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UNITED STATES BANKRUPTCY COURT

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SOUTHERN DISTRICT OF NEW YORK

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In the Matter of:

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AVIANCA HOLDINGS S.A., et al.

Main Case No.

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Debtors and Reorganized Debtors.

20-11133-mg

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United States Bankruptcy Court

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One Bowling Green

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New York, New York

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January 25, 2023

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B E F O R E:

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HON. DAVID S. JONES

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U.S. BANKRUPTCY JUDGE

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ECRO: ELECTRONICALLY RECORDED



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2 Reorganized Debtors' Twenty-Fourth Omnibus Objection to Proofs  
3 of Claim

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6 Reorganized Debtors' Twenty-Fifth Omnibus Objection to Proofs  
7 of Claim

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9 Motion Filed by Burnham Sterling and Company LLC and Babcock &  
10 Brown Securities LLC to Compel Compliance with 11 U.S.C  
11 Sections 365(d)(5) and 503(b)

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BY: PETER M. FRIEDMAN, ESQ.  
MATTHEW P. KREMER, ESQ.

**AVIANCA HOLDINGS S.A.**

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1 P R O C E E D I N G S

2 THE COURT: Good morning, everyone. It's Judge Jones  
3 here for 10 a.m. calendar on the Avianca matter. We have your  
4 appearances formally, but since I'm covering for Judge Glenn  
5 solely for purposes of this proceeding, let me just -- and I  
6 haven't spoken to you all directly on this case. Let me ask  
7 just for the people who anticipate participating today to  
8 introduce themselves. So I'll just call names in the order  
9 that people's faces appear on the screen. Mr. Friedman can  
10 start us off.

11 MR. FRIEDMAN: Good morning, Your Honor. It's Peter  
12 Friedman from O'Melveny Myers on behalf of Burnham Sterling and  
13 Company.

14 THE COURT: Great, and nice to see you. So you're  
15 the -- are you going to be the lead for the initiators? You  
16 there, Mr. Friedman?

17 MR. FRIEDMAN: Yes, I am.

18 THE COURT: Okay.

19 MR. FRIEDMAN: I will be speaking on behalf of the  
20 initiators.

21 THE COURT: Okay. That's great. Let me also say  
22 lovely to see you. I'm going to do a little disclaimer  
23 explaining that I know Mr. Friedman from a prior life once I  
24 hear from everybody.

25 Ms. Dexter, are you appearing, also -- or go ahead.

**AVIANCA HOLDINGS S.A.**

6

1 MS. DEXTER: Yes, Your Honor. Erin Dexter from  
2 Milbank on behalf of Avianca and the reorganized Debtors. My  
3 co-counsel, Michael Holbein, will be taking lead for the  
4 reorganized debtors this morning.

5 THE COURT: Okay, great.

6 And so hello to you, Mr. -- well, both of you. Hi,  
7 Mr. Holbein.

8 MR. HOLBEIN: Morning.

9 THE COURT: And Mr. McCarthy?

10 MR. MCCARTHY: I'm Mr. Holbein's partner. He'll be  
11 taking the lead, Your Honor.

12 THE COURT: Okay. Great. And I see Mr. Schak.

13 MS. SCHAK: Good morning, Your Honor. I'm also from  
14 Milbank for the debtors. I'm in the restructuring group at  
15 Milbank, and I'm available if Your Honor has any questions  
16 about the general course or status of the bankruptcy case.

17 THE COURT: Okay, great. Thanks very much. So nice  
18 to see you all. Let me just say a thing or two at the outset.  
19 First, as I just mentioned, I worked closely with Mr. Friedman  
20 on the General Motors bankruptcy when I was an attorney for the  
21 government and he was in private practice, but providing  
22 invaluable assistance to the government in the car cases.

23 I've considered closely whether there's a conflict or  
24 appearance issue, and the answer is no, but partly to make that  
25 even more so, I just wanted to inform all participants of my

**AVIANCA HOLDINGS S.A.**

7

1 prior dealings with Mr. Friedman. We're going back over 10  
2 years now, so it's stale, although a vivid memory.

3 So having said that, let me also let you know the  
4 state of my preparation coming in and what I anticipate for  
5 today. So I find the key legal issue this turns on very  
6 interesting, and I've done quite thorough reading on that. I  
7 will tell you, I come in -- if I were to view this as a pure,  
8 isolated legal question of whether lease obligations, even that  
9 arose pre-petition, and even that are for services that  
10 occurred pre-prepetition, and even where the ultimate recipient  
11 is someone other than the lessor, I still have the current  
12 leaning that those fall within the plain terms and plain  
13 meaning of the governing part of the Bankruptcy Code so that  
14 the debtors are going to have a -- have to really persuade me  
15 why that's wrong and for example, why the Child World case say  
16 is correctly decided and overrides what I perceive to be the  
17 plain meaning of the statute.

18 So I try to not hide the ball on people. I'm sure  
19 that's an unwelcome first utterance for your judge to say, but  
20 that is what I'm thinking.

21 I do want to reality test the assumption on which the  
22 initiators are proceeding that what is at issue here can be  
23 fairly deemed lease obligations. And partly, I'd like to just  
24 emerge understanding from people the actual state of the facts.  
25 So where in documentation does the obligation to make payments

**AVIANCA HOLDINGS S.A.**

8

1 on account of the initiators' fees arise? To what extent is it  
2 directly in documents denoted leases? To what extent is it  
3 directly in documents that are incorporated in leases? If so,  
4 what's the incorporation wording in the lease itself or other  
5 basis asserted to deem it a lease obligation if it doesn't  
6 appear in the actual lease instrument?

7 So I'm looking for help on that. I will tell you, in  
8 preparation, unless I'm overlooking it, I don't think I got  
9 exhaustive documentation, which I'm actually grateful for. But  
10 I suspect you have pretty voluminous deal documents. But I'd  
11 like to either emerge with a clear answer to that based on  
12 representations at argument, or it's possible I'll need to  
13 actually eyeball something that I don't have, unless you alert  
14 me to something that I'm missing. I've seen the excerpts  
15 attached to I think it's the debtors' reply, and that's the  
16 documentation I focused on mainly.

17 Okay. So I think, with those main thoughts, let me  
18 turn it -- let's see. Let me let the lawyers get started. I  
19 guess each side is in a sense a movement. We have claim  
20 objections, and we have a motion by the initiators. I think it  
21 makes sense to start with the debtors first, and then we can  
22 hear from Mr. Friedman. That's a bit of a coin flip, but you  
23 filed your objections first. And also, I'm sort of identifying  
24 things I hope to hear from you about.

25 Oh, let me also say one disclaimer. You're welcome to



**AVIANCA HOLDINGS S.A.**

9

1 present whatever you like. My utterances to date have been to  
2 orient you to my thinking coming in so that you can tailor your  
3 remarks accordingly. But I am not in any way restricting what  
4 you have to say. Also, I don't have any particular time  
5 limitations today, although I don't want to just have this go  
6 on needlessly long, whatever that means. So that means you  
7 don't have to feel rushed, but don't feel, like, unpurposeful  
8 either, okay?

9 Oh, yeah. Mr. Friedman, go ahead.

10 MR. FRIEDMAN: Your Honor, I did want to introduce my  
11 colleague, Matthew Kremer, who's on the phone.

12 THE COURT: Okay.

13 MR. FRIEDMAN: I think Mr. Kremer actually can do a  
14 better job than I can on walking you through the very granular  
15 question you asked about the documentation.

16 THE COURT: Okay, great.

17 MR. FRIEDMAN: So if it's okay with you, we may tag  
18 team if that's permissible.

19 THE COURT: Yeah, that's fine. I will tell you I have  
20 no problem tag teaming. Just keep it orderly. Mr. Kremer's  
21 turned his video on. Nice to see you.

22 MR. KREMER: You as well.

23 THE COURT: Now you're forewarned, and you're welcome  
24 to do that. The same goes for the debtors' side if there's  
25 somebody other than the main speaker who's well-situated to

**AVIANCA HOLDINGS S.A.**

10

1 field something, I'm happy to hear from that person as well.

2 Okay. Let me turn it to Mr. Holbein, please.

3 MR. HOLBEIN: Thank you, Your Honor. Michael Holbein  
4 for reorganized debtors on these 24th and 25th omnibus claim  
5 objections. I want to step back based on what the Court is  
6 just announced is sort of his predisposition with regard to  
7 this issue, so and with the specific request to point to the  
8 documents because those are the same questions that I had. But  
9 I think we can actually step back and look at -- if we want to  
10 look at the first thing that was filed, we can look at the  
11 motion to compel payment that was filed by the claimants.

12 And it quotes one of the lease agreements. And there  
13 were four basic transactions governing 20 lanes with separate  
14 lease agreements. But I think that -- and I can be corrected  
15 by lead counsel on this. We're conflict counsel for this, and  
16 so our familiarity with it is only a little bit longer than  
17 Your Honor's. But the provision in question, it says that  
18 these obligations, these initiator fees, are upon execution of  
19 the lease unconditional obligations to pay.

20 And so unlike, say, other payments do under a lease or  
21 obligations do under a lease, which are generally contingent  
22 upon corresponding obligations on both sides, which is why 365,  
23 which talks about executory contracts, also talks about  
24 unexpired leases. It's not like that. These are fees that  
25 were -- according to the contracts as emphasized by the

AVIANCA HOLDINGS S.A.

11

1 claimants, these are fees that, to quote the contract here, and  
2 this is on 3, page 3 of their motion at document 2657, "The  
3 sublessee acknowledges that the initiator has already provided  
4 services prior to the delivery date and accordingly agrees the  
5 sublessee's obligation to pay the initiator fees here under are  
6 unconditional."

7 If that is not the arising of an obligation, I don't  
8 know what would be. The issue then becomes, when is that  
9 payment due? And I think that's where these cases can get  
10 confusing, because when you look at the factual scenarios  
11 presented by these courts, inevitably, you're going to end up  
12 with discussions of proration. You're going to end up with  
13 discussions of how obligations are accrued. Not the case here.

14 And so one can disagree with the conclusion of Child,  
15 disagree with the holding altogether, and still identify within  
16 Child World the framework, the policy framework, behind saying  
17 this thing was earned pre-petition. It was done, and the  
18 obligation to pay it isn't contingent on anything else  
19 happening. In fact, reading from the same motion, next  
20 paragraph quoting the lease agreement, "No consent or act is  
21 required by the lesser for the initiator to enforce its rights  
22 hereunder." So let's --

23 THE COURT: I'm sorry. I want to back -- this is  
24 helpful. Thank you. Let me back up, though, and ask a couple  
25 of framing questions to make sure I've got it right. Were the

**AVIANCA HOLDINGS S.A.**

12

1 initiators Avianca's agents or retained professionals,  
2 essentially, in some form? I think yes, right?

3 MR. HOLBEIN: They were brokers.

4 THE COURT: Yeah. So they were serving as brokers for  
5 the benefit of Avianca or at Avianca's behest to arrange leases  
6 for aircraft, right? So they're not brokers engaged by the  
7 lessors to go find me an airline. It's the reverse. They were  
8 retained by Avianca to go find us an airplane, correct?

9 MR. HOLBEIN: Correct.

10 THE COURT: Okay.

11 MR. HOLBEIN: And the documents are pretty clear that  
12 that's the obligation to run that way.

13 THE COURT: Right.

14 MR. HOLBEIN: For lessee to initiate. So --

15 THE COURT: Okay. So let's see. I think I'm  
16 tracking. Let me see if I had another question because that  
17 flows very nicely into what you just told me. And so the  
18 documentation typically is a contract that goes bilaterally,  
19 Avianca, initiator, but that is integrated with lease terms as  
20 to payment obligations, or -- well, let me just back up.  
21 Explain to me how those three players are knit together.

22 MR. HOLBEIN: Sure. I would say often, if not  
23 usually, these fees are paid at closing as part of the closing  
24 of the financing transaction. The incremental payment  
25 coinciding with rent is a departure from our understanding of

**AVIANCA HOLDINGS S.A.**

13

1 the norm and sort of takes on the form of financing. And I  
2 don't want to again get into another confusing issue of  
3 financing versus true lease. That's not what I mean. I just  
4 mean that you have an obligation that is fully -- like, we all  
5 know what it is. There's no question about how much it is and  
6 who owes it. We've just agreed that it'll get paid in  
7 increments over time.

8 And unlike, for example, rent that you -- because you  
9 could claim it's -- well, rent, you know what's it's going  
10 to -- you have a rent schedule. Yes, but that is conditioned  
11 upon enjoyment of use of the thing being rented among other  
12 things, right? And so here, that's not the case. This is  
13 done. Burnham has nothing. Burnham and Babcock have nothing  
14 to do but cash a check.

15 And so that's why it helps to look at Child World.  
16 You don't need to embrace Child World as the sort of the  
17 righteous characterization of the law, but you can look at it  
18 and say, yeah, when Congress was trying to fix this 503(d)(1)  
19 problem, this is what they meant. And Your Honor's familiarity  
20 has caused me to dive out right in the middle of my outline.

21 THE COURT: Okay.

22 MR. HOLBEIN: Stepping back a bit, there are very few  
23 cases that we're looking at here. We're looking at Child  
24 World. We have this Pudgie's case, which is kind of helpful,  
25 but maybe not. And then last night, claimant's counsel brought

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14

1 to our attention two unpublished decisions that they provided  
2 based on our reliance on Child World, which we cited December  
3 2nd.

4 THE COURT: Who are claimants? Who do you mean by  
5 claimants?

6 MR. HOLBEIN: The initiators. People who filed --

7 THE COURT: Okay.

8 MR. HOLBEIN: -- the claim that are seeking  
9 administrative expense status under 365.

10 THE COURT: Got it. Okay.

11 MR. HOLBEIN: (d)(3). So right, initiators, Burnham  
12 Babcock claimants. I'm sorry, I've thought of them as  
13 claimants just because I thought of this as simply omnibus  
14 objections.

15 THE COURT: Yeah. No, that's fine. I just wanted to  
16 make sure -- you know, I wanted to make sure I had it right.

17 MR. HOLBEIN: Yeah. Yes, Your Honor. So we're on the  
18 same page with that. Burnham and Babcock have brought to our  
19 attention, reorganized debtors' attention, two cases,  
20 unpublishes decisions. And so you know, we've had a chance to  
21 review them, and I think the Court will agree, only in as much  
22 as there is allowance of an administrative claim are they  
23 helpful or 365(d)(5) claim.

24 And again, we're skipping a step here. And I think  
25 the Court knows, but we're talking about (d)(5) because there

AVIANCA HOLDINGS S.A.

15

1 are cases on (d)(5) and not (d)(3) just because there aren't  
2 and they read the same.

3 THE COURT: Right.

4 MR. HOLBEIN: But --

5 THE COURT: Sorry, this is another item on my punch  
6 list. It seems that the case law treats or analyzes 365(d)(3)  
7 and (d)(5) identically, right? The wording is pretty -- the  
8 wording tracks, and you can apply case law for either of those  
9 sections to the other, right?

10 MR. HOLBEIN: For our purposes, for the --

11 THE COURT: Yeah.

12 MR. HOLBEIN: I mean, there may be a distinction that  
13 is not related to what we're talking about, but --

14 THE COURT: Okay.

15 MR. HOLBEIN: -- for our purposes, I think that those  
16 cases are very instructive. And they tend to hover in the  
17 bankruptcy court district court level, so not providing the  
18 clear guidance that a court could rely on. If I could, I'll  
19 give Your Honor the cites for those two cases.

20 THE COURT: Yeah, please do.

21 MR. HOLBEIN: And I don't know -- well, I could talk  
22 about them. Your Honor can break and read them.

23 THE COURT: Well, let me ask, is one of them Macey,  
24 by chance?

25 MR. HOLBEIN: It is.

**AVIANCA HOLDINGS S.A.**

16

1 THE COURT: Okay. Yeah, my clerk dug that up, and we  
2 were very excited about, and it's written by a jurist who went  
3 on to big things, then district Judge Sotomayor. So and I had  
4 already come to the statutory leaning that I described, so I  
5 was very excited to see she agreed. Anyway --

6 MR. HOLBEIN: Good. I'd love to talk about that.

7 THE COURT: Yes, please do. That'd be helpful. Tell  
8 me what the other cases is, though.

9 MR. HOLBEIN: The other case is called Urban Retail  
10 Properties v. Loews Cineplex. It is found -- I only have the  
11 Westlaw cite. The West Law cite is 2002 WL535479.

12 THE COURT: I'm sorry. 535479?

13 MR. HOLBEIN: That's it.

14 THE COURT: Okay, okay. What district?

15 MR. HOLBEIN: That is the Southern District of New  
16 York District Court.

17 THE COURT: Okay. Okay. So yeah, tell me what you  
18 want to tell me about these cases. I'm sure I'll be hearing  
19 about them from Mr. Friedman and --

20 MR. HOLBEIN: Sure, sure. So I think we start with  
21 the Macey's case. And what's interesting about that is that we  
22 have this sort of preamble of a discussion between counsel and  
23 the court regarding obligations under the Code under 503, under  
24 365, even the consequences, because there does seem to be some  
25 unfamiliarity with the bankruptcy process evidence there with



AVIANCA HOLDINGS S.A.

