' Committees and Equity Security Holders' Committees

The disclosure statement should indicate whether there are any creditors' or equity security holders' committees, together with a list of the members of such committees, their addresses, and whether the proposed plan of reorganization has been negotiated with the committees. Any professionals retained by the committees should also be disclosed. The position of the committees on the plan and what role, if any, the committees will play after confirmation should be disclosed.

3-11.3.19 Information Regarding Plan Proponent

Occasionally, a plan and disclosure statement may be offered by a party other than the debtor, the trustee, or the creditors' committee. The proponent must be a "party in interest" under section 1121. In those situations, the disclosure statement should clearly describe the position of the proponent relative to the debtor – for example, a supplier holding an unsecured claim against the debtor in the amount of $20,000 – since it may affect the proponent's access to the information and, thus, the quality and quantity of disclosure. On the other hand, disclaimers by an "outside" plan proponent as to the absence of information regarding the debtor must also be scrutinized, since the formulation of a plan by the proponent necessarily involved certain assumptions, if not "hard" information, regarding the debtor. The standard of adequate information should not change depending upon the proponent of the plan. Any assumptions should be disclosed and the proponent should be compelled to obtain the necessary, existing information in order for the disclosure statement to be approved. *See In re Civitella*, 15 B.R. 206, 208 (Bankr. E.D. Pa. 1981) (disclosure statement for a plan proposed by three secured creditors denied approval because no factual information provided, only allegations and opinions). Where other plans have been proposed, their existence and the fact that they are on file with the court should be disclosed. These are potential alternatives to the plan that creditors/equity holders are being asked to vote upon.

3-11.3.20 Liquidation Analysis

A creditor cannot make an informed judgment regarding a proposed plan of reorganization without information as to the available alternatives. The most obvious alternative is liquidation of the debtor under chapter 7. Any reference to liquidation should be prefaced with the term "estimated," since liquidation has not occurred. *See In re Radco Properties, Inc.*, 401 B.R. 666, 682 (Bankr. E.D. N.C. 2009). These statements of alternatives should be neutral. If other alternatives, such as a competing plan of reorganization, have been considered by the proponent of the plan during the chapter 11 case, the disclosure statement could briefly describe the alternatives considered and the reasons for finding the proposed plan of reorganization preferable.

In most cases an elaborate liquidation analysis should not be necessary. A brief tabular presentation should suffice if it sets forth estimated administration expenses; estimated priority, secured, and unsecured claims; and estimated asset values; along with disclosure of the source of those estimates. The disclosure statement should indicate the percentage distribution, if any, to creditors on liquidation.

The disclosure statement should enable the reader to determine what assumptions were made in connection with the estimate of claims and asset values (e.g., the assumptions regarding disallowance of certain claims, recoverable transfers, the book figures upon which the liquidation values are based, and the method employed in computing the book figures or the discount applied to accounts receivable and how this discount relates to the debtor's actual pre-petition and post-petition collection experience). Certain assets, such as leases and real estate, may not be reflected accurately on the balance sheet, although quite valuable upon liquidation. Any adjustments that are made should be disclosed.

If liquidation will not be immediate, an estimate of the length of time that would be required to liquidate the assets of the debtor should be included. If relevant, the liquidation analysis should factor in available exemptions provided by the Bankruptcy Code. If claims incorporated in the liquidation analysis are held by "insiders" of the debtor, that fact should be mentioned. In the case of a partnership, the disclosure statement should include financial information about the general partners so that creditors can determine if the plan is in their "best interest." 11 U.S.C. § 1129(a)(7); *see also* 11 U.S.C. § 723 (partnership distributions in chapter 7).

Section 1125(b) of the Bankruptcy Code indicates that the court may approve a disclosure statement without a valuation of the debtor or an appraisal of its assets. Appraisals are, however, performed in most cases and their incorporation in the disclosure statement enhances the liquidation analysis. (Disclosure of information relating to an appraisal may be restricted.) If an appraisal is too voluminous, a summary and information on how to obtain a copy of the appraisal will generally suffice. In either event, the disclosure statement should identify the appraiser, identify the party who commissioned the appraisal, and disclose the purpose of the appraisal. The proponent of the plan of reorganization may want to argue that one of the appraisals is especially reliable and the reasons for this conclusion.

3-11.3.21 Vote Required for Acceptance

The disclosure statement should briefly describe the vote required for acceptance of the plan by the various classes of holders of claims and interests under section 1126, and should specifically identify which classes are impaired and voting on

the plan. The disclosure statement should also establish a record date for voting on the plan of reorganization by holders of equity securities.

3-11.3.22 Cram Down

Although the application of section 1129(b) is essentially a question for confirmation, the discussion in the disclosure statement of "cram down" raises a difficult problem. The term "cram down" is used to describe the power of the bankruptcy court to confirm a reorganization plan even though one or more impaired classes of creditors does not accept the plan. 7 *Collier on Bankruptcy* ¶ 1129.03 (Alan N. Resnick, Henry J. Sommer 16th ed. Rev. 2009). At a minimum, if the debtor intends to invoke the "cram down" provisions against a dissenting class, that intention should be disclosed. Moreover, if the invocation of "cram down" is intended, the disclosure statement should contain a brief summary of the operation of section 1129(b) as it would affect the class in question, as well as a brief outline of the "fair and equitable" standard that would be applied should "cram down" be invoked.

The disclosure problem is further complicated to the extent there may be, as a legal matter, significant doubt as to the availability of "cram down" in a given case. For example, although a plan of reorganization proposes that stockholders will receive cash payments in exchange for their shares, the disclosure statement may state, or at least suggest, that section 1129(b) "may be" invoked against unsecured creditors as a class. The availability of "cram down" in those circumstances may be questionable. It is misleading to even suggest to creditors that the debtor may invoke section 1129(b) without an explanation. Thus, in every case in which the debtor states or suggests that "cram down" is contemplated, the United States Trustee should analyze the legal issue and formulate a judgment as to the availability of "cram down" under the circumstances. If the United States Trustee questions the availability of "cram down," an objection to the disclosure statement should be made. The remedy may be deletion or the inclusion of an explanation of the legal issues involved.

Moreover, the disclosure statement should include a statement to the effect that, if a senior class of creditors rejects the plan, the court may find that the junior class (or classes) may not receive a distribution under the plan or retain its interests in the reorganized debtor unless it satisfies the "new value exception" which would require that the junior class (or classes) contribute value to the debtor that is new, substantial, money, or money's worth; necessary for a successful reorganization; and in an amount reasonably equivalent to the value of the interest or distribution that it is retaining or receiving. *Bank of America v. 203 N. LaSalle St. Partnership*, 526 U.S. 434, 143 L.Ed.2d 607, 119 S Ct. 1411, 1415 - 1424 (1999); *In re Brotby*, 303 B.R. 177, 194 (9th Cir. BAP 2003); *In re One Times Square Assocs. Ltd. Partnership*, 159 B.R. 695, 706-08 (Bankr. S.D.N.Y. 1993).

3-11.3.23 Miscellaneous Matters

The disclosure statement should identify the leases or executory contracts being assumed or rejected under the plan. To the extent a lease or executory contract is being rejected, a claim for damages may arise. An estimate of these damage claims should be set forth and factored into the estimated amount of claims in each class.

The disclosure statement should set forth any default provisions under the plan and the consequences attendant to a default. For example, a default could trigger an acceleration of the total future payments under the plan or an immediate conversion to chapter 7.

3-11.3.24 Summary and Table of Contents

If the disclosure statement is voluminous, the inclusion of a table of contents and a brief summary of the plan, of alternatives to the plan, and of the debtor's future prospects may be appropriate.

3-11.3.25 Notice

The notice of the hearing on a disclosure statement must be sent to all creditors. Fed. R. Bankr. P. 2002(b)(1). This may be only a one-page notice and need not include the proposed disclosure statement. The notice should indicate that copies are available, if requested, and that the original is on file with the court.

After a disclosure statement is approved, it must be sent to all creditors along with the plan, a ballot, and the order approving the disclosure statement. That order should indicate the date by which ballots must be received, the persons to whom they must be sent, the date of the confirmation hearing, and the date by which any objections to confirmation must be filed.

On the subject of notice, *see* Fed. R. Bankr. P. 3017(d) (giving the court discretion to direct that disclosure statements, plans, and notices of time for filing ballots not be sent to unimpaired classes of creditors or equity security holders); *In re Douglas Hereford Ranch, Inc.*, 76 B.R. 781, 783 (Bankr. D. Mont. 1987) (the affirmative vote of one impaired class was necessary to invoke cram down; deemed acceptance was not enough); *In re Russell*, 44 B.R. 452, 453 (Bankr. E.D.N.C. 1984) (the deemed acceptance of an unimpaired class is different from the affirmative acceptance of an impaired class required by section 1129(a) (10)). The United States Trustee should ensure that classes are described properly so that adequate notice is given.

3-11.4 PLAN MODIFICATION

The plan proponent may wish to modify the plan either prior to or after confirmation. 11 U.S.C. § 1127. To the extent that the change is not a

"material" modification, additional disclosure and a re-solicitation may not be necessary. *See* 11 U.S.C. § 1127(c) and the legislative history. Obviously, any downward change in the amount of distribution or the payment schedule would constitute a material modification requiring a re-solicitation. Such a procedure may be in the form of a "negative solicitation," i.e., members of the class may be given an opportunity to change their vote, vote if they had not already done so, or do nothing and have their vote counted as originally cast. The United States Trustee should review any modification and make such recommendation to the court as is appropriate.

3-11.5 REVIEW OF PLAN AND CONFIRMATION

The United States Trustee should review the plan to determine that it meets the requirements of section 1129. Confirmation issues that may concern the United States Trustee include: the inappropriate classification of claims and interests; administrative solvency or insolvency (whether the administrative and priority claims can be paid in full or properly deferred); a request for discharge in contravention of section 1141(d); inappropriate exculpatory clauses releasing professionals and disbursing agents from liability beyond the scope of section 1125(e); the bonding of escrow or disbursing agents where the absence of a bond casts doubt on whether the plan provides adequate means for its implementation; and ensuring that the plan includes a provision for payment of any outstanding quarterly fees on the effective date of the plan and for the payment of post-confirmation quarterly fees. Objections premised upon lack of feasibility should be filed in cases where a debtor's financial projections are totally unrealistic, as, for example, if unsupported by experience of the entity or the industry. The United States Trustee should also review the plan to determine if it contains provisions for the release of, or injunctions in favor of, guarantors, partners, or non-debtor entities in contravention of 11 U.S.C. § 524(e). *See In re Continental Airlines*, 203 F.3d 203 (3rd Cir. 2000) (plan_s broad release of claims against non-debtor shareholders violated section 524(e)); *In re PWS Holding Corp.*, 228 F.3d 224, 247 - 247 (3rd Cir. 2000) (release provisions in plan which purported to insulate committee members and professionals from any liability except willful misconduct or gross negligence did not violate section 524(e)); *In re Zenith Electronics Corp.*, 241 B.R. 92 (Bankr. D. Del. 1999), and *In re Genesis Health Ventures, Inc.*, 266 B.R. 591 (Bankr. D. Del. 2001).

While the United States Trustee has the discretion to file objections to confirmation, confirmation issues should generally be left to creditors after full and fair disclosure, absent exceptional circumstances. If creditors are not active or are unrepresented, as when a committee could not be appointed, the United States Trustee's role is more important. *In re South Beach Securities, Inc.*, 606 F.3d 366 (7th Cir. 2010).

On occasion, the plan proponent may seek to modify the plan or to change the ballot tabulation at the hearing on confirmation. Careful consideration should be given to such last-minute changes to ensure compliance with the requirements contained in the Bankruptcy Code and Rules.

3-11.6 POST-CONFIRMATION MONITORING

After confirmation of the plan, the reorganized debtor is required to "file such reports as are necessary or as the court orders." 11 U.S.C. § 1106(a)(7). If no such reports are required by local rule or guideline, the United States Trustee should require the reorganized debtor to file and serve post-confirmation reports on a periodic basis – monthly or quarterly – sufficient for the United States Trustee to determine the amount of the debtor's receipts and disbursements and to collect all post-confirmation quarterly fees that are owing. In addition, the reports should contain sufficient information for the United States Trustee to determine whether the reorganized debtor has substantially consummated the plan and whether the debtor is entitled to a final decree pursuant to 11 U.S.C. § 350 and Fed. R. Bankr. P. 3022. If necessary, the United States Trustee should interpose an objection to the plan of reorganization to require such reporting, along with appropriate language to confirm the reorganized debtor's continued obligation to pay quarterly fees until case dismissal, conversion, or closure.

The United States Trustee should review all final reports and motions for final decrees filed in chapter 11 cases and object if appropriate. In cases where no such pleadings have been submitted, the United States Trustee should monitor the progress of the case and initiate action to compel the filing of a final report once the case has been fully administered.

Often parties in interest may move to dismiss or convert a confirmed case. "Cause" sufficient to establish grounds for conversion or dismissal listed under 11 U.S.C. § 1112(b) includes the inability to effectuate substantial consummation of a confirmed plan (section 1112(b)(4)(M)) and material default by the debtor with respect to a confirmed plan (section 1112(b)(4(N)). It is clear that the courts retain jurisdiction to hear such motions post-confirmation. The United States Trustee may be requested to state his/her position at such hearings or file his or her own motion if the debtor has failed to progress toward completing the administration of the case.

The United States Trustee should review carefully the reported decisions within the applicable jurisdiction, if any, as the courts are divided over whether dismissal or conversion is the appropriate remedy in such situations. Some courts hold that, unless the plan or order of confirmation provides otherwise, the property permanently revests in the reorganized debtor and, absent revocation pursuant to 11 U.S.C. § 1144, dismissal is the appropriate remedy since a chapter 7 trustee would have no estate property to administer for the benefit of creditors.

Before taking a position, the United States Trustee also should review the plan and disclosure statement, order of confirmation, and the reorganized debtor's post-confirmation reports, if any. The United States Trustee also should determine whether any post-confirmation fees are owing and consider whether case closure is preferable to dismissal or conversion.

To the extent that the United States Trustee becomes aware of cause to revoke the order of confirmation pursuant to section 1144, the United States Trustee should pursue such action. For example, if there is a material misrepresentation in the disclosure statement discovered within six months after confirmation or there was a concealment of assets, the United States Trustee should move to revoke confirmation. Revocation of confirmation requires the filing of an adversary complaint and a specific showing of fraud. Special considerations for post-confirmation monitoring of chapter 11 cases filed by individuals are discussed in Manual 3-12.

3-11.7 CASE CLOSURE UNDER SECTION 350(a) AND RULE 3022

Section 350(a) provides that: "After an estate is fully administered and the court has discharged the trustee, the court shall close the case." Fed. R. Bankr. Proc. 3022 provides that "After an estate is fully administered in a chapter 11 reorganization case, the court, on its own motion or on motion of a party in interest, shall enter a final decree closing the case." The Advisory Committee Note to the Rule provides, in pertinent part: "Entry of a final decree closing a chapter 11 case should not be delayed solely because the payments required by the plan have not been completed. Factors that the court should consider in determining whether the estate has been fully administered include (1) whether the order confirming the plan has become final, (2) whether deposits required by the plan have been distributed, (3) whether the property proposed by the plan to be transferred has been transferred, (4) whether the debtor or the successor of the debtor under the plan has assumed the business or the management of the property dealt with by the plan, (5) whether payments under the plan have commenced, and (6) whether all motions, contested matters, and adversary proceedings have been finally resolved." This is not the same as substantial consummation under section 1101(2). Entry of the final decree is an administrative event and does not determine substantive rights of parties in interest. *In re Greater Jacksonville Transp. Co.*, 169 B.R. 221 (Bankr. M.D. Fla. 1994).

United States Trustees should not oppose closing of cases once the factors listed above have been satisfied. On the other hand, United States Trustees should oppose efforts to close cases prematurely.

CHAPTER 3-12: CHAPTER 11 CASES FILED BY INDIVIDUALS

3-12.1 SPECIAL CONSIDERATIONS FOR CASES FILED BY INDIVIDUALS

The BAPCPA included a number of provisions that materially changed how chapter 11 applies to individual debtors. Note that the SBRA includes many provisions that change how a case of an individual under Subchapter V of chapter 11 will be administered. See Manual chapter 3-17 for a discussion of the relevant provisions of Subchapter V. Accordingly, the following chapter 3-12 should be applied only to chapter 11 cases of individuals who have not elected the application of Subchapter V.

3-12.1.1 Property of the Estate Includes After-Acquired Wages and Property

Property of the estate for individual chapter 11 debtors is different from property of the estate for individual chapter 7 debtors. Pursuant to 11 U.S.C. § 1115, property of the estate for an individual chapter 11 debtor includes, in addition to property described in 11 U.S.C. § 541, the debtor's post-petition income from personal services and other property obtained post-petition. The United States Trustee should be alert to this difference and make certain that all property is fully identified.

3-12.1.2 Funding a Plan with Post-Petition Earnings

Section 1123(a)(8) states that a plan that is filed in a case in which the debtor is an individual must "provide for the payment to creditors under the plan of all or such portion of earnings from personal services performed by the debtor after the commencement of the case or other future income of the debtor as is necessary for the execution of the plan."

This section was added by the BAPCPA in 2005 to require that an individual debtor whose plan calls for periodic payments to creditors dedicate sufficient earning from personal services to enable the debtor to make those payments. In this regard, the section operates very similarly to 11 U.S.C. 1322 in chapter 13 cases. If an individual chapter 11 plan calls for periodic payments and does not comply with this requirement, the United States Trustee should object to the plan. *See* Manual 3-12.1.4 for further discussion of the disposable income test in individual chapter 11 cases.

3-12.1.3 Plan Confirmation Requires Debtor to Pay All Post-Petition Domestic Support Obligations in Full

Under § 1129(a) (14), as a condition of plan confirmation, individual chapter 11 debtors must have paid all post-petition amounts required by a judicial or administrative order, or by statute, for domestic support obligations. "Domestic support obligation" is defined in section 101(14A) to be "in the nature of alimony,

maintenance, or support...of [a] spouse, former spouse, or child of the debtor or such child's parent. . .," without regard to whether such debt is expressly so designated.

Section 1129(a) (14) thus requires that the individual debtor have paid all domestic support obligations that accrue post-petition. Pre-petition arrearages may be paid over the term of the plan in accordance with section 1129(a)(9)(B). Therefore, United States Trustees should object to confirmation if all post-petition domestic support obligations have not been paid in full.

