IN THE UNITED STATES BANKRUPTCY COURT

FOR THE SOUTHERN DISTRICT OF TEXAS

HOUSTON DIVISION

IN RE:	§ CASE NO. 23-90611-11
	§ HOUSTON, TEXAS
WESCO AIRCRAFT HOLDINGS, INC.,	§ MONDAY,
ET AL,	§ SEPTEMBER 23, 2024
DEBTORS.	§ 1:30 P.M. TO 5:01 P.M.

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WESCO AIRCRAFT HOLDINGS,	§ CASE NO. 23-03091-ADV
INC., ET AL	§ HOUSTON, TEXAS
	§ MONDAY,
v	§ SEPTEMBER 23, 2024
	§
SSD INVESTMENTS LTD., ET AL	§ 1:30 P.M. TO 5:01 P.M.

STATUS HEARING

BEFORE THE HONORABLE MARVIN ISGUR
UNITED STATES BANKRUPTCY JUDGE

APPEARANCES: SEE NEXT PAGE

(RECORDED VIA COURTSPEAK; NO LOG NOTES PROVIDED)

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(Please also see Electronic Appearances.)

HOUSTON, TEXAS; MONDAY, SEPTEMBER 23, 2024; 1:30 P.M.

THE COURT: All right. We're here in the Wesco main case in the Wesco adversary proceeding. The adversary proceeding number is 23-3091. The main case is 23-90611. We're going to start with the adversary proceeding.

Anyone wishes to appear in the adversary proceeding, you can do so, if you're in court. If you wish to appear on the phone, please press 5*.

Who in court wants to appear on the adversary proceeding?

MR. ROSENBAUM: Good afternoon, Your Honor. Zachary Rosenbaum for the 2024/2026 holders. My presentation today will be for the 2026 holders much more than the 2024 holders but the naming convention might stay the same. I just wanted to make that clarification on the record.

THE COURT: Thank you, sir.

MR. ROSENBAUM: And I understand at least from counsel for PIMCO and Silver Point that the expectation is that I go first, which is fine. I'd like to reserve some time for rebuttal.

THE COURT: All right. Thank you.

Mr. Bennett? Mr. Bennett, good afternoon.

MR. BENNETT: Good afternoon, Your Honor. I don't expect to have to say anything today because I'm sure you're aware, on October 2nd, the other adversary proceeding is going

to consider some of the same legal issues. The only reason I'm here is just in case something comes up that affects our case as well as this case.

THE COURT: Thank you, sir.

Mr. Heidlage?

MR. HEIDLAGE: Just for clarification, Benjamin Heidlage. I'll be appearing on behalf of the PIMCO and Silver Point.

THE COURT: Thank you.

MS. OBERWETTER: Ellen Oberwetter from Williams & Connolly on behalf of the Platinum defendants, Your Honor.

THE COURT: Thank you, Ms. Oberwetter.

MS. OBERWETTER: Thank you.

UNIDENTIFIED MALE: Good afternoon, Your Honor. Thomas -- Lowenstein Sandler on behalf of Citadel.

THE COURT: Good afternoon.

UNIDENTIFIED FEMALE: Good morning, Your Honor. -- and Mark -- on behalf of the Unofficial Committee of Unsecured creditors.

THE COURT: Good afternoon.

UNIDENTIFIED FEMALE: Good afternoon, Your Honor.

MR. STEIN: Good afternoon, Matthew Stein, -- lawyers on behalf of Senator.

THE COURT: Good afternoon.

MR. NOSKOV: Your Honor, Victor Noskov, Quinn

Emanuel, on behalf of the Debtors. We don't expect to say anything about the adversary proceeding, but we're here in case you have any questions.

THE COURT: Thank you. Good afternoon.

So Mr. Rosenbaum, I start off the hearing believing that the argument made by the respondents that this matter is moot unless they prevail on appeal is probably correct.

And so, I would like you to focus on why you shouldn't lose based on that argument. And as I understand it, it is that in order to prevail, you're going to have to show some sort of an injury. And under our opinion because we had left the 2026 holders intact and without change, that you can't proceed unless they win on appeal, at which point, potentially, you could proceed.

And because I will operate on the assumption that this is just like I'd issued a written opinion where I would've said that's now moot, that that's what I should do here.

So you're starting off with a couple of legs in the ground, but why don't you go ahead.

MR. ROSENBAUM: Well, I'm going to try really hard pull on that. And I think I -- as to why. We do have slides for this. I will almost certainly go out of order, but I do think it will be useful for the Court and, you know, others following along to start with our slides. If Mr. Stein can

approach?

THE COURT: Are they going to be put on the screen, Mr. Stein?

MR. STEIN: Yes. If you can give control to the 24/26 holders tech?

MR. ROSENBAUM: Okay. And I think we need to give credentials to 2024/2026 holder tech. And we can go -- we can start at slide 2.

So all the way down on the bottom of the elements slide, we note that damages are, in fact, an element of purchasing --. And at the outset of this case, the parties agreed to bifurcate remedies and liability.

The only issue that we tried over the course of six months, or at least largely the issue that we tried went to liability. And the Court issued a declaration of a breach and a declaration that as to the 2026 holders, their rights/interests and means are the same now as they were on March 27th, 2022. We accept all of that.

I think there can be no real question that in advancing our liability case, notwithstanding for the moment the declaration made by the Court, we established a prima facie case apart to the 2026 holders that were caused by the breach.

And we had set out ultimately then to quantify that harm in a separate proceeding, if we can prove up liability,

and I want to explain to you both under New York law and under, you know, the exigent facts that that should still occur as to tortious interference.

So let's go to the next slide. Next one after this.

So the New York Court of Appeals in a case called Guard Life v. S. Parker Hardware dealt with the remedies for tortious interference as distinct from the remedies for the breach of contract that was tortiously interfered with.

And in this case, the court noted, and we quoted at the bottom of page 4, "What other damages, if any, might be recovered in action of this nature and the nature there was tortious interference, we are not here required to determine an improper footnote."

The footnote is lifted in screenshot above. And it says, "An action against the third party for tortious interference, however, that is distinct from the underlying breach of contract, the elements of damages, including consequential damages, would be those recognized under the more liberal rules applicable to tort actions."

So this is the Court of Appeals explaining that if we have proven liability for tortious interference, that our quantum of damages --

THE COURT: So their argument is a little different, and I just want to focus on the way I understood their argument which is that an injury is an element, and I think

you acknowledged an injury is an element.

And that if they didn't alter your client's rights, you weren't injured as a matter of law because your client's rights were not altered.

You're telling me that we may have a different measure of damages in tort and in contract. But if the rights were never altered, their argument is that there was no tort by attempting to alter rights unsuccessfully.

MR. ROSENBAUM: Yeah. And there is no case -- I've read every case that they cite. The only case that arguably stands for that proposition is where the breach never happened. Right. In other words -- or in one case, where there was a corpus of an insurance policy.

One side said that you wrongfully excluded a beneficiary. And when that was rectified, the insurance policy stayed exactly the same.

Here the corpus is not exactly the same, so let me take a step back. Because I've worked through this example in my head, and I want to see if Your Honor sees it my way.

Let's say, for example, and I'll try to take a really simple example. Let's say I'm a lender, and my collateral is an automobile. And on -- so I have a lien on a car, and on day one, the day of a breach -- and we'll get to what the breach is in a moment -- let's say it's an expensive car.

It's a $75,000 car, and it only has 5,000 miles on it, right. And it's in pristine condition. No dents. The engine works perfectly. The person changes the oil, and the car on the day of the breach has a market value of $60,000, let's say for argument's sake.

Let's say someone wrongfully interferes with my lien on that car. On day one, it's worth $60,000. And in addition to wrongfully interfering, puts an indemnity obligation on top of it.

And then it takes me two and a half years to go to court and have a declare that, hey, your lien was never lost. The same lien that you had on the day of the breach. But when we get to court or we get through court, the car now has 75,000 miles on it, it's dented, the guy didn't change the oil, so what was worth $60,000 on the day of the breach is worth $20,000.

I don't know ultimately, when we get our recover based on the Court's findings that our facts will match that pattern exactly. But what we have shown for purposes of the prima facie case, right, is that there is damages.

I think the injury, in fact, is a different concept. What they're saying is that we've been fully compensated; so therefore, you don't have any damages. We don't know that yet. And I think it's premature in the way that we --

THE COURT: That's not their argument. And I think

that is an interesting argument, and maybe I'm misreading their argument, but I think they're saying -- and you're telling me that their cases don't support their argument, which is a different question. That was sort of the first thing you said.

But they're telling me that under New York law, if your status didn't change, so somebody attempted to interfere with your lien unsuccessfully, that there simply isn't a cause of action.

It's not that there's a cause of action for a different quantum of damages or for subsequent damages or for consequential damages. Their argument is there's no cause of action. And you're telling me to the contrary, right?

MR. ROSENBAUM: I'm telling you to the contrary. And I've read their cases, and I think they weave together disparate holdings on completely disparate facts that don't support that as a concept of New York law.

In other words, the New York law is what I described. If you tortiously interfere with my contract, and you wrongfully interfere with my liens, and you act for two and a half years as if you're the rightful lienholder, and I'm not, and I get my liens back, and the collateral is worth less than it was when you breached, then I have a damage.

THE COURT: Well, why aren't the damages caused by your failure to enforce your lien?

MR. ROSENBAUM: At the time?

THE COURT: Right. I mean, I understand it may have been difficult. But you had the right to enforce your lien all along.

MR. ROSENBAUM: Well, it took us this long. I mean, we did.

THE COURT: I've got that.

MR. ROSENBAUM: We did.

THE COURT: But I mean, that's --

MR. ROSENBAUM: But I don't think --

THE COURT: -- I don't know that your damage is because the court system is slow.

MR. ROSENBAUM: No, I don't. But I think -- and I'm looking --

THE COURT: But I don't think you tried to foreclose on your lien either.

MR. ROSENBAUM: We didn't. No one recognized ours. So --

THE COURT: Well, they don't need to recognize -- you mean, if I have a lien on my house, and I tell the mortgage company "I don't recognize your lien," they can't foreclose? I mean, that's not the way the world works.

MR. ROSENBAUM: Well, yeah, but, Your Honor, we immediately sued. Well, let me unpack that a little bit. Because we sued to -- we sued in state court for a finding

that we both, right, that we get our liens restored and we get damages, right. It wasn't one or the other.

And I don't -- I think where we're talking past -- maybe not talking past each other; where we're disagreeing is I don't think they're mutually exclusive.

If you commit a -- and I get what you're saying. You're saying that what you're accepting of, and I think it's the wrong construct of the law, that if at the time that the Court adjudicates my rights and finds the breach, I get the corpus back, then there is no question at that point whether if the corpus was harmed compared to what it looked like the day of the breach, then I don't have a damage.

I don't think -- there's not one case they cite that says that. So I don't know where the -- it's not an established principle of New York law.

THE COURT: So just to be sure that you follow where I am, I do think that the damages from the delay can be material. And I think they can be real. As to whether they get proven or not is a different question.

But in theory, they could be, which would mean that it's possible that the damages from the tort are different than the damages from the breach, the Debtor's breach.

MR. ROSENBAUM: Right. And that in the law --

THE COURT: So I will accept that it's possible that those damages are different.

MR. ROSENBAUM: Uh-huh.

THE COURT: And where I'm stuck is the argument -- and I'll let them defend their own cases -- but is the argument they're making that says that you have to have some deprivation to you before there is a claim?

MR. ROSENBAUM: What I'm suggesting is there was deprivation, right, that was coinciding. The breach was successful until the Court found that it was a breach.

And if there was harm in the intervening period -- and there might not have been, but I think there was -- in the intervening period between when the breach occurred and the Court adjudicated it, it's not about the speed at which the Court acts.

So I'm looking at my notes on at least one of their cases which dealt with an amendment to an insurance policy. It's called Lincoln Life and Annuity v. Wittmeyer, and it's from the Fourth Department of Health Division in New York, 211 AD 3d 1564.

And this is the one where -- not a nice family, but appears at one point wife and two daughters were all beneficiaries of the same insurance policy. I think it was a life insurance policy.

And let's say the policy is for $10 million. I don't know that it was. And the wife then amends the policy to exclude the daughters as -- or maybe she divorces the

husband. I'm not sure how the facts bear out.

But the policy is amended so the daughters are no longer beneficiaries. But by the time they got to court, the daughters were beneficiaries. And at no point did that policy go from being $10 million to $5 million to $2 million.

Our facts are completely different than that. So that doesn't -- that's not this blanket statement that because in that case, for example, when, by the time they got to a proceeding, there was no harm because there was nothing changed about the insurance policy.

This is a completely different set of facts. I don't know of any case -- and I've read all the ones that they cite in their recent brief -- that comes close to standing for the proposition that they do, which is why I started with the Court of Appeals, which has spoken on this, which is obviously the binding precedent.

Which is when you commit a tort, you have a broader, more-liberal range of damages. It wouldn't even then make sense to say that if you might have been compensated in contract, you don't still potentially at least have damages in tort.

And just sticking with the point, if we go to the next slide, slide 5. And this is, you know, an Appellate Division case, First Department, 1998. It's similar but it reinforces, and this was in the context of claim preclusion

that breach of contract and tortious interference are different causes of action.

So I do -- what I will acknowledge is that if we are fully compensated for the harm, that we don't have a damage. But that's not what they're saying. Right. And we all agree that a remedies phase would follow this one. Let me then talk about what our damages might be.

Let's go to the next slide. Slide 6. Oh, I think our slide show is frozen. Yeah, everyone has it worked out. So if we go to slide 6 or at least get to page 6 while we're working on the tech.

And this case at least will be interesting to Mr. Bennett because it's cited in the Langur Maize brief. But the facts, these facts are in the record for purposes of even our liability case.

These secured bonds, if you take a step back, and you look at the world, right, if you were to try -- and we might do this later to get a hypothetical world and an actual world and look at what the value of these interests were absent the breach.

A good data point, maybe not the ultimate, definitive data point, but a good data point is where were the bonds trading at a point where the market knew the company was in distress but before the market knew that there was going to be this exclusionary transaction.

And Mr. Wang testified to that in early February that the bonds were trading in the mid-eighties. So the market was pricing these bonds in some form, these secured bonds, in some form of distress to par, but in, you know, somewhere between 82 and 85.

And, you know, the Second Circuit has said again -- and I'm talking about tort damages as compared to contract damages in this case -- but where the breach involved the deprivation of an item with a determinable market value, the market value at the time of the breach is the measure of damages.

So again, all I'm suggesting to the Court is that we get an opportunity to prove the delta between what we can possibly get out of this bankruptcy and the total scope of harm that was caused by the tortious interference that occurred in this case.

Oh, Mr. Stein's reminding me of something else which we mentioned in our brief. It would be part of a damages analysis but the -- they left an extra gift behind when they made this amendment which was WSFS.

So they recognizing that the left-behind creditors were going to get something -- they left us with the same trustee who was in place, you know, that allowed for the breach.

I know the Court has dismissed the trustee from the

case, and I'm not revisiting that part of the ruling.

But what they also did was they put an extra roadblock in place and said basically to us, they amended a part -- on the way out, they amended a part of the indenture that said but you can't replace the trustee.

They stuck us with the same trustee that had just caused the breach and put a roadblock in front of us instructing the trustee to take action. We nonetheless took action on our own, and there's a long history behind it.

But I think it's just relevant overall to if the Court is actually looking at whether we could have foreclosed on anything when that trustee was saying we were unsecured creditors, I think is just an impossibility.

We can skip through the next few slides because they talk about prima facie harm, which I really don't think there's any genuine dispute that the breach caused harm. And I'd submit, Your Honor, that's all we have to show now because we agreed to bifurcate.

But if we go to slide 8, and I'll just -- then I'll jump ahead for a minute.

Mr. Carney testified, you know, within months of this transaction the company was in dire liquidity need again. And then in slide 9 as Professor Morrison testified, again in our attempt to put forward a prima facie case of harm because we weren't trying damages, he estimated conservatively that in

a bankruptcy immediately following the, you know, the end of March, had there been no transaction, our recovery would have been upwards of 75 cents on the dollar, again, on a conservative basis, which is another data point one might look at in a true damages case, which we haven't put on, right.

We have mid-eighties bonds trading on a normalized basis. Estimate 75 to 80 cents out of bankruptcy had this not occurred. And as we all know, this breach frankly changed the complete structure and dynamic of this case.

But you don't even have to take my word for it. Let me jump ahead to -- and then I'm going to get to -- back to the law in a second.

But let me jump to slide 15. Looks like tech is frozen, but we all have a hard copy.

On slide 15, this is Mr. Prager at Silver Point having done his own model about the negative impacts of the transaction that he and his colleagues were foisting upon the company.

And he acknowledged it would have negative impact borne by the non-participating notes, and the notes would likely trade down.

So in terms of ultimately whether we can prove up tort damages as compared to the compensation that we would get as a consequence of the Court's declaration, I think we're more than entitled, I think we've more than established that

we can, and should be able to.