17

1 what happens if it's rejected? What happens if it's assumed  
2 inured to these taxes?

3 But what I think we can kind of stop our analysis with  
4 here is the court's conclusion, which is consistent with  
5 counsel's argument that there is no dispute that the obligation  
6 here to pay the tax does not arise until the taxing authority  
7 says it does. So there you had an acquisition in 1988, pre-  
8 petition. Post-petition, in 1992, California goes back, and  
9 based on that pre-petition event issues a different tax  
10 assessment.

11 The lease provides that that tax liability would be  
12 paid by the tenant, but it didn't exist until it was  
13 reassessed. As counsel for the landlord notes in that opinion,  
14 there was no obligation to pay until it was reassessed, and the  
15 reassessment occurred post-petition. So there would have --  
16 this is from that opinion at page 8, which is kind of before  
17 the opinion in the discourse There would have been no  
18 obligation. In fact, there would have been no way of even  
19 determining whether the State of California intended to make  
20 reassessment or how much that assessment might be, just not the  
21 facts of this case. We know what it is. We knew what it was  
22 pre-petition.

23 THE COURT: Right. You're telling me this to say that  
24 what the initiators have here is not a true -- well, is more  
25 pre-petition claim like than was the case in Macey's because in

AVIANCA HOLDINGS S.A.

18

1 Macey's, at least, it sprang into existence only after the  
2 petition date?

3 MR. HOLBEIN: Yes, and --

4 THE COURT: Okay.

5 MR. HOLBEIN: -- because that is a way to describe it.  
6 But for the purposes of the law, what's important is 365(d)  
7 says arise. It doesn't say do. It says arise. And so  
8 claimants have presented their argument as strict construction  
9 reading of the statute. Right? But in reality, we know when  
10 this claim arose. They tell us it was unconditional as of the  
11 execution of the document. So there it is. It's arisen; it's  
12 just not due yet.

13 This is a pre-petition liability. And I think it's a  
14 distraction. It's an interesting distraction, but it's still a  
15 distraction in Macey's is the focus on the definition of the  
16 term claim versus obligation. Counsel for the debtors --  
17 Babcock there, I think, was what it was -- tried to argue  
18 that -- Bullock (ph.) argued that obligation is just the other  
19 side of the coin to claim for debtor credit. Right? And the  
20 court didn't really have time for that.

21 But this was -- the Court was taking issue there.  
22 Judge Sotomayor was taking issue -- then Judge Sotomayor was  
23 taking issue with the Child's court's characterization of the  
24 obligation versus a claim. If you look at Child, what the  
25 court is doing is it's saying, no, we're looking at the

AVIANCA HOLDINGS S.A.

19

1 definition of a claim because we can say it doesn't have to be  
2 due. It still exists. It's a thing that has arisen.

3 And so this this distinction is really unnecessary  
4 one. They can quibble over claim or obligation. We're not, at  
5 least initially here, getting to the second prong of 365(d)(3),  
6 which is under obligations under a lease. We're at the first  
7 prong, obligations arising within or from -- first arising from  
8 60 days after the order for relief. So we're looking at that.  
9 When did it arise? Not whether it's a claim or an obligation  
10 and whether there's a difference. And interesting, but  
11 unnecessary, especially here when you have a situation where  
12 that obligation could not have arisen any time other than post-  
13 petition, as clearly stated by opposing counsel and is  
14 apparently even not disputed based on the court's holding.

15 So in my reading of Macey's, it's limited. It's  
16 another case that says maybe proration's not the right idea.  
17 Maybe there are facts and circumstances, and maybe policy would  
18 compel even a different outcome with different facts. And I  
19 think the judge is pretty clear about that.

20 THE COURT: So let me ask, though, say a future debtor  
21 generates an obligation to pay someone -- we'll call that  
22 someone an initiator -- in connection with -- sort of tied to a  
23 transaction or an arrangement that's being made that centers on  
24 a lease. So it's really a three-way negotiation, plus any  
25 financiers about these arrangements. And the future debtor

**AVIANCA HOLDINGS S.A.**

20

1 could pay the initiator up front in full, but says, you know  
2 what? For whatever reason, we want to pay you over time. And  
3 then maybe, you know, the debtor says this, and then maybe  
4 initiator says, fine, but I want to really lock it in as a  
5 lease obligation. And that gives me a bundle -- that gives me  
6 known predictable payout schedule, and it gives me some  
7 protections in the event you go bankrupt in the future because  
8 of 365(d)(5). So why isn't that a permissible thing to be  
9 done? And why isn't that what exists here?

10 MR. HOLBEIN: It places form over substance because  
11 under that situation, the obligations still arose when it rose.  
12 And I think, again, it's important there to remember where  
13 this -- we're elevating this claim, even above regular  
14 administrative expenses when we apply 365(d)(3). And so we're  
15 not saying, hey, creditor you don't get paid. We're just  
16 saying, hey, creditor, you get to stand in line with everybody  
17 else who relied on the credit worthiness of the debtor in  
18 making a financial decision. And as a result, you have an  
19 unsecured claim. Should have taken it up front, I guess. But  
20 the fact of the matter is, it's been --

21 THE COURT: Well, so that's -- yeah, I mean, I can say  
22 what you're trying to do is deprive them of the benefit of the  
23 bargaining negotiated, which is, okay, we won't take the money  
24 up front, but we're going to take it as lease payments, as part  
25 of the lease obligations because we're smart and well

AVIANCA HOLDINGS S.A.

21

1 represented, and we know that 365(d)(5) says lease obligations  
2 have to be paid in real time until and unless the lease is  
3 rejected. So what's the response to that?

4 MR. HOLBEIN: Respectfully, I would say if they were  
5 smart and well represented, the contract would say that these  
6 obligations arise each month. Right?

7 THE COURT: I'm sorry, arise each month?

8 MR. HOLBEIN: Obligations arise each month. I mean,  
9 if you want to track the statute, if you want to give a -- have  
10 a bulletproof entitlement to an administrative expense. But  
11 that's not what they say. They say unconditional. That's not  
12 a ton of wiggle room in unconditional. So yes, bankruptcy is a  
13 place where creditors don't often end up in the cherry position  
14 they thought they had negotiated. But the fact of the matter  
15 is that when -- and this is where it is important to look at  
16 the policy.

17 When we look at the policy behind provisions like  
18 (d)(3), it isn't to protect people who are trying to enhance  
19 what would otherwise be an unsecured debt into something  
20 better. It's to protect people who become unwitting partners  
21 with the debtor in post-petition letting of property or  
22 premises. And so you're still left with, when does this claim  
23 arise?

24 THE COURT: Got it. Yeah. Can I just -- can I circle  
25 back to my friend, the statute, here just to make sure? I

AVIANCA HOLDINGS S.A.

22

1 think the language you're -- I want to make sure I'm hearing  
2 you right. I think the part of 365(d)(5) that is your friend  
3 here or that you're steering me to is that the obligations of  
4 the debtor that fall within the statute are those first arising  
5 from or after 60 days after the order for relief. And you're  
6 telling me this was completely fully arisen prior to the  
7 petition, and therefore, it doesn't fall within that temporal  
8 period? Is that right?

9 MR. HOLBEIN: Right. Correct. It was --

10 THE COURT: Okay.

11 MR. HOLBEIN: -- by the terms of the agreement an  
12 unconditional obligation as of the execution of the agreement.  
13 Unconditional.

14 THE COURT: Okay.

15 MR. HOLBEIN: There were, you know.

16 THE COURT: So if I'm being a textualist, I'm going to  
17 decide what obligations of the debtor arising means temporally  
18 where the obligation was fully existing and unconditional for  
19 work that was completed, and yet the payment stream is forward-  
20 looking, right?

21 MR. HOLBEIN: Right. And I think that's where you'll  
22 find the distinction with the other case that they cite, the  
23 (indiscernible) --

24 THE COURT: Okay.

25 MR. HOLBEIN: -- case. That case involved the

**AVIANCA HOLDINGS S.A.**

23

1 construction of a theater or theaters in a shopping center that  
2 spanned the petition date. So it was a year contract, roughly,  
3 entered pre-petition that allowed for payment of one million  
4 dollars, and it is a lease payment of one million dollars in  
5 construction reimbursements upon completion, occupancy,  
6 whatever the triggers.

7 Those triggers undeniably occurred three months post-  
8 partition. Much of the work was performed three months post-  
9 petition. Much of it was also performed pre-petition. But the  
10 right to that payment, it wasn't due. It arose upon  
11 completion. If they don't get to completion, they don't have a  
12 right to payment, at least under the lease, if they have a  
13 quantum meruit claim. But under the lease, that right to  
14 payment did not arise until that completion, which occurred  
15 post-petition.

16 THE COURT: Okay. Can I ask you a -- I always  
17 interrupt people by asking if I can ask something. I know I  
18 can ask you something. I will now ask you the question. Is it  
19 fair to characterize the payment obligations of debtor to  
20 initiators as required by the leases?

21 MR. HOLBEIN: Yes.

22 THE COURT: Okay. That is extremely helpful, and I'm  
23 grateful for your answer. I think your arguments aren't  
24 challenging that, but you just spared me a lot of agonizing  
25 parsing. So that's great, and that might take Mr. Kremer off

AVIANCA HOLDINGS S.A.

24

1 the hook when the initiators' turn comes, too, but we'll see.

2 Okay. So thank you.

3 So what I'm really thinking about is, does the fact  
4 that the work was complete pre-petition, the obligation was  
5 locked in by documents signed as being -- I think you said  
6 unconditional was the word, and the fact that that obligation  
7 had fully arisen pre-petition in the sense that it was locked  
8 in and due to be paid, albeit subject to a lease-tied rent  
9 delivery schedule that spans into the post-petition period,  
10 right?

11 MR. HOLBEIN: That's correct.

12 THE COURT: Okay, got it. And let me ask also -- I  
13 think for purposes of analyzing this motion, I want to make  
14 sure there's not a dispute on what period is covered. So I  
15 think it's clear that if there now has been or ever in the  
16 future is a rejection or an assumption, that'll terminate the  
17 running. And we're looking at obligations to -- the payment  
18 obligations to begin starting, I guess, 60 days after the  
19 petition date, right?

20 MR. HOLBEIN: That's correct. And there are  
21 presentations.

22 THE COURT: Okay, okay. So if you can live with it  
23 and the initiators can, I would love to just write a decision  
24 that just defines the disputed asserted payment obligations as  
25 being those scheduled to be paid during that time window, and



**AVIANCA HOLDINGS S.A.**

25

1 the parties will be able to work out what that translates to, I  
2 hope.

3 Mr. Friedman's nodding. That's great.

4 Is that workable, Mr. Holbein?

5 MR. HOLBEIN: I think so, yes.

6 MR. FRIEDMAN: Your Honor, we -- it's Peter Friedman.  
7 We would agree to meet and confer with Mr. Holbein and you  
8 know, in good faith, if that is the way the Court works things  
9 out.

10 THE COURT: Okay. And it may -- obviously, you won't  
11 have to if I rule for Avianca because then the answer --

12 MR. FRIEDMAN: Right.

13 THE COURT: -- will be zero. So okay, so that's all  
14 helpful.

15 So. Mr. Holbein, I may be bumping you off things you  
16 affirmatively wanted to say while I'm going through my punch  
17 list. Let me say on the claim objection piece, it seems to me  
18 it's undisputed that the initiators are going to be okay with  
19 your view that the pre-petition claim portion is unsecured, not  
20 properly secured, and should be classified. And I'm persuaded  
21 by that until and unless I'm told otherwise. I think that's  
22 conceded.

23 And then the other piece is your effort to clean up  
24 duplicative claims. I think is agreed to. I think the  
25 initiators' response didn't mention two specific claim numbers.

AVIANCA HOLDINGS S.A.

26

1 They didn't mention -- I'm going to just seek to pin that down.  
2 But I'll assume -- in principle, I'm fine with both those  
3 things. Okay?

4 MR. HOLBEIN: Correct. I actually emailed initiator  
5 counsel yesterday about the two unmentioned, and they confirmed  
6 that those were, in fact, disallowed as duplicative. So we're  
7 really --

8 THE COURT: Okay.

9 MR. HOLBEIN: -- have claims in dispute, 4038 and  
10 4033.

11 THE COURT: Okay, great. And while I've got you -- I  
12 mean, while we're on this point, yeah, from my preparation, I  
13 think the two that -- I'm just going to put their numbers on  
14 the transcript. The two that have now been confirmed as not in  
15 dispute are 4035 and 4037. Both are agreed to be duplicative.  
16 Do I have that, right?

17 MR. HOLBEIN: Yes, yes, Your Honor. Duplicative of --

18 THE COURT: Right?

19 MR. HOLBEIN: -- 4033.

20 THE COURT: Okay. So that that's helpful. Let's see.  
21 There's another argument you raised that I didn't find that  
22 compelling, honestly, but I want to give you a chance to speak  
23 to it, and that is the effect of the stipulation regarding the  
24 claims to the extent that's a game changer. Do you want to say  
25 anything about that?

**AVIANCA HOLDINGS S.A.**

27

1 MR. HOLBEIN: I don't know that it's necessarily a  
2 game changer, more that it adds flavor to the equities portions  
3 of this to the extent that bankruptcy courts as courts of  
4 equity are concerned with fair treatment of parties and  
5 delivering the benefit of the bargain, et cetera. You have  
6 these renegotiated. They knew about it. They didn't object.  
7 They weren't a party to it, but they didn't say anything. And  
8 it wasn't, in fact, until a few days before the deadline to  
9 object to claims that we even see this issue rise. So I --

10 THE COURT: Yeah, I got it. Can I ask -- and I know  
11 you're not leading with this, but it does strike me that the  
12 stipulation didn't purport to eliminate whatever obligation  
13 existed as to the initiator, so I don't see why they would have  
14 objected.

15 MR. HOLBEIN: And that goes to your very first  
16 question to me, which was, where do the obligations run? Do  
17 they run from the lessee to the initiator -- the lessor to the  
18 initiator? And they do. These are direct obligations of the  
19 lessee to the initiator. And so I understand the Court's  
20 position on that.

21 THE COURT: Okay, got it. That's helpful. All right.  
22 So I think that I have covered all my punch list of things I  
23 wanted to raise with you. And I have not let you go through  
24 whatever orderly progression you wanted necessarily. So let me  
25 ask you to -- or give you a chance to pause, reflect, and see

**AVIANCA HOLDINGS S.A.**

28

1 if there's anything else you want to emphasize. I think you've  
2 done a great job, and it's been a very good discussion,  
3 helpfully focusing me on the time of arising of the obligation.

4 MR. HOLBEIN: Right. If I have -- my closing thought  
5 is that there's a lot of noise around this issue that doesn't  
6 relate to the issue in this case, the facts of this case. And  
7 so there are infinite permutations of how these obligations  
8 accrue, come due, whether you prorate. And so often, in the  
9 opinions that I've read on this, the court will drift into  
10 general generalities and discussions of generalities when that  
11 generality is really more suited to the type of obligation  
12 before it. And then when you step away and try to insert  
13 another obligation, it just doesn't make sense.

14 So I would just caution against sort of the sweeping  
15 language in some of the -- applying some of the sweeping  
16 language in some of these cases in light of the larger sort of  
17 more 10,000-foot view of what was being accomplished here. And  
18 then in the context of this, is this really who Congress meant  
19 to protect?

20 We're not saying that they don't get paid. We're not  
21 saying that they go to jail. We're not saying that they've  
22 committed some unforgivable sin. We're just saying, hey, you  
23 don't get this really prime treatment that we've kind of  
24 reserved for people whose (sic) involuntarily have their neck  
25 on the line so that we can reorganize a debtor.

**AVIANCA HOLDINGS S.A.**

29

1 I would encourage the Court to look past what I see is  
2 noise in those issues that are relevant in other contexts, but  
3 just aren't relevant here based on the fact as embodied in the  
4 agreement that we're arguing here.

5 THE COURT: Okay. I got it. Let me try to give you a  
6 takeaway statement and see if it's partly -- it's a mash-up of  
7 encapsulating my own thinking and trying to characterize yours.  
8 So and see if you think this is a fair assessment. So I think  
9 we have a situation where Avianca retained the services or  
10 somehow got the services of the initiators in a commercial  
11 agreement for which they owed the initiators the -- the  
12 retention was pre-petition. The service was pre-petition. The  
13 payment obligation was entered into literally in or else in  
14 conjunction with the leases in a way that fairly read is now a  
15 term of the leases requiring a future-looking payment stream  
16 from Avianca to or for the benefit of the initiators. And the  
17 question --

18 I do think those are therefore fairly described as  
19 obligations of the debtor under a lease. But the real question  
20 is, are they arising in that relevant period for 365(d)(5),  
21 which is starting 60 days after the petition date and running  
22 through assumption or rejection?