3-12.1.4 Debtors Must Meet Disposable Income Test if Unsecured Creditor Objects to Confirmation

The BAPCPA imposed the "means test" on individuals in chapter 7 and chapter 13. Chapter 11 was amended to import a form of the means test into the requirements for the confirmation of a plan for an individual debtor. Section 1129(a) (15) provides that, if "the holder of an allowed unsecured claim objects to the confirmation of" an individual debtor's chapter 11 plan, the court cannot confirm the plan unless:

> "(A) the value, as of the effective date of the plan, of the property to be distributed under the plan on account of such claim is not less than the amount of such claim; or
>
> (B) the value of the property to be distributed under the plan is not less than the projected disposable income of the debtor (as defined in section 1325(b)(2)) to be received during the 5-year period beginning on the date that the first payment is due under the plan, or during the period for which the plan provides payments, whichever is longer."

11 U.S.C. § 1129(a) (15).

Confirmation of a plan is conditioned upon compliance with section 1129(a) (15) only if the holder of an allowed unsecured claim objects to confirmation. In the absence of such an objection, the "means test" plainly will not be a barrier to confirmation.

Because the United States Trustee is not a "holder of an allowed unsecured claim," the United States Trustee does not have standing to object to confirmation of a plan based upon the means test. Moreover, the United States Trustee should not attempt to raise the means test objection indirectly by objecting under the good faith requirement of section 1129(a)(3).

Instead, the United States Trustee should consider objecting to the adequacy of the disclosure statement if it does not contain adequate information to enable unsecured creditors to determine whether to raise a means test objection. If the disclosure statement and plan are considered at the same hearing, the United

States Trustee should clearly indicate that the objection is to disclosure, not to confirmation.

Nevertheless, if a party with standing files an objection triggering the means test issue, the United States Trustee, pursuant to 11 U.S.C. § 307 and 28 U.S.C. § 586(a)(3)(B), may comment on and be heard on whether the debtor's plan meets the requirements of section 1129(a)(15) (B).

Section 1129(a) (15) (B) requires that the plan provide for distributions to creditors in an amount not less than the debtor's projected disposable income over the time period during which plan payments are to be made. See 11 U.S.C. § 1129(a)(15) (B). In considering whether a plan complies with the means test once a party with standing triggers section 1129(a) (15), the United States Trustee must bear in mind that the debtor is not required to make periodic payments to his unsecured creditors. Instead, the test requires that the value of the property to be distributed to the unsecured creditors equal at least the amount of the debtor's projected disposable income for the longer of five years or the period for which the plan provides payments. Thus, if the plan calls for unsecured creditors to receive assets from sources other than the debtor's income, such as the proceeds of a property sale, the value of those assets must be considered in determining whether the means test is met.

Section 1129(a) (15) (B) refers to the "projected disposable income of the debtor (as defined in section 1325(b)(2))."[9] Despite the BAPCPA's intent to treat individual chapter 11 and chapter 13 debtors similarly, the calculation of "disposable income" for purposes of determining the debtor's "projected disposable income" is different in a chapter 11 case than in a chapter 13 case. Section 1129(a) (15) (B) specifically refers to section 1325(b)(2), which defines "disposable income" as current monthly income less amounts reasonably necessary to be expended for the support and maintenance of the debtor and the debtor's dependents and charitable contributions. Section 1325(b)(3), which is not specifically referred to in section 1129(a) (15) (B), provides that the amounts reasonably necessary to be expended under section 1325(b)(2) will be determined in accordance with the means test provisions of section 707(b). Although section 1129(a) (15) (B)'s reference solely to section 1325(b)(2) could imply the application of section 1325(b)(3), an alternative reading of the Code prevailed in the rule-making process.

In particular, Bankruptcy Rule 1007(b)(5) states that "an individual debtor in a chapter 11 case shall file a statement of current monthly income, prepared as prescribed by the appropriate Official Form." Fed. R. Bankr. P. 1007(b)(5). This Rule reflects the drafters' interpretation that, although current monthly

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[9]Section 1325(b)(2) refers to "disposable income." Section 1325(b)(1)(B), which is not included in section 1129(a)(15)(B), refers to "*projected* disposable income."

income is to be calculated in conformity with the chapter 13 means test, amounts reasonably necessary to be expended are to be determined by the court on a case-by-case basis. The United States Trustee should take no position if a party in interest questions the interpretation of these provisions reflected in Rule 1007(b)(5).

Notwithstanding the difference in the calculation of "disposable income," the phrase "projected disposable income" in chapter 11 should be interpreted consistently with the Program's position in the context of chapter 13 plan confirmation, as adopted by the Supreme Court. *See Hamilton v. Lanning*, 560 U.S. 505 (2010).

3-12.1.5 Modification of Cram Down Standards for Individual Chapter Debtors

In 2005, section 1129(b)(2)(B)(ii) was amended to allow individual debtors to retain property "included in the estate under section 1115" and still satisfy the "fair and equitable" requirement for cram down as long as the debtor's plan pays all post-petition domestic support obligations as required for confirmation by section 1129(a) (14). Although courts were initially divided on whether this provision abrogates the absolute priority rule in individual chapter 11 cases, the majority, including every circuit that has considered the issue, have held that this provision did not implicitly repeal the absolute priority rule for individual chapter 11 debtors. *Zachary v. Cal. Bank & Tr. (In re Zachary)*, 811 F.3d 1191 (9th Cir. 2016); *Ice House Am., LLC v. Cardin (In re Cardin)*, 751 F.3d 734 (6th Cir. 2014); *In re Lively*, 717 F.3d 406 (5th Cir. 2013); *Dill Oil Co., LLC v. Stephens (In re Stephens)*, 704 F.3d 1279 (10th Cir. 2013); *In re Maharaj*, 681 F.3d 558 (4th Cir. 2012); *contra SPCP Group, LLC v. Biggins*, 465 B.R. 316 (M.D. Fla. 2011); *In re Roedemeier*, 374 B.R. 264 (Bankr. D. Kan. 2007); In re Tegeder, 369 B.R. 477 (Bankr. D. Neb. 2007); *In re Bullard*, 358 B.R. 541 (Bankr. D. Conn. 2007). Thus, in most jurisdictions, debtors may not retain any pre-petition property over the dissenting votes of an unsecured class of creditors.

Absolute priority rule considerations are often complicated and may depend upon case specific facts. Creditors are in a better position to address these issues directly with plan proponents. As a result, the United States Trustee should not take a position on this issue at the time of plan confirmation. Instead, the United States Trustee should consider objecting to the adequacy of the disclosure statement if it does not contain adequate information to enable unsecured creditors to understand their rights. *See In re Ferguson*, 474 B.R. 466, 477 (Bankr. D.S.C. 2012) (denying approval of a disclosure statement that did "not provide adequate information with respect to the absolute priority rule").

3-12.1.6 An Individual Chapter 11 Debtor Does Not Receive a Discharge until after All Plan Payments Have Been Completed

Generally, pursuant to section 1141(d)(5), the plan payments must be completed before an individual chapter 11 debtor receives his or her discharge. The United States Trustee should closely scrutinize efforts by individual chapter 11 debtors to obtain a discharge before they have completed the payments called for by their plans. Specifically, the court may grant an early discharge after notice and a hearing "for cause," section 1141(d)(5)(A), or if unsecured creditors have received at least as much as they would have in chapter 7 and modification of the plan under section 1127 is impracticable. 11 U.S.C. § 1141(d)(5)(B). The inclusion of language in a proposed plan providing for an immediate discharge upon confirmation does not meet these requirements and is objectionable. Upon the filing of a motion for early discharge, courts should require that debtors provide evidence establishing cause to depart from Congressional intent that debtors receive their discharge only upon the completion of plan payments.

3-12.1.7 The Plan Can Be Modified Post-Confirmation

Pursuant to section 1127(e), the plan of an individual chapter 11 debtor can be modified at any time after confirmation on request of the debtor, the trustee, the United States Trustee, or the holder of an allowed unsecured claim in order to: increase or decrease the amount of payments on claims in a particular class, extend or reduce the time period for payments, or alter the amount of distribution to a creditor who has received payments outside of the plan. The United States Trustee should be alert to and monitor any such motion to alter plan payments to ensure that any proposed modification satisfies section 1127(e).

3-12.1.8 Individual Debtor Can Be a Small Business Debtor at the Same Time

Because of the many special rules affecting small business chapter 11 cases, it is important that United States Trustees understand that an individual chapter 11 debtor can, at the same time, also be a small business debtor. Therefore, when staff ensures that all small business debtors are identified, United States Trustees should ensure that staff understands that individual debtors are not automatically excluded from such analysis, and can be small business debtors.

3-12.2 PRE-CONFIRMATION MONITORING OF CHAPTER 11 CASE FILED BY AN INDIVIDUAL

Among the United States Trustees' most important duties is to monitor pending chapter 11 cases without confirmed plans to ensure compliance with the Bankruptcy Code and to take appropriate action when debtors show that they are unable or unwilling to discharge their fiduciary duties. While some cases warrant the appointment of a chapter 11 trustee, the appropriate remedy for debtor

misconduct is most often conversion or dismissal of the case under section 1112(b). Nothing in the BAPCPA relieves United States Trustees of the obligation to conduct pre-confirmation monitoring. In fact, the statute affirmatively requires United States Trustees to file conversion or dismissal motions if material grounds for such relief exist. 28 U.S.C. § 586(a)(8).

In evaluating whether grounds exist for conversion or dismissal of individual chapter 11 cases, United States Trustees must consider the impact of section 1115, added by the BAPCPA. Under section 1115, an individual chapter 11 debtor's post-petition income from personal services, like that of a chapter 13 debtor, is property of the estate.

Since section 1115(a)(2) makes an individual chapter 11 debtor's income from personal services property of the estate, questions have arisen over what, if any, authorization the debtor must seek to pay ordinary living expenses. Section 363(c) authorizes the trustee, which would include the debtor as debtor in possession, to use estate property in the ordinary course of business if the trustee is authorized to operate the debtor's business. 11 U.S.C. § 363(c). Because an individual's ordinary living expenses are not business expenses, at best section 363(c) provides an uncertain basis for the debtor to use estate property to pay living expenses.

Some have therefore suggested that individual chapter 11 debtors should be required to submit and comply with a budget for the period between the filing of the case and confirmation of a plan. Nothing in the Bankruptcy Code or Bankruptcy Rules provides for such a procedure. Section 1115(b) provides that "except as provided in section 1104 or a confirmed plan or order confirming a plan, the debtor shall remain in possession of all property of the estate." Section 1306 of the Bankruptcy Code contains almost identical provisions to section 1115, and there is no case law questioning the ability of a chapter 13 debtor to pay living expenses from current income. It is possible to infer from these provisions Congressional intent to allow individual debtors to use estate property to pay ordinary living expenses, as the right to possess the property has no value without the right to use it.

Because of this legal uncertainty, United States Trustees should not take steps to impose budgetary requirements on individual chapter 11 debtors. In appropriate cases, debtors may be advised at initial debtor interviews that fiscal discipline will be necessary for any proposed plan of reorganization to meet feasibility and confirmation requirements imposed by the Code. In all cases, monthly operating reports should be carefully monitored for evidence of profligate expenditures of estate assets. Importantly, if evidence of unusual and unjustified spending arises, the United States Trustee should seek an appropriate remedy, such as conversion or dismissal. *See, e.g.*, 11 U.S.C. § 1112(b)(4)(A) and (B) (substantial and continuing loss to or diminution of the estate without a reasonable likelihood of reorganization, and/or gross mismanagement of the estate).

3-12.3 CLOSURE OF CHAPTER 11 CASE FILED BY AN INDIVIDUAL

Under 28 U.S.C. § 1930(a)(6), quarterly fees must be paid to the United States Trustee until a chapter 11 case is "converted or dismissed." While the statute does not list case closing as an event that will stop the accrual of fees, the United States Trustee Program has consistently taken the position that the closing of the case does have that effect. Since the passage of the BAPCPA, many debtors and courts have sought to close individual chapter 11 cases even though a discharge has not been granted. These efforts are clearly designed to stop the accrual of quarterly fees during the term of the plan, which could extend for five years or more. The debtors propose to reopen the cases once all payments have been made so that the court can grant them their discharge under section 1141(d)(5)(A).

It is appropriate for United States Trustees not to object to requests by individual chapter 11 debtors with confirmed plans to close their cases before discharge, subject to reopening for the entry of a discharge upon the completion of plan payments under section 1141(d)(5)(A), if the estate has been fully administered as described below, any trustee has been discharged, and the eventual discharge hearing is the only business remaining before the court. United States Trustees should conduct the same analysis in individual and business chapter 11 cases when determining whether to object to a request to close the case, regardless of whether the debtor receives a discharge. In no event, however, should the United States Trustee be a proponent of closing individual chapter 11 cases, because the decision to close better resides in the debtor, subject to objection by parties in interest and adjudication by the court.[10]

The analysis begins with the language of section 350(a): "After an estate is fully administered and the court has discharged the trustee, the court shall close the case." 11 U.S.C. § 350(a). Because very few chapter 11 cases have trustees, the case can be closed once the estate has been fully administered. Bankruptcy Rule 3022 provides that "after an estate is fully administered in a chapter 11 reorganization case, the court, on its own motion or on motion of party in interest, shall enter a final decree closing the case." Fed. R. Bankr. P. 3022. The Advisory Committee Notes to the Rule are instructive:

> Entry of a final decree closing a chapter 11 case should not be delayed solely because the payments required by the plan have not been

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[10] *See Shotkoski v. Fokkena (In re Shotkoski)*, 420 B.R. 479 (B.A.P. 8th Cir. 2009) (holding that bankruptcy courts are charged with reviewing case closing requests on a case-by-case basis to determine whether the estate has been fully administered). The *Shotkoski* court found that the bankruptcy court has broad discretion to allow or disallow the closing of a case before discharge based on the facts and circumstances of the case. In affirming the bankruptcy court's order denying the individual debtors_ motion to close the case, the panel clarified that "we are *not* holding that every individual Chapter 11 case must remain open until such time as all long-term payments have been completed and a discharge is entered." 420 B.R. at 483 (emphasis in original).

> completed. Factors that the court should consider in determining whether the estate has been fully administered include (1) whether the order confirming the plan has become final, (2) whether deposits required by the plan have been distributed, (3) whether the property proposed by the plan to be transferred has been transferred, (4) whether the debtor or the successor of the debtor under the plan has assumed the business or the management of the property dealt with by the plan, (5) whether payments under the plan have commenced, and (6) whether all motions, contested matters, and adversary proceedings have been finally resolved.
>
> The court should not keep the case open only because of the possibility that the court's jurisdiction may be invoked in the future. A final decree closing the case after the estate is fully administered does not deprive the court of jurisdiction to enforce or interpret its own orders and does not prevent the court from reopening the case for cause pursuant to § 350(b) of the Code.

Fed. R. Bankr. P. 3022, Advisory Committee Note (1991).

The drafters of the committee notes advised against keeping a chapter 11 case open because the court's jurisdiction could possibly be invoked in the future. An exhaustive search of reported authorities reveals no cases holding that a bankruptcy case must remain open because a debtor might receive a discharge in the future. The Code specifically provides that "a case may be reopened . . . to accord relief to the debtor," section 350(b), which presumably includes the entry of a discharge if the requirements of section 1141(d)(5) are met. Further, a payment default will now prevent the individual debtor from receiving a discharge.

Other Code provisions also contemplate the prospect of invoking the court's jurisdiction in the future but do not prevent case closing if the estate has been fully administered. For example, under the BAPCPA, the confirmed plan in an individual chapter 11 case is subject to modification after substantial consummation but before the completion of payments under the plan. 11 U.S.C. § 1127(e). The possibility that the debtor or another party in interest might seek to modify the plan post-consummation is not so certain that courts should keep these cases open when the estates have otherwise been fully administered. Similarly, chapter 11 cases are not kept open solely to await the expiration of the 180-day period during which a party in interest may seek revocation of confirmation. 11 U.S.C. § 1144. By analogy, chapter 7 cases are also routinely closed well before the expiration of the one-year period during which a revocation of discharge may be sought for fraud. 11 U.S.C. § 727(e)(1). Cases may be reopened under section 350(b) if and when circumstances warrant.

For these reasons, United States Trustees should not object to an individual chapter 11 debtor's request to close the case before discharge once the estate has been fully administered and the court has discharged any trustee. However, a

number of case-specific factors should be carefully considered any time an individual chapter 11 debtor makes such a request:

1. Disclosure statements and plans should clearly set out the debtor's intention to seek to close the case before the discharge, and should specify the time when the debtor anticipates the case might be reopened for the grant of a discharge;

2. Plans should subject debtors to clear, enforceable payment obligations. For instance, a plan that simply provides that a debtor will sell property and distribute proceeds to creditors should be scrutinized. A timetable for the sales and payments and appropriate reporting should be included. Creditors should not have to guess whether a debtor has defaulted under a confirmed plan;

3. Cases should not be closed until the estate has been fully administered. In deciding whether to object to a proposed closing, United States Trustees should be guided by the factors outlined in the notes to Rule 3022, including the vesting of property of the estate in the reorganized debtor or another entity under section 1141(b), the commencement of plan payments (e.g., providing notes on the effective date that are payable in the future will not satisfy this requirement), the payment of all quarterly fees, and the resolution of all pending adversary proceedings, contested matters, and other issues before the court;

4. Courts should not mechanically allow closure of a case upon substantial consummation. Substantial consummation, as defined in section 1101(2), is not the same thing as the full administration of the estate under section 350(a). For instance, a plan might be substantially consummated even though multiple appeals related to the case are pending and the court has not yet ruled on claims challenges. The case should not be closed until these pending matters are resolved;

5. Even if the chapter 11 estate has been fully administered, the United States Trustee should not affirmatively seek to close the case before discharge. Once the case is closed, individual debtors lose the protections of the automatic stay without the benefit of the discharge injunction. 11 U.S.C. § 362(c)(2)(A). Nevertheless, both the debtor and creditors are bound by the confirmed plan, and creditors cannot undertake collection activities as long as the debtor complies with the plan. 11 U.S.C. § 1141(a);

6. The clerk must give notice to all parties in interest if an individual's case is closed without the entry of an order of discharge. Fed. R. Bankr. P. 4006. The notice should accurately reflect the status of the case and not mislead creditors into believing they may pursue immediate collection of the full amount of their allowed claims; and

7. Courts should adopt procedures for individual chapter 11 debtors seeking to reopen their cases to obtain a discharge after the completion of plan

payments under section 1141(d)(5)(A). Those procedures should require that the debtor file a motion with the court under section 350(b) and serve all parties in interest. The motion should be accompanied by a detailed accounting demonstrating that the debtor has made all payments called for under the confirmed plan. Parties should have sufficient time to object to the motion, and the court should treat any objection to the motion or accounting as a contested matter under Fed. R. Bankr. P. 9014, with the debtor bearing the burden of establishing entitlement to a discharge.

