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UNITED STATES BANKRUPTCY COURT

SOUTHERN DISTRICT OF NEW YORK

Case No. 21-12075-dsj

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In the Matter of:

JPA NO. 111 CO., LTD.,

Debtor.

- - - - - x

United States Bankruptcy Court

One Bowling Green

New York, NY 10004

March 18, 2022

11:00 AM

B E F O R E :

HON DAVID S. JONES

U.S. BANKRUPTCY JUDGE

ECRO: UNKNOWN

1 HEARING re Oral Ruling

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25 Transcribed by: Sonya Ledanski Hyde

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

1  
2 THE COURT: Good morning, everyone. It's Judge  
3 Jones. We're here on JPA. We have everyone's appearances  
4 through the Zoom sign-in process so I don't need to take  
5 appearances today. Let me thank you all for appearing on  
6 fairly short notice. The purpose of today's proceeding is  
7 for me to provide my oral ruling on Debtors' motion for  
8 approval of a proposed sale of their aircraft and associated  
9 lease rights to a stalking horse purchaser, a Court-approved  
10 auction process, having yielded no qualifying higher and  
11 better bids.

12 I also will issue a partially dispositive ruling  
13 with respect to Debtors' motion for an order determining or  
14 estimating the amounts owed to secured creditors and  
15 specifically FitzWalter while reserving other issues for  
16 further proceedings that may involve the presentation of  
17 additional evidence. After I rule, I will want to briefly  
18 discuss procedural next steps.

19 As you know, these interrelated motions were  
20 properly noticed and were heard during a nearly eight-hour  
21 hearing on March 14th, so four days ago. During the  
22 hearing, 129 exhibits were introduced. These included  
23 witness declarations and deposition transcripts or excerpts.  
24 There was no live testimony. We proceeded pursuant to an  
25 evidentiary and procedural stipulation that was stated on

1 the record pending final Court approval of a written version  
2 of the stipulation which also had some other provisions,  
3 that written version having been filed on notice of  
4 presentment as to which the objection deadline had not yet  
5 passed.

6 I have considered the entirety of the evidentiary  
7 record, the parties' written submissions which are outlined  
8 and listed in the agenda filed in anticipation of the March  
9 14th hearing, the arguments and facts advanced during the  
10 March 14th hearing, and the entirety of the case's  
11 proceedings up to this point. Familiarity with all these  
12 things is assumed and will not be recapped, at least not in  
13 detail, in this oral ruling.

14 First, I'm going to say slightly more about what's  
15 before me and provide a somewhat general orientation to this  
16 complex matter. There are two Debtors before me, each with  
17 its own bankruptcy case with the two cases jointly  
18 administered, but not substantively consolidated. Each  
19 debtor entity is referred to as JPA plus an identifying  
20 number. I'll call them generically JPA or Debtors.

21 Each JPA debtor entity is privately held and  
22 organized under the laws of Japan. Their common parent is  
23 referred to as JPL. The JPA entities are financed in  
24 relevant part by secured debt. Under governing agreements,  
25 the interests of secured lenders are the responsibility of

1 an entity known as the security agent. The security agent  
2 originally was an affiliate of the French bank, Credit  
3 Agricole. That entity is referred to as CACIB. In early  
4 December 2021, an entity known as FitzWalter Capital  
5 Management, which had acquired a substantial amount of the  
6 secured debt, succeeded CACIB as security agent under the  
7 relevant transaction documents.

8 There are additional holders of debt, but  
9 FitzWalter in its capacity as security agent, is authorized  
10 to act on behalf of all holders of JPA debt under these  
11 transactions and the governing agreements. A substantial  
12 junior position is held by an entity referred to as Mizuho  
13 Leasing and additional debt is held by Sumitomo Mitsui Trust  
14 Bank.

15 Each JPA entity is essentially a single purpose  
16 entity and each was created and exists to own and lease a  
17 single Airbus A350 commercial airliner. Each aircraft is  
18 leased directly from the JPA entity to an entity that  
19 originally was also created and owned by the JPL parent.  
20 I'll refer to those two entities as the intermediate  
21 lessors. The intermediate lessors are organized in Ireland  
22 or under Irish law. The intermediate lessors, in turn,  
23 lease the aircraft to a commercial airline, namely Vietnam  
24 Airlines, which is also referred to as VNA.

25 I am told and no one has disputed that the reason



1 for this structure is to avoid certain adverse tax or other  
2 legal consequences that might arise if the JPA entity  
3 directly leased the aircraft to VNA. I'm told this -- that  
4 this structure was intended to establish the intermediate  
5 lessors as pass-through entities that do not engage in  
6 independent activities other than to serve as a link in a  
7 leasing chain, receive rents or lease payments from VNA, and  
8 in turn pass those on to the appropriate JPA entity.

9 The JPA entities, in turn, were expected to use  
10 these same rent proceeds to satisfy their obligations to  
11 secured lenders, again now in charge of FitzWalter as  
12 security agent. Thus, Debtors' assets include their  
13 respective aircraft as is undisputed, and also what are  
14 referred to as lease assets, which refer to entitlements to  
15 revenues and other contractual rights relating to the leases  
16 of the aircraft. The lease assets are treated differently  
17 in some ways than the aircraft themselves as I'll discuss  
18 shortly.

19 Among other things, the aircraft are financed  
20 pursuant to a mortgage or mortgage-like instrument that is  
21 governed by New York law with a New York forum selection  
22 requirement. The lease assets, at least allegedly, are  
23 subject to English law and subject to possible foreclosure  
24 or security enforcement provisions that are available in  
25 England; although the status of and legal framework

1 governing the lease assets is complex and subject to debate.  
2 Reportedly, the transaction and lease arrangements  
3 functioned well as intended for a period as VNA stayed  
4 current on its lease payment obligations until the COVID  
5 pandemic began.

6           Thereafter, VNA became unable to meet its lease  
7 obligations as passenger loads and revenue declined steeply.  
8 Although JPA made some payments during the pandemic,  
9 evidently its decreased revenue caused a revenue shortfall  
10 to the intermediate lessors and thence to the JPA entities  
11 and ultimately to the secured lenders. The prior security  
12 agent, CACIB, did not take enforcement action in light of  
13 the lack of timely payment for a considerable time.

14           In early December 2021, several things happened in  
15 quick succession. CACIB declared a default. FitzWalter  
16 assumed at least a majority of the secured debt and was  
17 designated as the new security agent. And FitzWalter  
18 pursued a variety of enforcement efforts. Immediately,  
19 FitzWalter -- or I should say, essentially immediately,  
20 FitzWalter commenced a foreclosure sale of the lease assets  
21 with the sale scheduled to occur on or about December 17th,  
22 2021, seemingly with no notice given to JPA or its  
23 affiliates.

24           Debtors assert that they were unaware of this  
25 effort until on or about December 14th which, based on a

1 prior hearing, I conclude may have actually occurred in  
2 substance on December 13th. I have seen no evidence of any  
3 earlier notice to JPA or its affiliates of FitzWalter's  
4 foreclosure effort as to the lease assets. Debtors filed  
5 their petitions to commence these cases on December 17th,  
6 before the foreclosure sale of the lease assets was  
7 consummated.

8 At that time, and still as of today, no  
9 foreclosure has been attempted of the aircraft themselves.  
10 Debtors promptly stated their intention to proceed with an  
11 asset sale that would result in full payment to all parties  
12 in interest. FitzWalter objected that the filing was a bad  
13 faith effort to frustrate FitzWalter's lawful pursuit of  
14 foreclosure remedies which FitzWalter had commenced in  
15 England as to the lease assets, but not the aircraft  
16 themselves.

17 Debtors promptly filed a motion seeking approval  
18 of bid procedures and of a stalking horse bidder in  
19 connection with their anticipated sale. FitzWalter opposed  
20 and moved to dismiss the bankruptcy essentially as a bad  
21 faith filing. JPA, of course, opposed FitzWalter's motion.  
22 JPA's position was supported by other parties including  
23 JPA's parent JPL, Mizuho and Sumitomo based on their desire  
24 to secure full payment resulting from the proposed sale,  
25 notwithstanding that FitzWalter is the security agent, and

1 seemingly correctly asserts that it is empowered to speak  
2 and act for all holders of debt or at least secured debt,  
3 and also at a later stage, the proposed purchaser of  
4 Debtors' assets.

5           Following discovery and an earlier evidentiary  
6 hearing, the Court denied FitzWalter's motion to dismiss in  
7 an opinion that I incorporate by reference herein. I viewed  
8 it as prudent to resolve that motion before determining  
9 whether to approve the bid procedures motion and launching a  
10 sale process that would require the estate to commit to a  
11 breakup fee and other expenses if the sale were not  
12 consummated.

13           One key issue was a challenge by FitzWalter to  
14 JPA's ability to convey title to the assets that the  
15 proposed sale purported to convey. Specifically, FitzWalter  
16 argued that as a matter of English law, the security  
17 provisions of operative agreements gave secured lenders an  
18 absolute assignment of title to the lease assets, albeit  
19 explicitly by way of security, not a mere charge as that  
20 word is used in English law. A key feature of the bid  
21 procedures order was the approval of a stalking horse bidder  
22 that was committed to proceed with a purchase subject to any  
23 higher and better offers that came in through an auction  
24 process.

25           The order included specific provisions to make

1       sure that FitzWalter or any holder of secured debt would  
2       have a full opportunity to credit bid and thus emerge with  
3       the assets through a competitive process if FitzWalter so  
4       desired and offered the estate superior value to that  
5       offered by the stalking horse bidder.

6               Ultimately, the auction was conducted according to  
7       the court ordered procedures. No qualified bids -- excuse  
8       me, qualifying bids were received. FitzWalter opted not to  
9       pursue a credit bid. I therefore now am faced with Debtors'  
10      motion approve the asset sale that is to follow from the  
11      auction's conduct as a result of which the stalking horse  
12      bidder was determined to have made the best and highest  
13      offer for the assets, in fact, the only qualifying offer.

14             That offer consists of payment of \$5 million in  
15      cash plus -- meaning on top of -- payment of an unquantified  
16      amount that is sufficient to allow repayment of the full  
17      amount of principal and interest outstanding on the secured  
18      debt plus certain additional allowable costs of the secured  
19      lenders which may themselves be limited to reasonable  
20      amounts for non-bankruptcy law reasons and further, which  
21      are allowable here, only to the extent those costs are  
22      deemed reasonable pursuant to Section 506(b) of the  
23      Bankruptcy Code.

24             There is substantial dispute as to what  
25      constitutes reasonable and allowable costs that form part of

1 FitzWalter's entitlements under the governing transactions  
2 and transaction documents. The parties propose putting  
3 funds in escrow to cover potential future fact-dependent  
4 determinations of some of those amounts; although the  
5 movants ask me to disallow various asserted entitlements as  
6 a matter of law without delay.

7 At the hearing, the stalking horse bidder offered  
8 to escrow up to \$2.2 million in cash in support of that  
9 process. Thus, interrelated with the sale motion, is  
10 Debtors' motion asking the Court to determine or estimate  
11 the value of FitzWalter's claim. This is necessary to  
12 ensure that the sale of encumbered assets either fully pays  
13 or otherwise adequately protects FitzWalter's entitlements  
14 as a holder of an interest in the property to be sold.

15 Let me turn to the governing legal framework. In  
16 the interests of time, I will state some of my relevant  
17 findings and conclusions as I go through some of the links  
18 in the legal chain that governs the decision I have to make  
19 today. I'll also note that during the March 14th hearing, I  
20 articulated my understanding of the overall applicable legal  
21 framework and asked if I had it wrong. No one offered any  
22 correction or modification.

23 In essence, I need to decide whether Debtor owns  
24 that which the purport to sell -- I should say, Debtors own  
25 that which they purport to sell, or at least have a

1 sufficient property interest to support the proposed sale.  
2 I further need to decide whether the sale meets the  
3 requirements for sales of estate property, particularly  
4 pursuant to Section 363 of the Bankruptcy Code and I need to  
5 determine whether the proceeds will either fully pay  
6 FitzWalter or otherwise adequately protect FitzWalter's  
7 security interests.

8 Debtors say they are entitled to sell all their  
9 right, title, and interest in estate property free and clear  
10 of liens or other interests and they say that's all they're  
11 doing for the consideration described above. Estate  
12 property is defined by Section 541 of the Bankruptcy Code.  
13 As noted, there has been substantial discussion about  
14 whether what Debtor purports to sell here is all property of  
15 the estate. I discussed that in some more detail below but  
16 to cut to the chase, my conclusion is that the answer is  
17 yes, Debtor has sufficient property interests in all assets  
18 being conveyed to satisfy Section 541.

19 Subject to additional requirements, the code lets  
20 Debtors sell estate property if they show that there is a  
21 legitimate business justification for the sale. See Section  
22 363(b)(1) of the code and In re: Mannone, 512 B.R. 148 at  
23 153 (Bankr. E.D.N.Y. 2014). See also In re: GSC, Inc., 543  
24 B.R. 132 at 155 (Bankr. S.D.N.Y. 2011). If the Debtor or  
25 Trustee makes such a showing, the Court should give that

1 judgment proper deference. See Mannone.

2 Here, I conclude that Debtors have more than  
3 established that there is a legitimate business  
4 justification for the sale and that they have appropriately  
5 executed commercial judgment that is entitled to deference.  
6 And even if no deference were due or extended, the  
7 justification presented is ample. In essence, Debtors hold  
8 a bundle of entitlements to aviation assets and the revenue  
9 and the ultimate lessee's revenues have been severely  
10 compromised by COVID's impact on air travel.

11 Both pre-bankruptcy and today, Debtors have  
12 focused on achieving a restructuring of lease provisions so  
13 that VNA can continue to operate and the leases remain in  
14 effect with the controlling entities and debt holders  
15 ultimately to be repaid in full.

16 Setting aside the broad social constructiveness of  
17 this approach, this also is reasonably calculated to  
18 maximize the estate's recoveries as lessors of the aircraft,  
19 particularly given testimony that I credit from Heinrich  
20 Loechteken from earlier stages of the case that the market  
21 for commercial aircraft and aircraft leases is unsettled and  
22 depressed. It is unclear if a suitable replacement lease  
23 could be negotiated on viable terms and transition and  
24 transaction costs are very high if one wishes to change from  
25 one lessee to another.



1           Thus, Debtors have made a persuasive showing that  
2           at a minimum they have formed a reasonable judgment and  
3           legitimate business justification for the course they are  
4           pursuing here. This conclusion is buttressed by the reality  
5           that all parties in interest not affiliated with FitzWalter,  
6           including Mizuho and Sumitomo, support the sale and no one  
7           other than FitzWalter and an affiliate oppose the sale. In  
8           addition, the Court must determine that there was adequate  
9           notice of the sale. Here there was, by virtue of Debtors'  
10          showing that they adhered to Court procedures.

11          The auction must determine that the purchase price  
12          is fair and reasonable and I conclude yes, it is, as  
13          established by the conduct of a well-constructed auction  
14          process, among other considerations, and the Court also must  
15          conclude that the purchaser is proceeding in good faith.  
16          See *In re: MF Global, Inc.*, 467 B.R. 726 at 730 (Bankr.  
17          S.D.N.Y. 2012).

18          The issue of the purchaser's good faith was  
19          discussed during the March 14th hearing and including for  
20          reasons stated on the record, I am satisfied that that good  
21          faith is present here. The purchaser is not a related  
22          entity to Debtor or its affiliates. The negotiation  
23          involved -- consisted of arm's length negotiations. Both  
24          sides are represented by skilled counsel and the bona fides  
25          of the proposed deal were tested and established by the

1     conduct of an auction process aimed at seeing if any  
2     superior offers might come forward.  None did.