23 And you've given me a lot to think about, well, all of  
24 the cases really tend to be for matters that were not  
25 comparably, I'll say, in the can colloquially before the

AVIANCA HOLDINGS S.A.

30

1 petition date and that this is different. So do I have that --  
2 is that a fair statement of what I have to figure out?

3 MR. HOLBEIN: It is. And I think that because of  
4 that, it necessitates that the Court parse some of the "when  
5 due" language that you'll see because it doesn't make sense in  
6 this context.

7 THE COURT: Got it. Okay. Thanks very much. I think  
8 we've covered what you wanted to, and you look reasonably  
9 satisfied. So let me turn to Mr. Friedman. Thanks very much  
10 for your argument.

11 MR. FRIEDMAN: Good morning, Your Honor. Is Peter  
12 Friedman from O'Melveny Myers. I wanted to just start one  
13 quick point on the stipulation issue, which is if you look  
14 at -- I think the natural conclusion has to be it can't  
15 affect -- it could not have affected us and that the debtors  
16 knew that because if you look at docket number 2699-4, which is  
17 Exhibit D to the reply brief, and you look on -- it's page 9 of  
18 14 of what was submitted and at the bottom says page 43, the  
19 very top paragraph, which I think is probably -- it's not a  
20 full paragraph on that page, but it's paragraph G. Says you  
21 can do a bunch of things about amending the lease agreements  
22 provided that no such amendment may reduce, terminate, or amend  
23 the initiators' rights under this agreement or guarantee.

24 So I think it was obvious from the relevant  
25 documentation that without the initiators being a party to any

**AVIANCA HOLDINGS S.A.**

31

1 agreement, whatever they did between and among themselves  
2 couldn't change the obligation owed to the initiator. And so I  
3 think for that reason, it's just -- it doesn't make sense to  
4 interpret that second stipulation as affecting the rights of  
5 our clients.

6           So Your Honor, there are a few things that I thought  
7 were important to address about, so what does this statute  
8 mean, and what is the procedural posture? It is true that we  
9 filed claims, but we also, as you noted, filed a motion to  
10 compel because that's really what 3605(d)(5) is about. It's  
11 actually not even about giving claims to a creditor. It's  
12 about timely performance by the debtor of its obligation where  
13 a debtor decides to not reject or assume within a specified  
14 time period.

15           Remember, the debtor had total control. If the debtor  
16 decided to reject within the first 60 days, end of story. We  
17 don't get into this statute. So if the debtor felt like  
18 somebody was getting an unearned benefit, it was completely  
19 within its power to make a determination. We don't want to pay  
20 that obligation. We don't want to have to continue to perform  
21 under this contract.

22           Because I think that's really what -- the statute is  
23 remarkably unilateral in that it imposes all burdens on the  
24 debtor and none on the counterparty. And we know that sort of  
25 for a bunch of different reasons. We know it because what the

AVIANCA HOLDINGS S.A.

32

1 statute says, we know it because what the statute doesn't say,  
2 and we know it because of what the statute strips out.

3 So it strips out 503(d)(1), right? It just says the  
4 creditor doesn't have to do anything. Creditor doesn't have to  
5 give anything of value. What else doesn't it say? Doesn't use  
6 words like "rent", which appears six other times in 365. Like,  
7 the word "rent" appears six times.

8 THE COURT: Yeah. Let me just jump in for a minute  
9 and say, Mr. Holbein, when we're done, I'm going to -- when Mr.  
10 Friedman's done, I'm going to come back to you. And I  
11 definitely want to hear about the point that 365(d)(5)  
12 eliminates any benefit to the estate requirement that exists  
13 for admin claims, that notwithstanding concept and how strongly  
14 that cuts against you.

15 Okay, sorry. Go ahead, Mr. Friedman, because I  
16 thought that was a good point you raised.

17 MR. FRIEDMAN: Yeah. So and then, you know, what does  
18 the statute say? It says all obligations. All means all. It  
19 says timely perform. And so I think the straightest line is  
20 to -- and the right way to look at statute, the least confusing  
21 way to look at the statute is the debtor has to perform the  
22 contract from everything 60 days forward.

23 THE COURT: Yeah.

24 MR. FRIEDMAN: If (indiscernible) she was --

25 THE COURT: I'm going to need law telling me what --



AVIANCA HOLDINGS S.A.

33

1 yeah, as you know from my upfront comments, I find that reading  
2 the statute pretty appealing. And I guess the question that I  
3 think Mr. Holbein has zeroed in on is, is this particular  
4 obligation one that arises? Well, I'll just -- let me reword  
5 just to literally quote the statute. One that is first arising  
6 from or after 60 days after the order for relief in this case,  
7 and why?

8 MR. FRIEDMAN: So okay, so I would say that actually,  
9 Macey's, read correctly, does mean that same thing because the  
10 obligation in that case to pay property taxes is in the  
11 contract. Right? It says that it's something they have to  
12 cover, and so that it later came due, and it had to be paid,  
13 and I think that's really what the focus of 365(d)(5) is.

14 Although I think Pudgie's gets way too into the weeds  
15 as opposed to a very straightforward application, I think that  
16 case also talks about the issue of mere fortuity on the one  
17 hand, that something could have come due at a certain time  
18 versus schedules of payments. So I think that also is  
19 supportive of our position.

20 So the Court is correct that we don't have a -- we did  
21 not burden you with all the documentation, and if counsel needs  
22 additional time to look at the lease, if you don't want to  
23 prejudice him, I happen to have the master lease. I think it's  
24 37511, right in front of me.

25 THE COURT: Can I say right now I don't know -- yeah,

AVIANCA HOLDINGS S.A.

34

1 actually, that's helpful in case anyone on the other side wants  
2 to look at it and refer to it. Right now, I think, based on  
3 the very helpful, and forthright, and candid in the best sense  
4 of the term sort of acknowledgments I've got, I think the  
5 issues have been defined without reference to the -- needing to  
6 get into the documentation further. But --

7 MR. FRIEDMAN: Yeah.

8 THE COURT: Unless you tell me otherwise.

9 MR. FRIEDMAN: What I would just say is, Your Honor,  
10 from our view, when you look at that, the language in section  
11 3C of that agreement is "lessee shall pay all supplemental  
12 rent" to whom -- or "to other such person to whom such money  
13 may be owed under the basic documents promptly as the same  
14 shall become due and owing". And then it has a schedule for  
15 when those payments are made.

16 And likewise again, if you look at Exhibit D that was  
17 provided, we look at -- it's page 7 of 14 of, again, docket  
18 number 2699-4 5.2 sub A. "On each additional rent payment due,  
19 the sublessee shall pay the initiator account by way of  
20 additional rent payment." The corresponding amount of debt fee  
21 is set out in schedule 3, and schedule 3 happens to be the last  
22 page of that exhibit. I think it's the -- sorry, it's pages 10  
23 through 12 of that exhibit, and it has a schedule --

24 THE COURT: Right.

25 MR. FRIEDMAN: -- when payments come do. And

**AVIANCA HOLDINGS S.A.**

35

1 that's --

2 THE COURT: Yeah, I'm looking at it. Let me just  
3 insert we're looking at pages 10 of 14 through 12 of 14 of ECF  
4 number 2699-4. And it's a chart with a schedule, a list of  
5 dates, and payment amounts due on each of those dates. Okay.

6 MR. FRIEDMAN: So Your Honor, absent some other  
7 permissible default under the agreement, we could not have  
8 said -- the debtor would not have been obligated to make that  
9 payment to us on any date in particular. Right? If there'd  
10 been a default, maybe it would have been accelerated. But the  
11 debtor had no -- the debtor was not obligated to cut us a  
12 check. And we think that's --

13 THE COURT: Right.

14 MR. FRIEDMAN: -- the right --

15 THE COURT: So in other words, you --

16 MR. FRIEDMAN: -- reading of the obligation.

17 THE COURT: Yeah. So what you've pointed me to is the  
18 negotiated as a term that's integrated with the lease of the  
19 payment obligations to the initiators on dates certain that  
20 span the post-petition period, right?

21 MR. FRIEDMAN: Right. And that's the way we think  
22 about it. And you know, Mr. Holbein makes a fair point that  
23 some leases are different. You have the apartment that maybe  
24 somebody leases, nonresidential real property. But under 360,  
25 you -- under 365(d)(3), since the lessor doesn't have to

**AVIANCA HOLDINGS S.A.**

36

1 provide any value to the estate, maybe the debtor's not even in  
2 the apartment under that circumstance or the building under  
3 that circumstance and is providing no value. And I think  
4 everybody would agree that under a lease where at least  
5 physical premises were leased, even if the debtor isn't in it,  
6 they have to make -- the debtor has to make the payments.  
7 That's the whole purpose of the statute if the debtors moved  
8 out. And the --

9 THE COURT: Right.

10 MR. FRIEDMAN: -- lessor has got the property, and for  
11 whatever reason, the debtor has chosen not to reject it.  
12 There's still an obligation to pay whether or not they're using  
13 the premises.

14 THE COURT: Okay.

15 MR. FRIEDMAN: And so that's the way we think about  
16 the case. And I think what Judge Sotomayor's opinion really  
17 counsels for is, what is the straight line? The Bankruptcy  
18 Code is littered with special priorities for different people  
19 who may not like it. Right? But utilities get benefits. 507  
20 has a whole series of ways in which certain people are  
21 preferred over others. That's Congress' choice.

22 And I think what Judge Sotomayor is saying, frankly,  
23 on the list of things that might be slightly offensive, this  
24 one isn't even close to the most offensive there. But kind of  
25 interestingly, right, the statute does have a provision to deal

AVIANCA HOLDINGS S.A.

37

1 with equities. Right?

2 THE COURT: Yeah.

3 MR. FRIEDMAN: Mr. Holbein said you should think about  
4 the equities. They didn't avail themselves of the equities.  
5 Right? They didn't come back and say, Your Honor, we can't  
6 restructure if we have to make this additional rent payment at  
7 the time. Right? And that would've, I think, been a -- I  
8 would have found it far-fetched in the context of multibillion  
9 restructuring. I think that would have been the time to raise  
10 equities.

11 If you're going to raise equities under a statute  
12 which talks about equities, I think you have to really make a  
13 showing of equities. And the Midway case says when you have to  
14 do it. You can't do it two years later, when this will  
15 literally have no effect on other creditor recoveries. I don't  
16 think anybody's saying that if we get our admin claim -- I want  
17 to be careful. If the debtor had to timely perform its claim,  
18 its obligations, that's going to hurt anybody else, so --

19 THE COURT: Got it. Yeah, let me just put in the  
20 record -- and partly to make sure I've got it right and also in  
21 case anyone ever reads a transcript. If I'm reading the  
22 schedule right that we just referenced, it calls for quarterly  
23 payments through the middle of -- well, through the first  
24 quarter of 2027, including debt and equity components, whatever  
25 that means, in the rough amount of 33-, \$34,000, a quarter. So

**AVIANCA HOLDINGS S.A.**

38

1 we're looking -- by my thumbnail calculation, that's something  
2 like 130,000 bucks a year or so. Do I have that right?

3 MR. FRIEDMAN: Per plan. I think --

4 THE COURT: Oh, okay. So there's a multiplier? Yeah,  
5 what's the dollar value of the dispute?

6 MR. FRIEDMAN: I think we think that it's -- we think  
7 it's --

8 Mr. Kremer --

9 MR. KREMER: Yeah, I can jump in here. So Your Honor,  
10 just for the record, we were previously advised that all  
11 aircrafts besides one had been rejected, all of the applicable  
12 leases. Debtors' counsel has since advised that that was  
13 actually mistaken, and there's three aircrafts that continue to  
14 not yet be rejected. And it's their expectation that those  
15 will be rejected by the end of this month.

16 So we recalculated our claim last night using those  
17 additional three aircrafts that continue to accrue. And  
18 roughly, the number in dispute is approximately 4.5 million  
19 dollars. However, that does include the first 60 days, which,  
20 as we've discussed for purposes of this dispute, we would --

21 THE COURT: Have to consider that.

22 MR. KREMER: Yeah, we would zero those out, and --

23 THE COURT: Okay.

24 MR. KREMER: So yes, approximately, I would say,  
25 probably four million lessees are up to 60 days, but again,

AVIANCA HOLDINGS S.A.

39

1 that's subject to actually running to that.

2 THE COURT: Okay. For the court reporter, who has to  
3 catch up to this after the fact, that was Matthew Kremer  
4 speaking, K-R-E-M-E-R.

5 And thank you. Okay. I don't think that affects my  
6 legal analysis, but I just -- it's helpful to understand the  
7 dynamics here.

8 Okay. So Mr. Friedman, is there any -- I think that  
9 the case law doesn't directly tell me or define what a  
10 statutory phrase arising from or after 60 days means, right? I  
11 mean, I think that's sort of implicit in the analysis of  
12 various courts, but I don't think there's just an existing  
13 canned case law driven definition of that, right?

14 MR. FRIEDMAN: No. The closest I can point you to, I  
15 think, is a line in one of the cases that we sent to Mr.  
16 Holbein last night, the Urban Property (sic) v. Loews Cineplex  
17 case, and it's the 2002 Westlaw 535479 SDNY case, and it's at 7  
18 and 7. And look, let me say this, Judge. I don't know whether  
19 this is what Judge Sweet meant when he said it because judges  
20 write lots of things, and lawyers place tremendous significance  
21 on words that -- who knows? But on pages 6 and 7 says, the  
22 words "obligation" and "arise" are significantly unambiguous on  
23 their face and indicate that obligations must be paid in full  
24 when the governing lease indicates the obligor is required to  
25 pay. And the way I read that is the obligation to pay here is

AVIANCA HOLDINGS S.A.

40

1 on the date that that the check has to be cut. Mr. Holbein --

2 THE COURT: Okay.

3 MR. FRIEDMAN: -- views it differently, but I think  
4 that's to me a clear indication of the when the payment has  
5 to -- the requirement of payment.

6 THE COURT: Okay. I got it. So let me -- just like I  
7 did to Mr. Holbein, let me ask you some of my other questions,  
8 even though I'm interrupting your intended flow, maybe. One is  
9 that your -- at least your proposed order in connection with  
10 your motion says direct the immediate payment of the amounts  
11 due. I think I would substitute the word "timely", but that's  
12 not your biggest concern.

13 But the other thing you say is and give us an  
14 administrative claim. And I don't see how -- I think that  
15 doesn't work, and I want to give you a chance to explain to me  
16 on what basis I should be doing that because it seems to me --  
17 and in fact, you're arguing that you don't need to satisfy the  
18 post-petition benefit to the state requirement to get a  
19 administrative claim under 503(b). And so I'm not sure on what  
20 basis I would be granting initiators an allowed administrative  
21 claim as opposed to simply directing the payment to occur.

22 MR. FRIEDMAN: So Your Honor, I think we -- a couple  
23 things. One is that the debtors assume that they will make the  
24 payments, but to the extent the payment isn't immediately made,  
25 I think having an administrative claim or some other payment



AVIANCA HOLDINGS S.A.

41

1 obligation is helpful. We did make an assertion under  
2 503(b)(1). Since I owe you a duty of candor, it's probably not  
3 our strongest argument.

4 THE COURT: Yeah, I mean, I'll just tell you I don't  
5 see how you've got a 503(d) satisfying admin claim. At this  
6 minute, I guess -- and it's maybe a little indirect to say, ah,  
7 but if I direct -- if they pay you as you wish under 365(d)(5)  
8 and then they fail to, ah, well, then you'll have sort of a  
9 springing admin claim later. I think that's the reality of the  
10 situation, though.

11 MR. FRIEDMAN: I think that's right, Your Honor. The  
12 other the other component is that there was a court order  
13 saying that we had to file proofs of claim in connection with  
14 lease rejections. And so we did not want to be in a  
15 position -- even though I actually believe we could have risked  
16 it and not filed one because of the way the statute is worded  
17 to say that the debtor has an obligation to compel. I did not  
18 want to not file proofs of claims.

19 THE COURT: No, I'm not troubled by the filing. I'm  
20 just thinking about what you're seeking here and whether it  
21 actually makes sense. What I've said is kind of where I would  
22 come out if I were to rule for you. And I just want to extract  
23 from you a word that you agree with my exchange with Mr.  
24 Holbein earlier that there's not a dispute as to the  
25 reclassification of the pre-petition component from secured to

**AVIANCA HOLDINGS S.A.**

42

1 unsecured and that there's not a dispute as to which elements  
2 are duplicative and therefore appropriately expunged. Is that  
3 correct?

4 MR. FRIEDMAN: Mr. Kremer's telling me that I can say  
5 yes, that is correct.

6 THE COURT: Okay. Great.

7 MR. FRIEDMAN: Yes.

8 THE COURT: I appreciate it, and that's just very  
9 helpful to have clarity on. Okay. All right, so now I have  
10 run through my punch list, running ahead of maybe where you  
11 want to be. Let me just give you a chance to make any other  
12 points you want. We may have covered all of your content as  
13 well, but I'll give you the shot.