If they can come back and defend that somehow, we haven't been actually harmed, I think that's a different discussion.

So why don't I stop there because that addresses the first topic that the Court was interested in. I would change gears and go to some of the other topics. But I do think -- but I do want to reserve time because we -- this is a new argument that they made.

I'm not saying that it was -- there was anything untoward about having made it. But the first time we saw this argument was in their submission last week, so I would like some time to rebut on this point in particular.

So now going back to slide 2 for a minute. All right. We're going to try to fix the tech.

So Your Honor, substantively, if we -- assuming we have prima facie damages and that's all the Court needs to accept for today, which I think you do, if you look at element four, intentional interference without justification, and I don't think there's a credible dispute that there was intention interference.

And it doesn't mean that you need to establish a subjective understanding of the contract; you just need the conduct has the potential, and clearly it was, and a reasonable probability of the outcome. And I think that's

probably beyond any real -- where the -- and we can still talk it out.

The main dispute is whether it was with or without justification. Let me pause. If we can give control to Abigail-RA, maybe that was the problem with our tech issue.

THE COURT: I wonder if that person can turn on their camera so I can find them. We have a lot of people online. Here the online players could use -- there we go. Abigail. Okay. I've made her the presenter now.

MR. ROSENBAUM: Okay.

So Abigail, if -- well, I'll give you a second.

So slide 2 I just mentioned. And the main part of the discussion at least I want to start with is whether the intentional interference was with or without justification.

Because as, you know, the Court is no doubt now aware of is on cases, in some limited instances -- and it's different, and I'll start with this -- it's different for creditors like PIMCO and Silver Point compared to a controlling shareholder like Platinum.

So I want to start with creditors and PIMCO and Silver Point. So let's jump ahead to slide 11. Okay. I'll keep going. Apologies for whatever tech issues we have.

THE COURT: Do we have a copy of it here in the courtroom?

MR. ROSENBAUM: We do.

THE COURT: A physical, I mean, an electronic copy? No, do we have an electronic copy? Because I can put it up.

MR. ROSENBAUM: Would it make sense to take a moment to do that, Your Honor?

THE COURT: Well, if you want to send me the electronic copy, go ahead. And then I can open it. It's up to you. I mean, if you --

MR. ROSENBAUM: No, I think it's worthwhile. So, you know, I --

THE COURT: Well, that's fine. Let's go ahead and just have somebody send an electronic copy to my email. The other thing is if this is a problem with GoToMeeting, I can -- well, I'm seeing that one as moving. There. They've got it working. Someone just -- they did move it now to slide 11.

MR. ROSENBAUM: It might be like a minute lag. That's my concern. We can -- why don't -- we can send an electronic version to the Court, and I can --

THE COURT: Whichever way you want to do it but --

MR. ROSENBAUM: Can I have a moment just to confer with --

THE COURT: Sure. Sure.

MR. ROSENBAUM: -- my team?

(Brief pause.)

MR. ROSENBAUM: Your Honor, we're going to send the Court a copy. So if we could take two or three minutes to do

that rather than to try to do that ad hoc, I'd appreciate it.

THE COURT: Sure.

MR. ROSENBAUM: And with apologies.

THE COURT: No problem.

(Brief pause.)

THE COURT: Again, I could restart GoToMeeting if you think it's a problem with GoToMeeting. I doubt that it is from the way it's looking.

MR. ROSENBAUM: What I'm hearing, Your Honor, is that there's -- maybe it's our firewall, but there's a lag of, you know, like a minute between someone trying to change the page and it showing up. So we're going to send it to the Court momentarily --

THE COURT: Okay.

MR. ROSENBAUM: -- but if -- whether or not that works, I will able to send it either way.

(Brief pause.)

MR. ROSENBAUM: Your Honor, we sent it. I think we sent it.

THE COURT: Oh. So I know that the email does go through firewall. I don't think GoToMeeting does. I think we're both looking at remote locations.

MR. ROSENBAUM: I'm told that an electronic copy has been sent to the Court.

THE COURT: Great. Thank you.

(Brief pause.)

MR. ROSENBAUM: Your Honor, it's an email from Thomas O'Heney --

THE COURT: Okay. Thanks.

MR. ROSENBAUM: -- if that helps.

(Brief pause.)

THE COURT: Would you go grab my iPad out of the -- my red --

(Brief pause.)

THE COURT: Here it is. It just came.

Kevin, I don't need the iPad anymore. Okay.

MR. ROSENBAUM: Thank you, Your Honor. And apologies again for --

THE COURT: So you wanted page 11; is that right?

MR. ROSENBAUM: Yeah. Why don't we go to page 10 just to reorient; and then we can go 11.

So Your Honor, where we left off before our technology problems interfered was that I'm focused now on whether the interference was without -- with justification. And the analysis is very different when you look at creditor versus controlling holder such as Platinum.

So let's go to the next slide, and I'll first explain, you know, how and why that is. And then I'll try to illustrate it.

So the Court of Appeals in 2007 -- and this is the

most-recent pronouncement that it's given on tortious interference -- repeated, you know, that tortious interference with an existing contract is afforded greater protection, and I think that's natural and certainly in line with New York law and New York's emphasis on being a commercial jurisdiction.

A prior Court of Appeals case from the mid-nineteen nineties citing yet an earlier case talked about this concept that procuring the breach of contract in the exercise of an equal or superior right is acting with just cause.

I'll say it again because it's a concept that was slippery for me until I thought about it and absorbed it a few times. If you procured the breach of contract while exercising a right that is equal or greater, than that is just cause.

But if you are not exercising a right that is equal or greater, if you're -- if you have no right, then that is not just cause. And when White Plains in 2007, the Court of Appeals talked about creditors being able to assert an economic interest defense, it cited one case.

Because there are very, very few -- frankly, only four cases that either side has cited written decisions where the economic interest defense has been analyzed in the context of the creditors interfering.

And when the Court of Appeals mentioned creditors, it cited back to this Ultramar decision from 1992.

Let's go to slide 12. And to illustrate what Ultramar is and what the three other cases are where a creditor can be afforded an economic interest defense.

And in -- and maybe the easiest example is Abele Tractor which is also -- which is a 2018 case that does essentially the same thing as Ultramar. It's also in our string cites.

In Abele Tractor, a secured creditor had a first lien on a tractor. And the owner of the tractor purported through a bill of sale to sell it to a third party. Before the bill of sale closed and the third party took possession of the tractor, the secured creditor seized the tractor. And therefore, the contracting party couldn't deliver the tractor.

That is what it means to have, in that case probably, a greater right, but an equal or greater right to the corpus in the context of lending, in that case, secured lending.

Ultramar was functionally the same where the bank had a security interest in an account in cash. The cash was owed by virtue of a different contract arguably to the plaintiff entity, and the bank foreclosed or took possession, used its rights to take the cash.

And the other side said, no, you've interfered with my contract. And in both instances, of course, you're acting with an equal or greater right over the corpus; and therefore,

you're immune. You don't tortiously interfere.

The two cases -- there's Triax (phonetic), Bank of New York Mellon, which are both Federal District Court cases that stand for exactly the same proposition where a lender is owed payment of interest or principal, and there's one pot of cash.

If it says to the borrower don't pay him; you should pay me, nothing wrong with that if there's equal or greater right. Let's go to our case now, 13.

THE COURT: I kept waiting for it to move.

MR. ROSENBAUM: I know.

THE COURT: Sorry.

MR. ROSENBAUM: Well, it's at least quicker than what we've been able to accomplish. This is -- no case has excused the type of behavior here by a creditor, nor could it as a matter of New York law for economic interest.

And I'll take a giant step back. This idea of self-interest versus interest of a company makes a lot of sense when you're thinking about it in the context of the controlling shareholder who might be wearing two different hats.

A creditor is not. A creditor can act in its self-interest, except it can only do so if it's exercising either a greater right or an equal right.

THE COURT: A greater right or equal right to whom?

MR. ROSENBAUM: Well, here -- and I think this -- I've tried to illustrate it because frankly, Your Honor, it took me a while, but I think I'm there. Right. And these are our facts.

What PIMCO and Silver Point did was without -- with less than two-thirds, exercised or attempted to discharge the liens on collateral, right, our liens on collateral. And in that instance, they had the corpus, the equivalent of the tractor in Abele or the pot of cash in Ultramar, is liens on collateral.

THE COURT: Well, Incora did that, not them, right?

MR. ROSENBAUM: Well, they induced it.

THE COURT: They had first tried to use the two-thirds. That fails. And then Incora reaches what I thought was a reasonable decision as I've said, that their only way to avoid bankruptcy was to take the larger quantum of money --

MR. ROSENBAUM: Uh-huh.

THE COURT: -- that was being offered by PIMCO and Silver Point. PIMCO and Silver Point say the only way we're going to offer the money is if we get first liens here, as well as other promotions within the capital stack.

MR. ROSENBAUM: Right. So they induced the breach, right. I mean, in other words, they --

THE COURT: When you say they "induced the breach," they're willing to do it. What did they do to --

MR. ROSENBAUM: I'm going to get to that.

THE COURT: -- where --

MR. ROSENBAUM: If this is --

THE COURT: Yeah. I mean, where do they cross the line of doing something that exceeded their rights? They certainly had the right not to put in the new 250.

MR. ROSENBAUM: Agree with that.

THE COURT: They had the right to say if we're going to put in the new 50, these are the only conditions we'll put it in on. They can do that.

MR. ROSENBAUM: Well, that's getting closer. But --

THE COURT: Let's assume they didn't own any bonds at all.

MR. ROSENBAUM: Right.

THE COURT: And they came in and said we'll only put the 250 in on these conditions.

MR. ROSENBAUM: If they --

THE COURT: If you don't want our new money, don't take it.

MR. ROSENBAUM: If they said we will give you 250 if you give us 550 million of somebody else's lien, or you go bankrupt, and --

THE COURT: If you give us a $550 million first lien.

MR. ROSENBAUM: Well --

THE COURT: We'll give you 250 if you give us a $550 million first lien.

MR. ROSENBAUM: That aren't your -- right -- that -- right -- that are someone else's. We don't have equal right to it. They don't have equal right to it, and they don't have greater right. And that's the formula.

And if they induce the company to do that, which is what they did -- and I'll get to, like, how they did it -- then they've tortiously interfered.

Taking a step back, if this isn't tortious interference, then I'm not sure whatever could be, right. If you set up your transaction, right. You say with this Hobson's choice, and then you sweeten it by allowing the controlling shareholders to participate in it and get some extra value from it, not for the company but for themselves, and you orchestrate that whole thing, and you cause the company to breach, then you've tortiously interfered with someone else's contract.

I mean, that's exactly what happened, and that's why we've sued them for it. And, right, so that's why when you look at whether they have an economic interest -- it is -- you have to consider were they exercising any right that they had, and the answer is -- any legal right, and the answer is no.

They didn't have the right with less than two-thirds to cause the company to discharge our liens, and that's what

they did. So I'll keep going because --

THE COURT: I just want to -- this is why the economic interest issue matters, right, is they had the right to say we're only going to do this on these conditions. We already own all of these bonds.

You want more money from us, this is the only way we're going to lend you the more money. If you don't lend us more money, we're not threatening to do anything different than we would otherwise do; it's just you're going to be unstable, and you're going to probably default. They didn't make any threats.

MR. ROSENBAUM: Well, they used economic pressure no doubt. And I think --

THE COURT: Well, they -- but that gets down to their economic interest. They had the right to say we want our loan, our current bonds to perform. And they had the right to recognize the Debtor wasn't going to be able to perform. And they said here's 250 if you want it.

MR. ROSENBAUM: Well, they said here's 250 if you give us 550 million of somebody else's property. That is what happened, right. And so that part of the fact is not only what happened; it was their entire investment objective.

And taking a step back because Your Honor and I have had this conversation before. If you can make a return on your investment, in this case, they were -- obviously, they

were wrong, but they were projecting a 64 percent IRR.

You are free to do that, right, as long as you do it within the confines of the law. If they didn't cause a breach or they didn't induce a breach to do it, then more power to them. It was a brilliant arbitrage.

And they built the position, let's not forget, just to do that, right. If you go back to September of 2020 --

THE COURT: They did, but their problem was -- it wasn't that they wanted the economics. It wasn't that they wouldn't give the new money without the economics. The problem was what they did didn't work, right, which is because your documents held up.

So what did they do that was wrong? It turns out the documents held up, so there was no injury from it is sort of where we started. But if they were right that they could do this under the documents, then everyone's agreeing they're protected by their own economic interest, right?

Like the 2024s aren't challenging our ruling that they could've done this if they'd had the two-thirds. So this has to go on that they did something wrong other than be the only ones to offer enough money.

MR. ROSENBAUM: I don't think that's the correct -- I think they're wrong. And I'll get to the what they did wrong, right, like if you just want to look at the level of pressure and what they did wrong.

I have slides for that. I actually don't think that you need to --

THE COURT: Yeah, but -- and I got it. And you know that I wasn't too happy as we went through the trial about what happened. But under the economic interest rule, you need to show me that they exceeded what their economic interest permitted them to do.

MR. ROSENBAUM: And I think that's where we are missing each other, which is when it comes to a creditor, right, who can act in its self-interest, right, where the line is if you do something that is intentional and has a foreseeable consequence of a breach, that's all you need.

Like if your act was intentional and you have a reasonably foreseeable consequence that it breaches, that satisfies one element.

The next element is was it with or without justification. If you're in the Abele Tractor world, right, where you know I'm sitting here as the secured lender, I know there's a bill of sale. I know it.

And I'm pretty confident that if I take the tractor, he's going to breach on the bill of sale. So that part is easily satisfied.

But I could still do it because I have a superior right to the tractor than the person who bought it, right. That's -- but here, that's why I go back to my funky slide.

When the equation is at the, you know, with a gun facing at the board, right, and a sweetener for the board's principals -- and as the Court found, not a genuinely independent director or a director whose independence was certainly under serious question -- if that's the dynamic that you set up, you get all -- you don't get a cap on your downside.

We talked about this also during the trial. Remember when I was cross-examining Mr. Dostart, and I actually learned something. Because I thought there was only such a thing as downside risk; there's upside risk, right.

But if you're PIMCO and Silver Point and you want to get the upside risk, the law actually gives you all of the downside risk if your terms are I'm only going to give you your 250 if you give me something that belongs to somebody else, and I don't have a right to it.

So once this Court found that they didn't have an equal or greater right, which they didn't, then I submit that's tortious interference. That it would be different if we're talking about a controlling shareholder because those people wear two different hats.

And I know the law, it's developing in the sense of there are more cases channeling through, but that's why I pointed the Court to these cases that go back to 2007 and the nineteen-nineties because this concept is actually clear.

And the fact that there are only four cases, I think this tortious interference doctrine has existed in New York since the mid-eighteen hundreds. There's four cases that deal with creditors, and they all say the same thing, which is the Abele case, not this case.

So let me get a little bit, and I know we all lived it, so I won't belabor the facts. But I do want to talk about them a little bit.

Because again, I would submit that once the Court finds that they had a lesser right, it's game over. But if go to page 18.

THE COURT: Page 18, you said?

MR. ROSENBAUM: Slide 18. So from day one, how did PIMCO and Silver Point go about doing this. First of all, they developed a strategy, right, to do an uptier. This was not a set of bondholders who necessarily found themselves in this massive position when the company went into distress.

They had some bonds when the company went in distress, and they bought more to get this return, right, in order to affect this strategy. And from the very beginning in September of 2021, they knew that Platinum was a lynchpin.

So what do they do? In November of 2021, they reach out to Platinum. And then in December of 2021 when they put their first proposal out, they offer or at least they suggest, hey, Platinum, this is going to strip liens from existing

secured holders, but you can participate.

So they build the carrot. Now let's look at how the carrot panned out, at least in their minds, you know, all the way into March of 2022 in tab 19.

This is Silver Point. And from what I remember, he couldn't recall whether this was Carlyle or Platinum that he was speaking of, but it really doesn't matter because it was the unsecureds.

And what he said is we're uptiering them, like, so they're in control of this whole thing. And this is a windfall. So carrot, right. We're going to give you an opportunity to personally profit to lock this down because we want to get our 64 percent IRR. Excellent.

Then, right, coinciding with this when they learn that there's a minority group with financing out there, right, and again, if you think back, Judge, yes, they put terms on this that they won't open it up to everyone.

That was their choice. Had they opened it up to everyone, it would've been better for the company, and it would've been better for everyone. But instead, right, when they learned that there was, at least in their mind, a solution that was approximately liquidity neutral to the one that they were advancing, what do they do?

And this was after they knew there was a blocking position. Next slide. They -- this is Silver Point trying to

keep its own partners' feet to the fire to get to the deal. Let's go to the next slide.

And this is the Court's finding on this. And I interpret this as exactly satisfying, you know, what would be required if the Court was looking at, you know, their -- an element of interference, what they did. They were in a power position.

They knew that the company needed liquidity. They knew that there were other ways, right, there was another group that could've provided liquidity, and they knew that that other group had participated in their liquidity. But they used that power position to give the company one option, their option.