3             And again, I note this includes specifically that  
4     FitzWalter did not come forward with a better offer, despite  
5     opportunity to do so under a process that robustly protected  
6     FitzWalter's ability to credit bid.  See generally,  
7     discussion in 3 Collier Paragraph 363.02.  One other  
8     pertinent consideration is that the sale cannot be a sub  
9     rosa plan, meaning one that would determine matters properly  
10    left for a plan under the Bankruptcy Code, but the objector  
11    must properly articulate specific Chapter 11 rights or  
12    protections that the sale denies.  Again, see generally  
13    Collier Paragraph 363.02.

14            Here, as discussed during the hearing, during the  
15    prior hearing, I don't believe the sale constitutes a sub  
16    rosa plan.  FitzWalter has not credibly shown that it is a  
17    sub rosa plan.  The proposed sale provides \$5 million in  
18    cash beyond that needed to satisfy secured creditors which  
19    gives the estate flexibility in devising a future plan or  
20    other resolution of the case and nothing in the sale or the  
21    proposed sale order purports to dictate how the estate will  
22    be resolved as the case goes forward after the proposed  
23    sale.

24            One further requirement applies here because when,  
25    as is the case here, the estate proposed to sell assets that

1 are subject to a lien or a security interest, Code Section  
2 363(e) requires the Court to condition any sale of any  
3 property subject to an interest held by another as is  
4 necessary to provide adequate protection of such interest.  
5 That language comes from Section 363(e) of the code.

6 In order to ensure that that requirement is met  
7 here, I look to Code Section 506(b) which requires that to  
8 the extent the value of estate property subject to a  
9 security interest exceeds the secured claim amounts, the  
10 claim of the holder of security shall be allowed in an  
11 amount that includes interest and "reasonable fees, costs,  
12 or charges provided for under the agreement or state statute  
13 under which such claim arose." 11 USC Section 506(b). That  
14 is a mandatory provision.

15 So here, I need to value the amount to which  
16 FitzWalter is entitled as a secured claim so as to ensure  
17 that its interests in the property sold will be adequately  
18 protected in satisfaction of Section 363(e) either by full  
19 payment or some other method, such as a sufficient escrow.  
20 At times, the entitlements of secured creditors are limited  
21 by an insufficiency of value of their collateral, but here,  
22 that does not come into play for purposes of my decision  
23 today.

24 Rather, the negotiated consideration for the sale  
25 essentially requires the conclusion, at least for purposes

1 of today, that the assets conveyed are worth more than the  
2 secured claim amounts, because the purchase price is set at  
3 the total of the outstanding principal and interest on the  
4 debt plus reasonable and allowable costs plus \$5 million in  
5 cash above that amount. Ordinarily, an asset value can be  
6 most reliably determined by reference to a prevailing  
7 auction price and no one has tried to persuade me that  
8 that's not the case here.

9 So I conclude that FitzWalter holds an interest in  
10 property worth less than the proposed purchase price, such  
11 that FitzWalter is entitled to reasonable expenses to the  
12 extent allowed or allowable under Section 506(b). The only  
13 limiting factor is that if the secured claim amount  
14 including disputed amounts is set too high, the buyer may  
15 refuse to close on the transaction which would be a market  
16 indicator that the resulting price in light of those  
17 asserted secured claim components did exceed the market  
18 price.

19 FitzWalter at times suggests that's the case here  
20 by questioning whether it is receiving full payment even as  
21 it demands full allowance of all its asserted entitlements  
22 under Section 506(b). That possible complication is for  
23 another day, if at all. FitzWalter asserts very high levels  
24 of entitlements to payment as "Secured Obligations" under  
25 the governing transaction documents above and beyond the

1 principal and interest outstanding in secured debt. These  
2 asserted amounts were provided in a February 28th accounting  
3 by FitzWalter filed as Exhibit 6 to ECF No. 107 which was  
4 the declaration of Jared Borriello and they also are listed  
5 among other places at Pages 5 to 6 of Debtors' motion for an  
6 order determining the secured claims and for other relief.  
7 That's docketed at ECF 136 in the main case.

8           These asserted obligations include, among other  
9 things, over \$21 million in lease payments that FitzWalter  
10 says are due to it or its designee, since a default was  
11 declared with respect to the leases, an additional \$1.8  
12 million described as other alleged breaches of head lease  
13 claims, approximately \$318,000 in costs from asserted  
14 breaches of parent support letters, now unknown amounts on  
15 account of certain loan transaction breach, and  
16 defamation/anti-yakuza claims -- that's spelled Y-A-K-U-Z-A  
17 -- more than \$4 million in asserted management fees on the  
18 part of FitzWalter which are being charged at rates of up to  
19 \$50,000 per day for certain high level persons, legal fees  
20 in excess of \$4.6 million, and other charges including  
21 auctioneer expenses in excess of \$400,000 and \$75,000 in  
22 insurance costs.

23           I'll return to these later. Court approval of --  
24 oh, I'm sorry. Let me add that all of those asserted  
25 amounts due occur against a backdrop of an approximate

1 purchase price as contemplated by the stalking horse  
2 purchaser of roughly \$210 million.

3 Court approval of proposed estate sales of assets  
4 also must satisfy one or more of five requirements  
5 enumerated in Bankruptcy Code 363(f)(3). I'll also talk  
6 about those requirements in more detail slightly later. So  
7 to recap, if I am to grant Debtors' motions, I need to  
8 determine the following. One, does the estate indeed hold  
9 sufficient right, title, and interest to property to legally  
10 permit the sale that it proposes? In other words, is what  
11 is purported to be sold in fact estate property? The  
12 properties seemingly agree that I should not or cannot  
13 approve a sale of assets that are not property of the estate  
14 or in which the estate does not have an interest sufficient  
15 to support the proposed sale.

16 Two, are the ordinary procedural and business  
17 judgment requirements for asset sales met? I have already  
18 held today that the answer to that question is yes. Three,  
19 does the sale satisfy the requirement that assets subject to  
20 security interests or other property interests adequately  
21 protect those interests and/or directly pay them in full?  
22 Four, are the requirements of Section 363(f) met so as to  
23 authorize the proposed sale on a free and clear basis?

24 Five, if the answer to those four questions is  
25 yes, then I need to determine or adequately protect the

1 entitlements of FitzWalter as secured creditor so as to  
2 ensure that FitzWalter's interests are not improperly  
3 diminished by the sale order. And finally six, I also need  
4 to decide whether it is permissible for the sale price to be  
5 satisfied by direct payment to parties in interest including  
6 the owners of junior debt or other participating syndicate  
7 participants, at least as requested by the motion, because  
8 under the terms of the transaction, documents, payment is to  
9 be directed to FitzWalter and then distributed according to  
10 a negotiated so-called waterfall. I will address these  
11 questions in order.

12 First, yes, Debtor hold sufficient right, title,  
13 and interest ion the property being conveyed by the proposed  
14 sale. There is no dispute that Debtors own the aircraft  
15 themselves. There are several objections concerning the  
16 lease assets, but I reject those for the following reasons.  
17 FitzWalter insists that the governing agreements absolutely  
18 conveyed the lease assets to it because those lease  
19 interests were absolutely assigned by way of security to it  
20 or its predecessors in interest and FitzWalter insists that  
21 strips Debtors of title and renders them unable to sell the  
22 property until and unless they retire their obligations to  
23 FitzWalter.

24 It is hotly disputed whether FitzWalter holds  
25 title absolutely albeit by way of security as the

1 transaction documents state or merely holds a charge,  
2 roughly the same as a lien, in English legal parlance. This  
3 question has been the subject of extensive opining and  
4 testimony by learned experts in English law.

5           However, just as I concluded in connection with  
6 the prior motion to dismiss and bid procedures motion, I  
7 don't need to decide whether an absolute assignment was  
8 effected as a matter of English law, because all parties  
9 agree that the borrowing or pledging party retains a so-  
10 called equity of redemption associated with the property  
11 even if title were absolutely conveyed.

12           And I credit expert testimony that any purported  
13 attempt by a secured lender to unilaterally extinguish such  
14 a right would be invalid as a matter of English law, based  
15 on the testimony of expert Mr. Tregear at the prior hearing.  
16 His name is spelled T-R-E-G-E-A-R. FitzWalter's expert Mr.  
17 Shah either conceded this or did not effectively dispute it.

18           Further, an equity of redemption can be a  
19 sufficient property interest of the estate to give rise to  
20 an ability to sell the associated property free and clear if  
21 all legal requirements to such a sale are satisfied. See  
22 cases cited at Pages 8 to 10 of Debtors' omnibus reply on  
23 the motion, including the Whiting Pools, South Side House,  
24 Inc., and Brynn Athyn Investments Limited. Bryn Athyn is B-  
25 R-Y-N, A-T-H-Y-N.



1 I have not identified anything compelling a  
2 contrary conclusion in any source of potentially relevant  
3 law that the parties have identified, even if an owner  
4 finances by secured debt that formally vests title in the  
5 lender the owner/borrower is entitled to sell the asset  
6 subject to meeting repayment obligations on account of the  
7 secured debt.

8 As a commercial and practical matter, this  
9 conclusion is reenforced by discussion during the March 14th  
10 hearing in which the purchaser's counsel stated its  
11 willingness to close based on an order that did not make a  
12 finding that an absolute assignment had not occurred or that  
13 Debtor had full title to the property conveyed, so long as  
14 the order made clear that the purchaser was acquiring free  
15 and clear title through the sale.

16 FitzWalter makes a separate argument that these  
17 considerations are insufficient to permit the sale here.  
18 Because the equity of redemption in connection with the  
19 lease assets is held by the intermediate lessors rather than  
20 the Debtors, so the Debtors cannot enter a sale based on the  
21 equity of redemption property interest, because no such  
22 interest belongs to the Debtors. However, the intermediate  
23 lessors by their then authorized directors, entered an  
24 agreement that conveys all interests of the intermediate  
25 lessors in the lease assets to the Debtors.

1           During the March 14th hearing, counsel for the  
2           intermediate lessors, who after that agreement was entered  
3           had prior leadership removed at FitzWalter's direction and  
4           now have a single assertedly independent director installed  
5           at the request of or assuredly with the support of  
6           FitzWalter, objected that the conveyance is void or invalid  
7           due to various deficiencies. Again, that objection comes  
8           from counsel for the newly aligned with FitzWalter  
9           intermediate lessors.

10           Counsel for the intermediate lessors, however,  
11           identified no law or argument that overcame the controlling  
12           agreement's plain language that the relevant agreement  
13           effect a full transfer. Arguments based on the articulated  
14           capacity in which the signatories were acting do not alter  
15           the clear language used reflecting an absolute conveyance.  
16           Thus, any argument premised on the idea that the estate does  
17           not hold an equity of redemption as to the lease assets is  
18           incorrect. And thus, I reject the contention that the  
19           proposed sale should be rejected on the ground that Debtors  
20           are purporting to sell assets that are not property of the  
21           estate.

22           The second link in the analytical progression is  
23           whether the proposed sale meets applicable requirements such  
24           as a sufficient business justification, notice and  
25           procedural regularity, and the like. Earlier in my remarks,

1 I found that these requirements are met and I will not  
2 repeat or expand on that finding now, except to emphasize  
3 that this is a properly noticed sale that was subjected to  
4 an auction process that would have generated better offers  
5 if any were forthcoming.

6 The consideration has not been challenged as  
7 commercially unreasonable. FitzWalter could have but did  
8 not credit bid and could have but did not present valuation  
9 evidence to challenge the proposed transaction. And the  
10 consideration amount locks in significant benefit to the  
11 estate at an economically challenging time for the  
12 transportation industry in particular. I'm going to briefly  
13 defer discussion of the third analytical link which is the  
14 large topic of whether secured interests will be paid in  
15 full and/or adequately protected.

16 The fourth question I must answer is whether  
17 Debtors meet the requirements imposed by Code Section 363(f)  
18 on approvals of sales free and clear of interests held by  
19 other parties, such as FitzWalter. I conclude that Debtors  
20 do meet those requirements. Section 363(f) requires that  
21 Debtors satisfy at least one of five enumerated alternative  
22 considerations that will justify a free and clear sale. The  
23 statute states them very clearly, so I won't read them into  
24 the record here, but my decision on this question results  
25 from direct application of these clearly worded provisions.

1           First, the intermediate lessors, now that they are  
2 directed by a FitzWalter allied director, seem to have  
3 objected that Section 363(f) is not satisfied as to them.  
4 First, I have held that the intermediate lessors validly  
5 conveyed all their interests in the lease assets to Debtors  
6 such that they don't have an interest requiring satisfaction  
7 of Section 363(f) .

8           Second, even if that were not true, Section  
9 363(f)(2) is satisfied as to the intermediate lessors  
10 because the security notice agreement that conveyed title  
11 was for the purpose of facilitating the sale and thus  
12 conveys the intermediate lessor's consent to the sale  
13 adequately. In addition, findings I'll make under other  
14 sub-prongs of Section 363(f) likewise also, certainly  
15 including a full payment finding also include -- cover the  
16 intermediate lessors.

17           FitzWalter undisputedly holds security interests  
18 in the assets to be sold and so Section 363(f) must be  
19 satisfied as to them. Multiple subparts of Section 363(f)  
20 are satisfied as to FitzWalter. First, because the sale  
21 proceeds and escrowed amounts will exceed the amount of  
22 principal, interest, and reasonable costs and charges on  
23 account of FitzWalter's interests, the transaction satisfies  
24 Section 363(f)(3) as against FitzWalter. Discussion of the  
25 proper amount of such interests will follow shortly.

1           Second, Section 363(f) (1) is satisfied because  
2 applicable non-bankruptcy law permits a free and clear sale.  
3 I have already explained why I reject arguments to the  
4 contrary based on the intermediate lessors' asserted  
5 ownership of lease assets. Section 9-623 of the New York  
6 UCC gives the right to redeem collateral to a debtor, any  
7 secondary obligor, or any other secured party or lien  
8 holder. New York UCC law, Section 9-623 (McKinney).

9           Official Comment 2 to that provision states that  
10 under this subsection, as under former Section 9-506, the  
11 debtor or another secured party may redeem collateral so  
12 long as the secured party has not collected Section 9-607,  
13 disposed of or contracted for the disposition of Section 9-  
14 610, or accepted Section 9-620 the collateral. And other  
15 applicable bars secured lenders from preventing a sale by a  
16 borrower who possesses a sufficient ownership interest in  
17 the property to be sold.

18           I credit testimony from Debtors' English law  
19 expert, Mr. Tregear, that attempts to prevent an owner  
20 subject to secured debt from selling the property in  
21 questions are invalid as a matter of English law. These  
22 considerations are reinforced by the Cape Town Treaty  
23 extensively briefed and discussed by the parties, which has  
24 been ratified by the United States, England, Ireland, and  
25 Vietnam.

1 I credit counsel for JPL's assertion at the sale  
2 hearing that the Cape Town Treaty precludes restrictions on  
3 a Debtor's right of redemption and its associated right to  
4 sell the collateral. See sale hearing transcript at page  
5 260 Line 18 through Page 271 Line 10. See also e.g. Cape  
6 Town Convention Articles 9(4), 15, Official Commentary Part  
7 4, Comment 4.128.