14 MR. FRIEDMAN: No, Your Honor. I think everything's  
15 been covered, and I don't have anything further.

16 THE COURT: Okay, great.

17 MR. FRIEDMAN: Thank you.

18 THE COURT: Thank you for your arguments.

19 Mr. Holbein, let me hear from you by way of rebuttal,  
20 particularly on the question I flagged in the middle -- or  
21 early in Mr. Friedman's arguments.

22 MR. HOLBEIN: 503(1) issue?

23 THE COURT: Sure.

24 MR. HOLBEIN: Abandonment of that standard? I don't  
25 think it -- and I understand it. I agree with it, and I don't

AVIANCA HOLDINGS S.A.

43

1 think it changes the outcome for us because, again, we come  
2 back to this issue of when it arises whether or not it was  
3 necessary. We're not saying that it -- they don't get paid  
4 because it was unnecessary, although it was to the post-  
5 petition operations. The debtor, we're saying it doesn't get  
6 paid because it didn't arise.

7 And I think I would quibble with the claimant's  
8 counsel's reading of the Macey's case because it -- and it  
9 really isn't anything like it. It didn't just later come due.  
10 At the time they filed for bankruptcy, it didn't exist. Like,  
11 there would have been no way to demand payment. So it's just  
12 not on that issue on point. Whether you want to glean some  
13 guidance from the overall language is a different issue.

14 I think the -- I also want to clarify something I said  
15 earlier about the equities. What I meant was not the equities  
16 in favor of the debtor. I meant that if the claimants were to  
17 appeal to the Court's equities, it should consider the fact  
18 that they've remained silent for so long.

19 THE COURT: Okay.

20 MR. HOLBEIN: And then the excerpt from the Urban  
21 Properties cases run by counsel claimants was that the terms  
22 "obligations", "arise" is sufficiently unambiguous. That whole  
23 sentence actually says -- many courts have reasoned that the  
24 terms "obligation" and "arise" -- so although that -- that's  
25 not the whole right there. The Urban Developments or Urban

**AVIANCA HOLDINGS S.A.**

44

1 Retail case goes off also on the fact that that trigger, that  
2 the arising of the debt is the completion of the project.

3 So again, you don't have to disagree with the holding  
4 in Urban Retail to still say, look, this claim didn't arise. I  
5 think the most important thing to consider -- and what I hope  
6 is probably my closing thought on this is that if you step back  
7 and you look at what was being accomplished and why, you say,  
8 okay, here are entities or individuals who are forced to  
9 surrender something to the perspective reorganization of the  
10 debtor. And so we're going to accommodate that.

11 So where you're a lessor a personal property, you're  
12 without your thing while the debtor has it and uses it. If you  
13 are the lessor of a nonresidential real property, you are  
14 without your premises, and the debtor gets to figure out what  
15 it's going to do with it. Here, Burnham and Babcock aren't  
16 without anything, right? But what changed for them upon  
17 rejection? They don't get a thing back that they can then  
18 relet or --

19 THE COURT: Right. Well, they're going to tell me  
20 that what they're without is their negotiated, agreed-upon,  
21 robustly protected payment on a set schedule as a condition of  
22 the lease.

23 MR. HOLBEIN: But if that is the outcome, artful  
24 drafting has superseded the intent of the statute, and that is  
25 inconsistent with the intent because the intent is to protect

**AVIANCA HOLDINGS S.A.**

45

1 those people who are without. They're without their premises.  
2 They're without their property. Not to reward creditors on  
3 unsecured claims who bootstrap their claim to the timing of a  
4 lease.

5 THE COURT: Okay. Let me ask -- that is a point well  
6 taken that I'll consider. Not necessarily saying it carries  
7 the day, but I get it, and I definitely will process that.

8 Another basic background or question occurs to me that  
9 may or may not matter. So obviously, you're not paying the  
10 initiators amounts due, right, post-petition? Otherwise, we  
11 wouldn't be here. Is Avianca paying the actual lessors for use  
12 of the planes?

13 MR. HOLBEIN: There were stipulations regarding --

14 THE COURT: Yeah, there were modifications, right?

15 MR. HOLBEIN: Payment by use, power by the hour.  
16 There's an aviation term regarding how those payments were  
17 made. But it's my understanding that, yeah, and they were  
18 subsequently modified.

19 THE COURT: Okay. Got it. All right. Are you making  
20 any argument apart from your equity's point that you just  
21 raised based on earlier demand letters or prosecution of this  
22 issue by the initiators?

23 MR. HOLBEIN: To the extent that the initiators are  
24 requesting attorneys' fees, certainly, and that sort of  
25 allowing your cake to bake and get bigger doesn't seem to me

AVIANCA HOLDINGS S.A.

46

1 equitable. But I think it's more demonstrative of what the  
2 transaction was and inasmuch as that this isn't a party who's  
3 sitting there going, where is my tractor? Where is my retail  
4 space? I got it.

5 THE COURT: Right. I understand. Look, one way of  
6 looking at it is just they agreed to a payment schedule, and  
7 bummer for them. The obligor went bankrupt, and they, like any  
8 other person who's owed money by an obligor, even on a payment  
9 schedule, has an unsecured claim. Right? I mean, that's --  
10 and they can get paid. I don't know what the payout rate is on  
11 Avianca, but whatever. They'll get whatever they get, right?

12 MR. HOLBEIN: Yes, Your Honor. You have it. You have  
13 my position.

14 THE COURT: Okay. All right. Thanks. I think that  
15 closes it out.

16 MR. KREMER: Your Honor?

17 THE COURT: Mr. Friedman? Yeah, I was going to ask  
18 you if you have a burning need to say something more.

19 MR. FRIEDMAN: Just two --

20 THE COURT: Sure.

21 MR. FRIEDMAN: -- two very narrow points. One is just  
22 the statute says they have to timely perform again. It's a  
23 remarkable statute that imposes no obligation on the creditor.  
24 But even more, I don't fault Mr. Holbein because, as he said,  
25 he's been in this since, like, very recently. But I think the

**AVIANCA HOLDINGS S.A.**

47

1 Milbank lawyers on the phone would have to acknowledge we have  
2 been in a constant dialogue with them for the last almost two  
3 years about our claims and what would be -- and our desire --

4 THE COURT: Okay.

5 MR. FRIEDMAN: -- to be paid. I won't reveal any of  
6 those contents.

7 THE COURT: I'll just take --

8 MR. FRIEDMAN: But I can say it's ongoing.

9 THE COURT: Okay, thanks.

10 MR. FRIEDMAN: It's been ongoing.

11 THE COURT: What I'm going to absorb from this is that  
12 I'm not really going to draw any particular legal conclusions  
13 based on failure to prosecute or sitting on the hands or  
14 anything like that. And Mr. Friedman tells me that's not what  
15 they've been doing, and I tend to believe that. That's fine.

16 Let me ask the following question. I have hopes of  
17 deciding this very quickly. I'm going to reserve. But is  
18 there any particular practical need for a decision by a  
19 particular time? I'll ask Mr. Holbein first.

20 MR. HOLBEIN: Your Honor, I would have to defer to  
21 lead counsel on that.

22 THE COURT: Okay. Yeah, I'd like to know if there is.

23 MS. SCHAK: Benjamin Schak for Milbank, Your Honor,  
24 for the record. There's no hard-and-fast date, Your Honor. I  
25 will say, in order to marry it to the very, very final strokes

AVIANCA HOLDINGS S.A.

48

1 of claims resolution, I think we have this and perhaps four or  
2 five more buckets of claims.

3 One of those buckets is currently reserved by Judge  
4 Glenn, and the other few are either going to be settled or on  
5 for a hearing on February 8th. And pretty shortly after that,  
6 we do hope to make final distributions to all unsecured  
7 creditors, which because of how the plan works, it's sort of a  
8 POP plan. We have to know the entire unsecured claims space in  
9 order to make the final distribution.

10 THE COURT: Okay, got it. That's helpful. And my  
11 question really was for the debtors' side because the  
12 initiators just want to be paid sooner rather than later. So  
13 that's fine. I will reserve. I'm going to -- I've done a lot  
14 of work, as you can probably tell, on this. So I hope to be  
15 able to get something out fast. I have a number of big things  
16 sort of right around the corner. Basically, I am going to set  
17 myself the ambition of deciding something very quickly. And if  
18 I fail on that, you'll get pushed behind some other things that  
19 are going to be very insistent in demanding my time and  
20 attention. But I'll try to act faster than that. All right?

21 And if you check my local rules, I'll just tell you --  
22 it'll tell you you're welcome to nudge me any time you have a  
23 practical need for a decision. And particularly, I don't think  
24 this will be a risk, but if something been sitting dormant for  
25 60 days, you're welcome to ping me. You're also welcome to



**AVIANCA HOLDINGS S.A.**

49

1 ping me earlier if you develop a practical need. All right?

2 I think that covers this for today. Let me thank both  
3 sides for really excellent and very helpful arguments. I  
4 appreciate the forthrightness with which you both went about  
5 your tasks. As I said up front, it's very interesting issue,  
6 and I'll try to get you a sound and fast decision to the best  
7 of my ability. Thank you. Take care.

8 MR. HOLBEIN: Your Honor --

9 MR. FRIEDMAN: Thank you, Your Honor. Okay.

10 (Whereupon these proceedings were concluded)

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C E R T I F I C A T I O N

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I, JoAnna Sargent, certify that the foregoing transcript is a  
5 true and accurate record of the proceedings.

6

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*JoAnna Sargent*

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22

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24

25

January 25, 2023

\$	14:9,22;20:14; 21:10;40:14,19,20,25	almost (1) 47:2	appropriately (1) 42:2	6:20
\$34,000 (1) 37:25	advised (2) 38:10,12	although (5) 7:2;9:5;33:14;43:4, 24	approximately (2) 38:18,24	attorneys' (1) 45:24
A	affect (1) 30:15	altogether (1) 11:15	argue (1) 18:17	authority (1) 17:6
Abandonment (1) 42:24	affected (1) 30:15	always (1) 23:16	argued (1) 18:18	avail (1) 37:4
ability (1) 49:7	affecting (1) 31:4	ambition (1) 48:17	arguing (2) 29:4;40:17	available (1) 6:15
able (2) 25:1;48:15	affects (1) 39:5	amend (1) 30:22	argument (7) 8:12;17:5;18:8; 26:21;30:10;41:3; 45:20	Avianca (10) 5:3;6:2;12:5,8,19; 25:11;29:9,16;45:11; 46:11
above (1) 20:13	affirmatively (1) 25:16	amending (1) 30:21	arguments (4) 23:23;42:18,21; 49:3	Avianca's (2) 12:1,5
absent (1) 35:6	again (9) 13:2;14:24;20:12; 34:16,17;38:25;43:1; 44:3;46:22	amendment (1) 30:22	arise (15) 8:1;17:6;18:7,7; 19:9;21:6,7,8,23; 23:14;39:22;43:6,22, 24;44:4	aviation (1) 45:16
absorb (1) 47:11	against (2) 28:14;32:14	among (2) 13:11;31:1	arisen (5) 18:11;19:2,12; 22:6;24:7	away (1) 28:12
accelerated (1) 35:10	agents (1) 12:1	amount (2) 34:20;37:25	arises (2) 33:4;43:2	B
accommodate (1) 44:10	agonizing (1) 23:24	amounts (3) 35:5;40:10;45:10	arising (10) 11:7;19:7,7;22:4, 17;28:3;29:20;33:5; 39:10;44:2	Babcock (5) 13:13;14:12,18; 18:17;44:15
accomplished (2) 28:17;44:7	agree (5) 14:21;25:7;36:4; 41:23;42:25	analysis (3) 17:3;39:6,11	arose (4) 7:9;18:10;20:11; 23:10	back (14) 7:1;10:5,9;11:23, 24;12:20;13:22;17:8; 21:25;32:10;37:5; 43:2;44:6,17
according (1) 10:25	agreed (5) 13:6;16:5;25:24; 26:15;46:6	analyzes (1) 15:6	around (2) 28:5;48:16	background (1) 45:8
accordingly (2) 9:3;11:4	agreed-upon (1) 44:20	analyzing (1) 24:13	arrange (1) 12:5	bake (1) 45:25
account (2) 8:1;34:19	agreements (3) 10:12,14;30:21	announced (1) 10:6	arrangement (1) 19:23	ball (1) 7:18
accrue (2) 28:8;38:17	agrees (1) 11:4	anticipate (2) 5:7;7:4	arrangements (1) 19:25	bankrupt (2) 20:7;46:7
accrued (1) 11:13	ah (2) 41:6,8	apart (1) 45:20	artful (1) 44:23	bankruptcy (9) 6:16,20;7:13; 15:17;16:25;21:12; 27:3;36:17;43:10
acknowledge (1) 47:1	aircraft (1) 12:6	apartment (2) 35:23;36:2	asserted (2) 8:5;24:24	bargain (1) 27:5
acknowledges (1) 11:3	agreements (3) 10:12,14;30:21	apparently (1) 19:14	assertion (1) 41:1	bargaining (1) 20:23
acknowledgments (1) 34:4	agrees (1) 11:4	appeal (1) 43:17	assessment (3) 17:10,20;29:8	based (9) 8:11;10:5;14:2; 17:9;19:14;29:3; 34:2;45:21;47:13
acquisition (1) 17:7	ah (2) 41:6,8	appealing (1) 33:2	assistance (1) 6:22	basic (3) 10:13;34:13;45:8
act (2) 11:20;48:20	ahead (4) 5:25;9:9;32:15; 42:10	appear (2) 5:9;8:6	assume (3) 26:2;31:13;40:23	Basically (1) 48:16
actual (3) 7:24;8:6;45:11	aircraft (1) 12:6	appearance (1) 6:24	assumed (1) 17:1	basis (3) 8:5;40:16,20
actually (13) 8:9,13;9:13;10:9; 26:4;31:11;33:8; 34:1;38:13;39:1; 41:15,21;43:23	aircrafts (3) 38:11,13,17	appearances (1) 5:4	assumption (3) 7:21;24:16;29:22	become (2) 21:20;34:14
additional (5) 33:22;34:18,20; 37:6;38:17	airline (1) 12:7	appearing (1) 5:25	attached (1) 8:15	becomes (1) 11:8
address (1) 31:7	airplane (1) 12:8	appears (2) 32:6,7	attention (4) 14:1,19,19;48:20	begin (1) 24:18
adds (1) 27:2	albeit (1) 24:8	applicable (1) 38:11	attorney (1)	behalf (3)
admin (4) 32:13;37:16;41:5,9	alert (1) 8:13	application (1) 33:15		
administrative (8)	allowance (1) 14:22	apply (2) 15:8;20:14		
	allowed (2) 23:3;40:20	applying (1) 28:15		
	allowing (1) 45:25	appreciate (2) 42:8;49:4		