THE COURT: Except that you agree, I think -- and this is back to the economic interest position -- I agree with what you're showing on the screen on this exhibit that's what they did.

I think you have to agree they had the legal right to do exactly that. They had the legal right to say we're not going along with the deal offered by the Akin Group.

MR. ROSENBAUM: They had that right.

THE COURT: If they had that legal right, but that's exercise of that right is what caused the injury that you're talking about, why isn't it protected?

MR. ROSENBAUM: Because if it stopped there, then

there would've been no transaction. But when they put -- it didn't stop there. I can keep going through the slides, but I could also just -- I can do it from memory.

That's not what happened, right. What happened was they were trying to get to a bona fide two-thirds. And when they couldn't, right, that was the inflection point, Your Honor. That was the point at which for them I can use my power of position to induce a breach, or I could do one of two things.

I can let the company die on the vine and go bankrupt, or I can open -- I can actually deal. But the power was in their hands. You could do what's right, and you could do what's wrong under the contract.

Once they did what was wrong under the contract -- and I hear what Your Honor's saying, that it takes two to tango, but it always does. When you're inducing somebody else's breach, every single instance of that requires the breaching party to breach, right. In other words, --

THE COURT: Yeah. And in the absence of this provision under New York law, if you want to ask what do I think of the morality of this, that might be a different answer.

But if New York law says you can exercise the power that you legally have without risk of liability, even if you're doing it to achieve economic gain, you haven't yet

shown me what they did that violated, that exceeded what their rights were.

You're saying it invaded your rights, but what exceeded their rights? Because I think you have to show me that they exceeded the legally-protected rights that they had, and that resulted in an injury to you.

I do understand the injury to you. I don't know that it's unique from what we have already cured. But what did they do that exceeded their rights?

MR. ROSENBAUM: Well, I'll say it in a conclusory way, and then get on back to behavior, they procured the breach. They procured -- they induced the breach. They came forward. They --

THE COURT: What action did they take?

MR. ROSENBAUM: Okay. Let's --

THE COURT: You're telling me the consequence was not that they, but that the company chose to issue these first-lien notes which I've held was an invalid act by the company.

What did they do that exceeded what their rights were under the economic interest doctrine? You've already told me, and I think this is right, they had the right to say we're only going to lend the money on the conditions we wanted.

They had the right to say we're not going to agree

to the Akin deal because we don't like it for whatever reason. We don't like it; we're not going to vote for it. You don't get our consent.

So what did they do that exceeded their legal rights --

MR. ROSENBAUM: They --

THE COURT: -- that they have been given?

MR. ROSENBAUM: -- they structured the breaching transaction. They conceived of it.

THE COURT: So what? I mean, a bunch of brilliant lawyers can structure stuff.

MR. ROSENBAUM: Right. But when it -- look. I think this is -- I think if Your Honor goes this far, then it takes this cause of action to a point where it would be almost impossible to satisfy.

Because what they didn't do is literally have a gun at the head of Mr. Carney, like a gun. They had an economic gun at his head which was close so I think qualifies. But they didn't have a real gun and say if you don't sign that document, right -- and that's not the standard -- if you don't sign that document, I'm going to shoot you in the head, right.

They said it differently. They said if you don't sign that document, I'm going to -- you're going to die on the vine, right.

THE COURT: Well, --

MR. ROSENBAUM: You're going to have to file for bankruptcy, and that's economic pressure. And that is coercion.

THE COURT: So we don't know what would've happened just if this matters if the company had said nope, if you don't want to do a deal, then we are going to file bankruptcy. And you ought to do a deal that's pro rata. The company could have said that and it didn't.

MR. ROSENBAUM: They probably should've said that.

THE COURT: What is that?

MR. ROSENBAUM: The company probably should've said that.

THE COURT: Right.

MR. ROSENBAUM: But I think they fixed for that by cutting Platinum in. It was clever. They fixed for that, right. If Platinum wasn't cut in, then that would've been the right move by the company.

Because, in fact, this deal was worse for the company. I have a slide for it. I don't even need -- Your Honor can trust that I remember this anyway. Malik whose last name I'll never be able to pronounce --

THE COURT: Vorderwuelbecke.

MR. ROSENBAUM: -- admitted on the stand --

THE COURT: Or whatever, yeah.

MR. ROSENBAUM: -- yeah -- he admitted on the stand

that a transaction with more participation of 26s would've been better for the company, more PIK, less cash outlay, right.

So how do they get a board to do something that breaches a contract, is hyper aggressive, is the first of its kind, right, no one's ever done this before, we've all saw it with his notes and everything else, how do they get a board to do it?

Well, here's how. They give the controlling shareholders bonds participation to go from having their money unsecured to one-and-a-quarter L. That's how they did it. That is how this went down.

And the board and Platinum isn't protected because they didn't have an independent director as the Court, or at least -- and I don't want to put words in the Court's mouth so we can go to it -- but I think the Court made a finding already that Mr. Bartels did not act independently.

So you have a self-dealing board, right, a board that is on both sides of the transaction. And why let them in? The only reason to let them in is because they're going to say yes.

THE COURT: But why let Platinum in?

MR. ROSENBAUM: Yeah. That's what -- I mean, I know I'm passionate about it because I know so clearly that's how this was designed. And that crosses the line, right. Those

actions cross the line. You are -- if you are exercising your power position, your elements of control, right, to induce.

It doesn't have to be that I took your hand and signed the paper. If I induced the breach through my actions --

THE COURT: Through your actions that you were permitted to take under your documents?

MR. ROSENBAUM: No. They didn't have the right because what did they do? They -- the transaction did exactly what this Court has found they don't have the right to do. They had the right up until the point of doing the deal.

THE COURT: So your argument is that their demand that their 250 get promoted was fine because they didn't have to put in the 250, that their statement that they wouldn't approve the Akin deal under any circumstances was fine because they had the right to disapprove it for any reason.

And it was only when the company came around and said, okay, we're going to give you all of these uptierings and promotes, they said, okay, then we'll do the deal.

But it turned out that they didn't give them an uptiering, right? All they gave them was nothing. And tell me what they did wrong by taking that offer. How did they breach any of their duties to anyone?

MR. ROSENBAUM: Once they did, right, everything -- if they -- and this, I think, goes back to some of the cases,

and we'll hear what Mr. Heidlage has to say about that -- I don't think there's a tort for attempted tortious interference.

So if they said all of those things, and the company didn't do it, then if the company didn't do the deal, right, then --

THE COURT: But the company --

MR. ROSENBAUM: -- there would be no tortious interference.

THE COURT: -- but okay.

MR. ROSENBAUM: When the company --

THE COURT: So I said the company --

MR. ROSENBAUM: -- did the deal --

THE COURT: -- the company --

MR. ROSENBAUM: -- the company breached.

THE COURT: -- the company didn't do the deal.

MR. ROSENBAUM: I get it. We're back to the harm part. Again, and I do -- I appreciate how Your Honor's thinking about this. But that brings me back to this idea that tort is distinct from the -- in the eyes of the law, right, --

THE COURT: Right.

MR. ROSENBAUM: -- the tort is distinct from the breach of contract. It is a separate cause of action. And I think for good reason. Like we could take, like, peel back a

bit and think about it.

And I think there's, you know, from an economic standpoint the idea that if you use your economic leverage, right, and cleverly to cause a breach, right, and take something that you don't have an equal or greater right to, then you get all the consequences of it, right, not just part of them.

And those consequences are in tort. That's all the law says, and that's all we're asking for. I don't think, as I said, you have to hold the person's hand and make them sign under, you know, under threat of violence.

THE COURT: So I want you to identify for me what they did that exceeded their contractual rights, other than eventually writing -- up until the point they wrote the check, did they do anything that exceeded their contractual rights?

MR. ROSENBAUM: Before I answer, I'd like to talk to someone much smarter than me.

(Brief pause.)

MR. ROSENBAUM: Yeah, look. Your Honor, no, I think yes in the sense that they procured the breach, right. But if Your Honor isn't with me on that, right, the breach is the wrong. And the use of their powers, right, to induce the breach is the wrong. But -- so I'm not suggesting they didn't have the power.

THE COURT: I do -- let me repeat the argument

because I do accept factually at least that they used powers that they legally had to induce an outcome that they wanted, and I am concerned that under New York law that so long as what they were using was the powers that they legally had, that I ignore their motive because they had that economic interest that they were --

MR. ROSENBAUM: I don't --

THE COURT: -- exercising.

MR. ROSENBAUM: I understand Your Honor's concern, and I definitely understand your question, but I don't think that's what we are -- because now let me take it into a different context, right, which is the context of a -- which is how this doctrine is applied much more often than in the creditor-on-creditor, which is either controlling shareholder or an officer, right.

And Officer X -- and there's cases on this and I could pull them up or Mr. Stein can point us to them -- but if officer causes the company to breach an -- there's case right on point, officer causes company to breach -- right, there's no question that that officer has the power to cause the company to do that.

In other words, within the confines of the officer's power to do that, but if the reason that the officer did it was self-interest, not interest of the company, then the officer is not protected by economic interest.

THE COURT: Yeah, but the officer is a fiduciary of the company. These guys weren't fiduciaries of the company.

MR. ROSENBAUM: I agree.

THE COURT: So the officer didn't have the right to exercise a power that was in derogation of his breach of fiduciary duty. That was raw authority that had to be matched with fiduciary duty. Silver Point and PIMCO had no fiduciary duty here.

MR. ROSENBAUM: I agree with that. But I think that's why, right, I think that's why the equation only is whether, right, what the breach was. You look at what they did, not whether they -- how they exercised their power to get there.

Whether the breach that they induced, if you could just accept my language and not a legal, right, if we just agree that they did a bunch of things to induce this result that they wanted, right.

And if you do that, right, let's say you're within your rights to do all of it, but what the company does is breach an obligation to something, someone else as to which you don't have a greater or equal right, you don't get the protection of the economic interest defense.

THE COURT: Is there any New York law, any case anywhere that says that a creditor that is acting within the bounds of its credit agreement can be held liable for the

consequences of its motive rather than for the exercise of a right that it had because that's what we have going on here.

MR. ROSENBAUM: Yeah, I --

THE COURT: I don't question -- I actually don't even question the motive issue here because I think I've already found that repeatedly.

MR. ROSENBAUM: Yeah, and I'm not sure --

THE COURT: But I just --

MR. ROSENBAUM: -- the motive matters.

THE COURT: -- I'm not sure that creates --

MR. ROSENBAUM: No, look, Your Honor.

THE COURT: -- liability under New York law.

MR. ROSENBAUM: To that point, I think it -- I can't point to one. I could point to the inverse. You know, there was the four cases that have ever applied the doctrine --

THE COURT: Right.

MR. ROSENBAUM: -- to creditors, right. So I can't -- maybe we could certify it to the Court of Appeals. But I think I know the answer just based on the way New York law works and the way those four cases -- all four of those cases, the corpus of what the creditor was induced the breach for, it had an equal or greater right to the corpus.

Here if you don't have an equal or greater right to the corpus, this is the liens for which you were going to either get the benefit of, right -- 250 million for 550 or not

-- then you don't get the benefit of the economic interest defense.

In other words, I think in some ways, it's narrower than if you're a controlling shareholder. But in some ways, right, it's stricter, right. Because if you do what you have a legal right to do, right, including the breach -- and I think that's where you and I may be missing each other -- I don't think you could ignore the breach part of it and just think about their actions leading to the breach, right, because they didn't have an equal right to what they were inducing the breach for.

THE COURT: I mean, we're down to a really fine question here which is the -- defendants or the defendants to your cause of action apparently were only exercising legal rights that they possessed, but they did that in a manner that caused the Debtor to undertake wrongful conduct. That's your theory. And I --

MR. ROSENBAUM: That is in essence my theory.

THE COURT: -- need to figure what New York law says about that, I think.

MR. ROSENBAUM: Well, let me talk -- I think that's -- Your Honor, I think that's the right formulation. I think New York law says they can't do that unless they have the equal right to what they're taking, right.

What they took was our liens. They gave 250; they

got 550 of liens. They didn't have the right to it. That's the end of the equation. That's -- and I think that's -- why wouldn't that be, right?

THE COURT: But except that --

MR. ROSENBAUM: You take --

THE COURT: -- except that they didn't.

MR. ROSENBAUM: Well, I know that.

THE COURT: But --

MR. ROSENBAUM: That's another --

THE COURT: No, but I actually think this matters because there were a whole bunch of remedies available to me, right, that I could've done. And this was the one that I thought was the correct one which was it was void from the beginning. If it was void from the beginning, then it didn't actually happen.

I understand that others think I'm extremely wrong about that decision. And frankly, if you want to join them and say that I'm wrong about that decision, you might prevail today.

MR. ROSENBAUM: No, I think you're spot on. I just don't think --

THE COURT: So --

MR. ROSENBAUM: -- that ends the -- the only thing we disagree on is whether that, at this stage, the Court can find -- I don't think it moots the cause of action. I think

there is still a cause of action, and I think we would -- should still be entitled to prove --

THE COURT: I understand the argument.

MR. ROSENBAUM: -- the damages.

THE COURT: I actually do think I understand everything you're telling me. I'm just not sure it works. Let's hear what they have to say. I'm not trying to interrupt. You can finish but I --

MR. ROSENBAUM: No, it was -- I anticipated, and therefore, I got to enjoy, genuinely so, an intellectual discussion of this because it is not -- I've read every case I think in New York.

And this area of law, as you can tell from a lot of good lawyers who have told Your Honor markedly different things about what the law is, is, you know, isn't always clear.

But I think what we just discussed is exactly how it applies to creditors. And before I sit down -- and as I said, I'll reserve a few minutes for rebuttal -- I just want to talk about Platinum for a moment.

Because and it's the inverse, right, in some ways of what Your Honor and I were just discussing as to -- sorry; just looking for the slide -- as to PIMCO and Silver Point. Well, I'll go all the way to slide 36 and, you know, so everyone feels good, I only have 40 slides.

But somebody has to pull the trigger, right. Somebody has to -- if you look for the but-for clause, I think it's Silver Point and PIMCO in the sense that they put -- they conceived of the deal, they used their economic pressure power position to cause the deal, and they used that same position to cause no other deal.

And then on top of that, they sweetened it by giving -- by putting the board in a conflicted position, right. And so on slide 36, the board that we've discussed and, you know, we've heard from sat at Wolverine Intermediate Holdings.

All of the members except for Mr. Bartels were employees of Platinum Equity Advisors, LLC, the interferer, which is also the advisor to Wolverine Topco which had two positions. And it's the second position that made this case unique among cases.

If it was just the controlling shareholders, it's a completely different equation. But it wasn't. It set out in mid-2020 to buy unsecured bonds, right, and it made it -- nothing wrong with that on its face.

They bought them at a discount, and we see from its own write-ups on it, and we'll go to slide 37, and it's, as we've also noted, it's, you know, virtual overlap between the deal team and those responsible for the sponsor's economics and those who sit on the board again absent Mr. Bartels.

And they have dual purposes. One is they buy bonds

cheap. If COVID is short-lived, and the market recovers, and the company recovers, their bonds go up in price. Or secondary purpose is to be in the fulcrum, right, not so their equity position is protected but so their debt position gets better, right, and to be in the fulcrum of an eventual bankruptcy.

I mean, I don't think there's any dispute that that was one of the two reasons that they went out and bought over $100 million worth of bonds.

So then we get -- and we'll go to slide 39 -- to February of 2022. And I'm skipping a lot of the history because we all lived it or relived it. But lo and behold, right, PIMCO and Silver Point offer Platinum participation.

This was deal. Remember in that email I showed earlier. We're uptiering, right. That was the mindset of PIMCO of Silver Point. This was -- they were in control. And they sweeten the pot. They get the board to vote for it.

They allow for Platinum to get back into at least what they thought then would be the fulcrum, right. In other words, if you flip ahead of the left-behind 2024 and 2026s, you're going to get back into the fulcrum. That was one of their investment objectives for those bonds.

That was self-interest. That was not the interest of the company. And the attachment points -- detach and attachment points, essentially when you're in the money or out

of the money, was coinciding exactly as they were doing the analysis with their unsecured position being back in that sweet spot.

And then, right, as I said, no one was there with an actual gun to the head, but PIMCO Silver Point, it created all this ingredient, right, to get their 64 percent IRR, A; get the board to go along with the deal; and at least an attempt to create an appearance of independence, they put Mr. Bartels in but, like, without getting all the detail, the Court has found, it does not appear to the Court that Mr. Bartels acted independently. So you have --

THE COURT: But read the next sentence because it's a pretty important sentence.

MR. ROSENBAUM: Huh?

THE COURT: The next sentence. Despite this, the company's and its advisors sincerely believed that the transaction was in the company's best interest. They sincerely believed that raising the 250 was the way to avoid a bankruptcy case.

That was not an unreasonable business judgment. It was not even an unreasonable judgment at all --

MR. ROSENBAUM: But --

THE COURT: -- that they believed that. It turned out not to be right, but we aren't visiting it from that point of view. The board was voting to try and keep the company out

of bankruptcy which they thought was worthwhile.