8 Any or all of these additional grounds demonstrate  
9 that non-bankruptcy law permits a free and clear sale.  
10 Accordingly, Section 363(f)(1) is satisfied here. Third,  
11 there is substantial likelihood that Section 363(f)(5) is  
12 also satisfied because FitzWalter could be compelled in a  
13 legal or equitable proceeding to accept a money satisfaction  
14 of its interest. The Debtors' English law expert testimony  
15 establishes that to the extent English law applies, Debtors  
16 hold at least an equity of redemption in the encumbered  
17 property as well as an equitable right to redeem the  
18 property in qualifying circumstances.

19 That expert testimony further establishes that  
20 under English law Debtors are allowed to bring redemption  
21 actions and that under certain circumstances, which the  
22 Court does not conclude exist or don't exist here, such a  
23 proceeding could result in Court direction of a sale of the  
24 collateral with proceeds paid to satisfy the secured  
25 creditors' interest against the wishes of the holder of such

1 security interest.

2 Thus, the requirements of Section 363(f) (5) may be  
3 satisfied because a legal or equitable proceeding could be  
4 employed to compel FitzWalter to honor the equitable rights  
5 held by Debtors to redeem their property at least in  
6 connection with a sale or satisfaction in full of  
7 FitzWalter's entitlements. Satisfaction of any one of  
8 Section 363(f)'s subsections is sufficient under the code.  
9 I therefore needn't reach the other subsections, but I pause  
10 to observe that in my view, Subsection (f) (2) is not  
11 satisfied as to FitzWalter because FitzWalter does not  
12 consent and Subsection (f) (4) may well not be satisfied  
13 because, although the extent of FitzWalter's interest is  
14 disputed, there is no dispute that FitzWalter holds some  
15 form of security interest in property to be conveyed.

16 The fifth and major and somewhat complicated issue  
17 I must decide is the extent of FitzWalter's reasonable  
18 entitlements as secured lender to amounts beyond principal  
19 and interest because such an assessment is necessary to  
20 determine whether the proposed transaction will adequately  
21 protect FitzWalter's interests and/or permit their  
22 satisfaction in full. Because there is no basis to believe  
23 the property in question is worth less than the amount of  
24 FitzWalter's claims, the transaction must satisfy the  
25 requirements of Code Section 506(b) which allows the holders

1 of secured claims principal plus "interest on such claim and  
2 any reasonable fees, costs, or charges provided for under  
3 the agreement or state statute under which such claim  
4 arose."

5 Thus, I need to assess what fees, costs, or  
6 charges are reasonable and provided for under relevant  
7 agreements or statutes. The procedural posture, again, is  
8 that the parties have stipulated that I will only decide  
9 these issues to the extent I can do so as a matter of law,  
10 based on submissions made to date, some of which are factual  
11 in nature. To the extent additional evidence or a factual  
12 hearing is necessary, the parties will conduct discovery as  
13 needed -- if and as needed, and a subsequent evidentiary  
14 hearing will be conducted.

15 The parties agree that an escrow mechanism is the  
16 likely appropriate way to facilitate a closing if a sale is  
17 authorized with subsequent proceedings to conclusively  
18 determine any remaining disputed obligations owed to  
19 FitzWalter and then any resulting excess escrowed amounts to  
20 be released to the estate or some other appropriate  
21 recipient.

22 The stalking horse bidder agreed on the hearing's  
23 record on March 14th to provide additional funds to be  
24 escrowed in an amount up to \$2.2 million. There is no  
25 guarantee that the purchaser will be willing to escrow more



1 than that amount. FitzWalter asserts entitlements under the  
2 transaction documents that govern the respective rights of  
3 participants in the two transactions at issue here. Section  
4 506(b) tells us that such entitlements are to be awarded as,  
5 if nothing else, charges provided for under the agreement,  
6 but only to the extent those charges are reasonable within  
7 the meaning of Section 506(b).

8 The key contractual language defining what charges  
9 are provided for under the agreement is part of the defined  
10 term Secured Obligations appearing at Annex A, which is a  
11 definition section of the proceeds agreement set forth  
12 adhering Exhibits 8 and 15, also docketed at ECF No. 23,  
13 Exhibits 7 and 14.

14 That provision says, "Secured Obligations means  
15 any and all monies, liabilities, and obligations, whether  
16 actual or contingent, whether nor existing or hereafter  
17 arising, whether or not for the payment of money, and  
18 including without limitation any obligation or liability to  
19 pay damages from time to time owing to any of the financed  
20 parties by any obligor pursuant to any transaction document  
21 notwithstanding that the recourse of the financed parties  
22 against any person may be limited in recourse."

23 Debtors requested and FitzWalter provided an  
24 accounting of amounts that FitzWalter asserts are due as of  
25 February 28th, so 18 days ago, obviously with additional

1 amounts accruing since then. These amounts are set forth  
2 among other places at Exhibit 6 to ECF No. 137, the  
3 declaration of Jared Borriello. They also are summarized at  
4 Pages 5 to 6 of Debtors' motion for an order determining the  
5 value of FitzWalter's secured claim and that motion is  
6 docketed at ECF No. 136 in the main bankruptcy case and ECF  
7 No. 7 in Debtors' adversary proceeding against FitzWalter.

8           Reviewing those items as follows, I determine as  
9 follows about each category asserted. One, unpaid rent  
10 under the two head leases, one of which is held by one  
11 Debtor and the other of which is held by the other Debtor,  
12 in the total asserted amount of \$21,125,396.42. This amount  
13 is disallowed as unreasonable or possibly simply not due  
14 because it is entirely duplicative of the payment of  
15 principal and interest that the sale will cause to occur.

16           The entire premise of the underlying transactions  
17 is that rent payments were and are intended to flow through  
18 the intermediate lessors to the Debtors, to the ultimate  
19 secured lender now represented by FitzWalter in satisfaction  
20 of the secured lender's entitlements. Further, FitzWalter's  
21 entitlement at its election to take over entitlement to rent  
22 payments reflects the exercise of a security protection that  
23 it enjoyed under the governing agreements.

24           Thus, the payment in full of amounts due will  
25 satisfy those obligations and discharge what would be

1 duplicative recoveries via direct enforcement of lease  
2 payment obligations. FitzWalter's right to assert a direct  
3 entitlement to lease payments is a form of security for  
4 payment of the underlying debt, but it is not a license to  
5 recover twice over on account of that debt. This reasoning  
6 is supported by the waterfall contained in Clause 8 of the  
7 proceeds agreement as well as Clauses 11.2.1A and B. See  
8 ECF No. 136, Paragraphs 22 to 25 and Notes 11 to 15.

9 In short, under the terms transaction documents,  
10 rental payments under the head leases constitute collateral  
11 that secures the secured obligations, essentially JPA's  
12 debts to FitzWalter, not amounts that constitute additional  
13 secured obligations. Thus, because the sale provides for  
14 payment in full of the secured obligations, an additional  
15 amount -- excuse me, an additional provision for payment of  
16 unpaid rent would be duplicative.

17 Two, other alleged breaches of head lease claims  
18 in the -- asserted in the amount of \$1,842,148.42 plus  
19 unliquidated claims listed by Debtors as Categories IV and V  
20 of FitzWalter's demands on Page 6 of Debtors' claim  
21 determination motion. As I understand it, these appear to  
22 be claims against JPA's parent JPL, and possibly others,  
23 arising from alleged breaches of agreements relating to  
24 Debtors plus unliquidated claims in connection with  
25 litigation that FitzWalter commenced against non-debtor

1 parties in England.

2 A, first with respect to claims pending in England  
3 against -- asserting breach of contractual obligations  
4 centering on anti-yakuza -- again, that's Y-A-K-U-Z-A --  
5 aspects of the contracts that FitzWalter contends were  
6 breached and further give rise to secured obligations and  
7 thus to secured claims against the estate. Both parties'  
8 English law experts agree that under English law, which  
9 presumably governs the lawsuit pending in England entirely  
10 against non-debtor entities, one construes the relevant  
11 agreement as a whole and takes into account the agreement's  
12 context in determining its total meaning.

13 FitzWalter isolates the word "defame" in asserting  
14 that claims against Mr. Loechteken and others for conduct  
15 and actions relating to them violate the governing contracts  
16 but they draw from terms governing antisocial conduct --  
17 that's a quote, so "antisocial conduct" and so-called anti-  
18 yakuza provisions that cannot plausibly be construed as  
19 extending as sweepingly as FitzWalter asserts to encompass  
20 commercial speech and negotiations unrelated to organized  
21 criminal activity or terrorism.

22 Further, even if this impediment did not exist,  
23 given the reality that Debtors are not a defendant in the  
24 English action, there is an insufficient tie to Debtors to  
25 deem FitzWalter's claims against others for conduct not at

1 the behest of Debtors to give rise to secured claims against  
2 Debtors' estate.

3 This result also is supported by a third reality  
4 that FitzWalter takes an inherently unreasonable position  
5 that no sale could ever close because their adequate  
6 protection cannot be guaranteed while these claims are  
7 unliquidated and unresolved. This position cannot be  
8 squared with the English law's bar on "fettters" -- F-E-T-T-  
9 E-R-S, and "clogs on alienation." For all these reasons, I  
10 estimate the value of these claims as against the estate as  
11 zero dollars as a matter of law.

12 B, the other head lease claim demand for \$1.82  
13 million also is met with Debtor arguments that FitzWalter  
14 may be manufacturing impediments to the sale rather than  
15 engaging in good faith vindication of its rights. Be that  
16 as it may, I don't perceive a basis as a matter of law to  
17 disallow or estimate at zero these claims at the present  
18 state of the case.

19 Contractual issues are complex and FitzWalter does  
20 raise concerns about JPL's possible violation of pledges not  
21 to cause or support a bankruptcy filing, although further  
22 litigation may show that damages are minimal to nonexistent  
23 given the full pay course of the bankruptcy case. But I am  
24 not prepared to adjudicate these issues today, particularly  
25 given the somewhere cursory briefing on this point and the

1 lack of factual development at this time. I therefore am  
2 going to direct that any sale that goes forward provide for  
3 the escrow of the \$1.842 million amount associated with  
4 these claims without prejudice to further legal or factual  
5 arguments that may result in a release of this portion of  
6 the escrowed funds or a reduction in the required escrow  
7 amount if there is a delay in closing on the proposed  
8 transaction.

9 Three, costs from breaches of parent support  
10 letters demanded in the amount of \$318,277.84. This demand  
11 is for asserted damages resulting from an alleged breach by  
12 JPA's parent JPL of obligations or refusals to comply with  
13 the demand to, among other things, ensure that the JP  
14 entities remain solvent and not be liquidated or  
15 reorganized. There are serious questions whether any  
16 damages flow from this alleged breach given the full pay  
17 resolution being achieved.

18 Further, it is not entirely clear to me that  
19 claims against JPL are properly chargeable against the  
20 estate. Nevertheless, because I am not entirely confident I  
21 have a sufficient basis to rule on this issue, I will direct  
22 a slightly discounted escrow of \$300,000 as protection for  
23 FitzWalter in the event further litigation reveals any  
24 viability to this claim as it is directed against the  
25 estate.

1           Four, costs to retain Airborne as marketing --  
2           that's an entity name, A-I-R-B-O-R-N-E -- costs to retain  
3           Airborne as marketing agent in connection with FitzWalter's  
4           prepetition pursuit of foreclosure remedies in the amount of  
5           -- asserted in the amount of \$406,302.30. I am not  
6           persuaded, based on the current record, that the costs of  
7           retaining Airborne as FitzWalter's agent for the purpose of  
8           pursuing foreclosure remedies were excessive or commercially  
9           unreasonable, despite Debtors' minimization of the degree of  
10          effort expended by Airborne.

11           FitzWalter contends that the rate negotiated is  
12          commercially advantageous compared to a percentage fee  
13          structure that FitzWalter says some sales agents charge.  
14          Accordingly, and notwithstanding the argument that portions  
15          of Airborne's fee are for services that have not yet been  
16          rendered subject to possible further fact-specific challenge  
17          and possible resulting reductions, I decline to disallow any  
18          of the asserted Airborne fees at this time.

19           Five, FitzWalter insurance costs of approximately  
20          \$75,000. Debtors argue these payments are duplicative, but  
21          FitzWalter argues that changes in ownership of lease assets  
22          created uncertainty as to the applicability of prior  
23          insurance which created a risk that had to be eliminate  
24          through the acquisition of additional insurance coverage. I  
25          cannot reject this contention as a matter of law and so

1 presented decline to disallow the insurance expense, again  
2 subject to possible fact-based challenge and requested  
3 reductions at a later time, and I therefore will direct that  
4 the precise figure asserted which is \$75,021 be escrowed on  
5 account of the insurance costs.

6 Six, FitzWalter's management costs for which  
7 FitzWalter asserted \$4,090,000 was due were extraordinarily  
8 high. At the March 14th hearing, Debtors agreed to reduce  
9 the management fee, the requested management fee amount to  
10 \$500,000. Debtors object that even this amount still  
11 grossly exceeds the \$25,000 per year total amount charged by  
12 CACIB in management fees in an assertedly equivalent role.  
13 Debtors further argue that applicable contracts bar an  
14 increase in management fees based solely on a change in the  
15 identity of the security agent.

16 FitzWalter responds that increased fees are not  
17 due to the change in the security agent's identity but  
18 rather result from the intensification of security agent  
19 activity since FitzWalter decided to pursue more aggressive  
20 enforcement remedies as opposed to merely owning the assets  
21 and pursuing renegotiation. I may ultimately conclude that  
22 notwithstanding FitzWalter's arguments, the role played by  
23 the new managing agent is essentially unchanged such that  
24 the bar on increased fees by virtue of a change in security  
25 agent applies.



1           However, in the posture of the case, including the  
2 parties' reservation of issues -- excuse me, reservation of  
3 issues requiring factual development for a later date, and  
4 given the reality that a decision not to reserve funds makes  
5 later collection of greater amounts unlikely, I will direct  
6 an escrowing of funds to preserve FitzWalter's potential  
7 entitlement of up to \$500,000 in management fees that it now  
8 seeks.

9           Seven, FitzWalter's legal fees. As to  
10 FitzWalter's legal fees, which were roughly \$4.6 million as  
11 of February 28th, the Court notes that FitzWalter had taken  
12 an extraordinarily aggressive stance in this case,  
13 vigorously and extensively contesting every conceivable  
14 issue even those as to which in my view there is little  
15 objective room for dispute, such as whether Debtors  
16 satisfied the Section 109 eligibility requirement based on  
17 the deposit of funds for legal services in their counsel's  
18 New York bank account and quite possibly as to other issues.

19           Further, Debtors object that FitzWalter's conduct  
20 in the face of a promised full pay resolution that is  
21 consented to by all parties in interest other than  
22 FitzWalter shows that FitzWalter is acting not in a capacity  
23 as a lender seeking to ensure that it is repaid, but rather  
24 as an aggressive, self-interest actor looking to leverage  
25 its position for what it hopes will be higher return than

1 mere repayment of what it is owed.

2           The Court and caselaw that both parties cite is of  
3 the view that secured creditors such as FitzWalter are  
4 entitled to vigorously defend their interests and are  
5 entitled to leeway to do so as they think best to some  
6 reasonable degree. This well serves the adversary process.  
7 At the same time, however, the Court credits Debtors  
8 characterization of FitzWalter's approach to this case which  
9 has been obstructionist and overly oppositional at times and  
10 which has unquestionably generated unreasonably high  
11 professional expenses.

12           There is a serious argument that FitzWalter's fees  
13 are categorically unreasonable, beginning when it became  
14 clear that Debtors had a viable path to an on-consent asset  
15 sale that would fully pay outstanding secured debt such that  
16 fees after that point were inherently unreasonable and not  
17 incurred in a good faith attempt to protect FitzWalter's  
18 interests as a secured creditor and security agent. Rather,  
19 those fees served -- may reasonably ultimately be concluded  
20 to have served independent and self-interested profit  
21 maximizing objectives of FitzWalter.