January 25, 2023

5:12,19;6:2 <b>behest (1)</b> 12:5 <b>behind (3)</b> 11:16;21:17;48:18 <b>benefit (7)</b> 12:5;20:22;27:5; 29:16;31:18;32:12; 40:18 <b>benefits (1)</b> 36:19 <b>Benjamin (1)</b> 47:23 <b>besides (1)</b> 38:11 <b>best (2)</b> 34:3;49:6 <b>better (2)</b> 9:14;21:20 <b>big (2)</b> 16:3;48:15 <b>bigger (1)</b> 45:25 <b>biggest (1)</b> 40:12 <b>bilaterally (1)</b> 12:18 <b>bit (3)</b> 8:22;10:16;13:22 <b>bootstrap (1)</b> 45:3 <b>both (6)</b> 6:6;10:22;26:2,15; 49:2,4 <b>bottom (1)</b> 30:18 <b>break (1)</b> 15:22 <b>brief (1)</b> 30:17 <b>brokers (3)</b> 12:3,4,6 <b>brought (2)</b> 13:25;14:18 <b>buckets (2)</b> 48:2,3 <b>bucks (1)</b> 38:2 <b>building (1)</b> 36:2 <b>bulletproof (1)</b> 21:10 <b>Bullock (1)</b> 18:18 <b>bummer (1)</b> 46:7 <b>bumping (1)</b> 25:15 <b>bunch (2)</b> 30:21;31:25 <b>bundle (1)</b> 20:5 <b>burden (1)</b>	33:21 <b>burdens (1)</b> 31:23 <b>Burnham (6)</b> 5:12;13:13,13; 14:11,18;44:15 <b>burning (1)</b> 46:18  <b>C</b>  <b>cake (1)</b> 45:25 <b>calculation (1)</b> 38:1 <b>calendar (1)</b> 5:3 <b>California (2)</b> 17:8,19 <b>call (2)</b> 5:8;19:21 <b>called (1)</b> 16:9 <b>calls (1)</b> 37:22 <b>came (1)</b> 33:12 <b>can (37)</b> 5:9;7:22;8:21;9:2, 13,14;10:9,10,14; 11:9,14;13:17;15:8, 22;17:3;19:1,4; 20:21;21:24,24; 23:16,17,18;24:22, 23;27:10;28:25; 29:25;30:21;33:25; 38:9;39:14;42:4; 44:17;46:10;47:8; 48:14 <b>candid (1)</b> 34:3 <b>candor (1)</b> 41:2 <b>canned (1)</b> 39:13 <b>car (1)</b> 6:22 <b>care (1)</b> 49:7 <b>careful (1)</b> 37:17 <b>carries (1)</b> 45:6 <b>case (31)</b> 5:6;6:16;7:15; 11:13;13:12,24;15:6, 8;16:9,21;17:21,25; 19:16;22:22,25,25; 28:6,6;33:6,10,16; 34:1;36:16;37:13,21; 39:9,13,17,17;43:8; 44:1 <b>cases (13)</b>	6:22;11:9;13:23; 14:19;15:1,16,19; 16:8,18;28:16;29:24; 39:15;43:21 <b>cash (1)</b> 13:14 <b>catch (1)</b> 39:3 <b>caused (1)</b> 13:20 <b>caution (1)</b> 28:14 <b>center (1)</b> 23:1 <b>centers (1)</b> 19:23 <b>certain (3)</b> 33:17;35:19;36:20 <b>certainly (1)</b> 45:24 <b>cetera (1)</b> 27:5 <b>challenging (1)</b> 23:24 <b>chance (6)</b> 14:20;15:24;26:22; 27:25;40:15;42:11 <b>change (1)</b> 31:2 <b>changed (1)</b> 44:16 <b>changer (2)</b> 26:24;27:2 <b>changes (1)</b> 43:1 <b>characterization (2)</b> 13:17;18:23 <b>characterize (2)</b> 23:19;29:7 <b>chart (1)</b> 35:4 <b>check (4)</b> 13:14;35:12;40:1; 48:21 <b>cherry (1)</b> 21:13 <b>Child (8)</b> 7:15;11:14,16; 13:15,16,23;14:2; 18:24 <b>Child's (1)</b> 18:23 <b>choice (1)</b> 36:21 <b>chosen (1)</b> 36:11 <b>Cineplex (2)</b> 16:10;39:16 <b>circle (1)</b> 21:24 <b>circumstance (2)</b> 36:2,3 <b>circumstances (1)</b>	19:17 <b>cite (3)</b> 16:11,11;22:22 <b>cited (1)</b> 14:2 <b>cites (1)</b> 15:19 <b>claim (34)</b> 8:19;10:4;13:9; 14:8,22,23;17:25; 18:10,16,19,24;19:1, 4,9;20:13,19;21:22; 23:13;25:17,19,25; 37:16,17;38:16; 40:14,19,21,25;41:5, 9,13;44:4;45:3;46:9 <b>claimants (9)</b> 10:11;11:1;14:4,5, 12,13;18:8;43:16,21 <b>claimant's (2)</b> 13:25;43:7 <b>claims (13)</b> 25:24;26:9,24; 27:9;31:9,11;32:13; 41:18;45:3;47:3; 48:1,2,8 <b>clarify (1)</b> 43:14 <b>clarity (1)</b> 42:9 <b>classified (1)</b> 25:20 <b>clean (1)</b> 25:23 <b>clear (6)</b> 8:11;12:11;15:18; 19:19;24:15;40:4 <b>clearly (1)</b> 19:13 <b>clerk (1)</b> 16:1 <b>clients (1)</b> 31:5 <b>close (1)</b> 36:24 <b>closely (2)</b> 6:19,23 <b>closes (1)</b> 46:15 <b>closest (1)</b> 39:14 <b>closing (4)</b> 12:23,23;28:4;44:6 <b>co-counsel (1)</b> 6:3 <b>Code (3)</b> 7:13;16:23;36:18 <b>coin (2)</b> 8:22;18:19 <b>coinciding (1)</b> 12:25 <b>colleague (1)</b> 9:11	<b>colloquially (1)</b> 29:25 <b>coming (2)</b> 7:4;9:2 <b>comments (1)</b> 33:1 <b>commercial (1)</b> 29:10 <b>committed (1)</b> 28:22 <b>Company (1)</b> 5:13 <b>comparably (1)</b> 29:25 <b>compel (4)</b> 10:11;19:18;31:10; 41:17 <b>compelling (1)</b> 26:22 <b>complete (1)</b> 24:4 <b>completed (1)</b> 22:19 <b>completely (2)</b> 22:6;31:18 <b>completion (5)</b> 23:5,11,11,14;44:2 <b>component (2)</b> 41:12,25 <b>components (1)</b> 37:24 <b>conceded (1)</b> 25:22 <b>concept (1)</b> 32:13 <b>concern (1)</b> 40:12 <b>concerned (1)</b> 27:4 <b>concluded (1)</b> 49:10 <b>conclusion (3)</b> 11:14;17:4;30:14 <b>conclusions (1)</b> 47:12 <b>condition (1)</b> 44:21 <b>conditioned (1)</b> 13:10 <b>confer (1)</b> 25:7 <b>confirmed (2)</b> 26:5,14 <b>conflict (2)</b> 6:23;10:15 <b>confusing (3)</b> 11:10;13:2;32:20 <b>Congress (2)</b> 13:18;28:18 <b>Congress' (1)</b> 36:21 <b>conjunction (1)</b> 29:14
---	--	--	---	--

January 25, 2023

<b>connection (3)</b> 19:22;40:9;41:13 <b>consent (1)</b> 11:20 <b>consequences (1)</b> 16:24 <b>consider (4)</b> 38:21;43:17;44:5; 45:6 <b>considered (1)</b> 6:23 <b>consistent (1)</b> 17:4 <b>constant (1)</b> 47:2 <b>construction (3)</b> 18:8;23:1,5 <b>content (1)</b> 42:12 <b>contents (1)</b> 47:6 <b>context (3)</b> 28:18;30:6;37:8 <b>contexts (1)</b> 29:2 <b>contingent (2)</b> 10:21;11:18 <b>continue (3)</b> 31:20;38:13,17 <b>contract (7)</b> 11:1;12:18;21:5; 23:2;31:21;32:22; 33:11 <b>contracts (2)</b> 10:23,25 <b>control (1)</b> 31:15 <b>corner (1)</b> 48:16 <b>corrected (1)</b> 10:14 <b>correctly (2)</b> 7:16;33:9 <b>corresponding (2)</b> 10:22;34:20 <b>counsel (12)</b> 10:15,15;13:25; 16:22;17:13;18:16; 19:13;26:5;33:21; 38:12;43:21;47:21 <b>counsels (1)</b> 36:17 <b>counsel's (2)</b> 17:5;43:8 <b>counterparty (1)</b> 31:24 <b>couple (2)</b> 11:24;40:22 <b>course (1)</b> 6:16 <b>COURT (117)</b> 5:2,14,18,21;6:5,9, 12,17;9:12,16,19,23;	10:5;11:23;12:4,10, 13,15;13:21;14:4,7, 10,15,21,25;15:3,5, 11,14,17,17,18,20,23; 16:1,7,12,14,16,17, 23;17:23;18:4,20,21, 25;19:20;20:21;21:7, 24;22:10,14,16,24; 23:16,22;24:12,22; 25:8,10,13;26:8,11, 18,20;27:10,21;28:9; 29:1,5;30:4,7;32:8, 23,25;33:20,25;34:8, 24;35:2,13,15,17; 36:9,14;37:2,19;38:4, 21,23;39:2,2;40:2,6; 41:4,12,19;42:6,8,16, 18,23;43:19;44:19; 45:5,14,19;46:5,14, 17,20;47:4,7,9,11,22; 48:10 <b>courts (5)</b> 11:11;27:3,3; 39:12;43:23 <b>court's (5)</b> 17:4;18:23;19:14; 27:19;43:17 <b>cover (1)</b> 33:12 <b>covered (5)</b> 24:14;27:22;30:8; 42:12,15 <b>covering (1)</b> 5:4 <b>covers (1)</b> 49:2 <b>credit (2)</b> 18:19;20:17 <b>creditor (7)</b> 20:15,16;31:11; 32:4,4;37:15;46:23 <b>creditors (3)</b> 21:13;45:2;48:7 <b>current (1)</b> 7:11 <b>currently (1)</b> 48:3 <b>cut (2)</b> 35:11;40:1 <b>cuts (1)</b> 32:14	35:5,5,19 <b>day (1)</b> 45:7 <b>days (12)</b> 19:8;22:5;24:18; 27:8;29:21;31:16; 32:22;33:6;38:19,25; 39:10;48:25 <b>deadline (1)</b> 27:8 <b>deal (2)</b> 8:10;36:25 <b>dealings (1)</b> 7:1 <b>debt (4)</b> 21:19;34:20;37:24; 44:2 <b>debtor (31)</b> 18:19;19:20,25; 20:3,17;21:21;22:4, 17;23:19;28:25; 29:19;31:12,13,15, 15,17,24;32:21;35:8, 11,11;36:5,6,11; 37:17;41:17;43:5,16; 44:10,12,14 <b>Debtors (10)</b> 6:2,4,14;7:14;8:21; 10:4;18:16;30:15; 36:7;40:23 <b>debtors' (5)</b> 8:15;9:24;14:19; 38:12;48:11 <b>debtor's (1)</b> 36:1 <b>December (1)</b> 14:2 <b>decide (1)</b> 22:17 <b>decided (2)</b> 7:16;31:16 <b>decides (1)</b> 31:13 <b>deciding (2)</b> 47:17;48:17 <b>decision (5)</b> 20:18;24:23;47:18; 48:23;49:6 <b>decisions (2)</b> 14:1,20 <b>deem (1)</b> 8:5 <b>deemed (1)</b> 7:23 <b>default (2)</b> 35:7,10 <b>defer (1)</b> 47:20 <b>define (1)</b> 39:9 <b>defined (1)</b> 34:5 <b>defines (1)</b>	24:24 <b>definitely (2)</b> 32:11;45:7 <b>definition (3)</b> 18:15;19:1;39:13 <b>delivering (1)</b> 27:5 <b>delivery (2)</b> 11:4;24:9 <b>demand (2)</b> 43:11;45:21 <b>demanding (1)</b> 48:19 <b>demonstrative (1)</b> 46:1 <b>denoted (1)</b> 8:2 <b>departure (1)</b> 12:25 <b>deprive (1)</b> 20:22 <b>describe (1)</b> 18:5 <b>described (2)</b> 16:4;29:18 <b>desire (1)</b> 47:3 <b>determination (1)</b> 31:19 <b>determining (1)</b> 17:19 <b>develop (1)</b> 49:1 <b>Developments (1)</b> 43:25 <b>Dexter (3)</b> 5:25;6:1,1 <b>dialogue (1)</b> 47:2 <b>difference (1)</b> 19:10 <b>different (8)</b> 17:9;19:18,18; 30:1;31:25;35:23; 36:18;43:13 <b>differently (1)</b> 40:3 <b>direct (3)</b> 27:18;40:10;41:7 <b>directing (1)</b> 40:21 <b>directly (4)</b> 5:6;8:2,3;39:9 <b>disagree (3)</b> 11:14,15;44:3 <b>disallowed (1)</b> 26:6 <b>disclaimer (2)</b> 5:22;8:25 <b>discourse (1)</b> 17:17 <b>discussed (1)</b> 38:20	<b>discussion (2)</b> 16:22;28:2 <b>discussions (3)</b> 11:12,13;28:10 <b>dispute (9)</b> 17:5;24:14;26:9, 15;38:5,18,20;41:24; 42:1 <b>disputed (2)</b> 19:14;24:24 <b>distinction (3)</b> 15:12;19:3;22:22 <b>distraction (3)</b> 18:14,14,15 <b>distribution (1)</b> 48:9 <b>distributions (1)</b> 48:6 <b>district (5)</b> 15:17;16:3,14,15, 16 <b>dive (1)</b> 13:20 <b>docket (2)</b> 30:16;34:17 <b>document (2)</b> 11:2;18:11 <b>documentation (8)</b> 7:25;8:9,16;9:15; 12:18;30:25;33:21; 34:6 <b>documents (7)</b> 8:2,3,10;10:8; 12:11;24:5;34:13 <b>dollar (1)</b> 38:5 <b>dollars (3)</b> 23:4,4;38:19 <b>done (8)</b> 7:6;11:17;13:13; 20:9;28:2;32:9,10; 48:13 <b>dormant (1)</b> 48:24 <b>down (1)</b> 26:1 <b>drafting (1)</b> 44:24 <b>draw (1)</b> 47:12 <b>drift (1)</b> 28:9 <b>driven (1)</b> 39:13 <b>due (15)</b> 11:9;18:12;19:2; 23:10;24:8;28:8; 30:5;33:12,17;34:14, 18;35:5;40:11;43:9; 45:10 <b>dug (1)</b> 16:1 <b>duplicative (5)</b>
	<b>D</b>			
	<b>d3 (3)</b> 14:11;15:1;21:18 <b>d5 (3)</b> 14:25;15:1,7 <b>date (10)</b> 9:1;11:4;18:2; 23:2;24:19;29:21; 30:1;35:9;40:1;47:24 <b>dates (3)</b>			

January 25, 2023

25:24;26:6,15,17; 42:2 <b>during (1)</b> 24:25 <b>duty (1)</b> 41:2 <b>dynamics (1)</b> 39:7	13:11 <b>entered (2)</b> 23:3;29:13 <b>entire (1)</b> 48:8 <b>entities (1)</b> 44:8 <b>entitlement (1)</b> 21:10 <b>equitable (1)</b> 46:1 <b>equities (11)</b> 27:2;37:1,4,4,10, 11,12,13;43:15,15,17 <b>equity (2)</b> 27:4;37:24 <b>equity's (1)</b> 45:20 <b>Erin (1)</b> 6:1 <b>especially (1)</b> 19:11 <b>ESQ (2)</b> 4:2,3 <b>essentially (1)</b> 12:2 <b>estate (2)</b> 32:12;36:1 <b>et (1)</b> 27:5 <b>even (18)</b> 6:25;7:8,9,10; 16:24;17:18;19:14, 18;20:13;27:9;31:11; 36:1,5,24;40:8; 41:15;46:8,24 <b>event (2)</b> 17:9;20:7 <b>everybody (3)</b> 5:24;20:16;36:4 <b>everyone (1)</b> 5:2 <b>everything's (1)</b> 42:14 <b>evidence (1)</b> 16:25 <b>example (2)</b> 7:15;13:8 <b>excellent (1)</b> 49:3 <b>excerpt (1)</b> 43:20 <b>excerpts (1)</b> 8:14 <b>exchange (1)</b> 41:23 <b>excited (2)</b> 16:2,5 <b>execution (3)</b> 10:18;18:11;22:12 <b>executory (1)</b> 10:23 <b>exhaustive (1)</b>	8:9 <b>Exhibit (4)</b> 30:17;34:16,22,23 <b>exist (2)</b> 17:12;43:10 <b>existed (1)</b> 27:13 <b>existence (1)</b> 18:1 <b>existing (2)</b> 22:18;39:12 <b>exists (3)</b> 19:2;20:9;32:12 <b>expectation (1)</b> 38:14 <b>expense (2)</b> 14:9;21:10 <b>expenses (1)</b> 20:14 <b>Explain (2)</b> 12:21;40:15 <b>explaining (1)</b> 5:23 <b>expunged (1)</b> 42:2 <b>extent (6)</b> 8:1,2;26:24;27:3; 40:24;45:23 <b>extract (1)</b> 41:22 <b>extremely (1)</b> 23:22 <b>eyeball (1)</b> 8:13	7:12;22:4,7 <b>familiarity (2)</b> 10:16;13:19 <b>far-fetched (1)</b> 37:8 <b>fast (2)</b> 48:15;49:6 <b>faster (1)</b> 48:20 <b>fault (1)</b> 46:24 <b>favor (1)</b> 43:16 <b>February (1)</b> 48:5 <b>fee (1)</b> 34:20 <b>feel (2)</b> 9:7,7 <b>fees (7)</b> 8:1;10:18,24;11:1, 5:12:23;45:24 <b>felt (1)</b> 31:17 <b>few (4)</b> 13:22;27:8;31:6; 48:4 <b>field (1)</b> 10:1 <b>figure (2)</b> 30:2;44:14 <b>file (2)</b> 41:13,18 <b>filed (8)</b> 8:23;10:10,11; 14:6;31:9,9;41:16; 43:10 <b>filing (1)</b> 41:19 <b>final (3)</b> 47:25;48:6,9 <b>financers (1)</b> 19:25 <b>financial (1)</b> 20:18 <b>financing (3)</b> 12:24;13:1,3 <b>find (6)</b> 7:5;12:7,8;22:22; 26:21;33:1 <b>fine (6)</b> 9:19;14:15;20:4; 26:2;47:15;48:13 <b>First (14)</b> 6:19;7:19;8:21,23; 10:10;19:6,7;22:4; 27:15;31:16;33:5; 37:23;38:19;47:19 <b>five (1)</b> 48:2 <b>fix (1)</b> 13:18 <b>flagged (1)</b>	42:20 <b>flavor (1)</b> 27:2 <b>flip (1)</b> 8:22 <b>flow (1)</b> 40:8 <b>flows (1)</b> 12:17 <b>focus (2)</b> 18:15;33:13 <b>focused (1)</b> 8:16 <b>focusing (1)</b> 28:3 <b>following (1)</b> 47:16 <b>forced (1)</b> 44:8 <b>forewarned (1)</b> 9:23 <b>form (3)</b> 12:2;13:1;20:10 <b>formally (1)</b> 5:4 <b>forthright (1)</b> 34:3 <b>forthrightness (1)</b> 49:4 <b>fortuity (1)</b> 33:16 <b>forward (1)</b> 32:22 <b>forward- (1)</b> 22:19 <b>found (2)</b> 16:10;37:8 <b>four (3)</b> 10:13;38:25;48:1 <b>framework (2)</b> 11:16,16 <b>framing (1)</b> 11:25 <b>frankly (1)</b> 36:22 <b>FRIEDMAN (55)</b> 4:2;5:9,11,12,16, 17,19,23;6:19;7:1; 8:22;9:9,10,13,17; 16:19;25:6,6,12;30:9, 11,12;32:15,17,24; 33:8;34:7,9,25;35:6, 14,16,21;36:10,15; 37:3;38:3,6;39:8,14; 40:3,22;41:11;42:4,7, 14,17;46:17,19,21; 47:5,8,10,14;49:9 <b>Friedman's (3)</b> 25:3;32:10;42:21 <b>friend (2)</b> 21:25;22:2 <b>front (5)</b> 20:1,19,24;33:24;
E		F		