MR. ROSENBAUM: The problem for the board at that point, Judge, and we're not right now, at least, litigating the fiduciary duty claims. But the problem for the board is they don't get the -- when you self-deal -- because it was -- you don't get business judgment protection.

In other words, the Court was trying to -- you don't get to take one hat off, put one hat on. Right. You get into the most-stringent world under Delaware law which is entire fairness.

How could it be entirely fair to take someone else's -- right. They never even considered that. They didn't want to file bankruptcy. I don't think there was any records that they looked at that as a serious option.

So the only option that they considered was let's put us back in that fulcrum, and let's take something of extreme value from somebody else and give to, you know, the 1Ls.

And they don't get to act with business judgment under those facts. And under those facts, I think they were participants, right. They were co-tortfeasors in the tortious interference with PIMCO and Silver Point.

I'll stop there. I'll say this. Senator and Citadel have not gotten a lot of air time. I don't think they were primary actors. Senator -- and there's testimony in the

record to this effect, you know, that they admitted this was an impressive transaction that would result in litigation.

I think to the extent that they're liable, maybe it would be several for their participation. But if anything is clear from my presentation, I think the combination of PIMCO, Silver Point, and Platinum are the primary actors. So with that, Your Honor, I appreciate the Court's time, indulgence, and assistance with technology.

THE COURT: Thank you.

Mr. Heidlage, are you going to do a PowerPoint or do this --

MR. HEIDLAGE: I am.

THE COURT: -- acapella? No?

MR. HEIDLAGE: Well, sure. I will do a PowerPoint. I'm not sure how many slides we'll go through. I want to pass it out. I apologize. I have --

THE COURT: So who is the presenter here?

MR. HEIDLAGE: It's Spence Colburn.

THE COURT: All right. Spence Colburn is the presenter now. But wait. Someone else has just joined in. Ms. Klein has joined in too. I think that's for another hearing. Okay. Thank you.

So we're going to have a short interruption around 3:00. It won't take that long.

MR. HEIDLAGE: Is that in six minutes?

THE COURT: Yeah. We're not limiting this. There's a hearing scheduled for 3:00.

MR. HEIDLAGE: I --

THE COURT: I don't want to make them keep waiting forever.

MR. HEIDLAGE: No, no, no. I --

THE COURT: But if you'll get to a breaking point, --

MR. HEIDLAGE: -- I appreciate that.

THE COURT: Yeah.

MR. HEIDLAGE: I just was clarifying.

THE COURT: Yeah.

MR. HEIDLAGE: I've got a computer on a different time zone. I just --

THE COURT: Oh, right, right. In six minutes, I have a hearing that's scheduled, and they can wait a few minutes like you waited a few minutes so -- not that I want to.

MR. HEIDLAGE: We'll take a break, but in the meantime, we can just go through with this even though it's a little messy if that's okay.

THE COURT: Sure.

MR. HEIDLAGE: Good afternoon, Your Honor. So I heard your questions to Mr. Rosenbaum. I think I want to -- I do want to address the economic interest defense issues

because I think that they are important or dispositive, and I think that the law that he described it as is incorrect.

But I want to start with the injury complaint because I know that's where you were focused. So the way we read your order was to say that the lien -- it was a declaration of law that we or a declaration that the liens were never, in fact, -- which was the injury that they had identified.

And so our understanding was that therefore, there is no injury as a matter of law. So that element gets resolved. And I don't think that Mr. Rosenbaum, you know, identified any other sort of other injury, and certainly, that was the issue was the release of the liens.

And so if that didn't occur, there is no injury element.

THE COURT: So I think that what he identified was a theoretical possibility that the delay itself from playing the gambit for lack of a better description caused them injury if the value of their lien changed because of the passage -- or not because of -- changed during the passage of time from the March of '22 transaction through the date of our oral announcement.

That's his argument, I think, on what their injury might be.

MR. HEIDLAGE: Right. Well, I think at all times

what they had the right to was the liens. And if they always had the liens as a matter of law, then they couldn't have been injured by --

Now if the Court had ordered a different remedy, we might be in a different world but --

THE COURT: I offered him that.

MR. HEIDLAGE: I, you know, frankly, we had offered him that back at closings, and they argued against it. And so, you know, where we are is where we are. Now as you know, we've reserved our right to appeal. I don't want to suggest anything otherwise.

But the fact is that the Court by virtue of ruling the way that it did, our understanding is that it has mooted this element. Now we think --

THE COURT: Do you --

MR. HEIDLAGE: -- there should be another --

THE COURT: -- do you agree that if I find that it's moot, and then you win on appeal, it would come back to potential life? Because I would find that it's moot based on that finding, right?

MR. HEIDLAGE: Yes. Well, look. Whether or not it's moot or that it doesn't -- we think you could rule on multiple grounds here, including on the economic interest defense, which we actually think is really crystal clear that the -- with the way that the law is in New York.

And so, you know, you could rule on multiple grounds. And then we wouldn't have to come back. But I think if, you know, proceedings were remanded, we'd have to take those the way they are at the time. And depending on how the order, you know, was written, et cetera, it is possible that there could be, you know, a change in the final order.

I just don't know exactly how it would be written in and how the Appeals Court would address it. So I just don't want to suggest otherwise.

But look. I mean, it's conceivable depending on how the Court rules that if it's remanded for further proceedings that it could potentially come back. But again, I think, you know, the Court really can't rule on the economic interest defense.

I think the New York Court of Appeals is crystal clear here. And if I may, Mr. Rosenbaum said that he has every case in New York on this issue. He identified no cases because there are none in which the tortious interference claim survived against a creditor that was exercising its rights.

And he also didn't identify any rights that PIMCO or Silver Point violated to, you know, or obligations that they had to the company or to anyone else.

He also once again, the '26 holders, did not discuss the four cases dealing with uptier transactions and applying

the economic interest defense in that context. In every single one of those cases, three of them on motions to dismiss, the Court rejected the tortious interference claim.

And I think one of them, it's important. I just want to flag because the '26 holders said that there were four creditor cases.

They actually left out the fifth, which is -- or at least one fifth, which is the Mitel case, which is an uptier transaction in which a creditor was alleged to have used its position to orchestrate an uptier transaction and jump the line, jump the priority line over other -- over creditors.

And the Court said there's no tortious interference claim. And so I think the law is crystal clear in New York. Creditors have a -- or I should say, you know, parties with an economic interest, and that includes creditors, have a privilege to interfere in order to further that economic interest.

And so I'm happy to go through my slides. I also want to make sure that I'm addressing the questions. And I do think that the law here is crystal clear. I think the way I heard it, your questions were largely answered, and I think I agree with them.

But I'd like to know from you if there's anything in particular that you'd like me to do. Otherwise, I could go through portions of my presentation. Otherwise, I can just

address a couple of additional points that I think would be --

THE COURT: No, I'll leave it up to you. Look, I pushed pretty hard to Mr. Rosenbaum on drawing a line maybe a little differently than you defined it. And if you want to redefine my line, which is if what they were doing was exercising a right given to them under their contract, their motive doesn't matter.

But if they exercised rights that were not given to them under their contract, that there could be potential liability.

And then I can't locate a right that they exercised that wasn't under their contract. So --

MR. HEIDLAGE: Yeah, so --

THE COURT: -- am I right about where New York draws the line?

MR. HEIDLAGE: I actually think it's broader than that because -- and I want to give you a couple of examples.

THE COURT: Okay.

MR. HEIDLAGE: So in the Triax case, the -- it was actually, the creditor at issue was PIMCO, and they were alleged to have interfered by directing the borrower to breach a service agreement that it had with some vendor.

So the bondholder was the senior secured bondholder. There's a service agreement between I think it was a litigation support vendor or something like that. And they

are alleged to have told the party, the borrower, just don't pay that -- don't pay that invoice.

And it's not like the credit agreement says you can direct us to pay this invoice or that invoice or anything like that. It's simply what the borrower, you know, took direction from its largest creditor at the time, didn't pay an invoice, and the Court said, you know, by virtue of protecting -- furthering your economic interest, there's no liability there.

Now Mr. Rosenbaum also said and respectfully, I disagree with him, you know, that, oh, this eats -- there's nothing that could happen. Well, no, there's malice. So if there -- the sole intent is to cause harm or fraud or illegality, that's an exception to this rule.

But there aren't allegations here, and Mr. Rosenbaum didn't stand up and tell you that any of the things that PIMCO is alleged to have done, for example, tell the company that it's not going to provide them additional money or that it's not going to consent to a transaction, but that doesn't -- that's not malice, that's not illegal, that's not fraud.

And so it's not like this exception, you know, it's not like that those exceptions don't exist. And there are instances where a party can as an economic interest can nevertheless be liable.

But I guess what I would say is I don't think that it's limited to just exercising, you know, there's, you know,

specific rights under a creditor, for example.

THE COURT: But doesn't it have to be within the rights that they held as a creditor? Like in the Triax example -- and I've not read Triax so I'm just going to take what you said -- if the lender had an interest in the collateral, and they said don't use any of the collateral to pay these vendors, maybe the Court was looking at it that way. I don't know.

MR. HEIDLAGE: Well, I don't think that is the -- I don't think those were the facts.

THE COURT: Okay.

MR. HEIDLAGE: I actually just, I mean, I don't think that they got that far. I think it's telling that a lot of these get decided on a motion to dismiss. Because, in fact, it's pretty straightforward, and it's pretty broad protection by the New York courts to provide the ability of parties to act in furtherance of their economic interests in a party, even if that results in a -- ends up resulting in a breach.

THE COURT: And even if it's a right not granted under the contract you're saying?

MR. HEIDLAGE: Even if it's a right that's not explicitly granted. No, he -- in this case --

THE COURT: I'm not --

MR. HEIDLAGE: Well, --

THE COURT: Explicit or implicitly granted is what I'm looking at. An implicit grant to me is the same as an explicit grant in terms of whether --

MR. HEIDLAGE: Then perhaps I am not sure that I am necessarily disagreeing with you then. But for example, you know, there's -- I don't think that the credit agreement specifically says you don't have to provide additional money. Maybe it does.

I would agree with you though that there's no obligation by a creditor -- I think it's pretty well-established under New York law -- there's no obligation for a creditor to provide additional funds to a borrower just because that borrower is in financial distress, right.

And so, you know, in a sense that PIMCO and Silver Point are putting together deal terms and saying these are what we believe we would be willing to support, that's protected.

And I don't think that counsel for the '26 holders identified any other conduct that would constitute a breach.

Now I want to address one thing that he did mention. He did mention the notion of, like, providing a sweetener to Platinum. Now I think the evidence here is just the opposite, and I do want to address that other evidentiary matter because, in fact, what you heard in the testimony was that it would benefit the company the more noteholders PIK'd their

interest and participated in the unsecured loan, right.

And so PIMCO and Silver Point told everybody we don't care. The more, the better. Now there was a negotiation that PIMCO and Silver Point frankly weren't really a part of between the company and the unsecured noteholders because other unsecured noteholders had certain veto rights and things like that.

But it's not like PIMCO and Silver Point were -- there's no evidence that they were, you know, pushing that, you know, you need to have Platinum in here as a way to somehow, you know, unlawfully induce a breach or anything like that.

It was this would be a beneficial term economically for the company; and therefore, PIMCO and Silver Point. So it just -- I don't think the evidence supports that.

I also just don't -- I don't think that there was any real allegation that PIMCO and Silver Point weren't acting simply to provide, you know, what they believed to be economically beneficial terms for themselves and for the company because they wanted the company to accept the deal. So I guess --

THE COURT: I'm going to do this. I'll go ahead and call my 3:00 hearing.

MR. HEIDLAGE: Uh-huh.

THE COURT: And if you want to make other

presentations out of here, that's fine. If you want to just submit your PowerPoint, that's fine.

MR. HEIDLAGE: Okay.

THE COURT: But I'll leave that to you, and you can think about it, and you decide at the end of the 3:00 hearing. So why don't I give you-all a 15-minute break.

MR. HEIDLAGE: That --

THE COURT: This could take slightly longer than that, but I don't think so.

MR. HEIDLAGE: Okay. Thank you.

THE COURT: Okay. Thank you-all.

(Recess taken from 3:09 p.m. to 3:22 p.m.)

MR. HEIDLAGE: May I ask a -- what I hope is just an administrative question? If you would like us to -- if we do submit the PowerPoints, would you like those filed on the docket, or should they be submitted by email?

THE COURT: I'd rather they be filed on the docket.

MR. HEIDLAGE: Okay. Thank you.

THE COURT: Thanks.

So we lost our presenter --

MR. HEIDLAGE: For what it's worth, Your Honor, I'll preview --

(Off the record from 3:22 p.m. to 3:23 p.m.)

THE COURT: -- no more interruptions, I don't think, this afternoon.

Mr. Heidlage asked, if he chose -- during the break, if he chose to present a PowerPoint, should it be filed, and I asked that it be filed, so that there would be a good record of what it was that we were looking at.

Mr. Heidlage?

(Participants confer)

MR. HEIDLAGE: Thank you, Your Honor.

With the reservation that, if others speak and we need to reserve some time, with that reservation, I'll take you up on your offer. We'll submit a PowerPoint presentation, and I'll let the lead counsel for Platinum to speak.

THE COURT: Thank you, sir.

Ms. Oberwetter.

MS. OBERWETTER: Yes, Your Honor. And I think, if we can try to make Mr. Catalanotto the presenter.

THE COURT: Can you help me find him?

(Participants confer)

THE COURT: If he'll turn on his camera. There we go.

All right. He is the presenter. Let's be sure that works. Did you get a signal on your computer? All right. Thank you.

(Participants confer)

MS. OBERWETTER: Thank you, Your Honor. Ellen Oberwetter from Williams & Connolly on behalf of the Platinum

Defendants.

I listened to the first half of Mr. Rosenbaum's presentation, which was all about Silver Point and PIMPCO exercising control over the company, and then, also, the confessions throughout his presentation that equity owners are differently situated under the case law than creditors, which left with me with the question, pretty much all the way through, as to why they are still suing Platinum, which was an equity owner in the company, and there hasn't ever been any dispute about that.

It gets the benefit of the economic interest defense, the Platinum defendants get the benefit of the economic interest defense of the result, full stop it's a dispositive issue. All of the cases that we have cited on that point support that proposition.

I'll try to move forward if it's advancing. And I'm skipping through much of the presentation in the interest of time.

But for example, one of the multiple cases on up-tier transactions, the Audax case, makes very clear that a party was entitled to the economic interest defense when it, quote, "acted to protect the financial value of their stake."

The more recently decided Robertshaw case is to the same effect. It involved an equity owner, as well, that was the One Rock party. And there is multiple other cases under

New York law that have been cited to the Court throughout this proceeding to the same effect, that New York Courts regularly apply this defense in favor of equity sponsors.

There's one other case that -- I want to talk about this briefly -- that I don't have a slide for, but it's the Boardriders case, which is one of that suite of up-tier cases. It involves an equity sponsor that was also a creditor. It is as close to on all fours with this case, in terms of the claims against Platinum, as you could possibly find. It's certainly more on point that the tractor repossession case that we heard about from Mr. Rosenbaum. And we submit that all of that is dispositive.

There's nothing to differentiate this case from the now multiple other up-tier cases where parties have gone after equity owners, and they all come out the same way.

The 2024/2026 noteholders have said, in effect -- although they've framed it differently in different pleadings and it's a little unclear and difficult for us to unpack exactly what the theory is as to Platinum. But part of what they have said is that Platinum was acting, not to protect an existing economic interest, but rather, to obtain new economic interests, meaning the 1.25L notes.

But all -- it all comes out the same way. All of the interests they are ever talking about were interests in the company. The notes were in the company. The value being

protected was in the company. And the overall objective of the 2022 transaction was to enhance liquidity and defer debt obligations for the company.

I want to talk briefly about the suggestion that Platinum somehow engaged in wrongdoing or committed a tort because of its -- because Incora's Board of Directors approved Platinum receiving 1.25L notes. That doesn't work as a theory for a number of reasons that we've briefed, including all of the evidence, which has gone completely undiscussed here today, showing that Platinum's concessions were valuable to the company.

And I'll see how quickly I can skip ahead to Slide 15.

The three concessions that we have talked about in the case:

The financial concessions that Platinum made were to PIK its interest, that's the first bullet. It could decrease cash interest payments throughout the projected time period.

It deferred payment on its twenty-five-million-dollar promissory note that was due in the relatively near future, in 2023.

And it continued to defer its annual monitoring fee.

The evidence at the hearing overwhelmingly demonstrated that these things were, in fact, a financial benefit to the company. And nobody has ever suggested that

Platinum had made these concessions for free, for nothing in exchange. That has not been --

THE COURT: Yeah, it seems to me this is very similar to the other, but maybe with a twist, which is -- if my memory serves me correct; and, if it doesn't, please just correct me.

MS. OBERWETTER: Yes, Your Honor.

THE COURT: Platinum said that it would only do some of these things if they were exclusively Platinum rights and not shared with others, even though the economic benefits to the company would have grown if others had also had those conversion rights. Has that changed -- first of all, is my memory right? And second, does that change the amounts?