CHAPTER 3-13: PRE-PETITION ACCEPTANCE OR REJECTION OF THE PLAN

The term "prepackaged bankruptcy" (prepack) appears nowhere in the Bankruptcy Code or the Federal Rules of Bankruptcy Procedure. Nevertheless, the prepack is an established and legal device for expediting a chapter 11 case. In a prepack, the debtor negotiates and drafts a plan of reorganization before filing a petition. It then circulates the plan with a disclosure statement and a ballot to creditors and, if appropriate, to equity security holders. Parties who have been solicited are given time to review the plan and disclosure statement and to vote. If the debtor obtains sufficient acceptances to confirm the plan under the Bankruptcy Code, the debtor files a chapter 11 petition and simultaneously files the plan, the disclosure statement, the ballots, and a pleading seeking confirmation of the plan.

In other words, the essential element of the prepackaged plan is the solicitation of the plan acceptances prior to the debtor's commencement of its chapter 11 case. Having successfully solicited plan acceptances on a pre-petition basis, the debtor can then commence its chapter 11 case and proceed almost directly to a hearing on confirmation of its proposed plan, submitting the pre-petition acceptances as permitted by section 1126(b).

The concerns of the United States Trustee in connection with such a procedure include compliance with Bankruptcy Rule 6003 and other related statutes, inclusion of KERP Plans, and other improper distributions.

3-13.1 STATUTORY FRAMEWORK: 11 U.S.C. § 1126(b) and BANKR. RULE 3018(b)

Subsection 1126(b) is designed to further the concept that the existence of the Bankruptcy Code provides not only an incentive for an out-of-court workout, but also a template against which a debtor and its creditors can negotiate a reorganization plan. Subsection 1126(b) must be read in conjunction with Fed. R. Bankr. Proc. 3018(b), which relates to acceptances and rejections obtained pre-petition.

The debtor's goal in filing a prepack is to obtain confirmation of a plan as soon as possible. Section 1126(b) authorizes the court to consider pre-filing acceptances and rejections of a plan under certain circumstances:

> "(b) For the purposes of subsections (c) and (d) of this section, a holder of a claim or interest that has accepted or rejected the plan before the commencement of the case under this title is deemed to have accepted or rejected such plan, as the case may be, if —
>
> (1) the solicitation of such acceptance or rejection was in compliance with any applicable nonbankruptcy law, rule, or regulation governing the adequacy of disclosure in connection with such solicitation; or
>
> (2) if there is not any such law, rule, or regulation, such acceptance or rejection was solicited after disclosure to such holder of adequate information, as defined in section 1125(a) of this title."

11 U.S.C. § 1126(b). If a debtor has gathered sufficient acceptances during its pre-petition solicitation, the case can proceed straight to a confirmation hearing without the delay normally caused by the requirement that a disclosure statement be approved and submitted to stakeholders before their acceptances are solicited.

Federal Rule of Bankruptcy Procedure 3018(b) establishes procedures to be followed by the court in determining whether pre-petition acceptances or rejections of a plan should be considered in connection with a confirmation hearing. It provides:

> (b) *Acceptances or Rejections Obtained Before Petition.* An equity security holder or creditor whose claim is based on a security of record who accepted or rejected the plan before the commencement of the case shall not be deemed to have accepted or rejected the plan pursuant to § 1126(b) of the Code unless the equity security holder or creditor was the holder of record of the security on the date specified in the solicitation of such acceptance or rejection for the purposes of such solicitation. A holder of a claim or interest who has accepted or rejected a plan before the commencement of the case under the Code shall not be deemed to have accepted or rejected the plan if the court finds after notice and hearing that the plan was not transmitted to substantially all creditors and equity security holders of the same class, that an unreasonably short time was prescribed for such creditors and equity security holders to accept or reject the plan, or that the solicitation was not in compliance with § 1126(b) of the Code.

The requirement that the pre-petition solicitation be directed to "substantially all" of the creditors or equity security holders of a particular class in order for the pre-petition votes from that class to be considered in connection with confirmation has two implications. First, a plan proponent cannot "cherry-pick" a class by sending out solicitations to only those holders of claims or interests who are

amenable to the plan's provisions.[11] Second, and somewhat less obviously, this rule permits "partial prepacks," or cases where one or more classes of claims or interests are solicited pre-petition and the remaining classes are solicited after the post-petition approval of a disclosure statement. In the case of a partial prepack, the court will consider both pre-petition and post-petition acceptances in determining whether a plan should be confirmed.

A prepack must be contrasted with a "pre-negotiated" case. A pre-negotiated case has been described as:

> A reorganization or restructuring that is, prior to the commencement of bankruptcy, (1) negotiated with representatives of the most significant constituencies that are expected to be impaired and whose acceptance is sought or needed for confirmation (i.e., the senior lenders, bondholders, and principal equity security holders), (2) agreed to by those representatives (even if those representatives, by themselves, are not sufficient in number or amount to assure acceptance of the particular classes of debt that they represent), and (3) memorialized in written agreements containing the basic terms of a reorganization plan.

"*Out-of-Court Workouts, Prepacks and Pre-Arranged Cases: A Primer,*" 24-APR Am. Bankr. Inst. J. 16 (2005).

In a pre-negotiated case, no actual pre-petition solicitation occurs; votes are solicited only after the court approves a disclosure statement under section 1125.

3-13.2: SECTION 341 MEETINGS IN PRE-PACKAGED CHAPTER 11 CASES

Section 341(e) provides:

> Notwithstanding subsections (a) and (b), the court, on the request of a party in interest and after notice and a hearing, for cause may order that the United States trustee not convene a meeting of creditors or equity security holders if the debtor has filed a plan as to which the debtor solicited acceptances prior to the commencement of the case.

The United States Trustee will be confronted with two significant issues in connection with section 341(e):

1. In what cases may the court order that a section 341(a) meeting not be held?
2. Under what circumstances should the United States Trustee oppose a motion filed under section 341(e)?

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[11] Under 11 U.S.C. § 1126(c) and (d), whether a class of claims or interests has accepted a plan is determined based upon the votes actually cast for acceptance or rejection; it is therefore vital that all or virtually all members of a class be given the opportunity to vote on a proposed plan.

Section 341(e), by its terms, applies to a case where "the debtor has filed a plan as to which the debtor solicited acceptances prior to the commencement of the case." This can be broken down into two requirements. First, the debtor must have filed a plan either before or simultaneous with the filing of the motion seeking the section 341 meeting waiver. Determining whether this requirement has been met should not cause any difficulty. Second, the debtor must have solicited acceptances of the plan prior to the commencement of the case. The party in interest seeking the section 341 waiver, which is most likely the debtor, should detail its pre-petition solicitation efforts in the motion. To use the categories discussed above, a waiver motion would be appropriate in a prepack. It would not be appropriate in a partial prepack or pre-negotiated case, and United States Trustees should be alert to efforts by debtors to avoid a section 341 meeting by mis-characterizing pre-petition negotiations as pre-petition solicitations.

When a § 341(e) motion is filed in a prepackaged case, the United States Trustee should notify the Office of the General Counsel when there is a question as to the appropriateness of the relief requested. Section 341(e) requires that the court find "cause" to order the United States Trustee not to convene a section 341 meeting. While the movant will have the burden to establish cause, it is likely that a routine section 341(e) motion will become part of the first day motions filed in a prepack. The report of the National Bankruptcy Review Commission gives a road map as to what might constitute cause in a prepack. First, debtors are likely to allege that creditors would receive no significant benefit from a section 341 meeting when they have negotiated and voted on the plan before the filing. Second, debtors will allege that holding a section 341 meeting will unnecessarily delay confirmation of the plan.

A request to waive the section 341 meeting will often be included as part of a motion to schedule a combined hearing on the disclosure statement and confirmation of the plan. If the waiver of the section 341 meeting is appropriate, it is important that the waiver be conditioned on confirmation of the prepackaged plan occurring by a date certain. If the court does not confirm the prepackaged plan by this date, then the United States Trustee should schedule and convene the section 341 meeting.

In a true prepackaged case, the combined hearing motion is typically heard on the first day of the case. This motion will seek to dispense with the requirement for a separate disclosure statement. The motion will claim that the disclosure statement is unnecessary because all creditors have either been solicited pre-petition or are unimpaired. In the true prepack, this request is rather routine and non-controversial. In a partial prepack or a pre-negotiated case, the United States Trustee should object to any requests to combine these hearings.

While the appropriate response of a United States Trustee to a section 341(e) motion will necessarily be based on the facts of each case, some general principles should be considered. First, when it appears that a debtor has fully solicited votes from all classes entitled to vote on a plan and is ready to proceed to

a confirmation hearing, the United States Trustee should consider not objecting to the motion. If, however, the United States Trustee becomes aware that constituencies in the case have not been solicited or that information in the pre-petition solicitation was incomplete or misleading, the United States Trustee should object to the motion.

As a general rule, but recognizing that each case must be determined on its facts and circumstances, a section 341(e) motion would not be appropriate in a partial prepack case. Entire classes of creditors or equity security holders will not have received formal information about the plan before the filing of the case, and the section 341 meeting will provide them the opportunity to examine the debtor's representative under oath.

3-13.3 CREDITORS' COMMITTEES IN PRE-PACKAGED CHAPTER 11 CASES

Section 1102 does not excuse the United States Trustee from the duty to appoint a creditors' committee in a prepackaged case. It is often the case, however, that a creditors' committee will not be appointed in a prepackaged case. The United States Trustee may in his or her discretion appoint a creditors' committee in a prepackaged case, assuming interest to serve from eligible creditors. The United States Trustee should object to any request to limit the United States Trustee's authority to appoint a committee.

3-13.4 POST-PETITION DISCLOSURE AND SOLICITATION

Section 1125(g) provides:

> Notwithstanding subsection (b), an acceptance or rejection of the plan may be solicited from a holder of a claim or interest if such solicitation complies with applicable nonbankruptcy law and if such holder was solicited before the commencement of the case in a manner complying with applicable nonbankruptcy law.

This is a change to the Bankruptcy Code recommended by the National Bankruptcy Reform Commission. *See* NBRC Final Report, October 20, 1997, Recommendation 2.4.18. According to the commission, this provision would ameliorate some of the harsh consequences caused by the strict application to prepacks of the section 1125(b) prohibition against post-petition solicitation of acceptances without an approved disclosure statement. First, if a debtor had not quite completed a prepack solicitation but was forced into an involuntary filing by circumstances beyond its control, it would lose many of the advantages of the prepack and be returned to the "slower chapter 11 track." Second, this provision would prevent a small group of dissident creditors from seeking an unfair

bargaining advantage by threatening to derail a prepack solicitation by filing an involuntary petition against the debtor.[12] NBRC Final Report, at 596.

While section 1125(g) authorizes the post-petition solicitation of plan acceptances without an approved disclosure statement, it is important to recognize just how limited this exception to the general rule is. Each holder that is solicited post-petition must have been solicited pre-petition. If certain classes of creditors or equity security holders did not receive pre-petition solicitations, the plan proponent must have a disclosure statement approved by the court before it can solicit acceptances of the plan. Therefore, section 1125(g) is properly viewed as a "cleanup" provision enabling a plan proponent to contact parties in interest who have been solicited pre-petition and to urge them to get their votes in, and not as a major exception to the general disclosure statement requirement.

CHAPTER 3-14: SMALL BUSINESS CHAPTER 11 CASES

3-14.1 STATUTORY FRAMEWORK

The BAPCPA made several revisions to the treatment of small business debtors in chapter 11 cases. In general, these revisions reflected Congressional concerns that small business cases were experiencing excessive delays, that certain small business debtors were using chapter 11 to delay their creditors when they had no realistic prospect of reorganization, and that many small business estates were being depleted by chapter 11 professional fees.[13] Although relatively few published decisions have addressed small businesses under the BAPCPA, the small business provisions raise several developing legal issues of which United States Trustee Program staff should be aware.

Before 2005, the debtor could elect whether to be treated as a small business. Under the BAPCPA, such designation is mandatory and it is the duty of the debtor to self-designate in connection with the filing of the petition. If the debtor fails to do so, the United States Trustee should ensure that the proper designation takes place.

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[12]Before the adoption of section 1125(g), the filing of an involuntary petition would stop the solicitation of votes for a prepack. Section 1125(b) prohibits the solicitation of acceptances or rejections of a plan without an approved disclosure statement "after the commencement of the case." The filing of an involuntary petition commences a case. 11 U.S.C. § 303(b). Under prior law, therefore, several creditors who were unhappy with how they were treated in a prepack could, by filing an involuntary petition, stop the prepack solicitation in its tracks. This course of action could engender significant additional delay and costs for the debtor.

[13]See 147 Cong. Rev. S 2018-03, at 2046-2047, 2051, 107th Cong., 1st Sess. (March 8, 2001) (Proceedings and Debates - Comments by Sen. Bond).

Note that this chapter 3-14 applies only to cases of small business debtors that do not elect to proceed under subchapter V of chapter 11. Cases under subchapter V are considered separately under Manual chapter 3-17.

The principal Code provisions affecting small business debtors are:

1. 11 U.S.C. § 101(51C) (defining a "small business case" as a chapter 11 case in which the debtor is a "small business" debtor and has not elected that subchapter V of chapter 11 will apply);
2. 11 U.S.C. § 1116 (establishing various reporting and disclosure requirements for small business debtors);
3. 11 U.S.C. § 1112(b)(4)(H) (providing that failure to file required reports is cause for conversion or dismissal of case);
4. 11 U.S.C. § 1121(e) (providing a 180-day exclusivity period for a small business debtor to file a plan, providing that the debtor's plan must be filed no later than 300 days from the petition date, and restricting the ability of debtor to seek extensions of these deadlines);
5. 11 U.S.C. § 1102(a)(3) (providing that no committee will be appointed in a small business case unless the court orders such an appointment for cause)[14]; and
6. 11 U.S.C. § 1125(f) (authorizing waiver or expedited consideration of the disclosure statement in a small business case)

There are additional provisions regarding small business cases set out in Fed. R. Bankr. P. 1020. These provisions include a requirement that small business debtors self-designate as such. Interim Bankruptcy Rule 1020 deletes references in Rule 1020 to committee appointments because of the SBRA amendments to the small business definition and to section 1102(a)(3).

3-14.2 DEFINITION OF A SMALL BUSINESS

A small business debtor is defined as a debtor that is engaged in commercial or business activities and has no more than $2,725,625[15] in non-contingent

[14]Note that the SBRA amended section 1102(a)(3) to limit committee appointments in small business and subchapter V cases unless the court orders such an appointment for cause.

[15]This figure applies to cases commenced on or after April 1, 2019. Section 104(b) provides that amounts are adjusted on a three-year basis to account for inflation.

liquidated secured and unsecured debt. 11 U.S.C. § 101(51D). More than 50 percent of the aggregate debt must have arisen from the commercial or business activities of the debtor. If the debtor's primary activity is the business of owning single asset real estate real property, the debtor is not a small business debtor. *Id.* (*See* section 101(51B) for definition of "single asset real estate).

A debtor who is an "affiliate" as defined in section 101(2), of a small business debtor will itself be considered a small business debtor as long as aggregate non-insider debts of the affiliated debtors do not exceed the $2,490,925 debt limit. *Id.* If, therefore, both an individual and that person's closely held corporation or limited liability company (LLC) file chapter 11 petitions and if the aggregate debts of the two entities do not exceed the $2,490,925 limit, both entities will be treated as small business debtors. If, on the other hand, an individual who is employed by a closely held corporation or LLC files a personal petition, but the closely held business or LLC entity does not, the individual would most likely not be a small business debtor because the business entity, and not the individual, is the person "engaged in commercial or business activities."

3-14.3 SMALL BUSINESS DEBTOR DESIGNATION

A debtor must declare on the face of its petition whether it is a small business debtor. Fed. R. Bankr. P. 1020(a). The case will proceed in accordance with the debtor's designation unless the court enters an order finding that the debtor's statement is incorrect. Any objection to a debtor's designation must be filed by the United States Trustee or by a party in interest not later than 30 days after the conclusion of the section 341 meeting, or within 30 days after any amendment to the debtor's statement, whichever is later. Fed. R. Bankr. P. 1020(b). United States Trustees must, therefore, scrutinize questionable designations early in the case and, if appropriate, expeditiously seek a court order correcting an inappropriate designation. If the deadline for objecting to the debtor's designation has passed, a United States Trustee should under no circumstances institute or support any effort to change that designation.

3-14.4 CREDITORS' COMMITTEE FORMATION

The SBRA amended section 1102(a)(3) to provide that unless the court for cause orders otherwise a committee of creditors may not be appointed in a small business case or in a case under subchapter V of chapter 11. 11 U.S.C. § 1102(a)(1), (3). The United States Trustee will appoint a committee if the court orders such an appointment for cause.

3-14.5 INITIAL FILING REQUIREMENTS AND DEBTOR REQUIREMENTS

A small business debtor is required to file certain financial documents with the petition or to file a statement under perjury that such documents do not exist. 11 U.S.C. § 1116(1). In addition, a small business debtor must, among other things, attend an initial debtor interview (IDI) with the United States Trustee, timely file

schedules and statements of financial affairs, file periodic reports on its business operations, and allow the United States Trustee to inspect its business premises and/or records. 11 U.S.C. § 1116. The United States Trustee must conduct the IDI early in the case to determine a debtor's ability to reorganize and to inform the debtor of its obligations under the Bankruptcy Code. 28 U.S.C. § 586(a)(7).

The United States Trustee should closely monitor a small business debtor's compliance with its obligations under section 1116. While a number of questions about how to enforce those requirements arose soon after the BAPCPA was implemented, these questions appear to have subsided. As a practical matter, the United States Trustee's two options for enforcing these requirements are to contact counsel (or the debtor, if counsel has authorized direct contact) to urge compliance or, if such non-judicial efforts are unavailing, to bring motions to convert or dismiss under section 1112.

A plain reading of section 1112 suggests that if a debtor fails to comply with the reporting requirements of section 1116, dismissal or conversion of the debtor's case is mandatory. In particular, section 1112(b)(1) states that the court "shall" convert or dismiss a case for cause, in contrast to the pre-BAPCPA text of the statute, which provided that a court "may" dismiss or convert for cause. In addition, "cause" is expressly defined under section 1112(b)(4)(F) and (H) to include both failure to comply with a United States Trustee's requests for information and failure to timely satisfy reporting requirements. Notwithstanding this, at least one court has apparently continued to apply pre-BAPCPA standards by holding that dismissal of a case is discretionary, not mandatory, when a debtor fails to file documents required by section 1116. *See In re Franmar, Inc.,* 361 B.R. 170, 178 (Bankr. D. Colo. 2006) (holding that where debtor failed to file section 1116 reports, court would not dismiss case if it concluded that debtor's failure was excusable).