January 25, 2023

49:5 <b>full (3)</b> 20:1;30:20;39:23 <b>fully (4)</b> 13:4;22:6,18;24:7 <b>further (2)</b> 34:6;42:15 <b>future (4)</b> 19:20,25;20:7; 24:16 <b>future-looking (1)</b> 29:15	30:23 <b>guess (5)</b> 8:19;20:19;24:18; 33:2;41:6 <b>guidance (2)</b> 15:18;43:13	22,24;43:20;44:23; 45:13,15,23;46:12, 24;47:19,20;49:8 <b>Holbein's (1)</b> 6:10 <b>holding (3)</b> 11:15;19:14;44:3 <b>honestly (1)</b> 26:22 <b>Honor (28)</b> 5:11;6:1,11,13,15; 9:10;10:3;14:17; 15:19,22;25:6;26:17; 30:11;31:6;34:9; 35:6;37:5;38:9; 40:22;41:11;42:14; 46:12,16;47:20,23, 24;49:8,9 <b>Honor's (2)</b> 10:17;13:19 <b>hook (1)</b> 24:1 <b>hope (5)</b> 8:24;25:2;44:5; 48:6,14 <b>hopes (1)</b> 47:16 <b>hour (1)</b> 45:15 <b>hover (1)</b> 15:16 <b>hurt (1)</b> 37:18	<b>incorporated (1)</b> 8:3 <b>incorporation (1)</b> 8:4 <b>incremental (1)</b> 12:24 <b>increments (1)</b> 13:7 <b>indicate (1)</b> 39:23 <b>indicates (1)</b> 39:24 <b>indication (1)</b> 40:4 <b>indirect (1)</b> 41:6 <b>indiscernible (2)</b> 22:23;32:24 <b>individuals (1)</b> 44:8 <b>inevitably (1)</b> 11:11 <b>infinite (1)</b> 28:7 <b>inform (1)</b> 6:25 <b>initially (1)</b> 19:5 <b>initiate (1)</b> 12:14 <b>initiator (15)</b> 10:18;11:3,5,21; 12:19;19:22;20:1,4; 26:4;27:13,17,18,19; 31:2;34:19 <b>initiators (21)</b> 5:15,20;7:22;8:20; 12:1;14:6,11;17:24; 23:20;24:23;25:18; 29:10,11,16;30:25; 35:19;40:20;45:10, 22,23;48:12 <b>initiators' (4)</b> 8:1;24:1;25:25; 30:23 <b>insert (2)</b> 28:12;35:3 <b>insistent (1)</b> 48:19 <b>instructive (1)</b> 15:16 <b>instrument (1)</b> 8:6 <b>integrated (2)</b> 12:19;35:18 <b>intended (2)</b> 17:19;40:8 <b>intent (3)</b> 44:24,25,25 <b>interesting (5)</b> 7:6;16:21;18:14; 19:10;49:5 <b>interestingly (1)</b>	36:25 <b>interpret (1)</b> 31:4 <b>interrupt (1)</b> 23:17 <b>interrupting (1)</b> 40:8 <b>into (10)</b> 12:17;13:2;18:1; 21:19;24:9;28:9; 29:13;31:17;33:14; 34:6 <b>introduce (2)</b> 5:8;9:10 <b>inured (1)</b> 17:2 <b>invaluable (1)</b> 6:22 <b>involuntarily (1)</b> 28:24 <b>involved (1)</b> 22:25 <b>isolated (1)</b> 7:8 <b>issue (20)</b> 6:24;7:5,22;10:7; 11:8;13:2;18:21,22, 23;27:9;28:5,6; 30:13;33:16;42:22; 43:2,12,13;45:22; 49:5 <b>issues (3)</b> 17:9;29:2;34:5 <b>item (1)</b> 15:5
<b>G</b>	<b>H</b>	<b>I</b>	<b>J</b>	<b>K</b>
game (2) 26:24;27:2 general (3) 6:16,20;28:10 generalities (2) 28:10,10 generality (1) 28:11 generally (1) 10:21 generates (1) 19:21 gets (2) 33:14;44:14 given (1) 29:23 gives (3) 20:5,5,6 giving (1) 31:11 glean (1) 43:12 Glenn (2) 5:4;48:4 goes (5) 9:24;12:18;17:8; 27:15;44:1 Good (8) 5:2,11;6:13;16:6; 25:8;28:2;30:11; 32:16 governing (3) 7:13;10:13;39:24 government (2) 6:21,22 granting (1) 40:20 granular (1) 9:14 grateful (2) 8:9;23:23 Great (12) 5:14,21;6:5,12,17; 9:16;23:25;25:3; 26:11;28:2;42:6,16 group (1) 6:14 guarantee (1)	hand (1) 33:17 hands (1) 47:13 happen (1) 33:23 happening (1) 11:19 happens (3) 17:1,1;34:21 happy (1) 10:1 hard-and-fast (1) 47:24 hear (6) 5:24;8:22,24;10:1; 32:11;42:19 hearing (3) 16:18;22:1;48:5 hello (1) 6:6 help (1) 8:7 helpful (15) 11:24;13:24;14:23; 16:7;23:22;25:14; 26:20;27:21;34:1,3; 39:6;41:1;42:9; 48:10;49:3 helpfully (1) 28:3 helps (1) 13:15 hereunder (1) 11:22 hey (3) 20:15,16;28:22 Hi (1) 6:6 hide (1) 7:18 Holbein (73) 6:3,7,8;10:2,3,3; 12:3,9,11,14,22; 13:22;14:6,8,11,17; 15:4,10,12,15,21,25; 16:6,9,13,15,20;18:3; 5;20:10;21:4,8;22:9, 11,15,21,25;23:21; 24:11,20;25:4,5,7,15; 26:4,9,17,19;27:1,15; 28:4;30:3;32:9;33:3; 35:22;37:3;39:16; 40:1,7;41:24;42:19,	idea (1) 19:16 identically (1) 15:7 identify (1) 11:15 identifying (1) 8:23 immediate (1) 40:10 immediately (1) 40:24 implicit (1) 39:11 important (5) 18:6;20:12;21:15; 31:7;44:5 imposes (2) 31:23;46:23 inasmuch (1) 46:2 include (1) 38:19 including (1) 37:24 inconsistent (1) 44:25	<b>initiators (21)</b> 5:15,20;7:22;8:20; 12:1;14:6,11;17:24; 23:20;24:23;25:18; 29:10,11,16;30:25; 35:19;40:20;45:10, 22,23;48:12 <b>initiators' (4)</b> 8:1;24:1;25:25; 30:23 <b>insert (2)</b> 28:12;35:3 <b>insistent (1)</b> 48:19 <b>instructive (1)</b> 15:16 <b>instrument (1)</b> 8:6 <b>integrated (2)</b> 12:19;35:18 <b>intended (2)</b> 17:19;40:8 <b>intent (3)</b> 44:24,25,25 <b>interesting (5)</b> 7:6;16:21;18:14; 19:10;49:5 <b>interestingly (1)</b>	jail (1) 28:21 job (2) 9:14;28:2 Jones (1) 5:2 Judge (12) 5:2,4;7:19;16:3; 18:22,22;19:19; 36:16,22;39:18,19; 48:3 judges (1) 39:19 jump (2) 32:8;38:9 jurist (1) 16:2
				keep (1) 9:20 key (1) 7:5 kind (6)

January 25, 2023

13:24;17:3,16; 28:23;36:24;41:21 <b>knew (3)</b> 17:21;27:6;30:16 <b>knit (1)</b> 12:21 <b>known (1)</b> 20:6 <b>knows (2)</b> 14:25;39:21 <b>KREMER (11)</b> 4:3;9:11,13,22; 23:25;38:8,9,22,24; 39:3;46:16 <b>K-R-E-M-E-R (1)</b> 39:4 <b>Kremer's (2)</b> 9:20;42:4	23:20;29:14,15; 35:23,24;38:12 <b>lease-tied (1)</b> 24:8 <b>least (6)</b> 18:1;19:5;23:12; 32:20;36:4;40:9 <b>left (1)</b> 21:22 <b>legal (4)</b> 7:5,8;39:6;47:12 <b>lessee (4)</b> 12:14;27:17,19; 34:11 <b>lessees (1)</b> 38:25 <b>lesser (1)</b> 11:21 <b>lessor (6)</b> 7:11;27:17;35:25; 36:10;44:11,13 <b>lessors (2)</b> 12:7;45:11 <b>letters (1)</b> 45:21 <b>letting (1)</b> 21:21 <b>level (1)</b> 15:17 <b>liability (2)</b> 17:11;18:13 <b>life (1)</b> 5:23 <b>light (1)</b> 28:16 <b>likewise (1)</b> 34:16 <b>limitations (1)</b> 9:5 <b>limited (1)</b> 19:15 <b>line (5)</b> 20:16;28:25;32:19; 36:17;39:15 <b>list (6)</b> 15:6;25:17;27:22; 35:4;36:23;42:10 <b>literally (3)</b> 29:13;33:5;37:15 <b>littered (1)</b> 36:18 <b>little (3)</b> 5:22;10:16;41:6 <b>live (1)</b> 24:22 <b>local (1)</b> 48:21 <b>lock (1)</b> 20:4 <b>locked (2)</b> 24:5,7 <b>Loews (2)</b> 16:10;39:16	<b>long (2)</b> 9:6;43:18 <b>longer (1)</b> 10:16 <b>look (25)</b> 10:9,10,10;11:10; 13:15,17;18:24; 21:15,17;29:1;30:8, 13,16,17;32:20,21; 33:22;34:2,10,16,17; 39:18;44:4,7;46:5 <b>looking (11)</b> 8:7;13:23,23; 18:25;19:8;22:20; 24:17;35:2,3;38:1; 46:6 <b>lot (4)</b> 23:24;28:5;29:23; 48:13 <b>lots (1)</b> 39:20 <b>love (2)</b> 16:6;24:23 <b>lovely (1)</b> 5:22	36:1;40:8;41:6;42:10 <b>McCarthy (2)</b> 6:9,10 <b>mean (12)</b> 13:3,4;14:4;15:12; 20:21;21:8;26:12; 31:8;33:9;39:11; 41:4;46:9 <b>meaning (2)</b> 7:13,17 <b>means (6)</b> 9:6,6;22:17;32:18; 37:25;39:10 <b>meant (5)</b> 13:19;28:18;39:19; 43:15,16 <b>meet (1)</b> 25:7 <b>memory (1)</b> 7:2 <b>mention (2)</b> 25:25;26:1 <b>mentioned (1)</b> 6:19 <b>mere (1)</b> 33:16 <b>meruit (1)</b> 23:13 <b>Michael (2)</b> 6:3;10:3 <b>middle (3)</b> 13:20;37:23;42:20 <b>Midway (1)</b> 37:13 <b>might (3)</b> 17:20;23:25;36:23 <b>Milbank (5)</b> 6:2,14,15;47:1,23 <b>million (4)</b> 23:3,4;38:18,25 <b>minute (2)</b> 32:8;41:6 <b>missing (1)</b> 8:14 <b>mistaken (1)</b> 38:13 <b>modifications (1)</b> 45:14 <b>modified (1)</b> 45:18 <b>money (3)</b> 20:23;34:12;46:8 <b>month (4)</b> 21:6,7,8;38:15 <b>months (2)</b> 23:7,8 <b>more (9)</b> 6:25;17:24;27:2; 28:11,17;46:1,18,24; 48:2 <b>morning (6)</b> 5:2,11;6:4,8,13; 30:11	<b>most (2)</b> 36:24;44:5 <b>motion (7)</b> 8:20;10:11;11:2, 19:24;13:31;9;40:10 <b>Motors (1)</b> 6:20 <b>moved (1)</b> 36:7 <b>movement (1)</b> 8:19 <b>much (8)</b> 6:17;13:5;14:21; 17:20;23:8,9;30:7,9 <b>multibillion (1)</b> 37:8 <b>multiplier (1)</b> 38:4 <b>must (1)</b> 39:23 <b>Myers (2)</b> 5:12;30:12 <b>myself (1)</b> 48:17
<b>L</b>		<b>M</b>		<b>N</b>
<b>landlord (1)</b> 17:13 <b>lanes (1)</b> 10:13 <b>language (6)</b> 22:1;28:15,16; 30:5;34:10;43:13 <b>larger (1)</b> 28:16 <b>last (5)</b> 13:25;34:21;38:16; 39:16;47:2 <b>later (5)</b> 33:12;37:14;41:9; 43:9;48:12 <b>law (8)</b> 13:17;15:6,8; 16:11;18:6;32:25; 39:9,13 <b>lawyers (3)</b> 8:18;39:20;47:1 <b>lead (5)</b> 5:15;6:3,11;10:15; 47:21 <b>leading (1)</b> 27:11 <b>leaning (2)</b> 7:12;16:4 <b>lease (34)</b> 7:8,23;8:4,5,6; 10:12,14,19,20,21; 11:20;12:19;13:3; 17:11;19:6,24;20:5, 24,25;21:1,2;23:4,12, 13;29:19;30:21; 33:22,23;35:18;36:4; 39:24;41:14;44:22; 45:4 <b>leased (1)</b> 36:5 <b>leases (10)</b> 8:2,3;10:24;12:5;		<b>Macey (1)</b> 15:23 <b>Macey's (7)</b> 16:21;17:25;18:1, 15;19:15;33:9;43:8 <b>main (2)</b> 8:17;9:25 <b>mainly (1)</b> 8:16 <b>makes (3)</b> 8:21;35:22;41:21 <b>making (2)</b> 20:18;45:19 <b>many (1)</b> 43:23 <b>marry (1)</b> 47:25 <b>mash-up (1)</b> 29:6 <b>master (1)</b> 33:23 <b>matter (4)</b> 5:3;20:20;21:14; 45:9 <b>matters (1)</b> 29:24 <b>MATTHEW (3)</b> 4:3;9:11;39:3 <b>may (10)</b> 9:17;15:12;25:10, 15;30:22;34:13; 36:19;42:12;45:9,9 <b>maybe (12)</b> 13:25;19:16,17,17; 20:3,3;35:10,23;		<b>names (1)</b> 5:8 <b>narrow (1)</b> 46:21 <b>natural (1)</b> 30:14 <b>necessarily (3)</b> 27:1,24;45:6 <b>necessary (1)</b> 43:3 <b>necessitates (1)</b> 30:4 <b>neck (1)</b> 28:24 <b>need (8)</b> 8:12;13:16;32:25; 40:17;46:18;47:18; 48:23;49:1 <b>needing (1)</b> 34:5 <b>needlessly (1)</b> 9:6 <b>needs (1)</b> 33:21 <b>negotiated (4)</b> 20:23;21:14;35:18; 44:20 <b>negotiation (1)</b> 19:24 <b>New (1)</b> 16:15 <b>next (1)</b> 11:19 <b>nice (3)</b> 5:14;6:17;9:21 <b>nicely (1)</b>