MS. OBERWETTER: No, Your Honor. I will respectfully -- your memory -- I believe your memory is not correct on that --

THE COURT: Okay. Fix it for me.

MS. OBERWETTER: -- and that the evidence was uniform that it was not Platinum that was -- or really even the board that was in charge of the overall scope of the transaction, in terms of who could or couldn't participate, that those were negotiations among other parties who were in a position to vote on the transaction. So I believe that is what the record supports, and that it was not --

THE COURT: My memory may just be wrong on that.

MS. OBERWETTER: So other individuals on the seen who were deeply steeped in the transaction at the time testified that they viewed Platinum's financial -- some of the financial concessions as a benefit to the company.

And I'm going forward to -- we had Mr. Rule's testimony that I'm not going to spend time on.

One of those individuals was Mr. Prager of Silver Point, who talked about a couple of these different components of Platinum's financial gifts, in particular. And so I just join in the observations Mr. Heidlage made, when someone is talking about an overall theory that somehow Platinum was brought in with an inappropriate carrot of some sort, when, actually, what was going on is it had things of value to give to the company, to try to loop in the company's overall runway on its debt obligations.

THE COURT: But on the screen that you're on now, which is Slide 20 --

MS. OBERWETTER: Slide 20.

THE COURT: -- it's that last -- if you can go back to 20.

MS. OBERWETTER: Yes, Your Honor. Slide 20.

THE COURT: It's that last statement he made about the more unsecured debt that's exchanged in the second out debt, the better.

MS. OBERWETTER: Yes.

THE COURT: Who is it that -- and again, I'm going to have to go back and look at the record because I'm obviously remembering it wrong. Who is it that limited the unsecured debt that's exchanged with the second out debt only to Platinum? Because I thought that was Platinum, and you're telling me I'm wrong, so who did that?

MS. OBERWETTER: I believe that that is -- that's right, Your Honor. So there are different parties that were involved in negotiating different components of the transactions, in terms of the overall inclusion. I think the record evidence was Silver Point and PIMCO, in terms of the second out debt and who would receive that and who would not. I believe that was more in the nature of a Carlyle determination. But I would want to recheck the record on that.

THE COURT: That may be correct. Okay.

MS. OBERWETTER: Okay. Thank you, Your Honor.

In addition to testimony from Mr. Prager, there was testimony from Mr. O'Connell, which I'm moving forward toward, as the advisor -- oh, sorry -- as the advisor to the company, that Mr. O'Connell helped prepare the chart that was available in connection with the vote on the transactions, summarized the analysis of Platinum's gives. They are summarized on this chart. And this formed part of the basis of Mr. Bartels' vote then on Platinum's participation. So that is an advisor to

the company who assessed some of the value of the concessions that Platinum was making in connection with the overall transaction.

There is a different topic I want to talk about. So I only raise -- I mention those financial concessions only because they have somehow been made to sound improper or otherwise serve as the foundation of a tort. They were not improper. They were beneficial to the transaction and they were part and parcel of the overall debt extension that happened for the 2022 transactions.

I do want to talk about a separate element of the tortious interference tort with respect to the Platinum defendants, and that's inducement. I don't believe that we've actually heard any particular act or actions with respect to what any particular Platinum defendant did in connection with supposedly inducing the 2022 transaction.

What we have heard is a series of assertions without reference to principles of law that somehow the Court should treat the Wolverine Intermediate Holdings Corporation Board as synonymous with Platinum. That just isn't supportable as a matter of law.

And I'm going to skip forward a little bit more.

This is a slide that is the same or similar to one that we used in openings. The Platinum defendants are shown at the top of the page. They are distinct corporate entities

from the entity where the Wolverine Intermediate Holdings Corporation Board sat, which all of the evidence showed is the location where the actual decision-making happened. That's where the board meeting minutes happened, that's where a vote took place, so that is where the action occurred.

In Delaware, like almost everywhere else in America, corporate formalities are supposed to be taken seriously because, otherwise, the expectations of the parties can be upset with respect to what various entities have taken on what risks and rewards, and so those formalities are supposed to be respected, unless there's a very clear and defined reason to set them aside.

It's also the case, and it's a principle the United States Supreme Court has recognized in U.S. v. Bestfoods, which we cited in our briefing in this case, that of course it is possible and it happens all the time. It is utterly ordinary that individuals who work for one company, including a parent company, may also sit on the board of a subsidiary. And that fact does not suffice to attribute an action -- the actions of a board to the actions of a parent. They wear separate hats.

We've heard lots of testimony about that throughout this case. The individuals who sat on the board in this case understood themselves to be acting in their capacity as a Board Member of Wolverine Intermediate Holdings, even if they

happened also to be an employee of Platinum. And I'll refer the Court to other testimony that we heard on this general concept.

It's not just a -- this is not a Platinum construct. We heard from other individuals who testified at trial in the case that it is routine for directors and officers to be on a board wearing a different hat than what they might wear at the company that more regularly employs them. We saw examples of individuals who worked at a Golden Gate entity, for example, who were in a position to sign both halves of a single assignment contract.

So the fact that these types of corporate formalities get respected is normal, it is ordinary, it happens all the time. We have not heard a single theory in this case for setting aside the corporate formalities that were designed here and that were in effect here.

And then we have the straightforward and uncontradicted testimony that Mr. Vorderwuelbecke -- and you might have pronounced his name today better than I did -- who made clear that, when he was taking a vote at the board level, he understood himself to be acting for the company and not for Platinum. That's where the decision-making actually took place. The entirety of the theory that is seeking to go after Platinum is based on disregarding those basic principles.

And I'm skipping forward a little bit.

There's really two other points that I want to talk about briefly, which are -- it should -- there we go -- there is a provision -- so let me just frame up the reason that I'm putting up this particular section of the indenture on the screen, which is Section 13.05.

Even if you thought that a Platinum entity did something to induce a breach in this case -- which I don't think there's any evidence to support, and certainly, we've never heard anything about what Platinum entity did what, which is a failure to prove -- the indenture also has something to say about this, which is Section 13.05. And it says that:

"No equity holders, including members of the issuer," et cetera, "will have any liability for any obligations of the issuer or the guarantors or for any claim based on, in respect of, or by reason of such obligations or their creation."

That is a provision in the indenture that shuts off liability for anything that is derivative of a breach of contract claim, which a tortious interference would be. And that's part and parcel of what the parties agreed when they bought interests in the secured notes.

There is one other principle that I'd like to talk about, which was in our briefing, and so I won't belabor it. Mr. Rosenbaum made a comment earlier today that, effectively,

it doesn't -- you don't have to show that you intended to cause a breach. That's not what the law says, Your Honor. And we have the Roche case and other cases that we cited on this point, which is it is an element of tortious interference that the objective must have been to procure the breach. And if you have a situation where people did not believe that they were going to breach the contract by virtue of their actions, that should not suffice to demonstrate that you have committed a tort.

The evidence at trial was consistent with -- now that the Judge -- now that Your Honor has found a breach, is consistent with an unintentional breach. We have the testimony of Mr. Smith, who worked as an advisor to the company and was asked to go look at the transaction. He relayed to the board that, in his commercial under his understanding, he thought the transaction seemed to work within the four corners of the document.

We also have entered into evidence in the case -- and this is ECF 1238-21 -- an opinion letter by Milbank that went both to WSFS and said -- and represented in part:

"The issuance of the new notes, in accordance with the indenture, the sale of the securities to you and execution and delivery," et cetera, "do not (c) reach or violate or constitute a default under any specified agreement."

We've been identifying that, we haven't had an

answer to it from the plaintiffs in this case. And that same opinion letter went to, not just to WSFS, but also went to Platinum's counsel. And this, again, was entered, I believe during Mr. Osornio's testimony, at ECF 1152-20.

So there are a variety of dispositive reasons why Platinum should not be held liable for tortious interference in this case, and we think any one of which will suffice for a resolution in Platinum's favor on those notes.

THE COURT: So I've started with Mr. Rosenbaum and said, if we don't have a producing injury because of the fact that I said the action was itself void as to the 2026 holders --

MS. OBERWETTER: Yes, Your Honor.

THE COURT: -- do we ever get to the questions that you're addressing today? Mr. Heidlage said well, that may be, but please get to the issues that we're addressing today. What is your answer to that?

MS. OBERWETTER: My answer to that is identical to Mr. Heidlage's, which is I do think it would be useful and productive for the Court to resolve these other issues, at least in a -- at least in a contingent way. But I agree and firmly believe that the claims, as postured right now, are mute.

THE COURT: So, ordinarily -- and I want to try and figure out why I want -- why I shouldn't treat this ordinarily

-- if I conclude that deciding Issue A moots Issue B, I don't go to B and try and close some loop of if I'm wrong on A, somebody is going to win or lose on B. There have been exceptions to that, and I don't want to say I've never done that because I think I probably have, less in recent years than -- and probably years maybe. Why should I cross a bridge on something that is moot and give what amounts to arguably an advisory opinion because we don't need to get there if, in fact, we're right about that?

And by the way, I'm still thinking about whether that is correct. I haven't -- but if I did decide that's correct, why would I break sort of the normal standard that court opinions follow, making them as narrow as possible, and just say we're not there --

MS. OBERWETTER: Yes.

THE COURT: -- because of this?

MS. OBERWETTER: I don't want to suggest that that wouldn't be a perfectly valid approach for Your Honor to take because I think that it would. And so I do think this has been, as Your Honor has -- knows as well as anyone, long and protracted litigation. And I think the more certainty provided going forward, I think that's useful. But I understand the point that you're making and that, I guess, often, you know has to come first and everything else later.

THE COURT: Okay. Thank you.

MS. OBERWETTER: Thank you, Your Honor.

THE COURT: Would you file your PowerPoint, as well, on --

MS. OBERWETTER: Yes, Your Honor, we will.

THE COURT: Thank you.

MR. STEIN: Good afternoon, Your Honor.

THE COURT: Good afternoon.

MR. STEIN: Matthew Stein, Kasowitz Benson Torres, on behalf of Senator. No PowerPoint.

THE COURT: Okay. Thank you.

MR. STEIN: All right. I'll try to be non-repetitive and brief. My codefendants have set forth the core aspects of our arguments here and there's no need to repeat that which has already been covered.

But what I do want to do is connect those arguments to Senator and specifically focus on Senator's lack of involvement here.

Throughout the trial, the Court has heard very little about Senator, as Mr. Rosenbaum acknowledged. And that attention was proportional to Senator's role in the 2002 [sic] transaction. While Senator did participate in the 2002 transaction, it had no role in the formulation or the negotiation of the transaction as the evidence adduced provided. Senator, similarly, did not undertake any of the predicate acts necessary for the Court to make a finding of

liability for tortious interference, or any other claims, for that matter.

At the time of the transaction, Senator held three tranches of Incora notes: The 2024 notes, the 2026 notes, and the unsecured 2027 notes. Senator also held what the parties referred to as the "HoldCo PIK notes," which were at the holding company level.

On February 9th, 2022, Senator was approached by PJT, the company's financial advisor, about participating in the March 2002 trans -- 2022 transaction. This is set forth in the designated deposition testimony Senator's co-CIO, Mr. Bharadwa, as well as emails that are in evidence.

Senator was approached because it was told that the company needed Senator's consent to issue incremental debt stemming from contractual rights associated with Senator's PIK holdings. This was confirmed at trial by Mr. O'Connell, who stated that Senator held a majority of the non-Platinum-owned HoldCo notes, and that their consent was required to issue incremental debt.

By the time Senator was approached, many, if not most, of the key terms of the transaction were negotiated. And in any event, Senator had no involvement in negotiating any of the terms.

Indeed, at trial, Mr. O'Connell stated that Senator did not have a material influence on the negotiation of the

March 2022 transaction. Instead, Senator was offered a take-it-or-leave-it choice to participate in the deal in exchange for granting its consent to allow the transaction to proceed. This is the extent of the relevant evidence concerning Senator introduced at trial. The plaintiffs have not demonstrated otherwise.

THE COURT: So I think that's not the extent of it. I think there was some evidence that came in -- and my memory may be wrong, I have not looked at this in quite a few months at this point -- that Senator's participation was viewed as being necessary in order to reach some thresholds that were required, and Senator then knowingly participated.

And under Mr. Rosenbaum's theory, where it is only the ultimate transaction that was the triggering event, if he prevails on that, I don't know that you would be differently situated from someone that negotiated it, if their negotiations were within their rights under the documents; in other words, to say we're only going to put in the 250 million if we get all of these things. I think there's some consensus people can do that. But Mr. Rosenbaum says but there's still liability if you pull the trigger at the transaction that takes away someone's rights. And you helped with the trigger, right?

MR. STEIN: Certainly, we consented to the transaction. In terms of formulating any aspect of the

transaction --

THE COURT: Right.

MR. STEIN: -- we did not.

THE COURT: Right.

MR. STEIN: I would not -- I would dispute Your Honor's memory of the facts that were in evidence. What I would contest is Mr. Rosenbaum's explanation of what the case law actually provides.

THE COURT: Yeah, you didn't see me buying off on that too much. But I'm going to go back and read what he's telling me. And if he's right, though, that you get liability because you participated in something that took away the 2026 holders' rights on a purported basis that that can create liability, then you're pretty well the same as everybody else, despite the fact these are other things --

MR. STEIN: Yeah --

THE COURT: -- that they did that might have been protected, right?

MR. STEIN: There were alive in that sense.

THE COURT: There are.

MR. STEIN: So, if --

THE COURT: There are and I am --

MR. STEIN: If everything is true, then the totality would carry out, I agree with that.

I would say that the case law does not provide that.

The Roche case that was just cited to you says that:

"It is not enough that a defendant engaged in conduct with a third party that happened to constitute a breach of the third party's contract with the plaintiff; instead, the evidence must show that the defendant's objective was to procure such a breach."

And there is no evidence in the record that Senator had any knowledge or any intent to procure such a breach. And --

THE COURT: I think, just to be clear, Senator had the documents, I think it had the knowledge. It may not have had the intent, but they knew what the indenture trust said.

MR. STEIN: Of course. I mean --

THE COURT: And we ruled, basically, that what the indenture trust said controlled over what the parties tried to do.

MR. STEIN: Certainly. But I think there's a wide gap between knowing what the documents says, knowing what they provide, and thinking that the actions, as contemplated, and the signatures provided would actually procure that breach.

At the very end of his presentation, Mr. Rosenbaum cited a statement that Mr. Bharadwa said in part of his deposition that it was a perfect recipe for litigation. I don't think that connects to, oh, that this is we're procuring a breach. In think, in all LME transactions, including

numerous ones heard before this Court and other courts, there's always a potential for litigation. The mere potential that litigation will happen because certain parties are being up-tiered is not the same -- is not the requisite level of intent that the New York case law requires.

It's the -- yes, to the extent that if Your Honor's parade of ifs bore out, then I don't think Senator is that materially different from everybody else. I just think that there is a distinction because Senator's lack of involvement in baking the cake, so to speak, in putting the pieces together. It was given a choice saying do you want to participate or not, Senator opted to participate, and that's it. That -- if -- that doesn't rise to the level of what's needed for the intentional inducement, intentional interference with contract; and, therefore, I don't think the plaintiff's claims stand against Senator.

THE COURT: Thank you, sir.

MR. STEIN: Thank you.

MR. REDBURN: Good afternoon, Your Honor. Tom Redburn, Lowenstein Sandler, for Citadel. I'm batting cleanup, I think, on our side. And I'm going to say a lot of similar things, I think, to what Mr. Stein said.

Citadel was hardly even mentioned during this trial. And even today, Citadel has hardly come up. There's been no substantive argument made against Citadel. And I think

Mr. Rosenbaum conceded -- and I appreciate the concession -- that Citadel was, at best, a secondary actor here.

And that's all for very good reason because what the testimony at trial demonstrated is that Citadel was responsible for contributing less than one percent of the $250 million that was injected into the company, was invited to join the group late because of a personal -- of a business relationship, rather, that someone at Citadel had with someone at PIMCO, had no involvement in the negotiation of the substantive documents, was getting infrequent updates on those negotiations at best, and no control over the content of the documents.

And at the end of the day -- I think, really, there's been some talk today about competing formulations of the intentional inducement prong of tortious interference. I think, under either of those approaches, there isn't enough evidence to say -- to find beyond a preponderance that Citadel intentionally induced the company breach. Citadel wasn't in a position to induce the company to do anything.

With respect to the economic interest defense, I think we're basically similarly situated to PIMCO and Silver Point, in terms of our position as a creditor. I won't add to anything -- anything to that and we'll rest on the papers. And unless Your Honor has any questions, I will sit down.

THE COURT: Well, only -- this is somewhat the same

question I asked Mr. Stein. If I accept Mr. Rosenbaum's theory, your client had a copy of the indenture and purchased interests that it intended to be secured by a first lien that would have displaced the 2026 holders, if we had found it had actually taken force and effect, right?