Because the specifications of "cause" are now significantly broader, United States Trustees should exercise prudence in bringing a motion to convert or dismiss. The United States Trustee should take guidance from 28 U.S.C. § 586(a)(8), which requires that they promptly bring motions to convert or dismiss when they have *material* grounds for such motions. A single serious incident can certainly constitute material grounds, or the United States Trustee might establish material grounds by demonstrating to the court a pattern of debtor inattention to the requirements placed on debtors in possession under the Bankruptcy Code.

3-14.6 EXCLUSIVITY PERIODS, AND THE PLAN AND DISCLOSURE STATEMENT

The exclusivity periods for small business debtors differ from those of other chapter 11 debtors. A small business debtor has an initial exclusivity period of 180 days, as compared to 120 days for other chapter 11 debtors. 11 U.S.C. § 1121(e)(1). A small business debtor must file its reorganization plan no later than 300 days from the order of relief. 11 U.S.C. § 1121(e)(2). If a court

determines that the plan by itself provides adequate information, the court is permitted to find that a separate disclosure statement is not necessary. 11 U.S.C. § 1125 (f)(1). It may also approve a disclosure statement submitted on standard forms approved by the court. 11 U.S.C. § 1125(f)(2). The court may also conditionally approve a disclosure statement without a separate hearing, with final approval of the disclosure statement being deferred until the hearing on confirmation. 11 U.S.C. § 1125(f)(3); Fed. R. Bankr. P. 3017.1.

A court is also required to confirm a plan in a small business case not later than 45 days after the plan is filed, if the plan is filed in compliance with section 1121(e). 11 U.S.C. § 1129(e). As a practical matter, given the short statutory time frame available to the court to consider a plan for a small business debtor, such debtors will almost inevitably have to seek conditional approval of their disclosure statements, and the court will hold combined hearings on the adequacy of disclosure and confirmation of the plan.

The ability of a debtor to obtain extensions of these deadlines is limited by section 1121(e)(3). Specifically, the debtor must demonstrate by a preponderance of the evidence that it is more likely than not that the court will confirm a plan within a reasonable time. In addition, the court must impose a new deadline at the time the extension is granted, and the order granting the extension must be signed before the existing deadline expires. United States Trustees should, in appropriate cases, object to extensions when it appears that debtors will not meet the statutory standards for such extensions.

As small business cases filed since the effective date of the BAPCPA progressed through the system, issues inevitably arose over the effect of and extension of these deadlines. With respect to the debtor, the 300-day deadline is a bar date, and the debtor is prohibited from filing a plan once this deadline has lapsed. On the other hand, as discussed below, there is authority that the 300-day deadline is not binding on a creditor plan proponent. As a result, if the 300-day period has expired, the United States Trustee should, in most cases, immediately move to convert or dismiss the case. In some cases, however, special circumstances may exist that would justify a different response. For example, the United States Trustee may seek to appoint a chapter 11 trustee instead of moving to convert or dismiss. See 11 U.S.C. § 1104(a)(3). Circumstances could arise, however, where such a motion might not be appropriate. In other cases, dismissal or conversion may be inappropriate if it is likely that a non-insider creditor will file a plan after the expiration of the 300-day deadline. In addition, it may be permissible under some circumstances for a debtor to file a plan after the expiration of the 300-day deadline as a co-proponent with a non-insider creditor, even though it would have been inappropriate for the debtor to file the plan as the sole proponent.

Two issues of first impression under section 1121(e) were addressed in *In re Florida Coastal Airlines, Inc.,* 361 B.R. 286 (Bankr. S.D. Fla. 2007), where the court first faced the issue of whether a creditor could file a plan of reorganization

after expiration of the 300-day period. The court concluded that the 300-day period applies only to debtors and not to creditors. While the statutory language is less than completely clear, the court's rationale seems supportable. As a practical matter, because creditors seldom seek to file plans in small business cases, the acceptance of the court's conclusion should not significantly impair the effectiveness of the 300-day deadline as a mechanism for assuring that small business cases move expeditiously through the system.

The second issue considered by the *Florida Coastal Airlines* court is whether a debtor may, after the expiration of the 300-day period, amend a plan filed before the expiration of the period. The court concluded that, so long as the amended plan is simply a revised version of the original plan, the filing date would "relate back" to the filing date of the original plan. The court reached this conclusion by analogy to Fed. R. Civ. P. 15, and the case law under that rule that permits amended complaints to relate back to before the expiration of a statute of limitations so long as the complaints arise from the same factual occurrence. The court's decision seems consistent with general principles of law. The United States Trustee, however, should be alert to attempts by small business debtors to file skeletal plans and disclosure statements immediately before the expiration of the 300-day period and then attempt to flesh them out. The United States Trustee should also be cognizant of attempts by small business debtors to file plans after the 300-day bar date by using a straw man.

CHAPTER 3-15: INVOLUNTARY CHAPTER 11 CASE ADMINISTRATION

3-15.1 INTRODUCTION

An involuntary case is commenced by the filing of a petition under section 303. The automatic stay under section 362(a) is triggered by the filing of the petition. Some statutory provisions, however, do not take effect until the order for relief is entered.

Generally, the debtor may continue to operate as if no case were commenced under title 11:

> Notwithstanding section 363 of this title, except to the extent that the court orders otherwise, and until an order for relief is entered in the case, any business of the debtor may continue to operate, and the debtor may continue to use, acquire, or dispose of property as if an involuntary case concerning the debtor had not been commenced.

11 U.S.C. § 303(f).

3-15.2 STATUTORY AND BANKRUPTCY RULE PROVISIONS

Involuntary chapter 11 bankruptcy cases are governed by section 303, which states, in part:

> An involuntary case may be commenced only under chapter 7 or 11 of this title, and only against a person, except a farmer, family farmer, or a corporation that is not a moneyed, business, or commercial corporation, that may be a debtor under the chapter under which such case is commenced.

11 U.S.C. § 303(a); *see* 11 U.S.C.§ 109(b) and 101(41).

An involuntary petition can be filed by:

1. three or more creditors holding liquidated, undisputed claims that aggregate at least $14,425 more than the value of any collateral securing the claims (11 U.S.C. § 303(b)(1));
2. by one or more creditors holding liquidated, undisputed claims equaling at least $14,425 if fewer than 12 non-employee and non-insider creditors exist (11 U.S.C. § 303(b)(2));
3. by fewer than all general partners in a partnership (11 U.S.C. § 303(b)(3)); or
4. by a foreign representative of the estate in a foreign proceeding regarding the debtor (11 U.S.C. § 303(b)(4)). An entity that is the subject of a foreign proceeding may also commence an ancillary case under chapter 15 of the Code. *See* 11 U.S.C. § 1501 *et seq*. By operation of 11 U.S.C. § 104, the statutory amount is adjusted every three years.

Fed. R. Bankr. P. 1018 identifies the rules in Part VII of the Federal Rules of Bankruptcy Procedure (regarding adversary proceedings) that "apply to all proceedings relating to a contested involuntary petition . . . except as otherwise provided in Part I of these rules and unless the court otherwise directs. The court may direct that other rules in Part VII shall also apply." The effect of Fed. R. Bankr. P. 1018 is to make Rules 5, 8-10, 15, 16, 24-26, 28-37, 52, 54, 56, and 62 of the Federal Rules of Civil Procedure "generally applicable" to the raising of defenses and objections to the petition.

Section 303(d) permits the alleged debtor to file an answer to contest the entry of an order for relief. If no timely answer is filed, the court will enter an order for relief. 11 U.S.C. § 303(h).

If an involuntary case is contested, the court will conduct a trial to determine whether the statutory requirements for the entry of an order for relief have been met. The petitioners must establish that they are sufficient in number, type of debt, and amount of debt to fulfill the requirements of section 303(b), and that the debtor is generally not paying its undisputed debts as they become due or that a custodian has been appointed within 120 days of the filing of the petition to take

charge of less than substantially all of the debtor's assets. 11 U.S.C. § 303(h); *In re Byrd*, 357 F.3d 433 (4th Cir. 2004); *In re Mayhew*, 194 B.R. 6, 6-7 (Bankr. D.R.I. 1996).

The filing of an involuntary petition is an extreme action that may affect the alleged debtor's credit standing, cause public embarrassment, and impact its ability to carry on business affairs or transfer assets. The court may offer protection to the debtor under such circumstances, such as by dismissing the petition or requiring the posting of a bond. 11 U.S.C. § 303(e). If the petition is dismissed, other than with the consent of the parties, the court may assess costs, attorney fees, compensation, and punitive damages against the petitioning creditors. 11 U.S.C. § 303(i); *In re John Richards Home Bldg. Co., LLC*, 405 B.R. 192 (E.D. Mich. 2009); *In re Paczesny*, 282 B.R. 646 (Bankr. N.D. Ill. 2002); *In re Landmark Distributors, Inc.*, 195 B.R. 837, 845-48 (Bankr. D.N.J. 1996).

3-15.3 APPOINTMENT OF TRUSTEE PRIOR TO ENTRY OF ORDER FOR RELIEF

Section 1104 authorizes the appointment of a trustee "at any time after the commencement of the case but before confirmation of a plan . . . ." Therefore, even prior to the entry of the order for relief, the court may order the United States Trustee to appoint a trustee in an involuntary chapter 11 case. Generally, a motion for the appointment of a trustee prior to the entry of an order for relief should be made by the creditors rather than the United States Trustee.

A debtor faced with an involuntary chapter 7 petition may attempt to remove a "gap period" trustee by converting the case to one under chapter 11, or by filing a new chapter 11 case. Conversion terminates the service of a trustee serving before the conversion. 11 U.S.C. § 348(e). This effort may be of limited practical use as parties in interest could immediately move for appointment of a trustee in the chapter 11 case subsequent to conversion, or upon the filing of the new chapter 11 petition.

3-15.4 PROFESSIONAL FEES DURING THE GAP PERIOD

Professional fees incurred during the gap period raise unique issues that must be addressed by the United States Trustee and the court. If an order for relief is entered, courts have held that professionals rendering bankruptcy services during the gap period are entitled to the priority afforded by section 507(a)(2), just as if their claims were professional fees requested pursuant to section 330. As a result, such fees should be monitored by the United States Trustee pursuant to 28 U.S.C. § 586(a)(3)(A)(i). However, if the case is dismissed prior to the entry of an order for relief, the United States Trustee should not seek to review fees.

3-15.5 DISMISSAL

Section 303(j) permits dismissal of an involuntary case only after notice to all creditors and a hearing. Generally, in determining whether to sustain such a motion, the court must weigh the interests of the estate and the creditors. The case should be dismissed where dismissal would best serve the interests of the parties. 11 U.S.C. § 305(a). Additionally, where the involuntary case is in reality a two-party dispute and adequate non-bankruptcy remedies are available, the involuntary case should be dismissed. In determining whether to dismiss, the court should consider the prejudice to the parties, availability of another forum, and issues of non-bankruptcy law. The court should always consider whether the petition has been filed in bad faith. *See In re E.S. Professional Services, Inc.*, 335 B.R. 221, 224-26 (Bankr. S.D. Fla. 2005).

To guard against collusive dismissal of an involuntary petition to the detriment of non-petitioning creditors, the court may not dismiss an involuntary petition until there has been notice to all creditors and a hearing. 11 U.S.C. § 303(j). The United States Trustee should object to any dismissal of an involuntary petition if proper notice and opportunity for a hearing have not been given. The United States Trustee may also consider objecting to dismissal if the debtor and petitioning creditors work out an arrangement in which the petitioning creditors receive payment in preference over other creditors as consideration for dismissal.

CHAPTER 3-16: RAILROAD REORGANIZATIONS

3-16.1 INTRODUCTION

A railroad is defined as a "common carrier by railroad engaged in the transportation of individuals or property, or owner of trackage facilities leased by such a common carrier." 11 U.S.C. § 101(44). A railroad is not eligible to file under chapter 7 of the Bankruptcy Code, but may file for reorganization pursuant to the provisions of 11 U.S.C. § 1161 *et seq*. Liquidation may occur in chapter 11 as if the case were a case under chapter 7 if the court finds that the debtor cannot be reorganized or if certain time limits are not met. *See* 11 U.S.C. § 1174.

A railroad reorganization is markedly different from a typical chapter 11 reorganization. Certain sections of the Bankruptcy Code that are generally applicable in chapter 11 reorganization proceedings are made specifically inapplicable to a case concerning a railroad. *See* 11 U.S.C. § 1161. More particularly, the following sections do not apply in a railroad reorganization:

11 U.S.C. § 341:	Meetings of Creditors and Equity Security Holders
11 U.S.C. § 343:	Examination of the Debtor
11 U.S.C. § 1102(a)(1):	Appointment of Creditors' and Equity Security Holders' Committees

11 U.S.C. § 1104:	Appointment of Trustee or Examiner
11 U.S.C. § 1105:	Termination of Trustee's Appointment
11 U.S.C. § 1107:	Rights, Powers, and Duties of Debtor in Possession
11 U.S.C. § 1129(a)(7):	Confirmation Standards Relating to an Acceptance by Impaired Classes
11 U.S.C. § 1129(c):	Confirmation Standards in the Context of More Than One Plan

Because the appointment of a trustee is mandatory in a railroad reorganization, section 1107 is arguably not necessary. Sections 1129(a)(7) and 1129(c) have corresponding standards codified at 11 U.S.C. § 1173(a)(2) and (b), respectively. Curiously, however, there is no statutory provision for a meeting of creditors or examination of the debtor in the railroad reorganization case. While section 1102(a)(1) is made expressly inapplicable in railroad reorganization cases, section 1102(a)(2) remains applicable. Accordingly, the United States Trustee may appoint an official creditors' committee if the court orders one in response to a request by a party in interest.

3-16.2 APPOINTMENT OF A TRUSTEE

Section 1163 of the Bankruptcy Code indicates that it is the duty of the Secretary of Transportation, as soon as practicable after the order for relief, to submit a list of five disinterested persons who are qualified and willing to serve as the railroad reorganization trustee. In some cases, the attorney for the debtor railroad may already have contacted the Department of Transportation prior to the filing of the petition in order to expedite provision of the list. Otherwise, because the United States Trustee is required to make the appointment, the United States Trustee should promptly initiate contact with the Department of Transportation and request that a list be provided as soon as possible.

Because the trustee appointed under section 1163 must be disinterested, the United States Trustee should immediately contact the five candidates to obtain information about their connections, if any, with the debtor and the debtor's creditors.

Because section 1104 and Fed. R. Bankr. P. 2007.1 do not apply, court approval of the appointment is not required and, technically, consultation with parties in interest concerning the selection is not necessary. Prudence would dictate, however, that parties in interest, if they are available, be consulted regarding the relative merits and demerits of the five prospective appointees. The customary chapter 11 form of affidavit must be completed by the appointee and submitted so that a background investigation can be initiated.

The United States Trustee determines the amount and sufficiency of the railroad reorganization trustee's bond pursuant to section 322. The appointee qualifies as

a trustee if the bond is filed with the court within five days after his or her selection.

3-16.3 OPERATIONS DURING THE GAP PERIOD

Clearly, some period of time will elapse between the filing of a railroad case and the appointment of a trustee authorized to operate it. Technically, due to the inapplicability of section 1107 in a railroad reorganization case, the debtor is *de facto* left in possession during this gap period. The debtor's rights, powers, and duties under these circumstances are neither defined nor authorized by the Bankruptcy Code. Depending on the circumstances of the case, it may be appropriate for the United States Trustee or the debtor's attorney to urge an emergency motion for an operating order that would define the scope of the debtor's operating authority pending the appointment of a trustee. In addition, due to the peculiar feature contained in 11 U.S.C. § 1171 which accords administrative expense priority to both pre- and post-petition claims of individuals or personal representatives for personal injury or wrongful death, it is incumbent upon the United States Trustee to verify the existence of adequate liability insurance coverage at or before the initial debtor interview before permitting the debtor's operations to continue.

3-16.4 OTHER PROVISIONS APPLICABLE ONLY TO RAILROAD REORGANIZATIONS

The United States Trustee supervising the administration of a railroad reorganization estate should be cognizant of certain features of this type of case that are not typical of the ordinary chapter 11 case. First, in addition to the consideration generally given to the interests of the debtor, creditors, and equity security holders, the court is required to consider the "public interest" in applying certain provisions of this subchapter. 11 U.S.C. § 1165. Given that the Surface Transportation Board and the Department of Transportation, as well as any state or local commission having regulatory jurisdiction over the debtor, are accorded the right to be heard on any issue in the case, it may be presumed that these agencies will assist in informing the court of the nature of the public interest. *See* 11 U.S.C. § 1164. Other language within the subchapter indicates that the public interest would include, among other things, maintenance of adequate rail service and considerations having to do with the impact of the court's decisions on employees, shippers, and communities affected by the debtor's operations.

Notwithstanding sections 365 and 1113, the wages and working conditions of railroad employees established by a collective bargaining agreement cannot be changed by the trustee or the court except as permitted by non-bankruptcy laws. *See* 11 U.S.C. § 1167. Other preferences in favor of railroad employees are afforded in connection with abandonments, 11 U.S.C. § 1170(e)(1) and (2), and transfer of operations, 11 U.S.C. § 1172(c)(1) and (2).

The ability of the debtor to reorganize may be significantly affected by the provisions of 11 U.S.C. § 1168, which essentially provide an automatic relief from stay to a creditor holding a purchase money security interest in the debtor's rolling stock or equipment after 60 days, unless the trustee cures all defaults and agrees to perform all of the debtor's obligations under the security agreement.

CHAPTER 3-17: SUBCHAPTER V CHAPTER 11 CASES

3-17.1 INTRODUCTION

The Small Business Reorganization Act of 2019 ("SBRA"), Pub. L. No. 116-54, effective February 19, 2020, provides that a small business debtor may elect at the time of filing to proceed under a new subchapter V of chapter 11. This section of the manual discusses the provisions of the new law, including the legal rights and duties of the debtor and other parties, and the new responsibilities of the United States Trustee. The section will also specifically address changes to subchapter V effected by the CARES Act, effective for cases filed on or after March 27, 2020 and before March 27, 2021.