January 25, 2023

12:17 <b>night (3)</b> 13:25;38:16;39:16 <b>nodding (1)</b> 25:3 <b>noise (2)</b> 28:5;29:2 <b>none (1)</b> 31:24 <b>nonresidential (2)</b> 35:24;44:13 <b>norm (1)</b> 13:1 <b>noted (1)</b> 31:9 <b>notes (1)</b> 17:13 <b>notwithstanding (1)</b> 32:13 <b>nudge (1)</b> 48:22 <b>number (5)</b> 30:16;34:18;35:4; 38:18;48:15 <b>numbers (2)</b> 25:25;26:13	<b>obviously (2)</b> 25:10;45:9 <b>occupancy (1)</b> 23:5 <b>occur (1)</b> 40:21 <b>occurred (4)</b> 7:10;17:15;23:7,14 <b>occurs (1)</b> 45:8 <b>off (4)</b> 5:10;23:25;25:15; 44:1 <b>offensive (2)</b> 36:23,24 <b>often (3)</b> 12:22;21:13;28:8 <b>O'Melveny (2)</b> 5:12;30:12 <b>omnibus (2)</b> 10:4;14:13 <b>once (1)</b> 5:23 <b>one (20)</b> 8:25;10:12;11:14; 15:23;19:4;23:3,4; 30:12;33:4,5,16; 36:24;38:11;39:15; 40:8,23;41:16;46:5, 21;48:3 <b>ongoing (2)</b> 47:8,10 <b>only (4)</b> 10:16;14:21;16:10; 18:1 <b>operations (1)</b> 43:5 <b>opinion (4)</b> 17:13,16,17;36:16 <b>opinions (1)</b> 28:9 <b>opposed (2)</b> 33:15;40:21 <b>opposing (1)</b> 19:13 <b>order (8)</b> 5:8;19:8;22:5; 33:6;40:9;41:12; 47:25;48:9 <b>orderly (2)</b> 9:20;27:24 <b>orient (1)</b> 9:2 <b>others (1)</b> 36:21 <b>otherwise (4)</b> 21:19;25:21;34:8; 45:10 <b>out (13)</b> 13:20;25:1,9;30:2; 32:2,3;34:21;36:8; 38:22;41:22;44:14; 46:15;48:15	<b>outcome (3)</b> 19:18;43:1;44:23 <b>outline (1)</b> 13:20 <b>outset (1)</b> 6:18 <b>over (6)</b> 7:1;13:7;19:4;20:2, 10;36:21 <b>overall (1)</b> 43:13 <b>overlooking (1)</b> 8:8 <b>overrides (1)</b> 7:16 <b>owe (1)</b> 41:2 <b>owed (4)</b> 29:11;31:2;34:13; 46:8 <b>owes (1)</b> 13:6 <b>owing (1)</b> 34:14 <b>own (1)</b> 29:7	6:24;7:23;29:6; 37:20 <b>partner (1)</b> 6:10 <b>partners (1)</b> 21:20 <b>party (3)</b> 27:7;30:25;46:2 <b>past (1)</b> 29:1 <b>pause (1)</b> 27:25 <b>pay (16)</b> 10:19;11:5,18; 17:6,14;19:21;20:1, 2;31:19;33:10;34:11, 19;36:12;39:25,25; 41:7 <b>paying (2)</b> 45:9,11 <b>payment (32)</b> 10:11;11:9;12:20, 24;22:19;23:3,4,10, 12,14,19;24:17,24; 29:13,15;34:18,20; 35:5,9,19;37:6;40:4, 5,10,21,24,25;43:11; 44:21;45:15;46:6,8 <b>payments (10)</b> 7:25;10:20;20:24; 33:18;34:15,25;36:6; 37:23;40:24;45:16 <b>payout (2)</b> 20:6;46:10 <b>people (11)</b> 5:7;7:18,24;14:6; 21:18,20;23:17; 28:24;36:18,20;45:1 <b>people's (1)</b> 5:9 <b>Per (1)</b> 38:3 <b>perceive (1)</b> 7:16 <b>perform (5)</b> 31:20;32:19,21; 37:17;46:22 <b>performance (1)</b> 31:12 <b>performed (2)</b> 23:8,9 <b>perhaps (1)</b> 48:1 <b>period (6)</b> 22:8;24:9,14; 29:20;31:14;35:20 <b>permissible (3)</b> 9:18;20:8;35:7 <b>permutations (1)</b> 28:7 <b>person (3)</b> 10:1;34:12;46:8 <b>personal (1)</b>	44:11 <b>perspective (1)</b> 44:9 <b>persuade (1)</b> 7:14 <b>persuaded (1)</b> 25:20 <b>PETER (4)</b> 4:2;5:11;25:6; 30:11 <b>petition (10)</b> 17:8;18:2;19:13; 22:7;23:2,9;24:19; 29:21;30:1;43:5 <b>ph (1)</b> 18:18 <b>phone (2)</b> 9:11;47:1 <b>phrase (1)</b> 39:10 <b>physical (1)</b> 36:5 <b>piece (2)</b> 25:17,23 <b>pin (1)</b> 26:1 <b>ping (2)</b> 48:25;49:1 <b>place (2)</b> 21:13;39:20 <b>places (1)</b> 20:10 <b>plain (3)</b> 7:12,12,17 <b>plan (3)</b> 38:3;48:7,8 <b>planes (1)</b> 45:12 <b>players (1)</b> 12:21 <b>please (3)</b> 10:2;15:20;16:7 <b>plus (1)</b> 19:24 <b>point (10)</b> 10:7;26:12;30:13; 32:11,16;35:22; 39:14;43:12;45:5,20 <b>pointed (1)</b> 35:17 <b>points (2)</b> 42:12;46:21 <b>policy (4)</b> 11:16;19:17;21:16, 17 <b>POP (1)</b> 48:8 <b>portion (1)</b> 25:19 <b>portions (1)</b> 27:2 <b>position (5)</b> 21:13;27:20;33:19;
<b>O</b>		<b>P</b>		
<b>object (2)</b> 27:6,9 <b>objected (1)</b> 27:14 <b>objection (1)</b> 25:17 <b>objections (4)</b> 8:20,23;10:5;14:14 <b>obligated (2)</b> 35:8,11 <b>obligation (40)</b> 7:25;8:5;11:5,7,18; 12:12;13:4;17:5,14, 18;18:16,18,24;19:4, 9,12,21;20:5;22:12, 18;24:4,6;27:12; 28:3,11,13;29:13; 31:2,12,20;33:4,10; 35:16;36:12;39:22, 25;41:1,17;43:24; 46:23 <b>obligations (31)</b> 7:8,23;10:18,19,21, 22;11:13;12:20; 16:23;19:6,7;20:11, 25;21:1,6,8;22:3,17; 23:19;24:17,18,24; 27:16,18;28:7;29:19; 32:18;35:19;37:18; 39:23;43:22 <b>obligor (3)</b> 39:24;46:7,8 <b>obvious (1)</b> 30:24				

January 25, 2023

<p>41:15;46:13  <b>possible (1)</b>                          8:12  <b>post- (4)</b>                          19:12;23:7,8;43:4  <b>Post-petition (8)</b>                          17:8,15;21:21;                          23:15;24:9;35:20;                          40:18;45:10  <b>posture (1)</b>                          31:8  <b>power (2)</b>                          31:19;45:15  <b>practical (3)</b>                          47:18;48:23;49:1  <b>practice (1)</b>                          6:21  <b>pre- (1)</b>                          17:7  <b>preamble (1)</b>                          16:22  <b>predictable (1)</b>                          20:6  <b>predisposition (1)</b>                          10:6  <b>preferred (1)</b>                          36:21  <b>prejudice (1)</b>                          33:23  <b>premises (5)</b>                          21:22;36:5,13;                          44:14;45:1  <b>preparation (3)</b>                          7:4;8:8;26:12  <b>pre-petition (14)</b>                          7:9;11:17;17:9,22,                          25;18:13;23:3,9;                          24:4,7;25:19;29:12,                          12;41:25  <b>pre-prepetition (1)</b>                          7:10  <b>present (1)</b>                          9:1  <b>presentations (1)</b>                          24:21  <b>presented (2)</b>                          11:11;18:8  <b>pretty (6)</b>                          8:10;12:11;15:7;                          19:19;33:2;48:5  <b>previously (1)</b>                          38:10  <b>prime (1)</b>                          28:23  <b>principle (1)</b>                          26:2  <b>prior (4)</b>                          5:23;7:1;11:4;22:6  <b>priorities (1)</b>                          36:18  <b>private (1)</b>                          6:21  <b>probably (5)</b></p>	<p>30:19;38:25;41:2;                          44:6;48:14  <b>problem (2)</b>                          9:20;13:19  <b>procedural (1)</b>                          31:8  <b>proceeding (2)</b>                          5:5;7:22  <b>proceedings (1)</b>                          49:10  <b>process (2)</b>                          16:25;45:7  <b>professionals (1)</b>                          12:1  <b>progression (1)</b>                          27:24  <b>project (1)</b>                          44:2  <b>promptly (1)</b>                          34:13  <b>prong (2)</b>                          19:5,7  <b>proofs (2)</b>                          41:13,18  <b>properly (1)</b>                          25:20  <b>Properties (2)</b>                          16:10;43:21  <b>property (8)</b>                          21:21;33:10;35:24;                          36:10;39:16;44:11,                          13;45:2  <b>proposed (1)</b>                          40:9  <b>prorate (1)</b>                          28:8  <b>proration (1)</b>                          11:12  <b>proration's (1)</b>                          19:16  <b>prosecute (1)</b>                          47:13  <b>prosecution (1)</b>                          45:21  <b>protect (4)</b>                          21:18,20;28:19;                          44:25  <b>protected (1)</b>                          44:21  <b>protections (1)</b>                          20:7  <b>provide (1)</b>                          36:1  <b>provided (4)</b>                          11:3;14:1;30:22;                          34:17  <b>provides (1)</b>                          17:11  <b>providing (3)</b>                          6:21;15:17;36:3  <b>provision (2)</b>                          10:17;36:25  <b>provisions (1)</b></p>	<p>21:17  <b>Pudgie's (2)</b>                          13:24;33:14  <b>punch (4)</b>                          15:5;25:16;27:22;                          42:10  <b>pure (1)</b>                          7:7  <b>purport (1)</b>                          27:12  <b>purpose (1)</b>                          36:7  <b>purposes (6)</b>                          5:5;15:10,15;18:6;                          24:13;38:20  <b>pushed (1)</b>                          48:18  <b>put (2)</b>                          26:13;37:19</p> <p><b>Q</b></p> <p><b>quantum (1)</b>                          23:13  <b>quarter (2)</b>                          37:24,25  <b>quarterly (1)</b>                          37:22  <b>quibble (2)</b>                          19:4;43:7  <b>quick (1)</b>                          30:13  <b>quickly (2)</b>                          47:17;48:17  <b>quite (1)</b>                          7:6  <b>quote (2)</b>                          11:1;33:5  <b>quotes (1)</b>                          10:12  <b>quoting (1)</b>                          11:20</p> <p><b>R</b></p> <p><b>raise (3)</b>                          27:23;37:9,11  <b>raised (3)</b>                          26:21;32:16;45:21  <b>rate (1)</b>                          46:10  <b>rather (1)</b>                          48:12  <b>read (6)</b>                          15:2,22;28:9;                          29:14;33:9;39:25  <b>reading (8)</b>                          7:6;11:19;18:9;                          19:15;33:1;35:16;                          37:21;43:8  <b>reads (1)</b>                          37:21  <b>real (4)</b></p>	<p>21:2;29:19;35:24;                          44:13  <b>reality (3)</b>                          7:21;18:9;41:9  <b>really (20)</b>                          7:14;18:20;19:3,                          24;20:4;24:3;26:7;                          28:11,18,23;29:24;                          31:10,22;33:13;                          36:16;37:12;43:9;                          47:12;48:11;49:3  <b>reason (3)</b>                          20:2;31:3;36:11  <b>reasonably (1)</b>                          30:8  <b>reasoned (1)</b>                          43:23  <b>reasons (1)</b>                          31:25  <b>reassessed (2)</b>                          17:13,14  <b>reassessment (2)</b>                          17:15,20  <b>rebuttal (1)</b>                          42:19  <b>recalculated (1)</b>                          38:16  <b>recently (1)</b>                          46:25  <b>recipient (1)</b>                          7:10  <b>reclassification (1)</b>                          41:25  <b>record (3)</b>                          37:20;38:10;47:24  <b>recoveries (1)</b>                          37:15  <b>reduce (1)</b>                          30:22  <b>refer (1)</b>                          34:2  <b>reference (1)</b>                          34:5  <b>referenced (1)</b>                          37:22  <b>reflect (1)</b>                          27:25  <b>regard (1)</b>                          10:6  <b>regarding (4)</b>                          16:23;26:23;45:13,                          16  <b>regular (1)</b>                          20:13  <b>reimbursements (1)</b>                          23:5  <b>reject (3)</b>                          31:13,16;36:11  <b>rejected (5)</b>                          17:1;21:3;38:11,                          14,15  <b>rejection (3)</b>                          24:16;29:22;44:17</p>	<p><b>rejections (1)</b>                          41:14  <b>relate (1)</b>                          28:6  <b>related (1)</b>                          15:13  <b>relet (1)</b>                          44:18  <b>relevant (4)</b>                          29:2,3,20;30:24  <b>reliance (1)</b>                          14:2  <b>relied (1)</b>                          20:17  <b>relief (3)</b>                          19:8;22:5;33:6  <b>rely (1)</b>                          15:18  <b>remained (1)</b>                          43:18  <b>remarkable (1)</b>                          46:23  <b>remarkably (1)</b>                          31:23  <b>remarks (1)</b>                          9:3  <b>remember (2)</b>                          20:12;31:15  <b>renegotiated (1)</b>                          27:6  <b>rent (11)</b>                          12:25;13:8,9,10;                          24:8;32:6,7;34:12,18,                          20;37:6  <b>rented (1)</b>                          13:11  <b>reorganization (1)</b>                          44:9  <b>reorganize (1)</b>                          28:25  <b>reorganized (4)</b>                          6:2,4;10:4;14:19  <b>reply (2)</b>                          8:15;30:17  <b>reporter (1)</b>                          39:2  <b>representations (1)</b>                          8:12  <b>represented (2)</b>                          21:1,5  <b>request (1)</b>                          10:7  <b>requesting (1)</b>                          45:24  <b>required (3)</b>                          11:21;23:20;39:24  <b>requirement (3)</b>                          32:12;40:5,18  <b>requiring (1)</b>                          29:15  <b>reserve (2)</b>                          47:17;48:13  <b>reserved (2)</b></p>
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January 25, 2023