22           The problem the Court faces is that it is hard to  
23 quantify what degree of fee discount or disallowance should  
24 result, especially in the current posture of the case. I  
25 have not seen a breakdown of fees by date, task, or

1 objective and I am not confident that I can rule as a matter  
2 of law that all fees incurred by FitzWalter after a date  
3 certain are categorically disallowable, at least not on the  
4 current record. Moreover, the \$4.6 million figure quoted  
5 was as of February 28th, and additional fees have doubtless  
6 accrued since then because the past 18 days have seen  
7 intense legal activity.

8 At the same time, however, I am certain that a  
9 significant discount ultimately will need to be applied.  
10 Accordingly, and in the interest of protecting what I  
11 consider FitzWalter's maximum likely reasonable fee recovery  
12 while avoiding imposing an excessive burden on the costs of  
13 this transaction, I direct an escrowed reserve of \$4.1  
14 million on account of FitzWalter's legal fees.

15 That reflects an approximately 10 percent  
16 reduction of the amounts assertedly due as of February 28th,  
17 and that is a conservative approximation of a reduction that  
18 I am confident I will set, likely in a significantly greater  
19 amount, upon more detailed presentations from the parties.  
20 I am not rejecting contentions based on suggested cutoff  
21 dates by when the proposed sale's full pay outcome allegedly  
22 appeared likely, but I do note that FitzWalter identifies  
23 other cases turning on much more substantial equity cushions  
24 than exist here.

25 My intention in requiring a reserve in this amount

1 is to ensure that FitzWalter's potential rights with regard  
2 to fees are adequately protected and also as a practical  
3 matter to establish an additional monetary cushion to  
4 provide adequate protection as to any entitlement whatsoever  
5 as -- of FitzWalter's.

6 Thus, for now, if the parties wish to proceed with  
7 the transaction without any further prior order of the  
8 Court, I direct that funds be escrowed to cover an ultimate  
9 determination up to the amount of the sum of \$4.1 million to  
10 cover potentially allowable legal fees plus \$500,000 to  
11 cover potentially allowable management fees plus \$406,302.30  
12 as to the Airborne costs plus \$75,021 as to -- relating to  
13 insurance costs plus \$1,842,148.42 for what has been termed  
14 other alleged breaches of head lease claims plus \$300,000 in  
15 connection with parent support letter breach claims.

16 I'm going to not state a total because I tweaked  
17 one thing and I don't want to mess up my math, but those are  
18 the components and what I intend to allow and require as an  
19 escrow for the sale to go forward is the sum of those  
20 amounts that I just stated.

21 I do note specifically that this conclusion is  
22 without prejudice to all contentions of the parties  
23 including the possibility that the amounts charged are  
24 entirely or partly unreasonable or are not unreasonable, the  
25 possibility that certain demands should be disallowed as

1 they related to steps taken that were invalid as violations  
2 of the automatic stay, and the contention of Debtors that  
3 the management fees violate Section 2.15.7 of the Proceeds  
4 Agreement by having a change in security agent result in  
5 imposing on obligor, meaning the Debtor entities, having to  
6 make any increased payment or perform any increased  
7 obligations under the transaction documents.

8 Finally, FitzWalter challenges a provision of  
9 Debtors' proposed order that payment of proceeds of the sale  
10 shall be made directly to lenders including Mizuho and  
11 Sumitomo, notwithstanding the requirement of the underlying  
12 documents that all funds shall flow through the security  
13 agent for distribution according to the proceeds agreement.  
14 That argument, counsel for Mizuho declined to argue that the  
15 proceeds agreement should be set aside partly because Mizuho  
16 is bound by that agreement.

17 It is unusual to deviate from the parties'  
18 negotiated payment distribution scheme and Code Section  
19 510(a) instructs that subordination agreements are  
20 enforceable in bankruptcy cases. I nevertheless conclude  
21 that in the circumstances of this case, the requested  
22 payment of obligations is an appropriate exercise of  
23 discretionary authority at least under Code Section 105 and  
24 possibly under other law. Given the extraordinarily  
25 contentious nature of the proceeding and FitzWalter's

1       assertion that it is entitled to compensation for  
2       proceedings in multiple jurisdictions, other lenders are at  
3       risk of not receiving the benefit of the full pay outcome  
4       that this transaction is designed to yield and does yield.

5               The Court concludes that in the circumstances, a  
6       deviation from the parties' negotiated payment mechanism is  
7       appropriate to protect the interest of all parties in  
8       interest. Such a provision will not harm FitzWalter because  
9       it will ensure the effectuation of their payment obligations  
10      to other lenders while guarding against FitzWalter's attempt  
11      or possible attempt to divert estate funds for unreasonable  
12      and self-interest purposes and will serve the interests of  
13      Debtors and the estate by ensuring that all secured  
14      creditors are in fact paid in full as the result of this  
15      beneficial transaction.

16              If this requirement were to be deemed improper, I  
17      would entertain a subsequent request for an order directing  
18      FitzWalter to pay other holders of debt the amounts of  
19      principal and interest that they are due on account of the  
20      debt that those parties hold.

21              I'm going to circle back to the escrow amount,  
22      just to state that my staff has helpfully added up the  
23      numbers that I recited earlier and comes up with a total  
24      escrow amount that I'm directing of \$7,223,471.72. I will  
25      note that if that happens to include a mathematical error,

1 what I intend to be controlling is the specific set of  
2 dollar amounts that I stated on the record a few moments  
3 ago.

4 Two important, but I believe less controversial  
5 issues remain. First, Debtors and the stalking horse  
6 purchaser request a specific determination that the  
7 purchaser is a good faith purchaser entitled to the  
8 protections of Bankruptcy Code Section 363(m). I made such  
9 a finding earlier in this ruling and stated the reasons for  
10 it. I reiterate that finding here now and expressly link it  
11 to a finding and determination that the purchaser is  
12 entitled to a finding of good faith under Section 363(m).

13 And second, given the contentiousness of this case  
14 and the reality that it affects strenuously asserted  
15 objections of a major secured lender, I voiced discomfort at  
16 the hearing with Debtors' request that I waive the 14-day  
17 stay of sale orders that is automatically imposed by the  
18 bankruptcy rules, unless the Court directs otherwise.  
19 Debtors and the stalking horse purchaser expressed concern  
20 that t 14-day delay would be commercially problematic,  
21 especially in these uncertain economic and geopolitical  
22 times.

23 The rules impose a 14-day stay of sale orders,  
24 again as I just noted, unless the Court orders otherwise, so  
25 I have discretion whether to eliminate or modify such a

1 stay. I am sympathetic to the deal proponents' commercial  
2 observations, but I am unwilling to expose FitzWalter to a  
3 risk that their likely appeal will be equitably mooted by a  
4 rushed closing. I also am unwilling to impose on the  
5 district court an emergency demand for immediate relief  
6 without some minimal degree of breathing room for that  
7 court, which I am confident is likely to occur if I did not  
8 impose some degree of delay in the effectiveness of the  
9 Court's order.

10 I therefore will shorten but not eliminate the  
11 effective date of the order to seven days from the 14  
12 ordinarily provided under the rules, commencing on the date  
13 of entry of an order in connection with this oral ruling.  
14 That concludes my intended remarks. Let me just ask Debtors  
15 counsel if they believe I either omitted or misstated  
16 anything that requires correction or supplementation.

17 MR. ORTIZ: Good afternoon, I guess now, Your  
18 Honor. Kyle Ortiz of Togut, Segal and Segal for the  
19 Debtors. I do not believe so, Your Honor.

20 THE COURT: Okay, thank you. Then I'm going to  
21 just say a very few words by way of recap and then we'll  
22 talk about procedural next steps.

23 In sum, for the reasons I've just stated on the  
24 record, the motion is granted and the relief for claim  
25 determination is resolved as stated herein. Debtors are to



1 submit an order on notice. I will note that I was largely  
2 okay with the proposed order submitted in support of the  
3 motion, subject mainly to a modest number of modifications  
4 and issues that were discussed during the March 14th  
5 hearing. I may have some other concerns, but they're  
6 relatively minor and don't require discussion today.

7 That proposed order, of course, will need to be  
8 further modified in light of today's ruling and so I'll look  
9 to Debtor to generate and submit a proposed version in Word  
10 to chambers for entry. Of course, that needs to be on  
11 notice to all parties and it will be helpful for you to  
12 provide it both with -- track changes reflecting all changes  
13 to the proposed order most recently submitted in support of  
14 your motion and then also in clean for us to be able to  
15 easily manipulate.

16 I will give you a practical heads up about my own  
17 schedule. Obviously, I'm working today. I have work travel  
18 next week Monday through Thursday to attend judicial  
19 training in Washington, but I will be sort of in connection  
20 with chamber and able to deal with things, but you may  
21 encounter some slight delays in processing resulting from  
22 that. I know this is time sensitive and I'll try to  
23 minimize delay.

24 While I'm disclosing things, I'll share with you  
25 that I'm also traveling Monday through Wednesday of the

1 following week, so -- and I may have another conflict on  
2 Friday of next week, so bottom line, my availability is very  
3 tight, as a practical matter, much of next week, but -- or  
4 maybe all of next week but with some ability to tend to  
5 things while I'm also doing other things and then the  
6 following week, Monday through Wednesday I'm out of pocket  
7 but again able to be reached and deal with things.

8           Okay. So that concludes my ruling and gives you a  
9 preview on next steps with regard to the proposed order.  
10 Now I'm going to just turn briefly to next steps in any  
11 procedural or scheduling matters that need to be addressed.  
12 I know under the parties' stipulation, there's a  
13 contemplation of further discovery and an ensuing hearing  
14 date. I suspect that it's premature to do all that on the  
15 spot, that you all will want to process the ruling I just  
16 made and if so, that's fine and you would be welcome to  
17 confer and then come to me with a proposed -- any proposed  
18 case management or scheduling issues that you need me to  
19 approve and/or you can just come to chambers with a request  
20 for a follow-up date.

21           However, if people think that discussion right now  
22 would be helpful, I'm happy to engage that. So let me ask,  
23 I guess I'll start with Debtor, how they want to proceed  
24 with determining next steps in the case procedurally.

25           MR. ORTIZ: Good afternoon again, Your Honor.

1 Kyle Ortiz of Togut Segal for the Debtors. I think Your  
2 Honor's instinct is likely right that it's a lot to process  
3 for all the various parties and I think it probably makes  
4 sense for us, unless there's some adamant disagreement among  
5 the parties on the phone, to have us all kind of  
6 collectively regroup and come up with scheduling, Your  
7 Honor, that works for everybody.

8 THE COURT: Okay. That sounds right to me. I  
9 don't want to put people on the spot and I also don't want  
10 to have -- immediately and I don't think that would be  
11 productive or fair, so let's do the following. You all can  
12 confer among yourselves. I'm available easily the rest of  
13 the day and if you want to come back to me and ask for a  
14 conference where we can reconvene and just hash through any  
15 disagreements about whatever they may be. I anticipate you  
16 might -- I know you had some differences about possible  
17 discovery schedules following on.

18 I'm available. I also don't insist that you come  
19 to me. I'd be fine letting you go at whatever pace you  
20 collectively are comfortable with and then just coming to me  
21 if and as needed at a later time. Does that work?

22 MR. ORTIZ: I think it makes perfect sense, Your  
23 Honor, and we'll try to let you know either way so if folks  
24 aren't coming back, you'll -- won't be waiting up on a  
25 Friday.

1 THE COURT: Okay. Thank you very much --

2 MR. WINSTON: Your Honor?

3 THE COURT: Yes.

4 MR. WINSTON: Eric Winston of Quinn Emanuel on  
5 behalf of FitzWalter. May I be heard?

6 THE COURT: Yes, you may. Of course.

7 MR. WINSTON: Okay. In light of Your Honor's  
8 rulings, I guess we'll need to hear from the buyer if they  
9 intend to proceed given the escrow that Your Honor imposed.  
10 If the buyer is prepared to proceed and the Debtors are  
11 prepared to close, Your Honor, we certainly understand that  
12 you have imposed the seven-day stay as opposed to what the  
13 rules provide. As a matter of formality, we make an oral  
14 motion for a stay pending appeal so that at least until the  
15 district court has had an opportunity to actually rule on  
16 that we not face an equitable mootness argument.

17 I'm prepared to explain why under the Second  
18 Circuit standards we think we are entitled to a stay pending  
19 appeal, but I also am quite aware that you've actually  
20 already reduces what the statute provides, so I don't want  
21 to waste your time if you're just going to deny it.

22 THE COURT: Yeah --

23 MR. WINSTON: -- move on.

24 THE COURT: Mr. Winston, thank you for raising  
25 that. At this time, I'll deny any further application for

1 an emergency stay or other -- or an extension of the 14-day  
2 period as a matter of law. I do -- I will just say a word  
3 more, that I credit contentions that have been stated that  
4 the transaction is time sensitive and the other -- the deal  
5 proponents wanted me to absolutely eliminate any stay. I  
6 think that's unreasonable, both to FitzWalter and to the  
7 court -- the district court, because it is -- it really  
8 hamstringing their ability, but I think a seven-day is --  
9 delay in effectiveness of the order is reasonable and gives  
10 sufficient protection at this time.

11 And I'll just say specifically that that  
12 determination as of now is without prejudice to further  
13 applications either to this court or the district court as  
14 needed, but for my intention and hope is that what I've done  
15 adequately lets people look after their interests and gives  
16 a little breathing room for the district court as well.

17 I'll just further note that the -- as I'm sure you  
18 absorbed, the date's going to -- the seven-day period will  
19 run commencing with entry of the order, not with this oral  
20 ruling, so if there's ambiguity of that, I have just  
21 eliminated that possible concern. I think that's about what  
22 I need to say. I guess I should just say a bit more, that -  
23 - yeah, I don't consider the standard for emergency  
24 injunctive relief or stays to be met here in the  
25 circumstances of this case, but that's without prejudice to

1 further argument if anyone wants to make it. Okay?

2 MR. WINSTON: If I could just have -- sorry.

3 THE COURT: Yeah, go ahead, Mr. Winston.

4 MR. WINSTON: I just want to make -- because I  
5 know you talked about the order and it sounds like the  
6 parties need to at least look at some changes to it, but  
7 just to confirm, since the order approved the asset purchase  
8 agreement, I'm assuming Your Honor is approving the one that  
9 was filed on March 11th, Docket 159-2? There's not going to  
10 be any further changes to that?

11 MR. GREISSMAN: The --

12 THE COURT: Say your name, Mr. Greissman.

13 MR. GREISSMAN: Sorry. Scott Greissman, White and  
14 Case. There were provisions in the asset purchase agreement  
15 that we specifically identified would be dependent on the  
16 Court's ruling. We'll of course circulate to anybody any  
17 changed pages before signing. We're still a few days away.  
18 Mr. Winston doesn't need to worry too much about equitable  
19 mootness, with or without the Court's stay and we're not  
20 looking to jam anyone or slam dunk this on anyone and so,  
21 you know, we'll be in touch, I'm sure immediately.

22 THE COURT: Yeah, let me also just say a few --  
23 thank you, Mr. Greissman, and let me just say a few more  
24 words. I was hesitating a moment ago trying to formulate  
25 this thought and I just want to say it. First off, I want

1 to thank and compliment everyone on their advocacy,  
2 notwithstanding some of the tough comments I made about the  
3 positions being advanced by FitzWalter.