3-17.1.1 Statutory Framework

The major changes to chapter 11 made by SBRA for small business cases in which the debtor elects to proceed under subchapter V are highlighted below:

- A trustee is appointed in every case tasked primarily with facilitating a consensual plan.
- The court conducts a mandatory status conference within the first 60 days of the case. A status report must be filed by the debtor before the status conference.
- There is no required disclosure statement or mandatory unsecured creditors' committee, unless the court orders otherwise for cause.
- Only the debtor may file a plan, but it must do so within 90 days of the petition date, except with permission of the court for cause as described below.
- Plans may be confirmed consensually or through cram down. Each leads to different results under SBRA in terms of trustee retention, plan modification requirements, and timing of discharge, among other things.
- Debtors are not required to pay quarterly fees to the United States Trustee.

The legislative purpose of the SBRA was to provide a fast track for small businesses to confirm a consensual plan with the assistance of a private trustee. SBRA's key provisions seek: to increase a debtor's ability to negotiate a successful reorganization while retaining control of its business; to reduce "unnecessary procedural burdens and costs" by eliminating the creditors' committee and disclosure statement requirements; and to increase oversight and ensure quick reorganizations.

Debtors electing to proceed under subchapter V are subject to several additional requirements, set forth in more detail in Manual 3-17.5 below. These include reporting to the court and parties on progress towards achieving a consensual plan of reorganization and adhering to an accelerated schedule for confirming a plan.

3-17.1.2 Role of the United States Trustee in General

Under SBRA, the United States Trustee appoints and supervises subchapter V trustees and, as in other chapter 11 cases, takes enforcement action to ensure compliance with the Bankruptcy Code and Rules. As a practical matter, the United States Trustee generally should not take an enforcement action in a subchapter V case without first consulting and coordinating with the trustee appointed in the case to ensure that the United States Trustee is not frustrating the trustee's ability to facilitate a consensual plan. This is especially true during the first 90 days of the case. Moreover, the United States Trustee should not take action that would unduly frustrate the debtor's implementation of a consensual plan.

3-17.2.1 ELIGIBILITY FOR SUBCHAPTER V ELECTION

The CARES Act amended the definition of "debtor" in 11 U.S.C. § 1182(1) to substantially increase the debt limits for eligibility for relief under subchapter V. As amended, section 1182(1) increases the debt limit from the current limit of section 101(51D) of $2,725,625 to $7,500,000. This higher limit applies only to chapter 11 cases filed on or after March 27, 2020 until March 27, 2021. But for this higher debt limit, the definition of "debtor" for subchapter V cases in section 1182(1) is identical to the definition of "small business debtor" under section 101(51D), which after the CARES Act no longer applies to cases where eligible debtors elect the application of subchapter V.

Note that the amendments to the Code effected by the CARES Act will sunset on March 27, 2021. CARES Act sec. 1113(2). The sunset provisions effectively reverse the amendments made by the CARES Act.

3-17.2.2 SUBCHAPTER V ELECTION BY THE DEBTOR

Election to proceed under subchapter V is at the discretion of the debtor, but this election should be made in the petition (or, in an involuntary case, within 14 days of the entry of the order for relief). *See* Proposed Int. R. Bankr. P. 1020(a). Although neither the Bankruptcy Code nor the Bankruptcy Rules discuss amending the election after the petition has been filed, there is a general right to amend a voluntary petition under Rule 1009. The United States Trustee generally should not object to such an amendment unless it appears to be offered in bad faith or to adversely affect the rights of creditors.

3-17.3 ROLE OF THE SUBCHAPTER V TRUSTEE

The United States Trustee will appoint a private trustee in each subchapter V case. Section 1183(a) provides that the United States Trustee may appoint a standing trustee pursuant to 28 U.S.C. § 586(b) to handle such cases. If no standing trustee has been appointed, the United States Trustee shall appoint a disinterested person to serve as the trustee for a case. If necessary, the United States Trustee may serve as trustee. This should occur in only the rarest of circumstances, and the United States Trustees should not appoint themselves without obtaining approval from the Assistant Director for Oversight.

Under section 1183(b)(1), upon appointment, the trustee shall perform the duties specified in sections 704(a)(2), (5), (6), (7), and (9):

- Being accountable for all property received. 11 U.S.C. § 704(a)(2).
- Examining proofs of claim and objecting as needed. 11 U.S.C. § 704(a)(5).
- Opposing the debtor's discharge, if advisable. 11 U.S.C. § 704(a)(6).
- Furnishing information concerning the estate requested by a party in interest, unless the court orders otherwise. 11 U.S.C. § 704(a)(7).
- Making a final report and filing an account of the administration of the estate with the court and the United States Trustee. 11 U.S.C. § 704(a)(9).

If there is a claim for a domestic support obligation with respect to the debtor, the trustee must furnish the notice required by section 704(c).

The trustee also is charged with facilitating the development of a consensual plan of reorganization and ensuring that the debtor commences making timely payments under any confirmed plan. 11 U.S.C. §§ 1183(b)(4), (7). The trustee must also take part in the status conference required by section 1188(a) and at any hearing concerning the value of property subject to a lien, confirmation of a plan, or sale of property of the estate. 11 U.S.C. § 1183(b)(3).

Given the prescribed duties, the trustee should attend the initial debtor interview (IDI) convened by the United States Trustee with the debtor and debtor's counsel within 10 days after the case is filed and begin the process of facilitating a consensual plan with the debtor. And the trustee should participate in the section 341 meeting of creditors convened by the United States Trustee to question the debtor and to continue the facilitation of a consensual plan. The United States Trustee may also consult with the trustee to determine whether an inspection of the debtor's business premises, books, and records permitted under section 1116(7) is necessary or appropriate. 11 U.S.C. §§ 1116(7) and 1187(b). In addition, the trustee should be heard by the court on any extension sought by the debtor under section 1189(b) to file a plan beyond 90 days after the order for relief.

Section 1194 permits, but does not require, a debtor to make adequate protection

payments through the trustee. If the trustee holds funds pre-confirmation, then upon confirmation, section 1194 directs that the trustee either distribute those funds in accordance with a confirmed plan or return those funds to the debtor after deducting any (1) unpaid administrative expenses, (2) adequate protection payments due to a secured lender, and (3) fees owing to the trustee.[16] 11 U.S.C. § 1194(a).

For cause, and upon the request of a party in interest, the court may also require the trustee to perform the duties specified in sections 1106(a)(3), (4), and (7)—to investigate the conduct and financial condition of the debtor, and any other matter relevant to the case; to file a report of any investigation conducted; and, after confirmation, to file any such reports that are necessary or as the court orders. 11 U.S.C. § 1183(b)(2).

In addition, if the court orders under section 1185 that the debtor shall no longer be a debtor in possession, the trustee shall perform the duties required by section 704(a)(8) and section 1106(a)(1), (2), and (6), including:

- Operating the debtor's business. 11 U.S.C. § 1183(b)(5).
- Filing any required schedules and statements. 11 U.S.C. § 1106(a)(2).
- Filing periodic operating reports. 11 U.S.C. § 704(a)(8).
- Serving as the administrator of any employee benefit plan. 11 U.S.C. § 704(a)(11).
- Making reasonable efforts to transfer patients from a closing health care business to a new provider offering similar services. 11 U.S.C. § 704(a)(12).
- And, for any year in which a tax return has not been filed, furnishing such information as may be required by the applicable governmental entity. 11 U.S.C. § 1106(a)(6).

11 U.S.C. § 1183(b)(5). In such cases, the trustee is an independent third party who "steps into the shoes" of the debtor's management and becomes a fiduciary with an obligation of fairness to all parties in the case.

Note that although the subchapter V trustee may employ professionals under section 327(a), subchapter V is intended to be a quick and low cost process to enable debtors to confirm consensual plans in a short period with less expense while returning appropriate dividends to creditors. Therefore, the services required of outside professionals, if any, will be limited in many cases. This is especially important in cases in which the debtor remains in possession.

Additional information regarding the role, qualifications, and oversight of subchapter V trustees may be found in Manual 3-17.16.

[16]The trustee's fees should not be paid until they are awarded by the court pursuant to 11 U.S.C. § 330. *See* Manual 3-17.15.2.

3-17.4 CREDITORS' COMMITTEE ONLY ON ORDER OF COURT

SBRA amended section 1102(a)(3) to provide "[u]nless the court for cause orders otherwise, a committee of creditors may not be appointed in a small business case or a case under subchapter V of this chapter."[17] Therefore, the United States Trustee will not appoint a creditors' committee in either a small business case or a subchapter V case unless the court orders such an appointment for cause. Generally, the United States Trustee will not have sufficient information to establish cause for the appointment of a creditors' committee.

3-17.5 SUBCHAPTER V DEBTOR'S DUTIES

Subchapter V debtors are subject to many of the same requirements as non-electing small business debtors, despite the fact that section 1116 does not apply in subchapter V cases. *See* 11 U.S.C. § 1181(a). That is because section 1187 applies most of the duties under section 1116 to subchapter V cases by reference. For example, section 1187(a) applies most of subsection 1116(a)(1), and section 1187(b) applies subsections 1116(a)(2)-(7).

As a result, subchapter V debtors must:

- File the small business case documents required by section 1116(1). 11 U.S.C. § 1187(a).
- File the periodic financial reports required by section 308 and Rule 2015(a)(6). 11 U.S.C. § 1187(b).
- Attend meetings scheduled by the United States Trustee and the court, including IDIs, scheduling conferences and section 341 meetings as required by section 1116(2). 11 U.S.C. § 1187(b).
- Timely file all schedules and statement of financial affairs. 11 U.S.C. § 1187(b).
- File post-petition financial and other reports as required by section 1116(4), including a list of the 20 largest unsecured creditors (*see* Rule 1007(d)), monthly operating reports (*see* Rule 2015(a)(6)), and entity ownership reports (*see* Rule 2015.3). 11 U.S.C. § 1187(b).
- Maintain insurance per section 1116(5). 11 U.S.C. § 1187(b).
- File tax returns per section 1116(6). 11 U.S.C. § 1187(b).
- Allow the United States Trustee to inspect the debtor's premises, books, and records per section 1116(7). 11 U.S.C. § 1187(b).

But unlike non-electing small business debtors, subchapter V debtors must also attend a status conference no later than 60 days after the order for relief to further the expeditious and economical resolution of the case, and to encourage and facilitate the attainment of a consensual plan. 11 U.S.C. § 1188(a). This 60-day

[17]SBRA deleted the existence or level of activity of a creditors' committee as a criterion for status as a "small business debtor," including a subchapter V debtor. 11 U.S.C. § 101(51D).

period can be extended for circumstances for which the debtor should not justly be held accountable. 11 U.S.C. § 1188(b). Not later than 14 days before the status conference the debtor is required to file with the court and serve on all parties a report detailing the debtor's past and anticipated efforts to attain a consensual plan of reorganization. 11 U.S.C. § 1188(c).

3-17.6 UNITED STATES TRUSTEE'S OVERSIGHT OF SUBCHAPTER V CASES

It is important to note that 28 U.S.C. § 586(a)(7) *does not apply* to subchapter V cases. This subsection is the source of many of the United States Trustee's duties to oversee small business cases. But by its terms, subsection 586(a)(7) applies only to "small business cases," which are chapter 11 cases of small business debtors that have not elected treatment under subchapter V. *See* Pub. L. No. 116-54, § 4(a)(1)(A); and 11 U.S.C. § 101(51C).

This does not mean, however, that the United States Trustee will not monitor subchapter V cases. SBRA amended 28 U.S.C. § 586(a)(3) to expressly include the United States Trustee's general duty to supervise the administration of subchapter V cases.

Thus, in general, the United States Trustee should take appropriate action where a debtor is not fulfilling its duties as a debtor in possession, but remain mindful of SBRA's goals of increasing the debtor's ability to negotiate a successful reorganization by reducing unnecessary procedural burdens and costs.

Similarly, as more fully set forth in Manual 3-17.16, the United States Trustee should also supervise the trustee pursuant to 28 U.S.C. § 586(a)(3) and take appropriate action where a trustee is not fulfilling the required trustee duties, or is engaging in misconduct. If necessary, the United States Trustee may seek to remove a trustee pursuant to section 324. The Office of the General Counsel must review and approve all proposed motions by United States Trustees to remove a trustee. The United States Trustee should consult the Office of Oversight prior to submitting the proposed motion to the Office of the General Counsel. The United States Trustee also must notify the Office of Oversight whenever a motion to remove a trustee under section 324 has been filed by third parties.

When a subchapter V case is filed, the United States Trustee appoints the trustee and schedules the section 341 meeting of creditors in accordance with Rule 2003. If the United States Trustee has a pool of case-by-case trustees available for appointment instead of a standing trustee, the United States Trustee should review the facts and circumstances of the case and the skills of the trustees in the pool to select the trustee best suited for the given case. The United States Trustee, who generally presides at the meeting of the creditors, should schedule the meeting after consulting with the trustee to ensure the trustee is available to attend the meeting, consistent with the trustee's duty to facilitate a consensual plan under section 1183(b)(7).

The United States Trustee must communicate the selection of the trustee (if a case-by-case trustee) and the date of the section 341 meeting quickly to the clerk of court (within one to two days after the case is filed, if possible) to avoid unduly delaying the initial administration of the case. In addition to notifying the clerk about the selection of the trustee and the date of the section 341 meeting, the United States Trustee should concurrently or promptly thereafter file a Notice of Appointment with the court with an attached verified statement by the trustee disclosing that the trustee is disinterested and the trustee's proposed arrangement for compensation.

The United States Trustee should facilitate the participation of the trustee in the United States Trustee's case oversight activities, such as the IDI or any site visit. The United States Trustee should coordinate with the trustee in scheduling the IDI within 10 days after the case is filed. At the IDI, the United States Trustee should discuss the facts of the case and explain the administrative requirements of the case to the debtor and debtor's attorney with the trustee present, including required financial information, taxes, insurance, debtor in possession bank accounts, and monthly reports.

The United States Trustee may also consult with the trustee to determine whether an inspection of the debtor's business premises, books, and records permitted under section 1116(7) is necessary or appropriate. 11 U.S.C. §§ 1116(7) and 1187(b). Any such inspection should be coordinated with the debtor, debtor's counsel, and the trustee. There should be no "surprise" inspections.

The United States Trustee should review the materials received from subchapter V debtors under section 1187. The United States Trustee should also review the debtor's report and attend and participate in the status conference required by section 1188(a) to inform the court about any administrative deficiencies or other concerns in the case. Before the status conference, the United States Trustee should consult with the trustee, who is required to attend, about the trustee's views of the case.

Under section 1185, the United States Trustee and other parties may file a motion to remove the debtor in possession for "cause," including pre- or post-petition "fraud, dishonesty, incompetence, or gross mismanagement" or for default under a confirmed plan. 11 U.S.C. § 1185(a). *See also* 11 U.S.C. § 307. If the court grants the motion, or acts *sua sponte*, the debtor in possession is removed and the subchapter V trustee is empowered to operate the business, file reports with the court, and file tax returns. 11 U.S.C. § 1183(b)(5).

Other duties of the United States Trustee include reviewing the plan, monitoring the case post-confirmation and, if necessary, reappointing a trustee. The post-confirmation duties are described in Manual 3-17.10.

3-17.7 SUBCHAPTER V EXCLUSIVITY PERIODS AND DISCLOSURE REQUIREMENTS

SBRA imposes substantially different exclusivity period and disclosure statement requirements for cases under subchapter V. Section 1121 does not apply with respect to exclusivity. 11 U.S.C. § 1181(a). Instead, only the debtor may file a plan, and that plan must be filed not later than 90 days after the order for relief under chapter 11. 11 U.S.C. § 1189(a), (b).

The court may extend the 90-day period if the need for the extension "is attributable to circumstances for which the debtor should not justly be held accountable." 11 U.S.C. § 1189(b). The statute does not limit the length or number of potential extensions. The United States Trustee should review requests for extensions and in most cases, discuss those requests with the trustee serving in the case. The trustee should be heard by the court on such extensions. After consulting with the trustee, the United States Trustee should consider objecting if it appears that the case is languishing with no real prospect for rehabilitation.

Section 1125 does not apply in subchapter V unless the court for cause orders otherwise. 11 U.S.C. § 1181(b). Therefore, absent a court order, the debtor need not file a disclosure statement with the plan.[18] The plan, however, must include:

- a brief history of the business operations of the debtor;
- a liquidation analysis; and
- projections with respect to the ability of the debtor to make payments under the proposed plan of reorganization.

11 U.S.C. § 1190(1). This information is the core information that creditors and other interested parties would expect to see included in a disclosure statement filed under section 1125. The United States Trustee should review plans filed under subchapter V and file comments or objections if the disclosures appear to be inadequate. *See* 28 U.S.C. § 586(a)(3)(B).

[18]Note that if the court directs the filing of a disclosure statement in a subchapter V case, section 1125(f) will apply. 11 U.S.C. § 1187(c). That subsection relaxes disclosure requirements for small business cases. 11 U.S.C. § 1125(f). *See also* Official Bankr. Form 425B.

3-17.8 SUBCHAPTER V PLAN REQUIREMENTS

The requirements for a plan in a subchapter V case can be found in certain subsections of 1123 and in new sections 1181(a) and 1190. Specific confirmation requirements are discussed further in Manual 3-17.9.

In general, section 1123 of the Code governing the contents of chapter 11 plans applies in subchapter V cases. Significantly, sections 1181(a), 1190(2), and 1190(3) contain three exceptions for subchapter V cases filed by individual debtors.

First, section 1181(a) provides that subsection 1123(a)(8), which requires that an individual chapter 11 debtor dedicate earnings from personal services as are necessary for the execution of the plan, does not apply in subchapter V cases. Instead, the plan must provide for the submission of such portion of the future earnings or other future income of the individual debtor to the supervision and control of the trustee as is necessary for the execution of the plan. 11 U.S.C. § 1190(2). Note that this requirement applies only if the plan provides for periodic payments from income. Although most plans will contain such a provision, it is not required unless the plan is confirmed non-consensually under section 1191(b), as discussed in Manual 3-17.9.

Second, section 1181(a) provides that subsection 1123(c) does not apply. That subsection provides that a plan concerning an individual chapter 11 debtor cannot rely on the debtor's exempt property unless the debtor consents. It is unnecessary in a subchapter V case because only the debtor may file a plan.

Third, section 1190(3) creates a limited exception to the general proposition that a plan of reorganization cannot provide for the modification of a claim secured only by a security interest in the principal residence of an individual debtor. *See* 11 U.S.C. § 1123(b)(5). Section 1190(3) permits the modification of the rights of the holder of such a claim if the new value received by the debtor in connection with the granting of the security interest was not used primarily to acquire the residence and was used primarily in connection with the debtor's small business. 11 U.S.C. § 1190(3). Secured creditors holding such claims are expected to police their own rights in connection with plans providing for the modification of their claims.

Other provisions of section 1123 govern all plans filed in subchapter V cases, including plans filed by individual debtors. In addition, section 1190(1) specifies the required disclosures in the subchapter V plan, as discussed in Manual 3-17.7. 11 U.S.C. § 1190(1).