MR. REDBURN: I think that -- I will give a slightly different answer to this from Mr. Stein. I think there are two issues raised by that:

The first is whether that satisfies but for causation because, even under Mr. Rosenbaum's relaxed -- more relaxed view of intentional inducement, Citadel's actions still have to be the but for cause of the breach, and I don't think they get there.

The second thing I would say is that what that actually sounds like to me is not a direct tortious interference claim; it's an aiding and abetting claim. No assumption and assignment claim, even assuming that that exists under New York law, nothing has been pled here and nothing was tried.

THE COURT: Thank you.

MR. REDBURN: Thank you, Your Honor.

THE COURT: Mr. Bennett.

MR. ROSENBAUM: Oh, is there anything else?

THE COURT: I think Mr. Bennett -- oh, I'm sorry.

MS. FOUDY: No, Mr. Bennett --

THE COURT: The Committee --

MS. FOUDY: -- can go first.

THE COURT: -- and Mr. Bennett both want to talk.

MR. ROSENBAUM: Oh --

MS. FOUDY: Yeah.

THE COURT: And Mr. Clareman. We've got several others. But let's start with the Committee. Go ahead. And then we'll go to the others.

MS. FOUDY: Thank you, Your Honor. Theresa Foudy of Morrison & Foerster on behalf of the Unsecured Creditors Committee.

So we don't have a position on the tortious interference claim. And I hoped not to be able to -- not to have to stand up today. The reason why I do stand up is that we filed a standing motion that sought standing to pursue breach of fiduciary duty claims against Platinum, including for conduct arising out of the March 2022 transaction, but also conduct that occurred prior to the March 2022 transaction. We settled those claims. And we've always appeared at this trial just in a protective fashion, just in case the settlement doesn't get approved or the plan does not get confirmed that encompasses that settlement.

But unfortunately, while Platinum's counsel was arguing, they made some arguments about the financial benefits that Platinum contributed to the transaction, their

participation in it, that I think is relevant to our breach of fiduciary duty claims.

And obviously, I did not want to derail this argument with breach of fiduciary duty claims that we settled and that we don't yet have standing to bring, our standing motion is in abeyance. But if Your Honor feels that you may need to make factual findings about the financial benefits that Platinum gave as part of the transaction in making a ruling, then I would like to address that.

THE COURT: I don't know yet.

MS. FOUDY: Okay. So I think that the financial benefits that Platinum gave to the transaction were benefits that were basically ginned up as an excused for Mr. Bartels to approve Platinum's participation in the transaction. But the three things -- right? Were that -- because remember, Platinum's vote was not necessary to approve the transaction, so Platinum's vote was not necessary to get the $250 million in the door, which was the primary motivating factor for the transaction, was getting the $250 million in the door.

So the three things that were put forth to justify Platinum's participation, but not the participation of other unsecured noteholders, just Platinum and the holders whose vote was needed, was that they deferred their management fee.

The evidence at trial showed that, under the agreement, the CASA, the government management fee, the

contractual counterparty was Wolverine TopCo, it was not one of the Debtors. And under the contractual terms of the CASA, Wolverine TopCo was the only party liable to pay that management fee.

The evidence at trial also showed that, well before the March '22 transaction occurred, Platinum had already agreed to waive its management fee because its portfolio company was in financial distress and couldn't afford to pay that management fee. So the only reason why the management fee came up again in the context of the March 2022 transaction was that Platinum was looking for a reason to give Mr. Bartels to justify the transaction, and Platinum was looking for a reason to argue to Carlyle and Silver Point/PIMCO that Platinum deserved more cash pay interest and less PIK interest. Then, all of a sudden, the management fee was back on the table that had previously been waived by Platinum.

So I actually did prepare a PowerPoint that I was hoping I would not have to use. But in the circumstances, would you be able to give control to Mr. Dan Baskerville?

THE COURT: Sure. Mr. Baskerville, you should have a message on your computer at this point.

MS. FOUDY: And Dan, can you go to Slide 9 of the presentation?

So part of the breach of fiduciary duty case against Platinum is that, from the moment that Platinum purchased

unsecured notes, it began acting as a creditor of the company, which gave it an inherent conflict of interest with the best interests of -- what the best interests of the company were.

And what we're showing on Slide 9 was just -- is part of an email, an internal Carlyle email, where Carlyle is sort of recognizing that conflict of interest and is like -- you know, Michael Fabiano joined Kevin Smith on the call, he's on the Board of Incora, he is Platinum's Global Head of Credit. I suspect he's looking after their hundred-and-forty-eight-million-dollar unsecured bond position.

So the people who were on the board, who were making the decisions and leading the negotiation on the March 2022 transaction were also the people at Platinum who were on the deal team and were responsible for the unsecured notes position, which gave them an irreconcilable conflict of interest.

And if you could turn to the next slide, Dan.

And if Your Honor may recall from -- I guess we're getting the same delay. But as Your Honor may recall from the -- let's see -- Dan, can you try to turn to the next slide? I'm going to assume this is the same delay problem. But I just want to make sure Dan heard me.

As Your Honor may recall from the testimony about their negotiations in the March 2022 transaction, there was a number of PowerPoint presentations that were presented to the

board, where they had side-by-side comparisons, right? Silver Point and PIMCO's proposal, the company counterproposal, Silver Point and PIMCO counterproposal. And the same thing for the Carlyle piece of the transaction, right? The unsecured piece of the transaction. You had the -- you would have the company proposal, then a column with the Carlyle proposal, and then another column with the company counterproposal.

And what those PowerPoint presentations show was that -- was, one, that Silver Point and PIMCO were willing to let all noteholders, all unsecured noteholders participate in the transaction. And the company came back and said, you know, yes, we'll let Platinum participate in the transaction. And it showed that Carlyle wanted to eliminate Platinum's participation in the transaction. There was a counter -- it's Exhibit ECF 610-16. There was a proposal where the Carlyle counterproposal was to agree, except Platinum then not participate in exchange. There, it's up on the screen now. And Platinum's debt shall be PIKed for life. And then the company came back and said Carlyle/Senator/Platinum may exchange unsecured notes. So the company was the one who came back and said no, you know, Platinum has to participate.

None of the other -- there was no evidence at the trial that any of the other transaction participants had any demands or requests that Platinum participate. It was always

from Platinum/the company's point of view that Platinum have to participate in the transaction.

And if you could turn to the next slide, Dan. Unfortunately, this could take a while. It's trial testimony -- oh, here it is.

This is trial testimony from PJT's Jamie O'Connell, who presented the transaction to Mr. Bartels for its approval. And Mr. Bartels was told that the transaction would close only if the Platinum involvement in the transaction was approved. So, because the entire transaction involved the two fifty, Mr. Bartels was given a choice of, either approving the transaction that involved the two fifty with Platinum, or not approving the transaction at all. And that's against a backdrop where none of the other participants in the transaction had asked for Platinum to participate and Platinum's vote wasn't necessary. And obviously, that was a self-interested transaction.

And then if you could turn to the next slide, Dan.

THE COURT: What is your response to the argument that having their participation was, in fact, beneficial?

MS. FOUDY: We don't think that -- well, we don't think --

THE COURT: Having them --

MS. FOUDY: -- that it was --

THE COURT: Having them --

MS. FOUDY: -- beneficial.

THE COURT: -- PIK was better than not having them PIK, right?

MS. FOUDY: Having -- yes, I understand the argument that, at any level, PIK gives more liquidity than less level of PIK. But that would -- as I'm sure Mr. Bennett is going to say, that would apply to having everyone and not selectively choosing Platinum.

But also, we don't know like if that influenced Platinum not pushing for all the noteholders to be included. We don't know what was traded off with Carlyle for Platinum's participation, right? Because Carlyle says it's better for Carlyle if less people who participate, right? So they don't want Platinum to participate. And the company/ Platinum comes back and says no, Platinum has to participate. We don't know what the tradeoff was for that or what additional concessions maybe could have been gotten from Carlyle that would have been good for the company for that. So that's one point I would make.

And in terms of the other concessions -- and I think that they were -- what's shown on this slide, for example -- right? Is, in negotiating -- in the negotiations with Carlyle and Silver Point and PIMCO, Platinum was actually pushing for less PIK and more cash. And one of the ways that Platinum pushed for more cash and less PIK was to say, you know, look,

we're giving this cash benefit by deferring our management fees, which I think was a very disingenuous argument to make and to sort of hurt the company by pushing for more cash and less PIK.

And that's on Page 12. And on Page 13, there's another slide that goes to that.

So, on the management fee, again, on Page 14, we have a slide that shows the language from the CASA, that shows that the CASA was entered into at Wolverine TopCo, which was defined as "the company," and not the Debtors.

And then, on Page 15, we have -- we quote Section 2 of the CASA that makes clear that, while the company -- while the company could expect to be reimbursed by the members of its group, meaning its subsidiaries, the company would remain responsible for any failure of any member of the group to timely pay any amount. So the only company that was liable under the CASA was Platinum -- was the Platinum entity, Wolverine TopCo.

And then, on Page 16 is where we highlight the testimony that shows, well before the March 2022 transaction, Platinum had already decided that it wasn't going to be collecting the management fee. It was a year over -- a year before the March 2022 transaction, the company decided -- Platinum decided that it was not going to collect the management fee. That's based on the testimony of Mr.

Vorderwuelbecke, that's quoted on Slide 16. And at trial testimony at 204-1/13, where he talks about the decision to stop charging the management fees being reached in late 2020, that it decided to stop charging a management fee.

And on Page 17, we refer to deposition designation of Mary Ann Sigler, who testified that the management fee had been waived. So -- and they had decided to waive it because of COVID and because of the liquidity challenges. It had nothing to do with the March 2022 transaction.

So the company had no liability to pay the management fee; yet, that was used to justify, by Mr. Bartels, their participation in the transaction. It was used in negotiations with Silver Point and PIMCO and Carlyle to argue that Platinum should have more cash pay interest and less PIK interest.

And with respect to the twenty-five-million-dollar promissory note, one of the claims that we bring in our standing motion is that that note should have been recharacterized as an equity investment. We believe, under the Autostyle factors, they well weigh in favor of recharacterizing that note as an equity investment. In fact, Mr. Smith testified that no independent third party would have like invested the note on those terms, at that time that it was invested.

And even though it did extend the maturity date of

the twenty-five promise -- the twenty-five-million-dollar promissory note, that maturity date was always just a date that Platinum picked out of the air, it wasn't negotiated. And at the same time that they extended the maturity date, they also transformed that note from an unsecured promissory note into a secured note. And they transformed that note from an instrument that had only one obligor on it, which was Wesco Aircraft Holdings, Inc., to a note that was guaranteed by all of the Debtors. So there was -- it wasn't like a pure benefit that they were getting a maturity extension of something that I believe was really equity investment, in any event.

So I think that the benefits that Platinum purportedly gave were illusory, and that they were done in Platinum's self-interests as a noteholder and not considering the best interests of the company, and that that breached a fiduciary duty.

But again, we're not asking Your Honor to make that finding. We're just asking Your Honor not to make any findings that would prejudice our ability to try to make that case to you in the future, should that need arise because our settlement falls apart.

THE COURT: Thank you.

Can I get you to file the relevant pages of your PowerPoint then?

MS. FOUDY: I will, Your Honor.

THE COURT: Thank you.

MS. FOUDY: Thank you.

THE COURT: All right. Mr. Bennett or Mr. Clareman, I don't know who wants to go next.

MR. BENNETT: Your Honor, perhaps I should because, hopefully, I can -- Mr. Clareman won't have to speak, depending upon how we work things out. We are both scheduled to see you on October 2nd, and I expect to be in the courtroom on that day, and we have an extensive presentation, of course.

But one of the parts of the presentation are the actual facts of exactly what happened, in terms of the determinations as to which entities would be able to participate and one what terms they would be able to participate in what we call the "unsecured exchange." Platinum's counsel spent a lot of time explaining that to you and, frankly, we disagree with the explanation, and a lot of evidence was overlooked.

But if you're not going to rule until October 2nd and -- or if you're not going to dig into those facts or if you don't -- those facts don't matter to you for the purposes of what's before you today, I don't need to go any further. But if they are, I am prepared because the record actually is incredibly complete about exactly what happened, exactly who did what, when, concerning the unsecured exchange.

And so, if Your Honor wants to hear that

presentation today or that part of my presentation today, I'm ready to go and have slides. If Your Honor wants to put it off until the 2nd of October, I am prepared to do that, as well, and it's probably my preference, and I'm going to guess it's Mr. Clareman's preference, as well.

THE COURT: So I promise I'm not going to rule by October 2nd, that is not possible, so if that helps.

MR. BENNETT: And in that event, I'll hold my fire until October 2nd. I'll see you in Houston then.

THE COURT: Thank you.

Mr. Clareman, did you want to address anything?

(No verbal response)

THE COURT: You're muted, so you'll need to -- there we go.

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

THE COURT: I can now. Thank you.

MR. CLAREMAN: Good afternoon, Your Honor.

I echo Mr. Bennett's -- he anticipated correctly. If it's not an issue that needs to be addressed today, we'll withhold on discussion of this because I -- there will be a lot to say about this on October 2nd, so we'll wait until then.

We -- I did not prepare, just to remind, Your Honor, to address the Court today because the tortious interference claims by the 2024 and 2026 holders do not name Carlyle or any

of my clients as defendants, so I'm only in the case as a defendant to the Langur Maize claims, which we will address on the 2nd.

THE COURT: Thank you.

All right. Mr. Rosenbaum, you said you wanted to give a rebuttal of some wort.

MR. ROSENBAUM: Thank you, Your Honor, and good afternoon. Again, I will try my best to be brief, but there are some points that I want to respond to that were made over the course of the responses to my argument.

First of all, I think we need to take a step back. And I don't necessarily need to put it up. But element four of the elements that we set forth, and I don't think there's any disagreement on, for there to be tortious interference is intentional interference. And what the cases -- and I'll get to the Court of Appeals -- say about that is that you don't need to have a subjective understanding of what the agreement requires or doesn't require. You need to undertake intentional conduct -- which I don't think there's any dispute that any of the conduct here was intentional -- that has a reasonably foreseeable -- or will have a reasonably foreseeable or probable result and a breach.

THE COURT: Yeah. The only reason I was asking people to confirm they had the indentures was to be sure they actually had that information, not that they had interpreted

it in a certain way.

MR. ROSENBAUM: But what I'm -- what seems to be, you know, confused -- and I think this goes to whether -- the circumstances under which a creditor can get the benefit of the economic interest defense, is what conduct -- right? We don't have to show, in that sense, wrongful conduct. The wrongful conduct is simply that your intentional acts are -- the reasonable and foreseeable consequence of them would be a breach. We don't have to go put the proverbial actual gun to the head. I think we more than satisfy that.

If, then -- and let's go to PIMCO and Silver Point, and we'll get to some of their cases -- they can put forward an economic interest defense -- right? Which they haven't, and I'll explain why. Then the burden comes back to us, right? It's an affirmative defense that they have to prove up. The burden comes back to us to show some form of malice or extra wrong, right?

So one of the cases that Mr. Heidlage mentioned -- and it involved PIMCO -- was the Triaxx case. And Triaxx is among the four cases that I mentioned that involve a tortious interference claim against a creditor. One of the creditors was PIMCO. And just so that the record is clear on it, it's 2019 WL 4744220, and it was Judge Marrero in the Southern District of New York who decided it.

And I think this goes very clearly and squarely to

the concept that I had put forward before that, if the alleged interferer is exercising a right that is equal or greater, then it's protected, but if it is not -- and that's in causing the breach, right? Then it isn't protected. Then, in that case -- and I'll read it, it's page -- oh, I can't figure it out -- here it is -- I'll come back to it. It says:

"The complaint alleges, based in the terms of the indentures, that PIMCO, as a noteholder, will suffer an economic detriment if the Phoenix invoices are paid."

Right? PIMCO will suffer an economic detriment if the invoices are paid because it's a noteholder, there's one pot of cash, the underlying credit was in distress. So, if the money goes to one place, then it doesn't go to them. That is an equal right, right?

What you cannot do and what PIMCO did in this case was induce -- right? Through intentional conduct that had a reasonable and foreseeable outcome of a breach. It cannot undertake that conduct to take something that isn't its, right? And it doesn't have an equal right to. And that was $550 million of liens by putting in $250 million. That is the essence of the case.

And that's why I think, A, New York law is -- clearly runs our way on the applicability of the economic interest defense to creditors; and B, why you don't get to the this next level of, you know, was there something more wrong

than that. That's all -- that's the only wrong we needed to show.

In terms of the other LME cases -- and I think this is just an important distinction across the board -- this is the only one that's cited that I'm aware of that involved a bond indenture.

So, in these other LME cases, where you have capital "L" lenders -- right? Are all parties to the agreement. And they all get sued for the their conduct, right? And they -- there is no tortious interference, right? It's just straight breach of contract causes of action.

So, every time that counsel on this side of the table, to my right, your left, talks about other LME cases, it's completely different -- and I'll get to the equity sponsor issue in a moment -- because the lenders, capital "L" lenders, are already in the case on a breach of contract claim. There is no need to assert a tortious interference against them for that reason.