4 I'm very impressed by the -- everyone's  
5 professionalism and from everything I can see, everyone's  
6 working together in a professional manner. I will urge that  
7 to continue and specifically keep FitzWalter apprised of  
8 what the expected pace is and, you know, just give them fair  
9 notice as to the best of your ability about what's coming  
10 down the pike and try to engage constructively just in terms  
11 of logistics and what's coming. You know, there's -- if you  
12 are going to have expedited further litigation, that puts a  
13 lot of strain on everybody and just try to make the process  
14 as livable as possible.

15 I will also say if -- I'm not asking for even a  
16 hint from the prospective purchaser, but if the prospective  
17 purchaser concludes that it actually wants to hold off on  
18 closing it should just tell the parties in interest that as  
19 soon as they can from that sense because that may mean that  
20 the litigation pace can slow down if the purchaser concluded  
21 that it wants to wait to see the final outcome of escrow  
22 requirements pending, you know, following a further hearing.

23 So I don't want the Court to be an impediment of  
24 closing if people are ready to go forward, but if everything  
25 is going to slow down anyway, be kind to one another and

1 allow each other to know that so that, you know, people  
2 aren't doing superhuman things unnecessarily.

3 MR. GREISSMAN: Duly noted, Your Honor, and we'll  
4 report back. We, obviously, the seller and the buyer have  
5 to circle up and just take stock of what you've ruled.

6 THE COURT: Okay. Great. Thank you very much.  
7 Mr. Winston, anything else we need to cover today? I don't  
8 mean to give you the bum's rush at all. You can raise  
9 anything else you like.

10 MR. WINSTON: No. You're fine. I just wanted to  
11 go through the formality of getting denied, so thank you.

12 THE COURT: I will assure you, in the course of my  
13 ruling, I'm familiar with the requirements for a stay and I  
14 gave serious thought to it and I think I've reasonably  
15 balanced the need to protect your party's interests with the  
16 need to make sure that the conduct of this case doesn't  
17 cause commercial harm and harm flowing the other way. Okay?

18 MR. WINSTON: Understood.

19 THE COURT: So thank you all very much and good  
20 day and I'll be available to the maximum extent possible, if  
21 and when you need me. Take care. We're adjourned.

22 MR. GREISSMAN: Thank you, Your Honor.

23 MR. WINSTON: Thank you, Your Honor.

24 (Whereupon these proceedings were concluded at  
25 12:21 PM)



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I N D E X

RULINGS

	Page	Line
Motion to approve asset sale granted	48	23

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

1  
2  
3  
4  
5  
6  
7  
8  
9  
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I, Sonya Ledanski Hyde, certified that the foregoing transcript is a true and accurate record of the proceedings.



Sonya Ledanski Hyde

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Date: March 19, 2022

<b>&amp;</b>	<b>155</b> 15:24	<b>363.02.</b> 18:7,13	<b>8</b>
<b>&amp;</b> 3:10,17	<b>159-2</b> 54:9	<b>4</b>	<b>8</b> 24:22 33:12 35:6
<b>1</b>	<b>17th</b> 10:21 11:5	<b>4</b> 21:17 30:6,7 31:12	<b>865</b> 3:12
<b>1</b> 15:22 29:1 30:10	<b>18</b> 1:16 30:5 33:25 43:6	<b>4,090,000</b> 40:7	<b>9</b>
<b>1,842,148.42</b> 35:18 44:13	<b>19</b> 58:25	<b>4.1</b> 43:13 44:9	<b>9</b> 29:13 30:6
<b>1.8</b> 21:11	<b>2</b>	<b>4.128.</b> 30:7	<b>9-506</b> 29:10
<b>1.82</b> 37:12	<b>2</b> 28:9 29:9 31:10	<b>4.6</b> 21:20 41:10 43:4	<b>9-607</b> 29:12
<b>1.842</b> 38:3	<b>2.15.7</b> 45:3	<b>400,000</b> 21:21	<b>9-620</b> 29:14
<b>10</b> 24:22 30:5 43:15	<b>2.2</b> 14:8 32:24	<b>406,302.30</b> 44:11	<b>9-623</b> 29:5,8
<b>10004</b> 1:14	<b>2011</b> 15:24	<b>406,302.30.</b> 39:5	<b>a</b>
<b>10020</b> 3:20	<b>2012</b> 17:17	<b>467</b> 17:16	<b>a350</b> 8:17
<b>10119</b> 3:6	<b>2014</b> 15:23	<b>48</b> 57:5	<b>ability</b> 12:14 18:6 24:20 50:4 53:8 55:9
<b>105</b> 45:23	<b>2021</b> 8:4 10:14,22	<b>5</b>	<b>able</b> 49:14,20 50:7
<b>107</b> 21:3	<b>2022</b> 1:16 58:25	<b>5</b> 13:14 18:17 20:4 21:5 30:11 31:2 34:4	<b>absolute</b> 12:18 24:7 25:12 26:15
<b>109</b> 41:16	<b>21</b> 21:9	<b>50,000</b> 21:19	<b>absolutely</b> 23:17 23:19,25 24:11 53:5
<b>10th</b> 3:12	<b>21,125,396.42.</b> 34:12	<b>500,000</b> 40:10 41:7 44:10	<b>absorbed</b> 53:18
<b>11</b> 18:11 19:13 35:8	<b>21-12075</b> 1:3	<b>506</b> 13:22 19:7,13 20:12,22 31:25 33:4,7	<b>accept</b> 30:13
<b>11.2.1a</b> 35:7	<b>210</b> 22:2	<b>510</b> 45:19	<b>accepted</b> 29:14
<b>111</b> 1:7	<b>22</b> 35:8	<b>512</b> 15:22	<b>account</b> 21:15 25:6 28:23 35:5 36:11 40:5 41:18 43:14 46:19
<b>11501</b> 58:23	<b>23</b> 33:12 57:5	<b>541</b> 15:12,18	<b>accounting</b> 21:2 33:24
<b>11:00</b> 1:17	<b>25</b> 35:8	<b>543</b> 15:23	<b>accrued</b> 43:6
<b>11th</b> 54:9	<b>25,000</b> 40:11	<b>6</b>	<b>accruing</b> 34:1
<b>12151</b> 58:7	<b>260</b> 30:5	<b>6</b> 21:3,5 34:2,4 35:20	<b>accurate</b> 58:4
<b>1221</b> 3:19	<b>271</b> 30:5	<b>7</b>	<b>achieved</b> 38:17
<b>129</b> 6:22	<b>28th</b> 21:2 33:25 41:11 43:5,16	<b>7</b> 33:13 34:7	<b>achieving</b> 16:12
<b>12:21</b> 56:25	<b>3</b>	<b>7,223,471.72.</b> 46:24	<b>acquired</b> 8:5
<b>132</b> 15:24	<b>3</b> 18:7 22:5 28:24	<b>726</b> 17:16	<b>acquiring</b> 25:14
<b>136</b> 21:7 34:6 35:8	<b>300</b> 58:22	<b>730</b> 17:16	<b>acquisition</b> 39:24
<b>137</b> 34:2	<b>300,000</b> 38:22 44:14	<b>75,000</b> 21:21 39:20	<b>act</b> 8:10 12:2
<b>13th</b> 11:2	<b>318,000</b> 21:13	<b>75,021</b> 40:4 44:12	<b>acting</b> 26:14 41:22
<b>14</b> 33:13 47:16,20 47:23 48:11 53:1	<b>318,277.84.</b> 38:10		
<b>148</b> 15:22	<b>330</b> 58:21		
<b>14th</b> 6:21 7:9,10 10:25 14:19 17:19 25:9 26:1 32:23 40:8 49:4	<b>363</b> 15:4,22 19:2,5 19:18 22:5,22 27:17,20 28:3,7,9 28:14,18,19,24 29:1 30:10,11 31:2,8 47:8,12		
<b>15</b> 30:6 33:12 35:8			
<b>153</b> 15:23			

<b>action</b> 10:12 36:24 <b>actions</b> 30:21 36:15 <b>activities</b> 9:6 <b>activity</b> 36:21 40:19 43:7 <b>actor</b> 41:24 <b>actual</b> 33:16 <b>adam</b> 5:13 <b>adamant</b> 51:4 <b>add</b> 21:24 <b>added</b> 46:22 <b>addition</b> 17:8 28:13 <b>additional</b> 6:17 8:8,13 13:18 15:19 21:11 30:8 32:11,23 33:25 35:12,14,15 39:24 43:5 44:3 <b>address</b> 23:10 <b>addressed</b> 50:11 <b>adequate</b> 17:8 19:4 37:5 44:4 <b>adequately</b> 14:13 15:6 19:17 22:20 22:25 27:15 28:13 31:20 44:2 53:15 <b>adhered</b> 17:10 <b>adhering</b> 33:12 <b>adjourned</b> 56:21 <b>adjudicate</b> 37:24 <b>administered</b> 7:18 <b>advanced</b> 7:9 55:3 <b>advantageous</b> 39:12 <b>adversary</b> 34:7 42:6 <b>adverse</b> 9:1 <b>advocacy</b> 55:1 <b>affiliate</b> 8:2 17:7	<b>affiliated</b> 17:5 <b>affiliates</b> 10:23 11:3 17:22 <b>afternoon</b> 48:17 50:25 <b>agenda</b> 7:8 <b>agent</b> 8:1,1,6,9 9:12 10:12,17 11:25 39:3,7 40:15,18,23,25 42:18 45:4,13 <b>agent's</b> 40:17 <b>agents</b> 39:13 <b>aggressive</b> 40:19 41:12,24 <b>ago</b> 6:21 33:25 47:3 54:24 <b>agree</b> 22:12 24:9 32:15 36:8 <b>agreed</b> 32:22 40:8 <b>agreement</b> 19:12 25:24 26:2,12 28:10 32:3 33:5,9 33:11 35:7 36:11 45:4,13,15,16 54:8,14 <b>agreement's</b> 26:12 36:11 <b>agreements</b> 7:24 8:11 12:17 23:17 32:7 34:23 35:23 45:19 <b>agricole</b> 8:3 <b>ahead</b> 54:3 <b>aimed</b> 18:1 <b>air</b> 16:10 <b>airborne</b> 39:1,3,7 39:10,18 44:12 <b>airborne's</b> 39:15 <b>airbus</b> 8:17 <b>aircraft</b> 6:8 8:17 8:23 9:3,13,16,17 9:19 11:9,15	16:18,21,21 23:14 <b>airline</b> 8:23 <b>airliner</b> 8:17 <b>airlines</b> 8:24 <b>akiko</b> 5:3 <b>albeit</b> 12:18 23:25 <b>albert</b> 5:12 <b>alienation</b> 37:9 <b>aligned</b> 26:8 <b>alleged</b> 21:12 35:17,23 38:11,16 44:14 <b>allegedly</b> 9:22 43:21 <b>allied</b> 28:2 <b>allow</b> 13:16 44:18 56:1 <b>allowable</b> 13:18 13:21,25 20:4,12 44:10,11 <b>allowance</b> 20:21 <b>allowed</b> 19:10 20:12 30:20 <b>allows</b> 31:25 <b>alter</b> 26:14 <b>alternative</b> 27:21 <b>ambiguity</b> 53:20 <b>americas</b> 3:19 <b>amount</b> 8:5 13:16 13:17 19:11,15 20:5,13 27:10 28:21,25 31:23 32:24 33:1 34:12 34:12 35:15,18 38:3,7,10 39:4,5 40:9,10,11 43:19 43:25 44:9 46:21 46:24 <b>amounts</b> 6:14 13:20 14:4 19:9 20:2,14 21:2,14 21:25 28:21 31:18 32:19 33:24 34:1	34:1,24 35:12 41:5 43:16 44:20 44:23 46:18 47:2 <b>ample</b> 16:7 <b>amulic</b> 4:16 <b>analytical</b> 26:22 27:13 <b>andrea</b> 4:16 <b>andrew</b> 4:25 <b>angeles</b> 3:13 <b>annex</b> 33:10 <b>answer</b> 15:16 22:18,24 27:16 <b>anti</b> 21:16 36:4,17 <b>anticipate</b> 51:15 <b>anticipated</b> 11:19 <b>anticipation</b> 7:8 <b>antisocial</b> 36:16 36:17 <b>anybody</b> 54:16 <b>anyway</b> 55:25 <b>appeal</b> 48:3 52:14 52:19 <b>appear</b> 35:21 <b>appearances</b> 6:3,5 <b>appeared</b> 43:22 <b>appearing</b> 6:5 33:10 <b>applicability</b> 39:22 <b>applicable</b> 14:20 26:23 29:2,15 40:13 <b>application</b> 27:25 52:25 <b>applications</b> 53:13 <b>applied</b> 43:9 <b>applies</b> 18:24 30:15 40:25 <b>apprised</b> 55:7 <b>approach</b> 16:17 42:8
--	--	---	--