3-17.9 SUBCHAPTER V PLAN CONFIRMATION

Confirmation of a plan is governed by a combination of certain subsections of section 1129 and new section 1191. Section 1191(a) provides that the following

subsections of section 1129 *do not* apply in a subchapter V case: 1129(a)(15) (means test in individual chapter 11 cases); 1129(b) (cram down provisions); 1129(c) (court may confirm only one plan); and 1129(e) (requirement that plan in small business case be confirmed within 45 days).

Subchapter V does require that the plan classify claims and that it be submitted to creditors for balloting. 11 U.S.C. §§ 1122 and 1191(a). As discussed below, confirmation of a plan under section 1191 is either consensual or, if one or more impaired classes votes to reject the plan, non-consensual.

Note that priority claims under sections 507(a)(2) (administrative expenses) and 507(a)(3) (unsecured "gap period" claims in involuntary cases) may be paid over the life of the plan, presumably in full, notwithstanding section 1129(a)(9)(A). 11 U.S.C. § 1191(e). A plan providing for such delayed payment of these priority claims must be confirmed non-consensually under 11 U.S.C. § 1191(b).

As described below, a plan that cannot be confirmed consensually under 11 U.S.C. § 1191(a) may still be confirmed non-consensually (*i.e.*, by "cram down") if the requirements of 11 U.S.C. § 1191(b) are met.

3-17.9.1 Consensual Plans

Section 1191(a) provides that the court may confirm a plan only if all requirements of section 1129(a) other than 1129(a)(15) are met. This is "consensual" confirmation. Effectively, this requires that all impaired classes accept the plan.

In a consensual plan, the debtor generally makes payments under the plan directly. Except as otherwise provided in the plan or confirmation order, the confirmation of a consensual plan discharges the debtor under section 1141(d), and section 1141(d)(5) does not apply in subchapter V cases to delay the discharge for individual debtors. 11 U.S.C. § 1181(a).

The trustee's services are terminated upon the substantial consummation of a consensual plan. 11 U.S.C. § 1183(c)(1).

3-17.9.2 Non-consensual Plans

A plan that is not confirmed consensually under section 1191(a) can still be confirmed "non-consensually" under section 1191(b). Generally, section 1129(b) does not apply in a subchapter V case. Instead, section 1191(b) permits the court, on request of the debtor, to confirm a plan that does not meet the requirements of subsections 1129(a)(8), (10), or (15). Subsection (a)(8) requires that all impaired classes accept the plan. Subsection (a)(10) requires, as a prerequisite to cram down under 11 U.S.C. § 1129(b), that at least one impaired class of claims has accepted the plan. And subsection (a)(15) requires that if an unsecured creditor objected to the plan in a case filed by an individual debtor, the debtor pays the greater of the amount of the claim or the debtor's projected disposable income for five years.

To confirm a subchapter V plan non-consensually under section 1191(b), the court must find that the plan does not discriminate unfairly and that the plan is fair and equitable with respect to each class of impaired claims or interests that has not accepted the plan. While the standards for the unfair discrimination prong are the same as under section 1129(b)(1) applicable to other chapter 11 cases, what is "fair and equitable" with respect to unsecured creditors is different and the absolute priority rule of subsection 1129(b)(2) does not apply.

Section 1191(c) defines "fair and equitable" under a non-consensual plan. There are four requirements.

First, for a class of secured claims, subsection 1191(c)(1) incorporates the fair and equitable standards from subsection 1129(b)(2)(A). Section 1129(b)(2)(A) provides three alternatives for what is "fair and equitable" treatment for a secured claim. First, the plan may provide for the retention by the holder of the claim of the liens securing the claim and the payment to the holder of deferred cash payments totaling at least the allowable amount of the claim, of a value, as of the effective date of the plan, of at least the value of such holder's interest in the estate's interest in the property securing the liens. 11 U.S.C. § 1129(b)(2)(A)(i). Second, the plan may provide for the sale, subject to 11 U.S.C. § 363(k), of the property securing the liens, free and clear of the liens, with the liens to attach to the proceeds of such sale, and the treatment of such liens under subsection (i) or (iii) of section 1129(b)(2)(A). 11 U.S.C. § 1129(b)(2)(A)(ii). Third, the plan may provide for the realization by the holder of the secured claim of the "indubitable equivalent" of such claim. 11 U.S.C. § 1129(b)(2)(A)(iii).

Second, for other impaired classes, a plan is fair and equitable if, as of the effective date of the plan, it provides that (a) all of the debtor's projected disposable income for the three- to five-year period (as fixed by the court) will be applied to make payments under the plan, *or* (b) the value of the property to be distributed under the plan during the three to five-year period is not less than the projected disposable income of the debtor. 11 U.S.C. § 1191(c)(2). Thus, the debtor is not required to satisfy the "absolute priority rule" applicable in other chapter 11 cases.

For purposes of 11 U.S.C. § 1191(c)(2)(A), "disposable income" is defined as income received by the debtor that is not reasonably necessary to be expended for the maintenance or support of the debtor or a dependent of the debtor, for a post-petition domestic support obligation, or for the payment of necessary business expenditures. 11 U.S.C. § 1191(d). For individual debtors, the disposable income test is akin to that in chapter 12, *see* 11 U.S.C. § 1225(b)(2), and is not based on the "means test" as in chapter 7 under section 707(b)(2) or in chapter 13 under section 1325(b)(2).

Third, the plan must provide that the debtor will be able to make all plan payments or that there is a reasonable likelihood that the debtor will be able to make the payments. 11 U.S.C. § 1191(c)(3)(A).

Finally, the plan must provide "appropriate remedies" to protect holders of claims

or interests if the payments are not made, including liquidation of nonexempt assets. 11 U.S.C. § 1191(c)(3)(B).

When a plan is confirmed non-consensually, under section 1192 the debtor will not receive a discharge until after the debtor has made all plan payments due within three to five years, as set by the court. Section 1141(d)(5), which would otherwise delay discharge for individual debtors, does not apply in subchapter V cases. 11 U.S.C. § 1181(a). Debts on which the last payment is due after the first three years of the plan, or up to five years as fixed by the court, are not discharged. 11 U.S.C. § 1192(1). Furthermore, debts excepted from discharge under section 523(a) are not discharged. 11 U.S.C. § 1192(2).

In a non-consensual plan, except as otherwise provided in the plan or the confirmation order, the trustee shall make the payments to creditors under the plan, pursuant to section 1194(b).

3-17.10 SUBCHAPTER V POST-CONFIRMATION

Not later than 14 days after the debtor's consensual plan is substantially consummated, the debtor shall file a notice of substantial consummation and serve this notice on the subchapter V trustee, the United States Trustee, and all parties in interest. 11 U.S.C. § 1183(c)(2).

If the trustee is holding funds upon confirmation, regardless of whether the plan is consensual or non-consensual, the trustee should distribute those funds in accordance with the plan. 11 U.S.C. § 1194(a).

If the plan is consensual, unless otherwise provided in the plan or ordered by the court, the subchapter V trustee's duties terminate with substantial consummation. 11 U.S.C. § 1183(c)(1). Trustees should promptly file their compensation and expense requests, pursuant to section 330 for case-by-case trustees or 28 U.S.C. § 586 for standing trustees (*see* Manual 3-17.15), and distribute any funds on hand in accordance with the plan. In cases in which trustees made no distributions, the trustee shall file a report of no distribution with the court in accordance with section 1183(b)(1), which incorporates section 704(a)(9). In cases in which the trustee made distributions, the trustee should promptly submit the final report and account of administration to the United States Trustee for review pursuant to section 1183(b)(1). After review, the final report and account will be filed with the court. 11 U.S.C. §§ 1183(b)(1); 704(a)(9).

If the plan is non-consensual, the trustee will disburse payments under the plan, unless otherwise provided in the plan or confirmation order. 11 U.S.C. § 1194(b). The trustee should file with the court quarterly reports as prescribed by the court, and submit a copy of those quarterly reports to the United States Trustee for review, during the period in which the trustee continues to make plan payments. 11 U.S.C. §§ 1183(b)(2); 1106(a)(7). Upon completion of all plan payments, the trustee should submit the final report and final account of the

administration of the estate to the United States Trustee for review pursuant to section 1183(b)(1). After review, the final report and account will be filed with the court. 11 U.S.C. §§ 1183(b)(1); 704(a)(9).

If the debtor fails to perform under the plan, the United States Trustee should consider the appropriate response, which could include a motion for conversion or dismissal, revocation of the confirmation order if circumstances warrant under section 1144, or reappointment of a previously terminated trustee. *See generally* Manual 3-11.6.

3-17.10.1 Final Decree and Case Closing

After substantial consummation of a consensual plan, as provided in section 1101(2), and termination of the trustee's services pursuant to section 1183(c)(1), the debtor may proceed to seek entry of a final decree closing the case pursuant to section 350(a) and Fed R. Bankr. P. 3022, upon a showing that the estate has been fully administered and that there are no remaining matters for which the court must continue to exercise jurisdiction.

If the confirmed plan is non-consensual and the trustee is responsible for making plan payments to creditors, the case ordinarily will remain open after substantial consummation until the trustee has made all payments, the trustee has filed his final report and account, and there are no remaining matters for which the court must continue to exercise jurisdiction. *See* 11 U.S.C. § 350(a).

3-17.11 MODIFICATION OF SUBCHAPTER V PLANS

While section 1127 of the Code does not apply in subchapter V cases, many aspects of section 1127 allowing modification have been retained in some form under section 1193. One notable change is that in cases with proposed modifications either before confirmation or after confirmation but before substantial consummation, lien stripping may be allowed as to certain secured liens in the debtor's personal residence. 11 U.S.C. § 1190(3). Further, while section 1127 allows modification of plans in individual cases after confirmation but before completion of all plan payments, modification after substantial consummation in subchapter V cases is limited to non-consensual plans within three to five years of confirmation as long as the requirements of section 1191(b) for non-consensual plans are met. 11 U.S.C. § 1193(c). Finally, as with the initial proposed plan, disclosure requirements under section 1125 are not required for plan modifications in subchapter V cases. 11 U.S.C. § 1181(a) (section 1127 inapplicable in subchapter V; disclosure statement requirement found in 1127(c).

3-17.11.1 Modification before Confirmation

The debtor may modify a plan at any time before confirmation, but may not modify the plan so that as modified it fails to meet the requirements of sections 1122 and 1123 of the Code, other than section 1123(a)(8) (modification of lien on principal residence). 11 U.S.C. § 1193(a). The plan as modified becomes the plan upon filing with the court.

3-17.11.2 Modification after Confirmation

The debtor may modify a plan that has been consensually confirmed under section 1191(a) at any time before the plan is substantially consummated. The plan as modified must meet the requirements of sections 1122 and 1123 of the Code, other than section 1123(a)(8) (modification of lien on principal residence). The modified plan becomes the plan only if the court finds that circumstances warrant the modification and, after notice and a hearing, confirms the plan under section 1191(a). 11 U.S.C. § 1193(b).

Note that holders of claims or interests that have accepted or rejected a plan that was confirmed consensually under section 1191(a) are deemed to have similarly accepted or rejected the plan as modified unless, within the time fixed by the court, the holder changes its previous acceptance or rejection. 11 U.S.C. § 1193(d).

The debtor may modify a plan that has been confirmed non-consensually under section 1191(b) at any time during the three- to five-year period after confirmation (as set by the court). The plan as modified must meet the requirements of section 1191(b). The modified plan becomes the plan only if the court finds that circumstances warrant the modification and, after notice and a hearing, confirms the plan under section 1191(b). 11 U.S.C. § 1193(c).

3-17.11.3 Reappointing a Subchapter V Trustee Post-confirmation

Section 1185(a) provides that the debtor in possession can be removed for, among other reasons, failure to perform "the obligations of the debtor" under a plan that is confirmed consensually under section 1191(a). Upon the debtor in possession's removal under section 1185(a), section 1183(c)(1) provides that the United States Trustee may reappoint a trustee (1) as needed to appear and be heard on post-confirmation modifications and (2) as needed for performance of the debtor in possession's duties, including the obligations under the confirmed plan.

3-17.12 TRANSACTIONS WITH PROFESSIONALS IN SUBCHAPTER V CASES

Section 1195 provides that a professional is not disqualified for employment under section 327(a) solely because that person holds a claim of less than $10,000 that arose before the commencement of the case. Such a claim would otherwise make the professional a creditor and *per se* not disinterested.[19] 11 U.S.C. § 101(14)(A). Although SBRA is silent as to the priority of the professional's pre-petition claim, nothing in the SBRA or elsewhere in the Code would allow the

[19]This means that the United States Trustee should not object to the retention of a professional who waives the amount of any pre-petition claim exceeding $10,000. Similarly, the United States Trustee should not object to the retention of a professional who returns to the estate the total of pre-petition fee payments that are voidable as preferences under 11 U.S.C. § 547 and waives the amount of any resulting claim under 11 U.S.C. § 502(d) exceeding $10,000.

claim as other than a general unsecured claim.

3-17.13 SUBCHAPTER V TRUSTEE QUALIFICATIONS FOR APPOINTMENT

3-17.13.1 Qualifications and Acceptance

To ensure accountability, the United States Trustee generally will appoint individuals to serve as subchapter V trustees.[20] Subchapter V trustees may not accept appointment to cases in which they have a conflict and they must successfully complete background investigations. As discussed in Manual 3-17.16.2, the trustee must also either post or maintain an appropriate bond. In addition, pursuant to section 321(a), the trustee must be competent to perform the statutory duties set out in section 1183. For case-by-case trustees, additional considerations for the selection may be based on the unique circumstances of the specific case.

3-17.13.2 A Trustee Must Not Have Conflicts of Interest

The subchapter V trustee is an independent third party who owes fiduciary duties of fairness and impartiality to all parties in the case. *CFTC v. Weintraub*, 471 U.S. 343 (1985). The trustee must be free of conflicts of interest that might impair the trustee's ability to carry out these duties.

Conflicts of interest include, without limitation, the representation by a trustee's firm of a debtor or any party in interest in any case being administered by the trustee. Further, a conflict exists if the representation of a client by a trustee or the trustee's firm requires the trustee to take a position contrary to the fiduciary responsibilities of the trustee.

SBRA also specifies that a person appointed as a case-by-case subchapter V trustee must be "disinterested." 11 U.S.C. § 1183(a). Among other things, to be disinterested, a person must not be a creditor, equity security holder, or insider of the debtor. 11 U.S.C. § 101(14). Practically, the United States Trustee will insist that standing trustees decline cases in which they lack disinterestedness.

The trustee must decline to accept any appointment where the trustee has a conflict of interest. Moreover, the trustee's duty to review for conflicts in assigned cases is ongoing. The trustee must advise the United States Trustee in writing of any actual or potential conflicts upon becoming aware of them, and disclose any actual or potential conflicts at the meeting of creditors or on the court record, if applicable. If the trustee discovers a conflict after accepting an appointment, the trustee must immediately file a notice of resignation in the case

[20] All subchapter V standing trustees under subchapter V, as well as chapters 12 and 13, must be individuals. 28 U.S.C. § 586(b). Subchapter V case-by-case trustees must be "persons," 11 U.S.C. § 1183(a), which include partnerships and corporations in addition to individuals. 11 U.S.C. § 101(41). Pursuant to section 321(a)(2), partnerships and corporations that are authorized by their charters or bylaws to act as trustees are eligible to serve as case-by-case trustees. Nevertheless, as with the subchapter V standing trustees, the United States Trustee will generally appoint individuals as subchapter V case-by-case trustees.

and notify the United States Trustee, who will reassign the case to another trustee.

Conflict waivers by either the debtor or a creditor are not effective to obviate the necessity for the trustee to decline an appointment or to resign from the case. And to the extent that a standing trustee has a large number of resignations due to conflicts, the United States Trustee, with the approval of the Director of EOUST, may appoint another standing trustee.

3-17.13.3 Background Investigation

All persons appointed to serve as a trustee in a subchapter V case must undergo and successfully complete a security background investigation. Once the Assistant Director for Oversight has approved the United States Trustee's tentative recommendation of a candidate, the proposed appointee must promptly submit to the United States Trustee a Form E-Mail Pre-background (Form 8 in the trustee recruitment and selection package); USCIS – Form I-9 – Employment Eligibility Verification (form 9) and Subchapter V Trustee Notice and Acknowledgement (form 10); the trustee's full name and address (including middle name); the trustee's e-mail address; and the addresses to which each trustee candidate wants background documents sent.

After the United States Trustee reviews the documents for completeness and accuracy, the documents and information should be transmitted to the Office of Oversight for final review and processing. The Facilities and Security Branch of the Office of Administration will then initiate the background process directly with trustee candidates. The Office of Oversight will inform the United States Trustee when the trustee candidate has been preliminarily qualified to be a member of a pool subject to the completion of a full background check.

If the individual is in a pool of case-by-case trustees or is a standing trustee, then new security application forms are not required if a background investigation is in progress or has been completed within the preceding five years in connection with another chapter 11, chapter 7, or standing trustee appointment.

3-17.14 SUBCHAPTER V TRUSTEE RECRUITMENT

When seeking applicants for a position as subchapter V trustee, the United States Trustee, in consultation with the Assistant Director for Oversight, will engage in a process of public advertising and outreach to identify persons interested in serving. The United States Trustee should try to recruit a broad group of individuals to serve as subchapter V trustees who are not limited to attorneys or current trustees and include individuals with business and accounting backgrounds. All trustee appointments are made by the United States Trustee on a non-discriminatory basis.

Initially, the United States Trustees plan to appoint case-by-case trustees in subchapter V cases, learning from actual experience and may adjust this policy over time. To encourage broad professional and cultural representation among trustees, the United States Trustee should meet and speak with appropriate local

affinity organizations and community groups to remove real or perceived barriers to participation in the bankruptcy process and to broaden the awareness of opportunities the system affords.

The United States Trustee should recruit individuals who are interested in potential appointment as a subchapter V trustee through a public solicitation. The Program has adopted standard public vacancy notices to attract a pool of qualified applicants. All advertisements must conform to these notices, which may be obtained from the Office of Oversight.

Before commencing any solicitation, the United States Trustee must forward the advertisement and solicitation package to the Office of Oversight for review and suggestions. The solicitation package includes a proposed notice, a list of non-traditional contacts or sources in the community, and a description of proposed outreach efforts to encourage a pool of applicants.