28:24;48:3 <b>resolution (1)</b> 48:1 <b>Respectfully (1)</b> 21:4 <b>response (2)</b> 21:3;25:25 <b>restricting (1)</b> 9:3 <b>restructure (1)</b> 37:6 <b>restructuring (2)</b> 6:14;37:9 <b>result (1)</b> 20:18 <b>Retail (4)</b> 16:9;44:1,4;46:3 <b>retained (3)</b> 12:1,8;29:9 <b>retention (1)</b> 29:12 <b>reveal (1)</b> 47:5 <b>reverse (1)</b> 12:7 <b>review (1)</b> 14:21 <b>reward (1)</b> 45:2 <b>reword (1)</b> 33:4 <b>right (69)</b> 11:25;12:2,6,13; 13:12,20;14:11,16; 15:3,7,9;17:23;18:9, 19;19:16;21:6;22:2, 8,9,20,21;23:10,12, 13:24;10,19;25:12; 26:16,18;27:21;28:4; 32:3,20;33:11,24,25; 34:2,24;35:9,13,14, 20,21;36:9,19,25; 37:1,5,7,20,22;38:2; 39:10,13;41:11;42:9; 43:25;44:16,19; 45:10,14,19;46:5,9, 11,14;48:16,20;49:1 <b>righteous (1)</b> 13:17 <b>rights (3)</b> 11:21;30:23;31:4 <b>rise (1)</b> 27:9 <b>risk (1)</b> 48:24 <b>risked (1)</b> 41:15 <b>robustly (1)</b> 44:21 <b>room (1)</b> 21:12 <b>rose (1)</b> 20:11	<b>rough (1)</b> 37:25 <b>roughly (2)</b> 23:2;38:18 <b>rule (2)</b> 25:11;41:22 <b>rules (1)</b> 48:21 <b>run (5)</b> 12:12;27:16,17; 42:10;43:21 <b>running (4)</b> 24:17;29:21;39:1; 42:10 <b>rushed (1)</b> 9:7  <b>S</b>  <b>same (7)</b> 9:24;10:8;11:19; 14:18;15:2;33:9; 34:13 <b>satisfied (1)</b> 30:9 <b>satisfy (1)</b> 40:17 <b>satisfying (1)</b> 41:5 <b>saying (14)</b> 11:16;18:25;20:15, 16;28:20,21,21,22; 36:22;37:16;41:13; 43:3,5;45:6 <b>scenarios (1)</b> 11:10 <b>Schak (4)</b> 6:12,13;47:23,23 <b>schedule (12)</b> 13:10;20:6;24:9; 34:14,21,21,23;35:4; 37:22;44:21;46:6,9 <b>scheduled (1)</b> 24:25 <b>schedules (1)</b> 33:18 <b>screen (1)</b> 5:9 <b>SDNY (1)</b> 39:17 <b>second (2)</b> 19:5;31:4 <b>section (1)</b> 34:10 <b>sections (1)</b> 15:9 <b>secured (2)</b> 25:20;41:25 <b>seek (1)</b> 26:1 <b>seeking (2)</b> 14:8;41:20 <b>seem (2)</b>	16:24;45:25 <b>seems (3)</b> 15:6;25:17;40:16 <b>sense (8)</b> 8:19,21;24:7; 28:13;30:5;31:3; 34:3;41:21 <b>sent (1)</b> 39:15 <b>sentence (1)</b> 43:23 <b>separate (1)</b> 10:13 <b>series (1)</b> 36:20 <b>service (1)</b> 29:12 <b>services (4)</b> 7:9;11:4;29:9,10 <b>serving (1)</b> 12:4 <b>set (3)</b> 34:21;44:21;48:16 <b>settled (1)</b> 48:4 <b>shall (3)</b> 34:11,14,19 <b>shopping (1)</b> 23:1 <b>shortly (1)</b> 48:5 <b>shot (1)</b> 42:13 <b>showing (1)</b> 37:13 <b>sic (2)</b> 28:24;39:16 <b>side (5)</b> 8:19;9:24;18:19; 34:1;48:11 <b>sides (2)</b> 10:22;49:3 <b>signed (1)</b> 24:5 <b>significance (1)</b> 39:20 <b>significantly (1)</b> 39:22 <b>silent (1)</b> 43:18 <b>simply (2)</b> 14:13;40:21 <b>sin (1)</b> 28:22 <b>sitting (3)</b> 46:3;47:13;48:24 <b>situation (4)</b> 19:11;20:11;29:9; 41:10 <b>six (2)</b> 32:6,7 <b>skipping (1)</b> 14:24	<b>slightly (1)</b> 36:23 <b>smart (2)</b> 20:25;21:5 <b>solely (1)</b> 5:5 <b>somebody (3)</b> 9:25;31:18;35:24 <b>somehow (1)</b> 29:10 <b>someone (3)</b> 7:11;19:21,22 <b>sooner (1)</b> 48:12 <b>sorry (7)</b> 11:23;14:12;15:5; 16:12;21:7;32:15; 34:22 <b>sort (15)</b> 8:23;10:6;13:1,16; 16:22;19:22;28:14, 16;31:24;34:4;39:11; 41:8;45:24;48:7,16 <b>Sotomayor (4)</b> 16:3;18:22,22; 36:22 <b>Sotomayor's (1)</b> 36:16 <b>sound (1)</b> 49:6 <b>Southern (1)</b> 16:15 <b>space (2)</b> 46:4;48:8 <b>span (1)</b> 35:20 <b>spanned (1)</b> 23:2 <b>spans (1)</b> 24:9 <b>spared (1)</b> 23:24 <b>speak (1)</b> 26:22 <b>speaker (1)</b> 9:25 <b>speaking (2)</b> 5:19;39:4 <b>special (1)</b> 36:18 <b>specific (2)</b> 10:7;25:25 <b>specified (1)</b> 31:13 <b>spoken (1)</b> 5:6 <b>sprang (1)</b> 18:1 <b>springing (1)</b> 41:9 <b>stale (1)</b> 7:2 <b>stand (1)</b>	20:16 <b>standard (1)</b> 42:24 <b>start (4)</b> 5:10;8:21;16:20; 30:12 <b>started (1)</b> 8:18 <b>starting (2)</b> 24:18;29:21 <b>state (4)</b> 7:4,24;17:19;40:18 <b>stated (1)</b> 19:13 <b>statement (2)</b> 29:6;30:2 <b>status (2)</b> 6:16;14:9 <b>statute (23)</b> 7:17;18:9;21:9,25; 22:4;31:7,17,22;32:1, 1,2,18,20,21;33:2,5; 36:7,25;37:11;41:16; 44:24;46:22,23 <b>statutory (2)</b> 16:4;39:10 <b>steering (1)</b> 22:3 <b>step (5)</b> 10:5,9;14:24; 28:12;44:6 <b>Stepping (1)</b> 13:22 <b>Sterling (1)</b> 5:12 <b>still (8)</b> 7:11;11:15;18:14; 19:2;20:11;21:22; 36:12;44:4 <b>stipulation (4)</b> 26:23;27:12;30:13; 31:4 <b>stipulations (1)</b> 45:13 <b>stop (1)</b> 17:3 <b>story (1)</b> 31:16 <b>straight (1)</b> 36:17 <b>straightest (1)</b> 32:19 <b>straightforward (1)</b> 33:15 <b>stream (2)</b> 22:19;29:15 <b>strict (1)</b> 18:8 <b>strike (1)</b> 27:11 <b>strips (2)</b> 32:2,3 <b>strokes (1)</b>
---	---	---	---	---

January 25, 2023

47:25 <b>strongest (1)</b> 41:3 <b>strongly (1)</b> 32:13 <b>sub (1)</b> 34:18 <b>subject (2)</b> 24:8;39:1 <b>sublessee (2)</b> 11:3;34:19 <b>sublessee's (1)</b> 11:5 <b>submitted (1)</b> 30:18 <b>subsequently (1)</b> 45:18 <b>substance (1)</b> 20:10 <b>substitute (1)</b> 40:11 <b>sufficiently (1)</b> 43:22 <b>suited (1)</b> 28:11 <b>superseded (1)</b> 44:24 <b>supplemental (1)</b> 34:11 <b>supportive (1)</b> 33:19 <b>sure (15)</b> 7:18;11:25;12:22; 14:16;16:16;18:20, 20:21;25;22:1;24:14; 37:20;40:19;42:23; 46:20 <b>surrender (1)</b> 44:9 <b>suspect (1)</b> 8:10 <b>sweeping (2)</b> 28:14,15 <b>Sweet (1)</b> 39:19	<b>tax (3)</b> 17:6,9,11 <b>taxes (2)</b> 17:2;33:10 <b>taxing (1)</b> 17:6 <b>team (1)</b> 9:18 <b>teaming (1)</b> 9:20 <b>telling (4)</b> 17:23;22:6;32:25; 42:4 <b>tells (1)</b> 47:14 <b>temporal (1)</b> 22:7 <b>temporally (1)</b> 22:17 <b>tenant (1)</b> 17:12 <b>tend (3)</b> 15:16;29:24;47:15 <b>term (5)</b> 18:16;29:15;34:4; 35:18;45:16 <b>terminate (2)</b> 24:16;30:22 <b>terms (5)</b> 7:12;12:19;22:11; 43:21,24 <b>test (1)</b> 7:21 <b>textualist (1)</b> 22:16 <b>Thanks (5)</b> 6:17;30:7,9;46:14; 47:9 <b>That'd (1)</b> 16:7 <b>that'll (1)</b> 24:16 <b>theater (1)</b> 23:1 <b>theaters (1)</b> 23:1 <b>there'd (1)</b> 35:9 <b>therefore (3)</b> 22:7;29:18;42:2 <b>thinking (5)</b> 7:20;9:2;24:3; 29:7;41:20 <b>thorough (1)</b> 7:6 <b>though (6)</b> 11:24;16:8;19:20; 40:8;41:10,15 <b>thought (7)</b> 14:12,13;21:14; 28:4;31:6;32:16;44:6 <b>thoughts (1)</b> 8:17	<b>three (5)</b> 12:21;23:7,8; 38:13,17 <b>three-way (1)</b> 19:24 <b>thumbnail (1)</b> 38:1 <b>tied (1)</b> 19:22 <b>timely (5)</b> 31:12;32:19;37:17; 40:11;46:22 <b>times (2)</b> 32:6,7 <b>timing (1)</b> 45:3 <b>today (4)</b> 5:7;7:5;9:5;49:2 <b>together (1)</b> 12:21 <b>told (2)</b> 12:17;25:21 <b>ton (1)</b> 21:12 <b>top (1)</b> 30:19 <b>total (1)</b> 31:15 <b>track (1)</b> 21:9 <b>tracking (1)</b> 12:16 <b>tracks (1)</b> 15:8 <b>tractor (1)</b> 46:3 <b>transaction (3)</b> 12:24;19:23;46:2 <b>transactions (1)</b> 10:13 <b>transcript (2)</b> 26:14;37:21 <b>translates (1)</b> 25:1 <b>treatment (2)</b> 27:4;28:23 <b>treats (1)</b> 15:6 <b>tremendous (1)</b> 39:20 <b>tried (1)</b> 18:17 <b>trigger (1)</b> 44:1 <b>triggers (2)</b> 23:6,7 <b>troubled (1)</b> 41:19 <b>true (3)</b> 13:3;17:24;31:8 <b>try (5)</b> 7:18;28:12;29:5; 48:20;49:6	<b>trying (4)</b> 13:18;20:22;21:18; 29:7 <b>turn (4)</b> 8:18;10:2;24:1; 30:9 <b>turned (1)</b> 9:21 <b>turns (1)</b> 7:5 <b>two (12)</b> 6:18;14:1,19; 15:19;25:25;26:5,13, 14;37:14;46:19,21; 47:2 <b>type (1)</b> 28:11 <b>typically (1)</b> 12:18	<b>unpublishes (1)</b> 14:20 <b>unpurposeful (1)</b> 9:7 <b>unsecured (8)</b> 20:19;21:19;25:19; 42:1;45:3;46:9;48:6, 8 <b>unwelcome (1)</b> 7:19 <b>unwitting (1)</b> 21:20 <b>up (13)</b> 11:11,12,24;12:20; 16:1;20:1,19,24; 21:13;25:23;38:25; 39:3;49:5 <b>upfront (1)</b> 33:1 <b>upon (6)</b> 10:18,22;13:11; 23:5,10;44:16 <b>Urban (6)</b> 16:9;39:16;43:20, 25,25;44:4 <b>use (4)</b> 13:11;32:5;45:11, 15 <b>uses (1)</b> 44:12 <b>using (2)</b> 36:12;38:16 <b>usually (1)</b> 12:23 <b>utilities (1)</b> 36:19 <b>utterance (1)</b> 7:19 <b>utterances (1)</b> 9:1
<b>T</b>			<b>U</b>	
<b>tag (2)</b> 9:17,20 <b>tailor (1)</b> 9:2 <b>takeaway (1)</b> 29:6 <b>talk (2)</b> 15:21;16:6 <b>talking (2)</b> 14:25;15:13 <b>talks (4)</b> 10:23,23;33:16; 37:12 <b>tasks (1)</b> 49:5			<b>ultimate (1)</b> 7:10 <b>unambiguous (2)</b> 39:22;43:22 <b>unconditional (9)</b> 10:19;11:6;18:10; 21:11,12;22:12,13, 18;24:6 <b>undeniably (1)</b> 23:7 <b>under (26)</b> 10:20,21;11:5; 14:9;16:23,23,23; 19:6,6;20:11;23:12, 13;29:19;30:23; 31:21;34:13;35:7,24, 25;36:2,2,4;37:11; 40:19;41:1,7 <b>undisputed (1)</b> 25:18 <b>unearned (1)</b> 31:18 <b>unexpired (1)</b> 10:24 <b>unfamiliarity (1)</b> 16:25 <b>unforgivable (1)</b> 28:22 <b>unilateral (1)</b> 31:23 <b>unless (5)</b> 8:8,13;21:2;25:21; 34:8 <b>unlike (2)</b> 10:20;13:8 <b>unmentioned (1)</b> 26:5 <b>unnecessary (3)</b> 19:3,11;43:4 <b>unpublished (1)</b> 14:1	<b>value (4)</b> 32:5;36:1,3;38:5 <b>various (1)</b> 39:12 <b>versus (4)</b> 13:3;18:16,24; 33:18 <b>video (1)</b> 9:21 <b>view (4)</b> 7:7;25:19;28:17; 34:10 <b>views (1)</b> 40:3 <b>vivid (1)</b> 7:2 <b>voluminous (1)</b> 8:10

January 25, 2023

<b>W</b>	22	<b>2027 (1)</b>	<b>503b (1)</b>	
<b>walking (1)</b>	<b>work (6)</b>	37:24	40:19	
9:14	22:19;23:8;24:4;	<b>24th (1)</b>	<b>503b1 (1)</b>	
<b>wants (1)</b>	25:1;40:15;48:14	10:4	41:2	
34:1	<b>workable (1)</b>	<b>25th (1)</b>	<b>503d (1)</b>	
<b>way (17)</b>	25:4	10:4	41:5	
9:3;12:12;17:18;	<b>worked (1)</b>	<b>2657 (1)</b>	<b>503d1 (2)</b>	
18:5;25:8;29:14;	6:19	11:2	13:18;32:3	
32:20;21;33:14;	<b>works (2)</b>	<b>2699-4 (3)</b>	<b>507 (1)</b>	
34:19;35:21;36:15;	25:8;48:7	30:16;34:18;35:4	36:19	
39:25;41:16;42:19;	<b>World (6)</b>	<b>2nd (1)</b>	<b>535479 (2)</b>	
43:11;46:5	7:15;11:16;13:15,	14:3	16:12;39:17	
<b>ways (1)</b>	16,24;14:2			
36:20	<b>worthiness (1)</b>	<b>3</b>	<b>6</b>	
<b>weeds (1)</b>	20:17			
33:14	<b>write (2)</b>	<b>3 (4)</b>	<b>6 (1)</b>	
<b>welcome (5)</b>	24:23;39:20	11:2,2;34:21,21	39:21	
8:25;9:23;48:22,	<b>written (1)</b>	<b>33- (1)</b>	<b>60 (11)</b>	
25,25	16:2	37:25	19:8;22:5;24:18;	
<b>well-situated (1)</b>	<b>wrong (1)</b>	<b>360 (1)</b>	29:21;31:16;32:22;	
9:25	7:15	35:24	33:6;38:19,25;39:10;	
<b>weren't (1)</b>		<b>3605d5 (1)</b>	48:25	
27:7	<b>Y</b>	31:10		
<b>West (1)</b>		<b>365 (4)</b>	<b>7</b>	
16:11	<b>year (2)</b>	10:22;14:9;16:24;		
<b>Westlaw (2)</b>	23:2;38:2	32:6	<b>7 (4)</b>	
16:11;39:17	<b>years (3)</b>	<b>365d (1)</b>	34:17;39:17,18,21	
<b>what's (6)</b>	7:2;37:14;47:3	18:6		
8:4;13:9;16:21;	<b>yesterday (1)</b>	<b>365d3 (4)</b>	<b>8</b>	
18:6;21:3;38:5	26:5	15:6;19:5;20:14;		
<b>Whereupon (1)</b>	<b>York (1)</b>	35:25	<b>8 (1)</b>	
49:10	16:16	<b>365d5 (8)</b>	17:16	
<b>whole (4)</b>		14:23;20:8;21:1;	<b>8th (1)</b>	
36:7,20;43:22,25	<b>Z</b>	22:2;29:20;32:11;	48:5	
<b>who's (4)</b>		33:13;41:7		
9:11,25;46:2,8	<b>zero (2)</b>	<b>37511 (1)</b>	<b>9</b>	
<b>whose (1)</b>	25:13;38:22	33:24		
28:24	<b>zeroed (1)</b>	<b>3C (1)</b>	<b>9 (1)</b>	
<b>wiggle (1)</b>	33:3	34:11	30:17	
21:12				
<b>window (1)</b>	<b>1</b>	<b>4</b>		
24:25				
<b>wish (1)</b>	<b>10 (4)</b>	<b>4.5 (1)</b>		
41:7	5:3;7:1;34:22;35:3	38:18		
<b>within (8)</b>	<b>10,000-foot (1)</b>	<b>4033 (2)</b>		
7:12;11:15;19:7;	28:17	26:10,19		
22:4,7;31:13,16,19	<b>12 (2)</b>	<b>4035 (1)</b>		
<b>without (9)</b>	34:23;35:3	26:15		
30:25;34:5;44:12,	<b>130,000 (1)</b>	<b>4037 (1)</b>		
14,16,20;45:1,1,2	38:2	26:15		
<b>WL535479 (1)</b>	<b>14 (4)</b>	<b>4038 (1)</b>		
16:11	30:18;34:17;35:3,3	26:9		
<b>word (4)</b>	<b>1988 (1)</b>	<b>43 (1)</b>		
24:6;32:7;40:11;	17:7	30:18		
41:23	<b>1992 (1)</b>			
<b>worded (1)</b>	17:8	<b>5</b>		
41:16				
<b>wording (3)</b>	<b>2</b>	<b>5.2 (1)</b>		
8:4;15:7,8		34:18		
<b>words (4)</b>	<b>20 (1)</b>	<b>503 (1)</b>		
32:6;35:15;39:21,	10:13	16:23		
	<b>2002 (2)</b>	<b>5031 (1)</b>		
	16:11;39:17	42:22		