<p><b>appropriate</b> 9:8 32:16,20 45:22 46:7</p> <p><b>appropriately</b> 16:4</p> <p><b>approval</b> 6:8 7:1 11:17 12:21 21:23 22:3</p> <p><b>approvals</b> 27:18</p> <p><b>approve</b> 12:9 13:10 22:13 50:19 57:5</p> <p><b>approved</b> 6:9 54:7</p> <p><b>approving</b> 54:8</p> <p><b>approximate</b> 21:25</p> <p><b>approximately</b> 21:13 39:19 43:15</p> <p><b>approximation</b> 43:17</p> <p><b>argue</b> 39:20 40:13 45:14</p> <p><b>argued</b> 12:16</p> <p><b>argues</b> 39:21</p> <p><b>argument</b> 25:16 26:11,16 39:14 42:12 45:14 52:16 54:1</p> <p><b>arguments</b> 7:9 26:13 29:3 37:13 38:5 40:22</p> <p><b>arising</b> 33:17 35:23</p> <p><b>arm's</b> 17:23</p> <p><b>arose</b> 19:13 32:4</p> <p><b>arrangements</b> 10:2</p> <p><b>articles</b> 30:6</p> <p><b>articulate</b> 18:11</p> <p><b>articulated</b> 14:20 26:13</p> <p><b>asher</b> 4:5</p>	<p><b>aside</b> 16:16 45:15</p> <p><b>asked</b> 14:21</p> <p><b>asking</b> 14:10 55:15</p> <p><b>aspects</b> 36:5</p> <p><b>assert</b> 10:24 35:2</p> <p><b>asserted</b> 14:5 20:17,21 21:2,8 21:13,17,24 29:4 34:9,12 35:18 38:11 39:5,18 40:4,7 47:14</p> <p><b>assertedly</b> 26:4 40:12 43:16</p> <p><b>asserting</b> 36:3,13</p> <p><b>assertion</b> 30:1 46:1</p> <p><b>asserts</b> 12:1 20:23 33:1,24 36:19</p> <p><b>assess</b> 32:5</p> <p><b>assessment</b> 31:19</p> <p><b>asset</b> 11:11 13:10 20:5 22:17 25:5 42:14 54:7,14 57:5</p> <p><b>assets</b> 9:12,14,16 9:22 10:1,20 11:4 11:6,15 12:4,14 12:18 13:3,13 14:12 15:17 16:8 18:25 20:1 22:3 22:13,19 23:16,18 25:19,25 26:17,20 28:5,18 29:5 39:21 40:20</p> <p><b>assigned</b> 23:19</p> <p><b>assignment</b> 12:18 24:7 25:12</p> <p><b>associated</b> 6:8 24:10,20 30:3 38:3</p> <p><b>assumed</b> 7:12 10:16</p>	<p><b>assuming</b> 54:8</p> <p><b>assure</b> 56:12</p> <p><b>assuredly</b> 26:5</p> <p><b>athyn</b> 24:24,24</p> <p><b>attempt</b> 24:13 42:17 46:10,11</p> <p><b>attempted</b> 11:9</p> <p><b>attempts</b> 29:19</p> <p><b>attend</b> 49:18</p> <p><b>attorneys</b> 3:4,11 3:18</p> <p><b>auction</b> 6:10 12:23 13:6 17:11 17:13 18:1 20:7 27:4</p> <p><b>auction's</b> 13:11</p> <p><b>auctioneer</b> 21:21</p> <p><b>authority</b> 45:23</p> <p><b>authorize</b> 22:23</p> <p><b>authorized</b> 8:9 25:23 32:17</p> <p><b>automatic</b> 45:2</p> <p><b>automatically</b> 47:17</p> <p><b>availability</b> 50:2</p> <p><b>available</b> 9:24 51:12,18 56:20</p> <p><b>avenue</b> 3:19</p> <p><b>aviation</b> 16:8</p> <p><b>avoid</b> 9:1</p> <p><b>avoiding</b> 43:12</p> <p><b>awarded</b> 33:4</p> <p><b>aware</b> 52:19</p> <p style="text-align: center;"><b>b</b></p> <p><b>b</b> 1:21 13:22 15:22 19:7,13 20:12,22 24:24 31:25 33:4,7 35:7 37:12 39:2</p> <p><b>b.r.</b> 15:22,24 17:16</p> <p><b>back</b> 46:21 51:13 51:24 56:4</p>	<p><b>backdrop</b> 21:25</p> <p><b>bad</b> 11:12,20</p> <p><b>balanced</b> 56:15</p> <p><b>bank</b> 8:2,14 41:18</p> <p><b>bankr</b> 15:23,24 17:16</p> <p><b>bankruptcy</b> 1:1 1:12,23 7:17 11:20 13:20,23 15:4,12 16:11 18:10 22:5 29:2 30:9 34:6 37:21 37:23 45:20 47:8 47:18</p> <p><b>bar</b> 37:8 40:13,24</p> <p><b>bars</b> 29:15</p> <p><b>based</b> 10:25 11:23 24:14 25:11,20 26:13 29:4 32:10 39:6 40:2,14 41:16 43:20</p> <p><b>basis</b> 22:23 31:22 37:16 38:21</p> <p><b>began</b> 10:5</p> <p><b>beginning</b> 42:13</p> <p><b>behalf</b> 8:10 52:5</p> <p><b>behest</b> 37:1</p> <p><b>believe</b> 18:15 31:22 47:4 48:15 48:19</p> <p><b>belongs</b> 25:22</p> <p><b>beneficial</b> 46:15</p> <p><b>benefit</b> 27:10 46:3</p> <p><b>best</b> 13:12 42:5 55:9</p> <p><b>better</b> 6:11 12:23 18:4 27:4</p> <p><b>beyond</b> 18:18 20:25 31:18</p> <p><b>bid</b> 11:18 12:9,20 13:2,9 18:6 24:6 27:8</p>
--	--	---	--

<p><b>bidder</b> 11:18 12:21 13:5,12 14:7 32:22</p> <p><b>bids</b> 6:11 13:7,8</p> <p><b>bill</b> 5:11</p> <p><b>bit</b> 53:22</p> <p><b>blander</b> 4:17</p> <p><b>bona</b> 17:24</p> <p><b>borriello</b> 3:25 21:4 34:3</p> <p><b>borrower</b> 25:5 29:16</p> <p><b>borrowing</b> 24:9</p> <p><b>bottom</b> 50:2</p> <p><b>bound</b> 45:16</p> <p><b>bowling</b> 1:13</p> <p><b>breach</b> 21:15 36:3 38:11,16 44:15</p> <p><b>breached</b> 36:6</p> <p><b>breaches</b> 21:12,14 35:17,23 38:9 44:14</p> <p><b>breakdown</b> 42:25</p> <p><b>breakup</b> 12:11</p> <p><b>breathing</b> 48:6 53:16</p> <p><b>brian</b> 4:14</p> <p><b>briefed</b> 29:23</p> <p><b>briefing</b> 37:25</p> <p><b>briefly</b> 6:17 27:12 50:10</p> <p><b>bring</b> 30:20</p> <p><b>broad</b> 16:16</p> <p><b>bryan</b> 4:9</p> <p><b>bryn</b> 24:24</p> <p><b>brynn</b> 24:24</p> <p><b>bum's</b> 56:8</p> <p><b>bundle</b> 16:8</p> <p><b>burden</b> 43:12</p> <p><b>business</b> 15:21 16:3 17:3 22:16 26:24</p>	<p><b>butou</b> 4:18</p> <p><b>buttressed</b> 17:4</p> <p><b>buyer</b> 20:14 52:8 52:10 56:4</p> <hr/> <p style="text-align: center;"><b>c</b></p> <hr/> <p><b>c</b> 3:1,25 4:1,13 6:1 58:1,1</p> <p><b>ca</b> 3:13</p> <p><b>cacib</b> 8:3,6 10:12 10:15 40:12</p> <p><b>calculated</b> 16:17</p> <p><b>call</b> 7:20</p> <p><b>called</b> 23:10 24:10 36:17</p> <p><b>capacity</b> 8:9 26:14 41:22</p> <p><b>cape</b> 29:22 30:2,5</p> <p><b>capital</b> 3:11 8:4</p> <p><b>capitol</b> 3:18</p> <p><b>care</b> 56:21</p> <p><b>case</b> 1:3 3:17 7:17 16:20 18:20,22,25 20:8,19 21:7 34:6 37:18,23 41:1,12 42:8,24 45:21 47:13 50:18,24 53:25 54:14 56:16</p> <p><b>case's</b> 7:10</p> <p><b>caselaw</b> 42:2</p> <p><b>cases</b> 7:17 11:5 24:22 43:23 45:20</p> <p><b>cash</b> 13:15 14:8 18:18 20:5</p> <p><b>categorically</b> 42:13 43:3</p> <p><b>categories</b> 35:19</p> <p><b>category</b> 34:9</p> <p><b>cause</b> 34:15 37:21 56:17</p> <p><b>caused</b> 10:9</p> <p><b>centering</b> 36:4</p> <p><b>certain</b> 9:1 13:18 21:15,19 30:21</p>	<p>43:3,8 44:25</p> <p><b>certainly</b> 28:14 52:11</p> <p><b>certified</b> 58:3</p> <p><b>chain</b> 9:7 14:18</p> <p><b>challenge</b> 12:13 27:9 39:16 40:2</p> <p><b>challenged</b> 27:6</p> <p><b>challenges</b> 45:8</p> <p><b>challenging</b> 27:11</p> <p><b>chamber</b> 49:20</p> <p><b>chambers</b> 49:10 50:19</p> <p><b>change</b> 16:24 40:14,17,24 45:4</p> <p><b>changed</b> 54:17</p> <p><b>changes</b> 39:21 49:12,12 54:6,10</p> <p><b>chapter</b> 18:11</p> <p><b>characterization</b> 42:8</p> <p><b>charge</b> 9:11 12:19 24:1 39:13</p> <p><b>chargeable</b> 38:19</p> <p><b>charged</b> 21:18 40:11 44:23</p> <p><b>charges</b> 19:12 21:20 28:22 32:2 32:6 33:5,6,8</p> <p><b>chase</b> 15:16</p> <p><b>christopher</b> 4:3</p> <p><b>circle</b> 46:21 56:5</p> <p><b>circuit</b> 52:18</p> <p><b>circulate</b> 54:16</p> <p><b>circumstances</b> 30:18,21 45:21 46:5 53:25</p> <p><b>cite</b> 42:2</p> <p><b>cited</b> 24:22</p> <p><b>claim</b> 14:11 19:9 19:10,13,16 20:2 20:13,17 32:1,3 34:5 35:20 37:12</p>	<p>38:24 48:24</p> <p><b>claims</b> 21:6,13,16 31:24 32:1 35:17 35:19,22,24 36:2 36:7,14,25 37:1,6 37:10,17 38:4,19 44:14,15</p> <p><b>clause</b> 35:6</p> <p><b>clauses</b> 35:7</p> <p><b>clean</b> 49:14</p> <p><b>clear</b> 15:9 22:23 24:20 25:14,15 26:15 27:18,22 29:2 30:9 38:18 42:14</p> <p><b>clearly</b> 27:23,25</p> <p><b>clogs</b> 37:9</p> <p><b>close</b> 20:15 25:11 37:5 52:11</p> <p><b>closing</b> 32:16 38:7 48:4 55:18,24</p> <p><b>code</b> 13:23 15:4 15:12,19,22 18:10 19:1,5,7 22:5 27:17 31:8,25 45:18,23 47:8</p> <p><b>collateral</b> 19:21 29:6,11,14 30:4 30:24 35:10</p> <p><b>collected</b> 29:12</p> <p><b>collection</b> 41:5</p> <p><b>collectively</b> 51:6 51:20</p> <p><b>collier</b> 18:7,13</p> <p><b>come</b> 18:2,4 19:22 50:17,19 51:6,13 51:18</p> <p><b>comes</b> 19:5 26:7 46:23</p> <p><b>comfortable</b> 51:20</p> <p><b>coming</b> 51:20,24 55:9,11</p>
--	--	--	--

<b>commence</b> 11:5 <b>commenced</b> 10:20 11:14 35:25 <b>commencing</b> 48:12 53:19 <b>comment</b> 29:9 30:7 <b>commentary</b> 30:6 <b>comments</b> 55:2 <b>commercial</b> 8:17 8:23 16:5,21 25:8 36:20 48:1 56:17 <b>commercially</b> 27:7 39:8,12 47:20 <b>commit</b> 12:10 <b>committed</b> 12:22 <b>common</b> 7:22 <b>compared</b> 39:12 <b>compel</b> 31:4 <b>compelled</b> 30:12 <b>compelling</b> 25:1 <b>compensation</b> 46:1 <b>competitive</b> 13:3 <b>complex</b> 7:16 10:1 37:19 <b>complicated</b> 31:16 <b>complication</b> 20:22 <b>compliment</b> 55:1 <b>comply</b> 38:12 <b>components</b> 20:17 44:18 <b>compromised</b> 16:10 <b>conceded</b> 24:17 <b>conceivable</b> 41:13 <b>concern</b> 47:19 53:21 <b>concerning</b> 23:15	<b>concerns</b> 37:20 49:5 <b>conclude</b> 11:1 16:2 17:12,15 20:9 27:19 30:22 40:21 45:20 <b>concluded</b> 24:5 42:19 55:20 56:24 <b>concludes</b> 46:5 48:14 50:8 55:17 <b>conclusion</b> 15:16 17:4 19:25 25:2,9 44:21 <b>conclusions</b> 14:17 <b>conclusively</b> 32:17 <b>condition</b> 19:2 <b>conduct</b> 13:11 17:13 18:1 32:12 36:14,16,17,25 41:19 56:16 <b>conducted</b> 13:6 32:14 <b>confer</b> 50:17 51:12 <b>conference</b> 51:14 <b>confident</b> 38:20 43:1,18 48:7 <b>confirm</b> 54:7 <b>conflict</b> 50:1 <b>connection</b> 11:19 24:5 25:18 31:6 35:24 39:3 44:15 48:13 49:19 <b>consent</b> 28:12 31:12 42:14 <b>consented</b> 41:21 <b>consequences</b> 9:2 <b>conservative</b> 43:17 <b>consider</b> 43:11 53:23	<b>considerable</b> 10:13 <b>consideration</b> 15:11 18:8 19:24 27:6,10 <b>considerations</b> 17:14 25:17 27:22 29:22 <b>considered</b> 7:6 <b>consisted</b> 17:23 <b>consists</b> 13:14 <b>consolidated</b> 7:18 <b>constitute</b> 35:10 35:12 <b>constitutes</b> 13:25 18:15 <b>constructed</b> 17:13 <b>constructively</b> 55:10 <b>constructiveness</b> 16:16 <b>construed</b> 36:18 <b>construes</b> 36:10 <b>consummated</b> 11:7 12:12 <b>contained</b> 35:6 <b>contemplated</b> 22:1 <b>contemplation</b> 50:13 <b>contends</b> 36:5 39:11 <b>contention</b> 26:18 39:25 45:2 <b>contentions</b> 43:20 44:22 53:3 <b>contentious</b> 45:25 <b>contentiousness</b> 47:13 <b>contesting</b> 41:13 <b>context</b> 36:12 <b>contingent</b> 33:16	<b>continue</b> 16:13 55:7 <b>contracted</b> 29:13 <b>contracts</b> 36:5,15 40:13 <b>contractual</b> 9:15 33:8 36:3 37:19 <b>contrary</b> 25:2 29:4 <b>controlling</b> 16:14 26:11 47:1 <b>controversial</b> 47:4 <b>convention</b> 30:6 <b>convey</b> 12:14,15 <b>conveyance</b> 26:6 26:15 <b>conveyed</b> 15:18 20:1 23:13,18 24:11 25:13 28:5 28:10 31:15 <b>conveys</b> 25:24 28:12 <b>correction</b> 14:22 48:16 <b>correctly</b> 12:1 <b>costs</b> 13:18,21,25 16:24 19:11 20:4 21:13,22 28:22 32:2,5 38:9 39:1,2 39:6,19 40:5,6 43:12 44:12,13 <b>counsel</b> 17:24 25:10 26:1,8,10 30:1 45:14 48:15 <b>counsel's</b> 41:17 <b>country</b> 58:21 <b>course</b> 11:21 17:3 37:23 49:7,10 52:6 54:16 56:12 <b>court</b> 1:1,12 6:2,9 7:1 12:6 13:7 14:10 15:25 17:8
--	--	---	---