After review by the Office of Oversight, the Administrative Officer or another person designated by the United States Trustee will place the advertisement. The Office of Oversight will post the recruitment announcement on the Program's Website. The United States Trustee will handle local posting of announcements. The United States Trustee will also provide information concerning trustees to any local professional groups for notice to their membership where possible. The Office of Administration may also provide targeted notices of the solicitation to participants in professional or employment websites to increase the possible number of qualified applicants for the United States Trustee to review. All recruitment notices are to be advertised for a reasonable period.

The United States Trustee must follow the advertising policy set forth herein and avoid making any appointments of individuals who have not responded to a solicitation as described above.

The number of trustees in any judicial district is determined by the United States Trustee, in consultation with the Assistant Director for Oversight. The assignment of specific cases to trustees is within the discretion of the United States Trustee. The trustee must be competent to perform the duties of the office as defined by statute, be an able administrator, and be able to carry out fiduciary duties free from improper influence or conflict.

3-17.15 TRUSTEE COMPENSATION AND BENEFITS

Compensation for subchapter V trustees is determined by both the disposition of the case and whether the trustee is a case-by-case trustee or a standing trustee. Section 326(a), which sets forth limitations on chapter 11 trustees' compensation based on moneys disbursed or turned over in cases by the trustees, does not apply to subchapter V trustees. Pub. L. No. 116-54, § 4(a)(4)(A).

3-17.15.1 Effect of Disposition of the Case

How a trustee collects compensation depends on the outcome of the case. For cases with plans confirmed non-consensually under section 1191(b), the trustee

will remain in place throughout the life of the plan and generally disburse payments received from the debtor in accordance with the plan and confirmation order, including payments to satisfy the trustee's compensation. 11 U.S.C. § 1194(b).

By contrast, in cases with plans confirmed consensually under section 1191(a), the trustee's service ends with substantial consummation of the plan under section 1183(c)(1).

3-17.15.2 Case-by-Case Trustee Compensation

Subchapter V case-by-case trustees are compensated through section 330(a)(1)(A), which allows for "reasonable compensation for actual, necessary services rendered by the trustee … and by any paraprofessional person employed by any such person." The trustee may also be reimbursed for "actual, necessary expenses" pursuant to section 330(a)(1)(B).

These section 330 compensation provisions apply regardless of whether the case-by-case trustee makes disbursements of estate funds. SBRA specifically excludes all subchapter V trustees from section 326(a), which sets limits on other chapter 11 trustees' compensation based on the moneys they disburse or turn over. Pub. L. No. 116-54, § 4(a)(4)(A). And subchapter V case-by-case trustees are not subject to the section 326(b) limitation of compensation to five percent of plan payments that is applicable to chapter 12 and 13 case trustees. *See* 11 U.S.C. § 326(b), as amended by Pub. L. No. 116-54, § 4(a)(4)(B).[21]

When submitting their fee applications, trustees are encouraged to keep in mind Congress' stated intent that subchapter V cases not be burdened with excessive administrative expenses.

The United States Trustee should object or take other appropriate action in response to requests by subchapter V case-by-case trustees for excessive fees and expenses.

3-17.15.3 Standing Trustee Compensation

Like chapter 12 and chapter 13 standing trustees, subchapter V standing trustees are compensated pursuant to 28 U.S.C. § 586(e). The Director of EOUST, by delegation from the Attorney General and in consultation with the United States Trustee, sets the standing trustees' annual compensation and a percentage fee, including overhead, of no more than 10% of plan payments. 28 U.S.C.

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[21]Section 326(b) provides, in part, that the court may allow reasonable compensation to case trustees in chapter 12 and chapter 13 cases, not to exceed 5% upon all payments under the plan. SBRA amended section 326(b) to make clear that the court may not award compensation to subchapter V standing trustees under section 330(a), but SBRA did not further revise section 326(b) to provide that the 5% cap on plan payments expressly applies to subchapter V case-by-case trustees. Instead, the 5% cap remains effective only as to chapter 12 and 13 case-by-case trustees appointed under sections 1202(a) and 1302(a), respectively. As a result, there appears to be no express statutory limit on the compensation that can be awarded to subchapter V case-by-case trustees beyond the general "reasonableness" requirement imposed by section 330(a).

§ 586(e)(1).

Note that SBRA amended 28 U.S.C. § 586(e) to add a new subsection (5) specifically for subchapter V standing trustees. Pub. L. No. 116-54, § 4(b)(1)(D)(3). Subsection (5) provides that if a subchapter V case is converted or dismissed, or a consensually confirmed plan is substantially consummated, thereby impairing the ability of the standing trustee to collect an adequate percentage fee, the court may allow compensation consistent with the services performed by the trustee and subject to limits on the trustee's overall compensation established by the Attorney General. Note that this new provision applies only to standing subchapter V trustees.

3-17.16 SUPERVISION OF SUBCHAPTER V TRUSTEES

Subchapter V trustees are required to perform many duties in administering the cases in which they are appointed by the United States Trustee. In general, among the most important duties are assessing the financial viability of the small business debtor, facilitating a consensual plan of reorganization, and helping ensure that the debtor files or submits complete and accurate financial reports. Moreover, the statute sets forth specific case administration duties. Subchapter V trustees must be accountable for all property received during their administration of cases; they must retain all payments and funds received in cases until confirmation or denial of the plan; they must distribute such funds as authorized by the court or in accordance with any confirmed plan, or return the funds to the debtor if the court denies confirmation of the plan; and they must act as a disbursing agent under confirmed plans in certain cases. 11 U.S.C. §§ 1183(b)(1) (incorporating 11 U.S.C. §§ 704(a)(2), 1194(a)-(c)). In certain cases, they may be required to replace the debtor in possession and operate the business. 11 U.S.C. § 1185(a).

In addition, subchapter V trustees are required to preserve and safeguard all funds they administer, and they must be adequately bonded in all cases they administer. 11 U.S.C. §§ 322, 345(a). They also are required to file final reports and fully account for their administration of estates. 11 U.S.C. § 1183(b)(1) (incorporating 11 U.S.C. § 704(a)(9)).

The United States Trustee is charged with the responsibility to "appoint" the subchapter V trustees and "supervise" their administration of small business cases. 11 U.S.C. § 1183(a); 28 U.S.C. § 586(a)(3). Pursuant to this broad statutory mandate, the United States Trustee performs a variety of oversight functions as part of the supervision of subchapter V trustees. This is to ensure that the trustees are adequately performing their duties and to determine whether they should be appointed to administer future cases. These trustee oversight functions cover the duties performed by the trustees under SBRA and are similar

to the United States Trustee's oversight functions in supervising trustees who are appointed under other chapters of the Bankruptcy Code.

The United States Trustee's oversight functions include reviewing and evaluating subchapter V trustees' banking practices to ensure estate funds are preserved and accounted for, determining the amount and sufficiency of trustee bonds for the cases they administer, monitoring and reviewing certain trustee financial and case reports to ensure proper case administration and safeguarding of assets and personally identifiable information (PII), conducting audits and other periodic trustee reviews and evaluations, and undertaking enforcement actions, when appropriate and necessary.

In judicial districts in which the United States Trustee has appointed standing subchapter V trustees, the United States Trustee's oversight duties also will include reviewing and approving budgets for these trust operations, similar to the budget approval process currently in effect for trust operations for standing trustees in chapter 12 and 13 cases. 28 U.S.C. § 586(b).

These trustee oversight functions are further described below.

3-17.16.1 Banking[22]

Not all subchapter V trustees will hold or disburse estate funds. But to the extent that they do, trustees must preserve and safeguard estate funds by following statutory requirements for deposit and investment of money of the estates that they administer. 11 U.S.C. § 345(a). The United States Trustee closely supervises the trustees' banking practices to ensure performance of these specified duties, pursuant to 28 U.S.C. § 586(a)(3).

A trustee who holds estate funds or acts as a disbursing agent for plan payments "may make such deposit or investment of the money of the estate for which such trustee serves as will yield the maximum reasonable net return on such money, taking into account the safety of such deposit or investment." 11 U.S.C. § 345(a). Unless the funds are insured, guaranteed, or backed by the full faith and credit of the United States Government or its agencies, the institution holding the estate funds must post a bond in favor of the United States. 11 U.S.C. § 345(b)(1). In the alternative to posting a bond, the institution must deposit securities of the kind specified in 31 U.S.C. § 9303, and the trustee cannot accept or use other types of securities or investments absent court approval. 11 U.S.C. § 345(b)(2).

As a result of these statutory requirements, trustees must deposit all receipts into a banking institution that is insured by the Federal Deposit Insurance Corporation (FDIC), and is approved by the United States Trustee to hold deposits of bankruptcy estate funds as authorized depositories. 11 U.S.C. § 345(b). Each

[22] *See generally* Manual Volume 7.

regional office of the United States Trustee maintains a list of authorized depositories, which the trustee should request immediately upon appointment.[23]

It is the trustee's responsibility to ensure that the banking institution is in compliance with section 345 to the extent of the trustee's deposits. If the aggregate funds on deposit for an estate in a single institution exceed the FDIC's insurance limits, the excess funds must be bonded or adequately collateralized as required by section 345(b). The trustee must promptly notify the United States Trustee if the amount on deposit in an estate in any single depository exceeds or is expected to exceed the FDIC's insurance limits.

The types of trustee bank accounts also vary depending on whether the trustee is acting as a case-by-case trustee or a standing trustee. Case-by-case trustees must open a separate estate account for each case administered by the trustee. All receipts and disbursements of the trustee related to the case are made through this estate account, including all plan payments, administrative expenses allowed under 11 U.S.C. § 503, and any compensation that is awarded to the trustee under 11 U.S.C. § 330.

Standing trustees must establish and maintain two accounts. The first is a trust account for receipts and disbursements for all cases administered, and the second is an operating expense account for depositing all percentage fee income, interest income, awards of compensation to the trustee, and other receipts not deposited into the trust account. The standing trustee must pay all compensation, operating expenses, and payments to the United States Trustee System Fund out of the operating expense account. 28 U.S.C. §§ 586(e)(1), (e)(2). The percentage fee and any other compensation awarded to the trustee are to be transferred from the trust account to the operating expense account after all other section 503(b) awards have been paid.

Generally, a trustee should utilize a single banking institution. Bankruptcy-related funds may not be deposited to the trustee's business, personal, or trust account. And a standing trustee may not use the operating expense account for deposit or payment of any funds unrelated to the administration of the standing trustee's cases.

All trustee bank accounts should include the trustee's name and capacity as trustee. Individual estate accounts opened by case-by-case trustees should also include the case name and number.

Trustees must disclose to the United States Trustee the identity of each banking institution in which the trustee has an estate account (case-by-case trustees) or trust and operating accounts (for standing trustees) for the cases administered. If a bond in favor of the United States is filed to protect the deposit of estate funds, the United States Trustee must approve the corporate surety securing the bond. 11 U.S.C. § 345(b)(l)(B). The United States Trustee can only approve a surety

[23]To be approved by the United States Trustee, the banking institution must execute a Uniform Depository Agreement.

listed in Treasury Circular 570. The United States Trustee also receives a periodic report from the Federal Reserve to review the sufficiency of collateral posted by the banking institutions under 11 U.S.C. § 345(b)(2).

To assist in monitoring trustee accounts, trustees must supply all bank account information to the United States Trustee, including an authorization for the bank's release of information to the United States Trustee.

3-17.16.2 Bonding[24]

To qualify as a subchapter V trustee, the trustee has a duty to post and maintain a bond in favor of the United States, conditioned on the trustee's faithful performance of the trustee's duties. 11 U.S.C. § 322(a). The bond must be posted for every case in which the trustee is appointed regardless of whether the trustee administers any estate funds or acts as a disbursing agent, or whether the trustee is appointed as a case-by-case trustee or a standing trustee. 11 U.S.C. § 322(a). The trustee is not qualified to serve as a trustee in a case unless and until the bond has been filed with the court. 11 U.S.C. § 322(a). The bond must be posted before seven days after selection to serve as trustee in a case.

The United States Trustee determines the initial amount and sufficiency of the bond. 11 U.S.C. § 322(b). The United States Trustee may authorize the issuance of a blanket bond to cover a trustee for multiple cases or to cover multiple trustees for multiple cases in a particular jurisdiction. Fed. R. Bankr. P. 2010.[25] Pursuant to this statutory duty, the United States Trustee will direct the trustee whether to participate in a blanket bond or to procure an individual bond.

The initial amount of the bond shall be set by the United States Trustee after consultation with the trustees in the region, but shall not be less than $50,000 per trustee. Only companies that appear on Treasury Circular 570 are approved by the United States Trustee as sureties for issuing trustee bonds, but it is the trustee's responsibility to procure the bond and ensure that the bonding company is an approved surety. After approval of the amount of the bond and the sufficiency of the surety, the original bond and any riders will be filed by the United States Trustee with the court.

From time to time, the amount of the bond may need to be increased. Adjustments to the bond should be made only as approved by the United States Trustee.

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[24] *See generally* Manual Volume 7.

[25] An individual case bond insures a single case for a single amount. A blanket bond covers multiple cases for one or more trustees. Two types of blanket bonds are schedule bonds and aggregate bonds. A schedule bond covers all listed trustees in a particular jurisdiction, with a listed limit per trustee and often with a listed case limit. An aggregate bond covers all listed trustees and their cases in an amount equal to the face amount of the bond.

It is the trustee's duty to monitor the bond and to ensure that it is maintained in an appropriate amount throughout the case. The trustee must promptly notify the United States Trustee of any significant increases in bank balances or any anticipated increases in funds because these might warrant an increase in the trustee's bond. 11 U.S.C. § 322.

A trustee who assumes the duties of a debtor in possession under section 1185 must promptly confer with the United States Trustee about whether a separate bond is required in the case or whether anticipated activity in the case requires an increase to the existing bond. The United States Trustee makes the final determination of the amount and sufficiency of the bond that must be posted for the trustee to remain as trustee in the case. 11 U.S.C. § 322(b).

As soon as the trustee becomes aware of an incident that may give rise to a claim against the trustee's bond, the trustee must notify the United States Trustee and the bonding company. 28 U.S.C. § 586(a)(3). The United States Trustee or any other party in interest may make a claim on the trustee's bond by filing an adversary proceeding no later than two years after the date on which the trustee was discharged. 11 U.S.C. § 322(d); Fed. R. Bankr. P. 9025.

3-17.16.3 Reporting

In addition to their court reporting responsibilities in specific cases, including filing final reports for each case administered (*see* Manual 3-17.10), subchapter V trustees must submit monthly and annual reports to the United States Trustee to assist the United States Trustee in supervising the administration of cases and ensuring accountability for any estate funds received or disbursed. 28 U.S.C. § 586(a)(3); 11 U.S.C. § 1183(b)(1) (incorporating 11 U.S.C. § 704(a)(2)). For case-by-case trustees, the monthly and annual reports will include the activity in the estate account(s) used for each assigned case during the period; for standing trustees, these reports will include the activity in the trust and operating expense accounts.

The trustee's monthly report will show activity in the various bank accounts maintained by the trustee, beginning and ending balances for each account, the trustee's receipts and disbursements, information related to the collateralization of funds and the sufficiency of the trustee's bond, case filing and closure information for all assigned cases, and such other information as is required by the United States Trustee. 28 U.S.C. § 586(a)(3). The monthly report shall be in the form prescribed by the United States Trustee in the Subchapter V Trustee Handbook. The trustee must submit the monthly report, together with copies of corresponding bank statements, to the United States Trustee within 30 days after the end of each month. 11 U.S.C. § 1183(b)(1) (incorporating 11 U.S.C. § 704(a)(2)).

The trustee's annual report will show the activity in the bank accounts maintained by the trustee, beginning and ending year-end balances for each account, the trustee's receipts and disbursements, case filing and closure statistics for the cases administered, information regarding the trustee's compensation received in the

cases administered, and such other information as is required by the United States Trustee. 28 U.S.C. § 586(a)(3). The trustee must submit the annual report to the United States Trustee in the form prescribed by the United States Trustee in the Subchapter V Trustee Handbook. 11 U.S.C. § 1183(b)(1) (incorporating 11 U.S.C. § 704(a)(2)). Case-by-case trustees must submit their annual reports to the United States Trustee within 45 days after the end of the fiscal year. Likewise, standing trustees must submit their annual reports to the United States Trustee within 45 days from the end of the fiscal year in which they are serving as standing trustees.

Trustees also are required to promptly report to the United States Trustee the loss, or potential loss, of PII in connection with cases the trustee administers.[26] The trustee's reporting obligation applies to, among other instances, the loss or potential loss of PII arising from the theft of paper files, personal computers, laptops, electronic devices, and removable drives such as USB flash drives and CDs. The trustee, in consultation with the United States Trustee, shall develop a plan of corrective action that the trustee will undertake to remediate the breach. The plan shall include the trustee's notifications to the affected individuals, law enforcement officers, and insurance carriers, as appropriate or required by law. The trustee also should take appropriate actions to mitigate the risk of further losses of PII, which largely will depend on the circumstances of the suspected breach.

3-17.16.4 [Reserved]

3-17.16.5 Audits, Periodic Reviews, and Evaluations

In addition to monitoring for compliance as described elsewhere in this Manual, the United States Trustee will conduct periodic audits, reviews and evaluations of the subchapter V trustees' performance of their duties similar to those conducted for trustees whom the United States Trustee regularly appoint and supervise in other chapters. This oversight function is separate and apart from specific monitoring and enforcement activity in particular cases, which the United States Trustee also is authorized to undertake in subchapter V cases. 11 U.S.C. § 307.

These periodic audits, reviews and evaluations are performed regardless of whether the trustee administers any estate funds or acts as a disbursing agent during the review period, or whether the trustee is appointed as a case-by-case trustee or serves as a standing trustee. 28 U.S.C. § 586(a)(3). They are essential for the United States Trustee to determine not only whether the trustee is adequately performing his or her duties in the cases administered, but also to

[26]This reporting obligation applies when the loss or potential loss of PII originates from the trustee's operation. The debtor may have separate duties to report PII losses consistent with applicable law.

determine whether the trustee should be appointed by the United States Trustee to administer future cases.

The trustee must submit to independent audits conducted periodically at the direction of the United States Trustee. 11 U.S.C. § 1183(b)(1) (incorporating 11 U.S.C. § 704(a)(2)). The United States Trustee will conduct an audit at least every three years regarding the cases and bank accounts administered by the trustee. The frequency of these audits is consistent with the frequency of audits conducted for other trustees appointed and supervised by the United States Trustee under other chapters.[27]

The audit is designed to determine the sufficiency of internal controls over estate accounts, the accuracy of the trustee's reporting to the United States Trustee, and the trustee's compliance with the United States Trustee's practices and procedures. Audits are the starting point for determining the adequacy of the trustee's financial management, internal control procedures, and organizational support. Audit firms are selected by the Office of Oversight, and the expense of the audit is paid from the United States Trustee Program's funds. The scope of the audit and the audit procedures are further described in the Subchapter V Trustee Handbook.