And there's a pretty good example of that. It's a case, Boardriders, it was mentioned -- I just want to make sure I have the right one -- yeah, Boardriders, where Oaktree Capital was the private equity sponsor and because -- and solely in its capacity as a private equity sponsor, it didn't participate, it was let out of the -- it was let out of the case without having -- so they're not having been established,

tortious interference claims. But interestingly enough -- right? Its participating affiliates, the lenders, were not let out of the case, right?

If you look at the caption and you look at what the Court did -- right? So, in that case, the plaintiff sued the private equity sponsor, the equity owner for tortious interference, separate entities that owned a bond or, in that case, I guess participation rights in a loan. The entities that had participation rights in the loan stayed in. It was only the private equity sponsor that was let out. So it's entirely distinguishable and I'll explain why that doesn't save Platinum in a moment.

And Mr. Heidlage also mentioned a case called Mytel (phonetic), which the only thing we have is a transcript. There was no written decision. And I'm looking -- it's in the record, I think it was Exhibit B to the defendants' brief. On Page 54, the only thing it says about Credit Suisse, that apparently was a creditor, is that it had an economic interest to be paid down early on the original revolver. Well, that sounds just like Triaxx, right? But what happened here is functionally and fundamentally different, where someone took somebody else's rights, not rights for which they have equal participation and equal rights.

So, Your Honor, that, I guess, explains, the best I can -- right? The -- you know, both the differences in the

legal construct that's been put forward and what actually happened here.

I'd urge the Court to consider, in unpacking, you know, what the law actually is your -- and what has to be shown in order to make the affirmative case and for the affirmative defenses then kick in, to read the Guard Life decision, it's 1996 Court of Appeals. But that talks about this idea that most interferers don't even know the details of the other's contract, they just know there is a contract. And obviously, here, our interferers knew the details of the contract.

Going back to Platinum for a moment, just very briefly, a couple of things that I'm scratching my head over. Yes, corporate formalities exist, corporate form exists. Self-dealing -- right? Is one of the fundamental ways that you look through corporate formalities. Board members can't be on both sides of the transaction. They were here. And this transaction -- right? Was intended to take something from someone and give it to somebody else. So I think, you know, that argument goes out the window.

And you know, one more point on Platinum because I think it's very important. The same entity, Wolverine TopCo, that was managed by Platinum, who also employed the board members, owned debt and equity. If all this happened and Platinum derivatively had a benefit to its equity position, it

would be squarely within the economic defense. That's what it's there for.

But that's not what happened, right? Platinum did a transaction that benefitted its bond position, right? Not its equity and not derivatively. It was directly, right? It took unsecured bonds, moved them into what they considered the fulcrum, and they then secured at the direct expense of others, right? So it, in that sense, as, you know, comprising the board and the same deal team, did tortiously interfere.

One final point because I do think, you know, derivative versus direct benefit is critical, as to our group's attempts to enforce their rights. And in addition to suing in State Court to protect our interests, we came in and objected to the DIP hearing and, you know -- or the DIP at the outset of the case and, ultimately, got a reservation of rights for purposes of our, you know, status as rightful secured creditors. So, to the extent Your Honor is thinking that we didn't do everything we could to protect our interests, I think we did. With that, I have nothing further.

THE COURT: Mr. Heidlage.

MR. HEIDLAGE: I'm going to try to be quick. I think a number of these points are covered in our slides, but just because they were brought up then, I -- right now, I just feel like I have to --

First, on the standard for intentional inducement, I

just want to join with Ms. Oberwetter and her explanation as to what the standard is of an objective breach.

On the -- you know, the creditor cases, you know, I think something is important Mytel because, there, what was going on with the -- Credit Suisse was both the administrative agent and the revolving lender. And as the revolving lender, under those documents, it sat way below the other nonparticipating -- I'm sorry -- the nonparticipating lenders. And what it did was it jumped the line. And so it was alleged to have used its position to sort of get rights that it otherwise didn't have the right to. But the Court said, under the economic interest defense, that that's acceptable.

Now I -- the last thing I want to address is the Boardriders or the liability management cases because Mr. Rosenbaum referenced the fact that they were loan agreements, and that that's why some of the lenders, you know, were in the -- you know, were able to stay -- stayed in the case.

That only goes to point out what I think you -- the relevance of the question that you asked at the beginning, which is what was the -- what was the thing that PIMCO and Silver Point did that violated one of their -- you know, that were their obligations. In those cases, there were contractual obligations alleged that the -- that the lenders had. And if those obligations had been breached, there was a

contractual breach claim. Where there wasn't that contractual obligation; for example, with the sponsors, there was a tortious interference claim, like there is here, and that was dismissed.

So it's just -- it's an -- it's a distinction without a difference. The point is, I think, it boils down to, if you have a contract and you breach the contract, you can get sued on the contract. If you don't have a contract, you still have to meet the economic interest defense to make out a tort claim for tortious interference. They don't get to sort of fill in the gap just by saying well, because there's no contractual obligation here, there must be some type of other liability. That's not how -- that's not how it works.

I think, with that, I'm going to otherwise -- I don't feel the need to go further on that. That's all.

THE COURT: Thank you, Mr. Heidlage.

Ms. Oberwetter?

MS. OBERWETTER: Your Honor, if you can give Mr. Catalanotto the control again?

(Participants confer)

MS. OBERWETTER: Thank you. We'll come to this in a moment. It's an excerpt.

Again, for the record, Ellen Oberwetter on behalf of the Platinum Defendants.

I'm mostly going to be addressing Ms. Foudy's

comments because those are the issues that came up since I last spoke that were somewhat new. I just want to address a few points out of what she said, prefacing that with I don't think any of those items matter to our bases for dismissal of the tortious interference claims. And I think there are ample bases for dismissing those claims against Platinum, short of wading into all of those issues. But because some of those issues effectively cast aspersions on some of Platinum's conduct, I'm going to address it.

There's not any dispute that Platinum made a package of financial concessions in connection with the 2022 transaction. I've outlined what those three things are. I believe, in part, because mister -- Ms. Foudy agreed with the point that the PIKing of interest uncontestedly had value for the company, there's not any question about that.

Once that's true and it defers tens of millions of dollars worth of company debt at the same time that the company is trying to get itself a long runway, the suggesting that there was any effort to "gin up," I believe she -- was the phrase that she used -- a document to show that there was going to be a benefit, when there, in fact, was a benefit, as supported at trial, not only by the testimony of witnesses; including, for example, the testimony of Mr. Prager I showed already today, but also the lengthy testimony of Mark Rule as an expert, who calculated the benefit of those concessions, I

just don't think there's any benefit to cast that aspersion on the process.

Beyond that, I want to talk briefly about the CASA, which is the agreement that providing for the monitoring fee and has received way more air time at every point in this process than it should ever need to because, again, the agreement to continue deferring the monitoring fee was part of a package of concessions.

The part of the CASA that I haven't gotten to talk about yet, in nine months, ten months, or however long we've been at this, is 4.1. And this is in ECF 563.8, which is the provision that says that the company shall or cause a subsidiary entity to pay the fee. So the notion that this was some illusory fee that the company wasn't actually on the hook for is completely in error because Section 4.1 provides that the TopCo entity was in a position to cause the subsidiary to pay the fee. And as long as the company was still going as a concern, it had the ability to cause the subsidiary entities to do that, which has been overlooked from start to finish, every time we talk about the CASA.

I do also want to talk about just the factual underpinnings of the suggestion that the fee had already been completely waived. That's not true. There is no evidence to support that. And in fact, while I don't have it at the ready, if we went back to Ms. Foudy's Slide 17, where she

quoted some of Ms. Sigler's testimony, that's not what Ms. Sigler said. She was asked the question did you waive it or did you accrue it, and the answer was they accrued it. It was a deferred, ongoing obligation.

And you don't have to just listen to Ms. Sigler on that, either, because you can also go back to -- if we could take a look at Slide 22.

(Pause in proceedings)

MS. OBERWETTER: And let me just start to describe it before we get there because it may take a minute to get there, given the lag in the presentation.

Slide 22, entered into evidence, is a financial statement that the company itself -- ECF 536-28 -- which made very clear that, as far as the company was concerned, it still owed the $7 million for 2020 -- sorry -- for 2021, and there hadn't been -- it certainly doesn't reflect any agreement to waive the monitoring fee prospectively. So the suggestion that this was a fake give or an artificial give is, point one, not supported by the evidence; and, point two, there's no reason anyone would have made that up, given that the PIKing of the interest was a substantial benefit to the company anyway.

I want to talk briefly about the excerpt of Mr. O'Connell's testimony that Ms. Foudy put up, raising the question of well, why was Platinum given the ability to

participate in the transaction. They're the equity sponsor.

You've heard a lot during the trial just about the need for speed in connection with this transaction, the logistical difficulties and rounding up parties with whom to negotiate. It shouldn't be surprising to anyone that the company would have viewed it as a significant benefit to have an entity there on the scene that had significant, tens of millions of dollars worth of near-term obligations to defer, and that that would be the party then that would have its interests -- that would be eligible to get a 1.25L lien position in exchange for making those very concessions. Again, again, we haven't heard from anyone that it was obligated to make those financial concessions for free.

The last point that I'll talk about is the twenty-five-million-dollar unsecured note that was issued in 2020. You will probably recall from trial that was part of -- that was sort of a two-parter, in terms of additional financial support that Platinum made to Incora, far before we ever got to the 2022 transaction, because it believed in the company and wanted to give it some additional bridge capital and financing, to allow it to succeed. It made a twenty-five-million-dollar unsecured loan and it injected $25 million of additional equity at that point in time, as well.

I was surprised to hear Ms. Foudy say that -- and cite the testimony of Mr. Smith as saying that oh, well, that

should be treated as equity because Mr. Smith said that loan was made on terms that the company couldn't have gotten commercially. The reason Mr. Smith said -- and you can check the transcript, and I don't have a cite, but we're happy to provide it. He said the company wouldn't have been able to get that term commercially because it was more favorable to the company, given the fact that the company's position had only deteriorated since COVID began. So there was nothing untoward, either, about the twenty-five-million-dollar unsecured loan.

And of course, whatever the UCC's theory may be today, in terms of whether or not it be recharacterized as equity or not, that's certainly not anything anybody was talking about in early 2022, in terms of something that was required to be done. Everybody understood that it was debt that was owed to Platinum and it was debt that was rolled up, so that the payment obligation was deferred.

So I did want to address those points and put them in a different light. And with that, I'm prepared to complete my remarks.

THE COURT: Thank you.

MS. OBERWETTER: Thank you, Your Honor.

THE COURT: All right. I'm going to disclose the discussion in that matter and we're going to move to the mediation motion filed in the main case.

MR. LEBLANC: Good afternoon, Your Honor. Andrew Leblanc. Your Honor, it's not -- I represent Incora.

Your Honor, it's not our motion, but if Your Honor would permit it, I'd like to give just a brief status update on where things stand, and then I'll also give my perspective on the motion.

Your Honor, just as the hearing was starting or just shortly before, we did file a notice extending certain deadlines in connection with the confirmation hearing, pushing those out as far as we can. We have not changed because we haven't worked with chambers yet. We recognize that October 7th, as the start of the confirmation hearing, is not going to work. We have a reply deadline that we proposed in the notice that we filed today of October 6th. So we're --

THE COURT: Have all the parties agreed to that extension?

MR. LEBLANC: I believe they have, Your Honor. I'll -- I'm --

(Participants confer)

MR. LEBLANC: Your Honor, we -- this is just extending out the -- some of the objection deadlines. We certainly agreed with the parties to an objection extension.

(Participants confer)

MR. LEBLANC: Mr. Schak, my colleague Mr. Schak will address that.

MR. SCHAK: Your Honor, just given the exigencies of time, we haven't heard back a position yet from the '24/'26 group or a firm position from the Committee. The 1Ls have agreed to it and the U.S. Trustee.

THE COURT: Okay. Thank you.

MR. LEBLANC: And Your Honor, we also, this afternoon, filed a motion to extend our periods of exclusivity, as those were expiring.

But with respect to the issues, Your Honor, we have conceded -- and I think Mr. Dunne did this up in the disclosure statement -- we recognize that the plan that we have on trial is confirmable only with the consent of both of the groups, the two groups of secured creditors. We structured it in that way. We provided the '26 holders that are now secured with their own class. We recognize that we need the consent of both parties, and we have been trying very hard to facilitate that. And our perspective is whatever can be done to get these parties to engage with one another, Your Honor, we would very much encourage it.

We see there's really only, in our view, two paths. And I think this is elucidated in the motion that was filed. There's really two paths to get to a confirmable plan here as -- under the plan that we'd propose:

One is if the parties can come to an agreement on preserving the ability of both parties, frankly, to appeal

from Your Honor's decision. So that's what is contemplated in our plan. And we understand that the appellate adjustment mechanisms is not something that the 2026 holders are interested in. We're happy as long as we know that appeal has to be preserved.

Or, alternative number two, frankly, something we would prefer, is that, if the parties can come together and reach global resolution just to settle the underlying dispute, then we can have a plan.

But both of those paths require the consent of both sets of secured creditors. That's the position. I think Your Honor said it when you first issued the decision, that you're putting us in this position, and we understand that.

THE COURT: Not on purpose. That's just the way --

MR. LEBLANC: No --

THE COURT: -- the numbers came out.

MR. LEBLANC: That's the way --

THE COURT: Yeah.

MR. LEBLANC: -- the numbers came out, Your Honor, and we are operating under that.

And here's the reality for this company: We need to get out of bankruptcy, so our view is we need to do whatever we can do to cause that to happen, which means we need to get these parties together to try to come to a resolution.

Now we have -- Your Honor, the company has done

everything it can. As of now, we don't believe there are any outstanding diligence requests from the 2026 holders. We provided both sets of holders an update on the company's business performance in August, the company's cash position, why the company is desperate to emerge from bankruptcy as quicky as it can.

We have found and been frustrated with the level of engagement between the parties. We need the principals to get in a room and talk to one another and try to engage. We've received, Your Honor -- and as is not atypical, we have received proposals, but only when we are walking into court.

So we got a proposal that would have allowed for the preservation of the appeal about an hour before the disclosure statement, from the 2026 holders. And I'm not going to go into any detail on these proposals. The only proposal we've received with respect to a global resolution we got over this past week.

We need the parties to be engaged, however we can do that. And if it's mediation, we are all for that. If it's talking to one another otherwise, we're all for that. If it's talking to one another through us, we're all for that, whatever we can do to cause the parties to come together and talk to one another.

Now, Your Honor, I -- one thing that I've done in this courthouse before is we -- I've been required to come to

court frequently to report on the status of negotiations, obviously not the substance, but just to make sure that the parties are actually engaged. In Neiman Marcus, one of your colleagues ordered us to appear on a daily basis. I don't think that is necessary here.

But I would -- I believe, Your Honor, if what prompts people to make proposals is that we're coming to court, then I would say let's come to court more often, just on status conferences, a couple of times a week, even if we have to, because that is what seems to get people motivated to make proposals.

THE COURT: So I'm not sure that you all need a mediator, maybe you do, I want to hear from others. But I do think you need everybody in a room together.

Do you know who you need in the room by name?

MR. LEBLANC: Yes.

THE COURT: Is this room big enough?

MR. LEBLANC: Yes.

THE COURT: Well, why don't we do that?

MR. LEBLANC: It's more than large enough, Your Honor, without question.

THE COURT: I'll turn off all the speakers. Why don't we give you all -- and I want to hear from everybody about this -- a few days, like until the end of this week, to see if you all reach a deal by the end of the week? And then,

next week, I'll set a date and everybody has to be here in person to try and work through it. If they can't, they can't.

But I mean, is it going to help to have a judicial mediator present? You've had an awful lot of mediation time with Judge Lopez.

MR. LEBLANC: We have.

THE COURT: And I very much appreciate it. But I -- you know, those mediations are hard because then you always don't really have all the right people there at the right time. But if, literally, we put everybody in this room, that may --

MR. LEBLANC: Your Honor --

THE COURT: -- mean something.

MR. LEBLANC: -- I would do one better. I would say let's do it this week, Thursday, Friday. We'll -- whether it's here or in New York, I don't care. I just would love to have the principals together in a room, talking about the resolution of this.

It literally is -- I think it's as simple as negotiating a number, a single number. They can work out -- there are obviously other issues like minority protections, things like that.

THE COURT: So let me hear what people think of that. I -- look, I would -- I was thinking making everybody come down here would be sort of the punishment --

MR. LEBLANC: That --

THE COURT: -- and --

MR. LEBLANC: That's also fine, Your Honor.

THE COURT: -- and that, if I gave people a few days, they wouldn't want the punishment. But if you want the meeting in New York --

MR. LEBLANC: The only --

THE COURT: -- later this week --

MR. LEBLANC: -- reason, they're --

THE COURT: -- that's fine.

MR. LEBLANC: Not everybody is in New York, so it will be punishment for some, but I'd like it sooner, rather than later. And I would like --

THE COURT: What I do --

MR. LEBLANC: -- it in person.