<p>17:10,14 19:2                  21:23 22:3 30:22                  30:23 41:11 42:2                  42:7,22 44:8 46:5                  47:18,24 48:5,7                  48:20 51:8 52:1,3                  52:6,15,22,24                  53:7,7,13,13,16                  54:3,12,22 55:23                  56:6,12,19  <b>court's</b> 48:9 54:16                  54:19  <b>cover</b> 14:3 28:15                  44:8,10,11 56:7  <b>coverage</b> 39:24  <b>covid</b> 10:4  <b>covid's</b> 16:10  <b>created</b> 8:16,19                  39:22,23  <b>credibly</b> 18:16  <b>credit</b> 8:2 13:2,9                  16:19 18:6 24:12                  27:8 29:18 30:1                  53:3  <b>creditor</b> 23:1                  42:18  <b>creditors</b> 6:14                  18:18 19:20 30:25                  42:3 46:14  <b>credits</b> 42:7  <b>criminal</b> 36:21  <b>cross</b> 4:19  <b>current</b> 10:4 39:6                  42:24 43:4  <b>cursory</b> 37:25  <b>cusano</b> 4:20  <b>cushion</b> 44:3  <b>cushions</b> 43:23  <b>cut</b> 15:16  <b>cutoff</b> 43:20</p>	<p style="text-align: center;"><b>d</b></p> <p><b>d</b> 6:1 57:1  <b>damages</b> 33:19                  37:22 38:11,16  <b>daniela</b> 5:4  <b>date</b> 32:10 41:3                  42:25 43:2 48:11                  48:12 50:14,20                  58:25  <b>date's</b> 53:18  <b>dates</b> 43:21  <b>david</b> 1:22 5:6  <b>dawn</b> 5:7  <b>day</b> 20:23 21:19                  47:16,20,23 51:13                  52:12 53:1,8,18                  56:20  <b>days</b> 6:21 33:25                  43:6 48:11 54:17  <b>deadline</b> 7:4  <b>deal</b> 17:25 48:1                  49:20 50:7 53:4  <b>debate</b> 10:1  <b>debt</b> 7:24 8:6,8,10                  8:13 10:16 12:2,2                  13:1,18 16:14                  20:4 21:1 23:6                  25:4,7 29:20 35:4                  35:5 42:15 46:18                  46:20  <b>debtor</b> 1:9 7:19                  7:21 14:23 15:14                  15:17,24 17:22                  23:12 25:13 29:6                  29:11 34:11,11                  35:25 36:10 37:13                  45:5 49:9 50:23  <b>debtor's</b> 30:3  <b>debtors</b> 3:4 6:7,13                  7:16,20 9:12                  10:24 11:4,10,17                  12:4 13:9 14:10                  14:24 15:8,20</p>	<p>16:2,7,11 17:1,9                  21:5 22:7 23:14                  23:21 24:22 25:20                  25:20,22,25 26:19                  27:17,19,21 28:5                  29:18 30:14,15,20                  31:5 33:23 34:4,7                  34:18 35:19,20,24                  36:23,24 37:1,2                  39:9,20 40:8,10                  40:13 41:15,19                  42:7,14 45:2,9                  46:13 47:5,16,19                  48:14,19,25 51:1                  52:10  <b>debts</b> 35:12  <b>december</b> 8:4                  10:14,21,25 11:2                  11:5  <b>decide</b> 14:23 15:2                  23:4 24:7 31:17                  32:8  <b>decided</b> 40:19  <b>decision</b> 14:18                  19:22 27:24 41:4  <b>declaration</b> 21:4                  34:3  <b>declarations</b> 6:23  <b>declared</b> 10:15                  21:11  <b>decline</b> 39:17 40:1  <b>declined</b> 10:7                  45:14  <b>decreased</b> 10:9  <b>deem</b> 36:25  <b>deemed</b> 13:22                  46:16  <b>defamation</b> 21:16  <b>defame</b> 36:13  <b>default</b> 10:15                  21:10  <b>defend</b> 42:4</p>	<p><b>defendant</b> 36:23  <b>defer</b> 27:13  <b>deference</b> 16:1,5                  16:6  <b>deficiencies</b> 26:7  <b>defined</b> 15:12                  33:9  <b>defining</b> 33:8  <b>definition</b> 33:11  <b>degree</b> 39:9 42:6                  42:23 48:6,8  <b>delay</b> 14:6 38:7                  47:20 48:8 49:23                  53:9  <b>delays</b> 49:21  <b>delgado</b> 4:21  <b>demand</b> 37:12                  38:10,13 48:5  <b>demanded</b> 38:10  <b>demands</b> 20:21                  35:20 44:25  <b>demarco</b> 4:1  <b>demonstrate</b> 30:8  <b>denied</b> 12:6 56:11  <b>denies</b> 18:12  <b>deny</b> 52:21,25  <b>dependent</b> 14:3                  54:15  <b>deposit</b> 41:17  <b>deposition</b> 6:23  <b>depressed</b> 16:22  <b>described</b> 15:11                  21:12  <b>designated</b> 10:17  <b>designed</b> 46:4  <b>designee</b> 21:10  <b>desire</b> 11:23  <b>desired</b> 13:4  <b>despite</b> 18:4 39:9  <b>detail</b> 7:13 15:15                  22:6  <b>detailed</b> 43:19</p>
--	---	---	--



<b>determination</b> 35:21 44:9 47:6 47:11 48:25 53:12 <b>determinations</b> 14:4 <b>determine</b> 14:10 15:5 17:8,11 18:9 22:8,25 31:20 32:18 34:8 <b>determined</b> 13:12 20:6 <b>determining</b> 6:13 12:8 21:6 34:4 36:12 50:24 <b>development</b> 38:1 41:3 <b>deviate</b> 45:17 <b>deviation</b> 46:6 <b>devising</b> 18:19 <b>dictate</b> 18:21 <b>differences</b> 51:16 <b>differently</b> 9:16 <b>diminished</b> 23:3 <b>direct</b> 23:5 27:25 35:1,2 38:2,21 40:3 41:5 43:13 44:8 <b>directed</b> 23:9 28:2 38:24 <b>directing</b> 46:17,24 <b>direction</b> 26:3 30:23 <b>directly</b> 8:18 9:3 22:21 45:10 <b>director</b> 26:4 28:2 <b>directors</b> 25:23 <b>directs</b> 47:18 <b>disagreement</b> 51:4 <b>disagreements</b> 51:15 <b>disallow</b> 14:5 37:17 39:17 40:1	<b>disallowable</b> 43:3 <b>disallowance</b> 42:23 <b>disallowed</b> 34:13 44:25 <b>discharge</b> 34:25 <b>disclosing</b> 49:24 <b>discomfort</b> 47:15 <b>discount</b> 42:23 43:9 <b>discounted</b> 38:22 <b>discovery</b> 12:5 32:12 50:13 51:17 <b>discretion</b> 47:25 <b>discretionary</b> 45:23 <b>discuss</b> 6:18 9:17 <b>discussed</b> 15:15 17:19 18:14 29:23 49:4 <b>discussion</b> 15:13 18:7 25:9 27:13 28:24 49:6 50:21 <b>dismiss</b> 11:20 12:6 24:6 <b>disposed</b> 29:13 <b>disposition</b> 29:13 <b>dispositive</b> 6:12 <b>dispute</b> 13:24 23:14 24:17 31:14 41:15 <b>disputed</b> 8:25 20:14 23:24 31:14 32:18 <b>distributed</b> 23:9 <b>distribution</b> 45:13 45:18 <b>district</b> 1:2 48:5 52:15 53:7,13,16 <b>divert</b> 46:11 <b>docket</b> 54:9 <b>docketed</b> 21:7 33:12 34:6	<b>document</b> 33:20 <b>documents</b> 8:7 14:2 20:25 23:8 24:1 33:2 35:9 45:7,12 <b>doing</b> 15:11 50:5 56:2 <b>dollar</b> 47:2 <b>dollars</b> 37:11 <b>doubtless</b> 43:5 <b>draw</b> 36:16 <b>dsj</b> 1:3 <b>due</b> 16:6 21:10,25 26:7 33:24 34:13 34:24 40:7,17 43:16 46:19 <b>duly</b> 56:3 <b>dunk</b> 54:20 <b>duplicative</b> 34:14 35:1,16 39:20 <p style="text-align: center;"><b>e</b></p> <b>e</b> 1:21,21 3:1,1 6:1 6:1 19:2,5,18 24:16,16 37:8,9 39:2 57:1 58:1 <b>e.d.n.y.</b> 15:23 <b>e.g.</b> 30:5 <b>earlier</b> 11:3 12:5 16:20 26:25 46:23 47:9 <b>early</b> 8:3 10:14 <b>easily</b> 49:15 51:12 <b>ecf</b> 21:3,7 33:12 34:2,6,6 35:8 <b>economic</b> 47:21 <b>economically</b> 27:11 <b>ecro</b> 1:25 <b>edelman</b> 4:2 <b>effect</b> 16:14 26:13 <b>effected</b> 24:8 <b>effective</b> 48:11	<b>effectively</b> 24:17 <b>effectiveness</b> 48:8 53:9 <b>effectuation</b> 46:9 <b>effort</b> 10:25 11:4 11:13 39:10 <b>efforts</b> 10:18 <b>eight</b> 6:20 <b>eitan</b> 4:17 <b>either</b> 14:12 15:5 19:18 24:17 48:15 51:23 53:13 <b>election</b> 34:21 <b>eligibility</b> 41:16 <b>eliminate</b> 39:23 47:25 48:10 53:5 <b>eliminated</b> 53:21 <b>elin</b> 4:24 <b>emanuel</b> 3:10 52:4 <b>emerge</b> 13:2 <b>emergency</b> 48:5 53:1,23 <b>emilano</b> 4:21 <b>emphasize</b> 27:2 <b>employed</b> 31:4 <b>empowered</b> 12:1 <b>encompass</b> 36:19 <b>encounter</b> 49:21 <b>encumbered</b> 14:12 30:16 <b>enforceable</b> 45:20 <b>enforcement</b> 9:24 10:12,18 35:1 40:20 <b>engage</b> 9:5 50:22 55:10 <b>engaging</b> 37:15 <b>england</b> 9:25 11:15 29:24 36:1 36:2,9 <b>english</b> 9:23 12:16 12:20 24:2,4,8,14
--	--	---	---

<p>29:18,21 30:14,15 30:20 36:8,8,24 37:8 <b>enjoyed</b> 34:23 <b>ensuing</b> 50:13 <b>ensure</b> 14:12 19:6 19:16 23:2 38:13 41:23 44:1 46:9 <b>ensuring</b> 46:13 <b>enter</b> 25:20 <b>entered</b> 25:23 26:2 <b>entertain</b> 46:17 <b>entire</b> 34:16 <b>entirely</b> 34:14 36:9 38:18,20 44:24 <b>entirety</b> 7:6,10 <b>entities</b> 7:23 8:20 9:5,9 10:10 16:14 36:10 38:14 45:5 <b>entitled</b> 15:8 16:5 19:16 20:11 25:5 42:4,5 46:1 47:7 47:12 52:18 <b>entitlement</b> 34:21 34:21 35:3 41:7 44:4 <b>entitlements</b> 9:14 14:1,5,13 16:8 19:20 20:21,24 23:1 31:7,18 33:1 33:4 34:20 <b>entity</b> 7:19,21 8:1 8:3,4,12,15,16,18 8:18 9:2,8 17:22 39:2 <b>entry</b> 48:13 49:10 53:19 <b>enumerated</b> 22:5 27:21 <b>equitable</b> 30:13 30:17 31:3,4</p>	<p>52:16 54:18 <b>equitably</b> 48:3 <b>equity</b> 24:10,18 25:18,21 26:17 30:16 43:23 <b>equivalent</b> 40:12 <b>eric</b> 3:15 52:4 <b>error</b> 46:25 <b>escrow</b> 14:3,8 19:19 32:15,25 38:3,6,22 44:19 46:21,24 52:9 55:21 <b>escrowed</b> 28:21 32:19,24 38:6 40:4 43:13 44:8 <b>escrowing</b> 41:6 <b>especially</b> 42:24 47:21 <b>essence</b> 14:23 16:7 <b>essentially</b> 8:15 10:19 11:20 19:25 35:11 40:23 <b>establish</b> 9:4 44:3 <b>established</b> 16:3 17:13,25 <b>establishes</b> 30:15 30:19 <b>estate</b> 12:10 13:4 15:3,9,11,15,20 18:19,21,25 19:8 22:3,8,11,13,14 24:19 26:16,21 27:11 32:20 36:7 37:2,10 38:20,25 46:11,13 <b>estate's</b> 16:18 <b>estimate</b> 14:10 37:10,17 <b>estimating</b> 6:14 <b>event</b> 38:23</p>	<p><b>everybody</b> 51:7 55:13 <b>everyone's</b> 6:3 55:4,5 <b>evidence</b> 6:17 11:2 27:9 32:11 <b>evidentiary</b> 6:25 7:6 12:5 32:13 <b>evidently</b> 10:9 <b>exceed</b> 20:17 28:21 <b>exceeds</b> 19:9 40:11 <b>excerpts</b> 6:23 <b>excess</b> 21:20,21 32:19 <b>excessive</b> 39:8 43:12 <b>excuse</b> 13:7 35:15 41:2 <b>executed</b> 16:5 <b>exercise</b> 34:22 45:22 <b>exhibit</b> 21:3 34:2 <b>exhibits</b> 6:22 33:12,13 <b>exist</b> 30:22,22 36:22 43:24 <b>existing</b> 33:16 <b>exists</b> 8:16 <b>expand</b> 27:2 <b>expected</b> 9:9 55:8 <b>expedited</b> 55:12 <b>expended</b> 39:10 <b>expense</b> 40:1 <b>expenses</b> 12:11 20:11 21:21 42:11 <b>expert</b> 24:12,15 24:16 29:19 30:14 30:19 <b>experts</b> 24:4 36:8 <b>explain</b> 52:17</p>	<p><b>explained</b> 29:3 <b>explicitly</b> 12:19 <b>expose</b> 48:2 <b>expressed</b> 47:19 <b>expressly</b> 47:10 <b>extended</b> 16:6 <b>extending</b> 36:19 <b>extension</b> 53:1 <b>extensive</b> 24:3 <b>extensively</b> 29:23 41:13 <b>extent</b> 13:21 19:8 20:12 30:15 31:13 31:17 32:9,11 33:6 56:20 <b>extinguish</b> 24:13 <b>extraordinarily</b> 40:7 41:12 45:24</p>
			<b>f</b>
			<p><b>f</b> 1:21 4:14 22:5 22:22 27:17,20 28:3,7,9,14,18,19 28:24 29:1 30:10 30:11 31:2,8,10 31:12 37:8 58:1 <b>face</b> 41:20 52:16 <b>faced</b> 13:9 <b>faces</b> 42:22 <b>facilitate</b> 32:16 <b>facilitating</b> 28:11 <b>fact</b> 13:13 14:3 22:11 39:16 40:2 46:14 <b>factor</b> 20:13 <b>facts</b> 7:9 <b>factual</b> 32:10,11 38:1,4 41:3 <b>fair</b> 17:12 51:11 55:8 <b>fairly</b> 6:6 <b>faith</b> 11:13,21 17:15,18,21 37:15 42:17 47:7,12</p>