At the conclusion of the audit, the auditor will issue a report with findings. The trustee is required to satisfactorily respond to any noted deficiencies or inadequate findings, and to take corrective action as necessary or appropriate. The United States Trustee must report the trustee's failure to satisfactorily respond to the audit findings or take appropriate corrective action to the Assistant Director for Oversight and the Deputy Director for Field Operations, with a recommendation as to the appropriate response or enforcement action.

When an audit contains, in the judgment of the United States Trustee, serious findings, the United States Trustee may make a follow-up visit to the trustee's office to verify subsequent corrective actions and compliance. A follow-up visit also may be appropriate based on the auditor's disclosure of material weaknesses in internal controls or issuance of a qualified opinion, adverse opinion or disclaimer of opinion. Resolution of serious findings and audit deficiencies is an integral component of the United States Trustee's effective supervision of trustees. Failure by a trustee to implement necessary changes will result in appropriate action by the United States Trustee.

In those years in which no independent audit is performed, the United States Trustee may, but is not required, to conduct an office visit of the trustee. The scope of the office visit generally is more limited than an audit and largely dictated by areas of the trustee's past performance, if any, that may warrant further review. The trustee will be expected to satisfactorily address and resolve any performance issues or problems that are detected in connection with these office visits. The trustee's failure to implement any necessary changes may

[27]Chapter 7 trustees and chapter 12 standing trustees are audited every 3 to 4 years. Manual 2-2.7, 4-4.1. Standing chapter 13 trustees are audited annually. Manual 4-4.1.

result in appropriate remedial action by the United States Trustee.

In addition to audits and field office visits, the United States Trustee will evaluate the trustees and their performance on a periodic basis as part of the United States Trustee's ongoing supervisory responsibility. As part of these evaluations, the United States Trustee will review and evaluate the trustee's case administration, success rate in negotiating consensual plans, performance in making any plan disbursements, banking and bonding practices, professional conduct, and cooperation with the United States Trustee, among other review areas.

Standing trustees will be formally evaluated at least biennially. These evaluations will be documented in a formal written report, as further described in the Subchapter V Trustee Handbook.

Issues relating to the trustee's performance may result in remedial actions by the United States Trustee. For a standing trustee, this might include the termination of future case assignments. Because case-by-case trustees are appointed at the sole discretion of the United States Trustee, they should have no expectation of any future case assignments, regardless of the results of any particular audits or performance reviews.

3-17.16.6 Enforcement Actions Against Subchapter V Trustees

The United States Trustee's supervision of subchapter V trustees necessarily includes bringing actions in the bankruptcy court when performance problems or issues arise. Among others, enforcement actions in a specific case may include an objection to the trustee's final report and account, an objection to the trustee's requested compensation, requests for turnover of books and records, or an action to recover unauthorized expenses or compensation. These case-specific enforcement actions are prosecuted in the bankruptcy cases in which the trustee was appointed by the United States Trustee. The United States Trustee will make a concerted effort to resolve disputes consensually with the trustees, when appropriate, but final outcomes may be determined by the court when these efforts are unsuccessful or unavailable, or when a consensual resolution otherwise requires court approval.

If the United States Trustee has reason to believe that the trustee has engaged in conduct during the administration of a case that has resulted in harm to the estate, the debtor, creditors or other parties in interest, the United States Trustee also may commence a recovery action against the trustee to remedy such harms. This may include filing suit against the trustee and the trustee's surety in appropriate cases. The outcomes of these actions likewise are adjudicated by the bankruptcy court.

The United States Trustee also may move to remove the trustee from any or all assigned cases for "cause." 11 U.S.C. § 324(a). "Cause" is not defined in the Bankruptcy Code, but it may include the trustee's failure to properly administer cases, including the failure to comply with reporting obligations; discovery of fraud or embezzlement; mismanagement; or other misconduct or unsatisfactory

performance by the trustee. Whenever the court grants a motion to remove a trustee, the trustee is removed from all other cases in which the trustee is serving, unless the court orders otherwise. 11 U.S.C. § 324(b).

In addition, if the trustee has engaged in criminal misconduct, the United States Trustee may refer the matter to the appropriate law enforcement authorities for further investigation. 18 U.S.C. §§ 152-158; 28 U.S.C. § 586(a)(3)(F).

EXHIBIT O

Archives
U.S. Department of Justice

BLOG POST

The Future of the USTP's CRO "Protocol"

Saturday, September 1, 2018

Courtesy of Clifford J. White III, Director, EOUST, William K. Harrington, U.S. Trustee for Regions 1 and 2, and Nan Roberts Eitel, Associate General Counsel for Chapter 11 Practice, EOUST.

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Seventeen years ago, the United States Trustee Program (USTP) entered into settlement agreements regarding the terms for the retention of firms providing Chief Restructuring Officers (CROs) and other staff to assist debtors-in-possession (DIPs) with their chapter 11 duties. These settlements, which have come to be known as the "J. Alix Protocol" (protocol) after the firm involved, apply the conflict of interest provisions of the Bankruptcy Code to the hiring of CROs who are charged with mixed professional and business management duties. Courts have approved hundreds of these settlements, which allow employment under § 363(b) (use of estate property outside the ordinary course of business), while applying the relevant conflict protections of § 327(a) (employment of professionals). These settlements have brought predictability and consistency to CRO engagements. Nonetheless, after almost two decades during which the complexity of bankruptcy reorganizations and CRO industry practices have changed significantly, the USTP began outreach to stakeholders more than a year ago to discuss how to update the protocol without disturbing its essential features. While that process unfolds, the USTP will continue to follow the protocol and to object to applications that do not comply with it.

Background

In 2001 in the cases of *In re Safety-Kleen Corp.*[Footnote 1] and *In re Harnischfeger Industries, Inc.*,[Footnote 2] bankruptcy courts approved the USTP's settlements of its objections to the

DIPs' applications to retain a CRO and the CRO's firm as a restructuring advisor. These cases provided a template for USTP agreements on the employment of CROs that allowed the CROs' employment under § 363 and applied § 327(a)'s relevant conflict protections, such as the bar on a professional's service as a director. CROs, which are hybrids with professional responsibilities covered by § 327(a) and executive functions covered by § 363, did not exist 40 years ago when the Code was adopted. Although DIPs retain authority to appoint *traditional* corporate officers and *salaried* professionals without court approval,[Footnote 3] the hybrid nature of the CRO's engagement makes them neither fish nor fowl or, perhaps more accurately, both fish and fowl. CROs are not wholly a traditional corporate officer no matter how traditional many of their duties may be, and a DIP's decision to hire a CRO is by definition outside the ordinary course of business.[Footnote 4]

In settling, the USTP recognized the dual nature of the engagements, the litigation risk arising from a CRO's legally uncertain status under a Bankruptcy Code that never contemplated their existence, and the debtors' legitimate need for CRO services at a time of crisis. The USTP's goal was two-fold: (1) to take a principled approach in harmonizing the applicable Code provisions; [Footnote 5] and (2) to provide notice of the USTP's litigating position on this complex issue.

As the Supreme Court has stated many times, statutory interpretation is a "holistic" endeavor, [Footnote 6] which should avoid rendering other statutory provisions unnecessary and should avoid interpreting them inconsistently with the policy of another provision.[Footnote 7] Statutory construction requires reading "the statutes to give effect to each if we can do so while preserving their sense and purpose."[Footnote 8] Consistent with these canons, the protocol gives the fullest effect to all of the pertinent Code provisions, including § 363(b) and § 327(a).

The protocol has no force of law. It merely telegraphs to the bankruptcy community how the USTP interprets and will apply the law in carrying out its statutory duty to review applications to employ. Even though a few courts have criticized the protocol as too accommodating to the CRO industry,[Footnote 9] most courts and the CRO firms have widely accepted and followed the protocol. The USTP therefore intends to continue to follow the protocol and to enforce it consistently. Likewise, if proposed CROs deviate from the protocol, the USTP will continue to object to their employment applications under § 327.

Key Provisions of the CRO Protocol

The key ethical and disclosure components of the protocol can be summarized as follows:

- The protocol incorporates § 327(a)'s and § 101(14)'s prohibition on serving, or having served within two years, on a debtor's board. This is important because the two-year ban is a bright-line rule set forth in statute. Directors, not officers, are vested with ultimate management authority and owe a duty of loyalty to the corporation. A board must be

independent of the CRO to prevent actual or apparent conflicts of interest, which are key aspects of § 327(a). For example, if the CRO serves on the board while that same board decides to retain the CRO's firm, this insider transaction presents a conflict of interest.

- The protocol incorporates § 327(a)'s conflict of interest rules to bar those with an actual conflict of interest from being retained. The protocol also avoids conflicts of interest by preventing the CRO from managing the engagement to the financial benefit of the CRO's firm. It does so by establishing the so-called "one hat rule" — allowing the professional to serve in only one capacity, such as CRO, crisis manager, financial adviser, claims agent, or investor. Similarly, it also bans the CRO's firm from investing in the DIP for two years after the engagement concludes.
- The protocol incorporates the disclosure requirements governing a § 327(a) application by requiring an affidavit setting forth connections with parties and professionals. These disclosures are analogous to those required under Fed. R. Bankr. P. 2014. Disclosure and transparency are key to evaluating potential conflicts of interest and enhancing public confidence in the integrity of the system.
- The protocol requires disclosure of staffing and compensation, as well as court review of compensation under a "reasonableness" standard, which is analogous to the review of compensation of professionals employed under § 327(a). Approval of retention under § 363 alone would deprive the court and the parties of their critical role in protecting the estate by evaluating the justifications for the fees and other payments made to key players who are employed to guide the debtor company through the bankruptcy process.

The USTP Consistently Follows the Protocol

The USTP widely disseminated and posted the protocol, as well as gave notice that the USTP would object under § 327 to any CRO employment application that failed to comply with every component of the protocol.[Footnote 10] As stated in the USTP Manual posted on our website, "if the debtor or crisis manager rejects any term of the *Jay Alix Protocol*, the United States Trustee retains the right to object to all issues regarding the crisis manager's employment, including the request to be retained under section 363 rather than section 327."[Footnote 11] It is fair to say that the USTP's reserved § 327 objection for violations of the protocol is as much a part of the protocol itself as are the conflict and disclosure provisions.

The USTP has occasionally, but rarely, been forced to object to CRO retentions under § 327. [Footnote 12] More commonly, the USTP resolves these objections once the CRO comes into compliance with the protocol or the debtor withdraws its application if compliance is not possible. The relative absence of CRO retention litigation over the last 17 years is a testament both to the protocol's widespread acceptance and to the CRO firms' adherence to it.

Just as the USTP seeks to bring integrity and efficiency to the bankruptcy system, it likewise seeks to bring predictability and stability through consistent litigating positions. Any major

changes in the jurisprudence governing CRO retentions would create uncertainty and inefficiency for all parties, the court, and the USTP.

One recent court decision calls into question the future viability of the protocol and may reopen previously settled questions about CRO retentions going forward. In *Nine West*, the debtors sought to retain a restructuring firm to provide an interim CEO and to retain the firm itself to provide additional restructuring services.[Footnote 13] The CEO had served on one debtor's board of directors for several years and resigned only once the bankruptcy filing was imminent. Thus, given the failure to comply with the protocol's sine qua non of an independent board, the USTP objected to the retention under § 327.[Footnote 14]
The *Nine West* court seemingly approved of the protocol and its ethical protections, noting that "[r]equiring parties to comply with the Protocol has served as a way to avoid conflicts of interest."[Footnote 15] But in overruling the USTP's § 327 objection, the court applied neither § 327 nor the protocol and instead ruled that "nothing precludes the Debtors from relying on section 363(b) to seek authorization for the retention of [the restructuring firm and CEO]."[Footnote 16]

If case law develops that § 363 is the sole hurdle for CRO applicants, then the protocol may become obsolete and other unintended consequences may follow. For example, because § 363 independently imposes no disclosure requirements or conflict of interest standards,[Footnote 17] the result could be little transparency and accountability for those arguably serving in the most critical role in the chapter 11 case. Furthermore, a "§ 363-only" rule renders future CRO applications susceptible to ad hoc standards, thereby depriving debtors and the CRO industry of the predictability and stability that the protocol affords. And if officers provided by restructuring firms are like any other corporate officers and are not subject to § 327's constraints incorporated in the protocol, then those officers are likely insiders for all purposes, including § 503(c)'s limits on insider compensation and bonuses for the firm.

Future of the Protocol

Like all policies and practices, the protocol is worthy of reevaluation from time to time. Indeed, the USTP has publicly stated that "[w]e have reached out to participants in the restructuring business and other stakeholders for information on how the Protocol should be updated to account for the facts of modern practice, while remaining faithful to the conflict of interest provisions of the Code."[Footnote 18] In our outreach to stakeholders, we have explained that in considering any changes to the protocol we will follow a process similar to that followed for the large case fee guidelines issued in 2013 acquire information, publish for comment (even though the Administrative Procedure Act does not apply), convene a public meeting, and issue an updated CRO protocol for final publication.

The USTP should be prudent and careful when considering whether to modify longstanding policy on which creditors, debtors, and professionals alike have relied. Thus, we are considering potential consequences as we deliberately reevaluate and study the protocol. For now and the foreseeable future, however, the USTP intends to continue to abide by the protocol and consistently enforce it as we have for almost two decades because we believe the protocol to be a legally-principled approach for employing CROs.

Conclusion

The USTP understands the valuable role that CROs play in business reorganizations. We developed the protocol as a workable framework for analyzing employment applications in a manner that faithfully follows the law and ensures that statutory safeguards against conflicts of interest are observed. With the growing complexity of the CRO industry, some modifications to the protocol may be appropriate. But it would be a mistake and contrary to statute to jettison the conflict and disclosure provisions of the protocol that govern all other professional retentions in chapter 11. The USTP stands ready to listen to stakeholders about updating the protocol in a way that does not violate statutory mandates. Unless and until changes are made to the protocol or law, however, the bankruptcy community can continue to rely upon the USTP to follow the protocol and to object to employment applications that deviate from its terms.

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[1] Case No. 00-2303 (Bankr. D. Del. 2000).

[2] Case No. 99-2171 (Bankr. D. Del. 1999).

[3] *See Jacobson v. AEG Capital Corp.,* 50 F.3d 1493, 1500 (9th Cir. 1995) (“directors still have the power to elect officers”) (quotation omitted); 11 U.S.C. § 327(b) (professionals regularly employed on salary are subject to § 327(b), not § 327(a)).

[4] Restructuring in bankruptcy can never be considered “ordinary course” for any business, and courts have approved the retention of restructuring professionals under § 363(b). *See, e.g.*, *In re Liberty Asset Management Corp.,* No. 16-13575 (Bankr. C.D. Cal. Jun. 9, 2016), Docket No. 94; *In re Interfaith Medical Center,* No. 12-48226 (Bankr. E.D.N.Y. Jan. 25, 2013), Docket No. 177; *In re Qualteq, Inc.,* No. 11-12572 (KJC) (Bankr. D. Del. Sept. 2, 2011), Docket No. 135; *In re Hartford Computer Hardware, Inc.,* No. 11-49744 (PSH) (Bankr. N.D. Ill. Apr. 12, 2012), Docket No. 270; *In re Colad Grp., Inc.*, 324 B.R. 208, 215 (Bankr. W.D.N.Y. 2005).

[5] Section 327(a)’s rigorous disinterestedness requirement makes any officer ineligible for professional employment notwithstanding § 363’s more deferential business judgment

standard. Indeed, it is this statutory conflict and the hybrid nature of CRO engagements that was the genesis for the protocol in 2001.

[6] *United Sav. Ass'n v. Timbers of Inwood Forest Assocs. Ltd.*, 484 U.S. 365, 371 (1988).

[7] *Ratzlaf v. United States*, 510 U.S. 135, 140 (1994); *Timbers of Inwood*, 484 U.S. at 371.

[8] *Matter of Spanish Peaks Holdings II LLC,* 872 F.3d 892, 899 (9th Cir. 2017) (quoting *Watt v. Alaska*, 451 U.S. 259 (1981)).

[9] *E.g., In re Mirant Corp.,* 354 B.R. 113, 127 n.29 (Bankr. N.D. Tex. 2006) ("The UST and other parties acquiesced in this method of retention [under § 363] (which was intended to avoid application to AP of the disinterestedness test of 11 U.S.C. § 101(14) due to AP's personnel serving as officers of Debtors). The court is not satisfied that use of Code § 363 is appropriate for such a purpose, but need not here reach that issue." *Id. Contra In re Ajubeo, LLC,* 2017 WL 5466655, *4 (Bankr. D. Colo. Sept. 27, 2017) (approving CRO's retention under § 363 and stating that the "Court believes it is enforcing the Code . . . ").

[10]
See https://www.justice.gov/ust/file/volume_3_chapter_11_case_administration.pdf/download (UST P Manual).

[11] *Id.* at 106-07.

[12] *See, e.g., In re Patriot National, Inc.* (Bankr. D. Del. 2018); *Ajubeo,* 2017 WL 5466655; *In re Adams Resources Exploration Corp.* (Bankr. D. Del. 2017); *In re The Adoni Group, Inc*. (Bankr. S.D.N.Y. 2014); *In re Revstone* (Bankr. D. Del. 2013).

[13] *In re Nine West Holdings, Inc.,* 2018 WL 3238695 (Bankr. S.D.N.Y. July 2, 2018).

[14] The USTP has never knowingly failed to object to a CRO's and his or her firm's retention when a firm member has served on a debtor's board. For example, in *In re Allen Systems Group* (Bankr. D. Del. 2015), one of the principals of the CRO's firm had served on the board pre-petition in violation of the protocol. The USTP filed an objection under § 327, and the firm withdrew its application because the conflict could not be remedied.

[15] *Nine West*, at *6. The court further recognized that the protocol is "designed to avoid the 'inherent conflict' between an advisor's duty to a debtor and its own business interests where the advisory firm serves both as a financial advisor retained pursuant to § 327 of the Bankruptcy Code and as a crisis manager with firm staff serving as officers of the debtor corporation." *Id.*

[16] *Id.* at *8.

[17] At least, not beyond what would be necessary to show a proper exercise of a DIP's business judgment as opposed to the more rigorous standards of § 327 imported into the protocol.

[18] *Director's Remarks Delivered at the 33rd Annual Bankruptcy and Restructuring Conference of the Association of Insolvency and Restructuring Advisors* (June 7, 2017), available at https://www.justice.gov/ust/speeches-testimony/remarks-director-33rd-annual-bankruptcy-and-restructuring-conference-association.

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