THE COURT: -- want it to be is in person.

MR. LEBLANC: I agree with you, Your Honor.

THE COURT: So let me hear what other people think.

MR. LEBLANC: Thank you.

MR. SCHAIBLE: Your Honor, Damien Schaible with Davis Polk on behalf of the PIMCO and Silver Point noteholders.

It's not every day that the Debtor picks up your motion and runs with it, but I appreciate that.

Your Honor, we filed the motion because, as we told

you at the status conference back in August, we told you again at the disclosure statement hearing a couple of weeks ago, PIMCO and Silver Point are here for this company and want to get this company out of bankruptcy. We absolutely believe that this company needs to get out of bankruptcy. And we have done everything that we can.

Our clients are engaged and motivated, Your Honor. You know, they heard your decision, they heard your views as -- during -- as the trial went on. They are not a problem, in terms of being motivated and incentivized to try to get something done that can get this company out of bankruptcy.

Obviously, we all would love a global resolution and everyone links arms and we come together. But it would be irresponsible for us to only focus on, as Mr. Leblanc said, one number. We need to get the company out of bankruptcy. And if we can get the global resolution, that would be everyone's first choice.

But if we can't get the global resolution in the very near term -- and so far, Your Honor, we've been working on that for a very long time and we've gotten, effectively, nowhere -- then we need a plan B.

Leaving the Debtors and other parties Hobson's Choice with the patient in pain on the table, versus accepting demands that, you know, either side would make just doesn't make any sense. If we can get the global settlement, we

should and we would love to and our clients would be available and willing to jump in and do that. And we've been seeking that engagement.

THE COURT: Yeah. Do you need --

MR. SCHAIBLE: But we --

THE COURT: Do you need --

MR. SCHAIBLE: -- also need to --

THE COURT: Do you need a mediator or do you just need everybody in the room together?

MR. SCHAIBLE: Your Honor, I would posit, at this point, that a mediator would be helpful. I -- certainly, we need people together and we need to talk about both things, right? We need to talk about global resolution, if we can get to it, but we also, Your Honor, need to talk about what a settlement -- what a consensual plan would look like to get this company out of bankruptcy, even as people continue to talk. What we can't do is be stuck in a morass of, either you agree on a number, or the patient has to stay in the hospital, right? We need to get the patient out of the hospital, one way or the other.

I believe that it would be best with a mediator. These parties have been talking in various ways in one-offs and two-offs for a very long time. I think the help of a mediator to talk about both things, to talk about global resolution and to talk about, short of global resolution, how

do we get this company out of bankruptcy, we're flexible --

THE COURT: Are you better off with a judicial mediator or picking the smartest person in the world, literally, who knows these deals and can help find a solution to it?

MR. SCHAIBLE: I'm not sure --

THE COURT: Like it's not --

MR. SCHAIBLE: -- that I --

THE COURT: -- like people haven't read about this case, right? Who -- anyone that's going to be a capable mediator in the case is familiar with the case, generally, right?

MR. SCHAIBLE: Yes.

THE COURT: So --

MR. SCHAIBLE: I'm not sure that I --

THE COURT: So you're not --

MR. SCHAIBLE: -- I have a --

THE COURT: -- available. So who's the smartest person that can do it?

MR. SCHAIBLE: I'm not sure that I have a militant view on that, Your Honor. But I often, in my practice, have mediated before Your Honor and lots of other people, along time. I generally find that judicial mediators get things done more quickly than professional mediators.

But I'm not -- I just want engagement. I -- we want

engagement on both potential global resolution and, short of that, a path to get this company out of bankruptcy. That's what we've been begging for. We've sought mediation from the other parties-in-interest. We've been not agreed to. We want to just get going. And that's -- that was the purpose of our motion, was really a Hail Mary to Your Honor. I know --

THE COURT: No, and --

MR. SCHAIBLE: And I've appeared in your court enough times to know what you were going to say, I could probably even say the words, that you've never in your career ordered people to mediation. I totally get it.

THE COURT: It's not that --

MR. SCHAIBLE: But --

THE COURT: -- I've never done it, I've just only done it once or twice.

MR. SCHAIBLE: Oh, yeah, I thought you said -- I thought that, many times, I've you heard you say you've never -- but in any event --

THE COURT: I've done it once or twice.

MR. SCHAIBLE: -- this is a Hail Mary, Your Honor, because we've been seeking -- we've provided the Debtors with numerous rounds of comments on the plan. We've opened the door to discussions with the '24/26 holders about different plan constructs.

We're militant on one thing, which is, short of a

global mediation, we need to preserve appellate rights on both sides in a fair and totally straightforward manner, not looking to play any games at all. But we need to talk about both, and that was the Hail Mary that we --

THE COURT: So I want to ask you another question. If I don't extend exclusivity, is there a plan that works that could be done over an objection?

MR. SCHAIBLE: I believe there -- well, I believe there is a consensual plan that can be reached, A. B, I actually do believe that there are certain plans that can be undertaken. It would just -- it would require people to be talking together. So I'm not willing to give up on consensual plan because it feels to me like there should be a consensual plan --

THE COURT: I --

MR. SCHAIBLE: -- even short --

THE COURT: I think --

MR. SCHAIBLE: -- of global resolution --

THE COURT: -- there should be --

MR. SCHAIBLE: -- we can get to.

THE COURT: -- a consensual plan. But if we can't do that, maybe the triggering event -- maybe that ought to trigger an end to exclusivity and let people --

MR. SCHAIBLE: No --

THE COURT: -- file plans that work.

MR. SCHAIBLE: Your Honor, my concerns, as a corporate lawyer, is, when you end exclusivity -- and I've appeared before Your Honor in cases where I, you know, am fighting with the Debtors, I've fought with the Debtors here quite a lot -- I still do think like having sort of a channeling process is helpful. If, all of a sudden, we have three different plans being filed and it becomes chaos, I worry that it takes longer. And trying to get to something consensual or the Debtors --

THE COURT: Consensual is best.

MR. SCHAIBLE: -- getting something --

THE COURT: Consensual is best.

MR. SCHAIBLE: -- on file --

THE COURT: I'm just --

MR. SCHAIBLE: I do believe there are plans that can be undertaken, under the right circumstances, that don't require full consensus, but that's not where I'm focused, Your Honor.

THE COURT: Thank you.

MR. SCHAIBLE: And lastly, with respect to timing, you know, obviously, we need people to travel in the real world. People are going to need a few days to figure out, you know, travel --

THE COURT: Do you agree --

MR. SCHAIBLE: -- plans and --

THE COURT: -- everybody --
MR. SCHAIBLE: -- things like that.
THE COURT: -- ought to be in one room --
MR. SCHAIBLE: If you think --
THE COURT: -- no videos?
MR. SCHAIBLE: -- everybody --
THE COURT: No videos, show up.
MR. SCHAIBLE: I think that -- I think that at least a representative from each place should be in one room.
THE COURT: With full authority?
MR. SCHAIBLE: With full authority, you know, or people available on the phone. We've done this before.
THE COURT: No.
MR. SCHAIBLE: People -- no, no, no. People in the background to be able to get authority available by phone because these are large institutions. Realistically speaking, they have credit Committees, they need to -- whatever, there's going to be people behind the scenes. But yeah, decision-makers, I believe that's important, imperative.
THE COURT: Okay. Thank you.
MR. SCHAIBLE: Thank you, Your Honor.
THE COURT: Mr. Rosenbaum? You all may be perfectly happy with mediation. I don't know. What do you think?
MR. ROSENBAUM: Your Honor, I don't think I've ever walked into court and said absolutely no to mediation, I don't

think it's a good idea. But I think I agree that, if we were to go to mediation, the parties should actually confer and pick a mediator who would, for lack of a better -- be able to bang heads, right? And really get into the minds of the decision-maker. To me, that's been the most effective way that those who are motivated can get across the finish line.

And we did expend an extraordinary amount of time with Judge Lopez. And to his credit, he gave us an extraordinary amount of time. I personally don't know that that's the solution here. I can talk to our clients about it.

But taking a step to the side of that, there has been substantial engagement across -- right? I don't think anyone can disparage the other. You know, the lawyers -- the professionals and their clients are working hard. The parties, as the Court can see from our argument today and from the last seven or eight months, we tend to see the world differently, which is challenging.

And the problem with a partial settlement, as has been outlined, it creates more litigation, right? I mean, we are, by definition, continuing litigation, which isn't a great option for the company and it puts its capital -- it keeps its capital structure in some form of limbo.

The problem with a full settlement is it requires handicapping. Your Honor, we spent six months on this. We think Your Honor was spot on, others might not, and I won't

get into the details with that.

And then there's the alternative plan. And just for the record, and I won't go into the detail, but it wasn't 408. In this context of robust discussion, our group did put forward an alternative plan to the Debtors, and it wasn't 408. It included a termsheet on governance and it also included alternative DIP terms. So there has been a lot of engagement and there has been some progress, but the parties are worlds apart still.

So what's the best solution? I have no objection, I don't think my clients would, to, as a first step, the parties getting in a room, whether it's in New York, whether it's here or somewhere else, and trying to see if reasonable minds can prevail.

I would suggest, coinciding with that, we talk about a full-time mediator and see if we can come to some agreement on who that might be, as a secondary option, because, as I started with, you know, I don't like to come into court and say no to any form of mediation. I think it's -- we all know the facts, we all might disagree on the law, but we all know the law, and this case should resolve.

THE COURT: So, look, I can think of several judicial mediators who would be great. I haven't asked Judge Lopez, but my guess is, right now, he's like the busiest person in the United States, so that it may be hard to get him

to do it right now.

There can't be that many non-judicial mediators that will understand this deal, other than people that you're all familiar with from the industry, right?

MR. ROSENBAUM: Retired -- when you say "non-judicial," do you mean sitting judges or retired judges?

THE COURT: No, I'm saying, if we leave the judicial scope and we go to the true experts within the industry -- this is sort of the question I was asking Mr. Schaible is who's the smartest person in the world. And the smartest person in the world is not going to be a judge, right? They took a big cut in salary, and you guys are out there earning a lot more money than they are, so let's not count that. But if we think of who is the smartest person, it's going to be somebody that is already up to speed on this just because they would be following it and they won't have a conflict. Are there people like that out there in the world or does --

MR. ROSENBAUM: Well, we --

THE COURT: -- everyone have --

MR. ROSENBAUM: We haven't --

THE COURT: -- a conflict?

MR. ROSENBAUM: -- conferred on it, but I do think most of the -- you know, the distressed credit market and the -- or credit market, in general, the professionals and non-professionals know something about this case, so we might be

able to --

THE COURT: But most of them are in the case, right?

MR. ROSENBAUM: Well, not really. There are -- there might be like one or two.

But I -- look, we've never even conferred on it. So I think there are, you know, a lot of smart lawyers who may a lot of people. So maybe something we should do, coincident with trying to create a meeting --

THE COURT: Does Judge Perez have a conflict, Alfredo Perez?

MR. MELKO: He does. He -- John Melko for the record. He worked on Serta, briefly, which is on appeal.

THE COURT: He worked on Serta briefly. But does he have any conflict in this case, if he wanted to serve as a mediator?

MR. MELKO: Oh, I don't think Weil is in the case, best as I --

UNIDENTIFIED: No.

MR. MELKO: Yeah.

(Participants confer)

MR. MELKO: Now I think it might be an issue preclusion, it might be an issues conflict.

THE COURT: It may be that people don't want it, but in terms of his --

MR. MELKO: Well, actually, the reason I --

(Participants confer)

(Laughter)

MR. MELKO: The reason I stood up is because I had been thinking the same thing. And I know that Weil Gotshal represented Serta. We actually checked the fee application to see if Judge Perez had worked on the case. He worked very few hours, but he did work on the case.

THE COURT: Yeah, but I don't think that would cause a conflict in mediation, I may be wrong about that, or he may be unwilling to do it on that basis.

MR. MELKO: Well, it was an up-tier was the issue.

THE COURT: Yeah.

MR. LEBLANC: Your Honor, I think the right answer is for us to confer. Maybe you hold our motion in abeyance and let us confer, if we can reach resolution on, you know, the fact of mediation and someone to mediate.

But Your Honor, Mr. Rosenbaum is an excellent advocate and he just sort of -- just sort of did the advocate thing, where he moved it from what we think we need to talk about, which is both things, consensual plan short of global resolution and just global resolution, and kind of just honed in on global resolution and, you know, dropped a little bomb on non-consensual -- on consensual resolution that doesn't include global resolution.

It's not a company capital structure issue and it's

not additional litigation. It's just continuing the litigation, right? In other words, Your Honor made a decision. That decision is going to be on appeal probably from both sides. And the company can get out of bankruptcy and be perfectly happy and go along, plugging along perfectly well out of bankruptcy while the appeal continues. There's no reason to cut off appeals in order for the company to get out of bankruptcy. And the ongoing appeals don't impact the company.

The do impact -- you know, if I were Mr. Rosenbaum, I would not like the idea of preserving appeals because I have won in this court and so I want appeals to go away. Unfortunately, it's going to take two sides to tango, if we can get to a consensual plan. And our clients need to be able to preserve, in a fair and appropriate and negotiated way, the appeal rights, even while we get this company out of bankruptcy, and we've been crystal-clear on that. And frankly, Your Honor has suggested that you understand that.

So I'd like to mediate both. I'd like us to talk about both global resolution and a --

THE COURT: Okay.

MR. LEBLANC: -- consensual plan that can get this company out of bankruptcy, short of global resolution.

THE COURT: What are you doing at 8:00 a.m. the day after tomorrow?

MR. LEBLANC: Sorry, Your Honor?

THE COURT: 8:00 a.m. the day after tomorrow, we'll get a report on how you all want to proceed on this.

MR. LEBLANC: Sure, yes. Is virtual okay?

THE COURT: Oh, yeah, it will be only virtual.

UNIDENTIFIED: That works for us, Your Honor.

THE COURT: So --

UNIDENTIFIED: That works.

THE COURT: -- we'll continue the motion to mediate until 8:00 a.m. on the 25th, really just for announcements by the parties --

UNIDENTIFIED: Perfect.

THE COURT: -- on what to do.

UNIDENTIFIED: Perfect. Thank you, Your Honor.

THE COURT: And hopefully, you all will have agreed on a process.

Any process is going to require that principals participate.

UNIDENTIFIED: Absolutely.

THE COURT: And the principals have to participate in person.

UNIDENTIFIED: Very much.

THE COURT: I take your point that that may be difficult to define, but I also think everybody here trusts each other to know that, if we say "principals," people know

what we mean, and I'm not too worried about defining that.

MR. SCHAIBLE: I was expecting you to deny my motion, so continuing it is better than --

(Laughter)

THE COURT: Well, I mean -- okay. So any problem doing this at 8:00 in the morning on September 25th?

MR. ROSENBAUM: No, Your Honor.

THE COURT: Okay.

MR. ROSENBAUM: Not from us.

THE COURT: I want there to be a proposal to get us to a plan. If that proposal doesn't work, then sort of everything needs to be on the table, including exclusivity. And I understand how messy that is and I don't want to do it. But at some point, we got to break the logjam. And you know, I can -- the danger of this is you know I get to structure those, if there's competing plans, in the order that I want. So, if you file an unreasonable plan, it probably won't get first in line.

So, hopefully, we can make a bog jam (phonetic) and get something done you all can agree to, but we've got to get something done. We can't just sit here. We're losing too much, I think, and it hurts all the parties.

I want you all to include the possibility that you would treat parties within the class of the 2026 holders differently than one another in a way to break open the

logjam. They don't need to be treated identically if there's an agreement for differential treatment. And I don't know if you all have already been talking about that or not, but maybe there's a way to do that. And I'm willing to think about anything, so -- but I'm not willing to just continue it and continue it and continue it. I -- you know, I don't think that's been working for us too well, so.

All right. What else can we do today? I'm going to take the whole matter that we argued on the adversary proceeding under advisement. But on the main case, anything else we can do?

(No verbal response)

THE COURT: All right. Thank you. We'll see you in a couple of days.

(Proceedings concluded at 5:00 p.m.)

* * * * *

I certify that the foregoing is a correct transcript to the best of my ability produced from the electronic sound recording of the proceedings in the above-entitled matter.

/S./ MARY D. HENRY

*CERTIFIED BY THE AMERICAN ASSOCIATION OF ELECTRONIC REPORTERS AND TRANSCRIBERS, CET**337*

JUDICIAL TRANSCRIBERS OF TEXAS, LLC

JTT TRANSCRIPT #69149

DATE FILED: SEPTEMBER 30, 2024

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF TEXAS

In Re:	Wesco Aircraft Holdings, Inc. and Official Committee Of Unsecured Creditors Debtor	Case No.: 23−90611 Chapter: 11

Wesco Aircraft Holdings, Inc.,
Plaintiff(s),
vs.
SSD Investments Ltd.,
Defendant(s).

Adversary No.: 23−03091

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- the year of the individual's birth;
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- the last four digits of the financial account number; and
- the city and state of the home address.

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Nathan Ochsner
Clerk of Court