<b>familiar</b> 56:13	10:15,17,19,20	<b>follow</b> 13:10	<b>fully</b> 14:12 15:5
<b>familiarity</b> 7:11	11:12,14,19,25	28:25 50:20	42:15
<b>farmer</b> 4:22	12:13,15 13:1,3,8	<b>following</b> 12:5	<b>functioned</b> 10:3
<b>feature</b> 12:20	15:6 17:5,7 18:4	22:8 23:16 50:1,6	<b>funds</b> 14:3 32:23
<b>february</b> 21:2	18:16 19:16 20:9	51:11,17 55:22	38:6 41:4,6,17
33:25 41:11 43:5	20:11,19,23 21:3	<b>follows</b> 34:8,9	44:8 45:12 46:11
43:16	21:9,18 23:1,9,17	<b>foreclosure</b> 9:23	<b>further</b> 6:16
<b>fee</b> 12:11 39:12,15	23:20,23,24 25:16	10:20 11:4,6,9,14	13:20 15:2 18:24
40:9,9 42:23	26:6,8 27:7,19	39:4,8	24:18 30:19 34:20
43:11	28:2,17,20,24	<b>foregoing</b> 58:3	36:6,22 37:21
<b>fees</b> 19:11 21:17	30:12 31:4,11,11	<b>form</b> 13:25 31:15	38:4,18,23 39:16
21:19 32:2,5	31:14 32:19 33:1	35:3	40:13 41:19 44:7
39:18 40:12,14,16	33:23,24 34:7,19	<b>formality</b> 52:13	49:8 50:13 52:25
40:24 41:7,9,10	35:12,25 36:5,13	56:11	53:12,17 54:1,10
42:12,16,19,25	36:19 37:4,13,19	<b>formally</b> 25:4	55:12,22
43:2,5,14 44:2,10	38:23 39:11,13,19	<b>formed</b> 17:2	<b>future</b> 14:3 18:19
44:11 45:3	39:21 40:7,16,19	<b>former</b> 29:10	
<b>fetters</b> 37:8	41:11,22,22 42:3	<b>formulate</b> 54:24	<b>g</b>
<b>fides</b> 17:24	42:21 43:2,22	<b>forth</b> 33:11 34:1	<b>g</b> 3:22 6:1 24:16
<b>fifth</b> 31:16	45:8 46:8,18 48:2	<b>forthcoming</b> 27:5	<b>general</b> 7:15
<b>figueroa</b> 3:12	52:5 53:6 55:3,7	<b>forum</b> 9:21	<b>generally</b> 18:6,12
<b>figure</b> 40:4 43:4	<b>fitzwalter's</b> 11:3	<b>forward</b> 18:2,4,22	<b>generate</b> 49:9
<b>filed</b> 7:3,8 11:4,17	11:13,21 12:6	38:2 44:19 55:24	<b>generated</b> 27:4
21:3 54:9	14:1,11,13 15:6	<b>found</b> 27:1	42:10
<b>filing</b> 11:12,21	18:6 23:2 24:16	<b>four</b> 6:21 22:22	<b>generically</b> 7:20
37:21	26:3 28:23 31:7	22:24 39:1	<b>geopolitical</b> 47:21
<b>final</b> 7:1 55:21	31:13,17,21,24	<b>fourth</b> 27:16	<b>getting</b> 56:11
<b>finally</b> 23:3 45:8	34:5,20 35:2,20	<b>framework</b> 9:25	<b>giaino</b> 4:3
<b>financed</b> 7:23	36:25 39:3,7 40:6	14:15,21	<b>give</b> 15:25 24:19
9:19 33:19,21	40:22 41:6,9,10	<b>free</b> 15:9 22:23	36:6 37:1 49:16
<b>finances</b> 25:4	41:19 42:8,12,17	24:20 25:14 27:18	55:8 56:8
<b>finding</b> 25:12 27:2	43:11,14 44:1,5	27:22 29:2 30:9	<b>given</b> 10:22 16:19
28:15 47:9,10,11	45:25 46:10	<b>french</b> 8:2	36:23 37:23,25
47:12	<b>five</b> 22:4,24 27:21	<b>friday</b> 50:2 51:25	38:16 41:4 45:24
<b>findings</b> 14:17	39:19	<b>frustrate</b> 11:13	47:13 52:9
28:13	<b>flexibility</b> 18:19	<b>full</b> 11:11,24 13:2	<b>gives</b> 18:19 29:6
<b>fine</b> 50:16 51:19	<b>floor</b> 3:12	13:16 16:15 19:18	50:8 53:9,15
56:10	<b>flow</b> 34:17 38:16	20:20,21 22:21	<b>global</b> 17:16
<b>first</b> 7:14 23:12	45:12	25:13 26:13 27:15	<b>go</b> 14:17 44:19
28:1,4,20 36:2	<b>flowing</b> 56:17	28:15 31:6,22	51:19 54:3 55:24
47:5 54:25	<b>focused</b> 16:12	34:24 35:14 37:23	56:11
<b>fitzwalter</b> 3:11	<b>folks</b> 51:23	38:16 41:20 43:21	<b>goes</b> 18:22 38:2
6:15 8:4,9 9:11		46:3,14	<b>going</b> 7:14 27:12
			38:2 44:16 46:21

<p>48:20 50:10 52:21 53:18 54:9 55:12 55:25 <b>good</b> 6:2 17:15,18 17:20 37:15 42:17 47:7,12 48:17 50:25 56:19 <b>gorrepati</b> 4:23 <b>gosby</b> 4:24 <b>govern</b> 33:2 <b>governed</b> 9:21 <b>governing</b> 7:24 8:11 10:1 14:1,15 20:25 23:17 34:23 36:15,16 <b>governs</b> 14:18 36:9 <b>graham</b> 4:4 <b>grant</b> 22:7 <b>granted</b> 48:24 57:5 <b>gray</b> 4:25 <b>great</b> 56:6 <b>greater</b> 41:5 43:18 <b>green</b> 1:13 <b>greissman</b> 3:22 54:11,12,13,13,23 56:3,22 <b>griffin</b> 4:5,6 <b>grossly</b> 40:11 <b>ground</b> 26:19 <b>grounds</b> 30:8 <b>gsc</b> 15:23 <b>guarantee</b> 32:25 <b>guaranteed</b> 37:6 <b>guarding</b> 46:10 <b>guess</b> 48:17 50:23 52:8 53:22</p>	<p><b>h</b> <b>h</b> 24:25 <b>hamstrings</b> 53:8</p>	<p><b>h</b> <b>h</b> 24:25 <b>hamstrings</b> 53:8</p>	<p><b>happened</b> 10:14 <b>happens</b> 46:25 <b>happy</b> 50:22 <b>hard</b> 42:22 <b>harm</b> 46:8 56:17 56:17 <b>harrison</b> 5:1 <b>hash</b> 51:14 <b>hazan</b> 4:7 <b>head</b> 21:12 34:10 35:10,17 37:12 44:14 <b>heads</b> 49:16 <b>hear</b> 52:8 <b>heard</b> 6:20 52:5 <b>hearing</b> 2:1 6:21 6:22 7:9,10 11:1 12:6 14:7,19 17:19 18:14,15 24:15 25:10 26:1 30:2,4 32:12,14 40:8 47:16 49:5 50:13 55:22 <b>hearing's</b> 32:22 <b>heinrich</b> 4:11 16:19 <b>held</b> 7:21 8:12,13 19:3 22:18 25:19 27:18 28:4 31:5 34:10,11 <b>helpful</b> 49:11 50:22 <b>helpfully</b> 46:22 <b>hesitating</b> 54:24 <b>high</b> 16:24 20:14 20:23 21:19 40:8 42:10 <b>higher</b> 6:10 12:23 41:25 <b>highest</b> 13:12 <b>hint</b> 55:16 <b>hold</b> 16:7 22:8 23:12 26:17 30:16</p>	<p>46:20 55:17 <b>holder</b> 13:1 14:14 19:10 29:8 30:25 <b>holders</b> 8:8,10 12:2 16:14 31:25 46:18 <b>holds</b> 20:9 23:24 24:1 28:17 31:14 <b>hon</b> 1:22 <b>honor</b> 31:4 48:18 48:19 50:25 51:7 51:23 52:2,9,11 54:8 56:3,22,23 <b>honor's</b> 51:2 52:7 <b>hope</b> 53:14 <b>hopes</b> 41:25 <b>horse</b> 6:9 11:18 12:21 13:5,11 14:7 22:1 32:22 47:5,19 <b>hotly</b> 23:24 <b>hour</b> 6:20 <b>house</b> 24:23 <b>hugo</b> 4:22 <b>hyde</b> 2:25 58:3,8</p>	<p><b>impose</b> 47:23 48:4 48:8 <b>imposed</b> 27:17 47:17 52:9,12 <b>imposing</b> 43:12 45:5 <b>impressed</b> 55:4 <b>improper</b> 46:16 <b>improperly</b> 23:2 <b>include</b> 9:12 21:8 28:15 46:25 <b>included</b> 6:22 12:25 <b>includes</b> 18:3 19:11 <b>including</b> 11:22 17:6,19 20:14 21:20 23:5 24:23 28:15 33:18 41:1 44:23 45:10 <b>incorporate</b> 12:7 <b>incorrect</b> 26:18 <b>increase</b> 40:14 <b>increased</b> 40:16 40:24 45:6,6 <b>incurred</b> 42:17 43:2 <b>independent</b> 9:6 26:4 42:20 <b>indicator</b> 20:16 <b>industry</b> 27:12 <b>inherently</b> 37:4 42:16 <b>injunctive</b> 53:24 <b>insist</b> 51:18 <b>insists</b> 23:17,20 <b>installed</b> 26:4 <b>instinct</b> 51:2 <b>instructs</b> 45:19 <b>instrument</b> 9:20 <b>insufficiency</b> 19:21</p>
		<b>i</b>			
		<p><b>idea</b> 26:16 <b>identified</b> 25:1,3 26:11 54:15 <b>identifies</b> 43:22 <b>identifying</b> 7:19 <b>identity</b> 40:15,17 <b>immediate</b> 48:5 <b>immediately</b> 10:18,19 51:10 54:21 <b>impact</b> 16:10 <b>impediment</b> 36:22 55:23 <b>impediments</b> 37:14 <b>important</b> 47:4</p>			

<b>insufficient</b> 25:17 36:24	<b>introduced</b> 6:22	<b>jpa's</b> 11:22,23 12:14 35:11,22 38:12	30:15,20 32:9 36:8,8 37:11,16 39:25 43:2 45:24 53:2
<b>insurance</b> 21:22 39:19,23,24 40:1 40:5 44:13	<b>invalid</b> 24:14 26:6 29:21 45:1	<b>jpl</b> 7:23 8:19 11:23 35:22 38:12 38:19	<b>law's</b> 37:8
<b>intend</b> 44:18 47:1 52:9	<b>investments</b> 24:24	<b>jpl's</b> 30:1 37:20	<b>lawful</b> 11:13
<b>intended</b> 9:4 10:3 34:17 48:14	<b>involve</b> 6:16	<b>judge</b> 1:23 6:2	<b>laws</b> 7:22
<b>intense</b> 43:7	<b>involved</b> 17:23	<b>judgment</b> 16:1,5 17:2 22:17	<b>lawsuit</b> 36:9
<b>intensification</b> 40:18	<b>ion</b> 23:13	<b>judicial</b> 49:18	<b>leadership</b> 26:3
<b>intention</b> 11:10 43:25 53:14	<b>ireland</b> 8:21 29:24	<b>junior</b> 8:12 23:6	<b>learned</b> 24:4
<b>interest</b> 11:12 13:17 14:14 15:1 15:9 17:5 19:1,3,4 19:9,11 20:3,9 21:1 22:9,14 23:5 23:13,20 24:19 25:21,22 28:6,22 29:16 30:14,25 31:1,13,15,19 32:1 34:15 41:21 41:24 43:10 46:7 46:8,12,19 55:18	<b>irish</b> 8:22	<b>jurisdictions</b> 46:2	<b>lease</b> 6:9 8:16,23 9:7,14,16,22 10:1 10:2,4,6,20 11:4,6 11:15 12:18 16:12 16:22 21:9,12 23:16,18,18 25:19 25:25 26:17 28:5 29:5 35:1,3,17 37:12 39:21 44:14
<b>interested</b> 42:20	<b>isabella</b> 4:20	<b>justify</b> 27:22	<b>leased</b> 8:18 9:3
<b>interests</b> 7:25 14:16 15:7,10,17 19:17 22:20,20,21 23:2,19 25:24 27:14,18 28:5,17 28:23,25 31:21 42:4,18 46:12 53:15 56:15	<b>isle</b> 3:18	<b>justin</b> 4:6	<b>leases</b> 9:15 16:13 16:21 21:11 34:10 35:10
<b>intermediate</b> 8:20 8:21,22 9:4 10:10 25:19,22,24 26:2 26:9,10 28:1,4,9 28:12,16 29:4 34:18	<b>isolates</b> 36:13	<b>justification</b> 15:21 16:4,7 17:3 26:24	<b>leasing</b> 8:13 9:7
<b>interrelated</b> 6:19 14:9	<b>issue</b> 6:12 12:13 17:18 31:16 33:3 38:21 41:14	<b>known</b> 8:1,4	<b>ledanski</b> 2:25 58:3 58:8
	<b>issues</b> 6:15 32:9 37:19,24 41:2,3 41:18 47:5 49:4 50:18	<b>kotliar</b> 4:9	<b>leeway</b> 42:5
	<b>items</b> 34:8	<b>kyle</b> 3:8 48:18 51:1	<b>left</b> 18:10
	<b>iv</b> 35:19	<b>l</b>	<b>legal</b> 9:2,25 14:15 14:18,20 21:19 24:2,21 30:13 31:3 38:4 41:9,10 41:17 43:7,14 44:10 58:20
	<b>j</b>	<b>lack</b> 10:13 38:1	<b>legally</b> 22:9
	<b>j</b> 4:3	<b>language</b> 19:5 26:12,15 33:8	<b>legitimate</b> 15:21 16:3 17:3
	<b>jam</b> 54:20	<b>large</b> 27:14	<b>lender</b> 24:13 25:5 31:18 34:19 41:23 47:15
	<b>james</b> 4:2	<b>largely</b> 49:1	<b>lender's</b> 34:20
	<b>japan</b> 7:22	<b>launching</b> 12:9	<b>lenders</b> 7:25 9:11 10:11 12:17 13:19
	<b>jared</b> 3:25 21:4 34:3	<b>law</b> 8:22 9:21,23 12:16,20 13:20 14:6 24:4,8,14 25:3 26:11 29:2,8 29:18,21 30:9,14	
	<b>jason</b> 4:15		
	<b>jennifer</b> 4:1		
	<b>john</b> 4:12		
	<b>johnson</b> 4:8		
	<b>jointly</b> 7:17		
	<b>jonathan</b> 4:19		
	<b>jones</b> 1:22 6:3		
	<b>joseph</b> 5:5		
	<b>jp</b> 38:13		
	<b>jpa</b> 1:7 6:3 7:19 7:20,21,23 8:10 8:15,18 9:2,8,9 10:8,10,22 11:3 11:21		

<p>29:15 45:10 46:2 46:10 <b>length</b> 17:23 <b>lessee</b> 16:25 <b>lessee's</b> 16:9 <b>lessor's</b> 28:12 <b>lessors</b> 8:21,21,22 9:5 10:10 16:18 25:19,23,25 26:2 26:9,10 28:1,4,9 28:16 29:4 34:18 <b>letter</b> 44:15 <b>letters</b> 21:14 38:10 <b>letting</b> 51:19 <b>level</b> 21:19 <b>levels</b> 20:23 <b>leverage</b> 41:24 <b>levinson</b> 4:10 <b>liabilities</b> 33:15 <b>liability</b> 33:18 <b>license</b> 35:4 <b>lien</b> 19:1 24:2 29:7 <b>liens</b> 15:10 <b>light</b> 10:12 20:16 49:8 52:7 <b>likelihood</b> 30:11 <b>likewise</b> 28:14 <b>limitation</b> 33:18 <b>limited</b> 13:19 19:20 24:24 33:22 <b>limiting</b> 20:13 <b>line</b> 30:5,5 50:2 57:4 <b>link</b> 9:6 26:22 27:13 47:10 <b>links</b> 14:17 <b>liquidated</b> 38:14 <b>listed</b> 7:8 21:4 35:19 <b>litigation</b> 35:25 37:22 38:23 55:12</p>	<p>55:20 <b>little</b> 41:14 53:16 <b>livable</b> 55:14 <b>live</b> 6:24 <b>llp</b> 3:3,10,17 <b>lo</b> 5:2 <b>loads</b> 10:7 <b>loan</b> 21:15 <b>locks</b> 27:10 <b>loechteken</b> 4:11 16:20 36:14 <b>logistics</b> 55:11 <b>long</b> 25:13 29:12 <b>look</b> 19:7 49:8 53:15 54:6 <b>looking</b> 41:24 54:20 <b>los</b> 3:13 <b>lot</b> 51:2 55:13</p>	<p><b>market</b> 16:20 20:15,17 <b>marketing</b> 39:1,3 <b>masahiko</b> 4:18 <b>math</b> 44:17 <b>mathematical</b> 46:25 <b>matsuda</b> 5:3 <b>matter</b> 1:5 7:16 12:16 14:6 24:8 24:14 25:8 29:21 32:9 37:11,16 39:25 43:1 44:3 50:3 52:13 53:2 <b>matters</b> 18:9 50:11 <b>maximize</b> 16:18 <b>maximizing</b> 42:21 <b>maximum</b> 43:11 56:20 <b>mcclain</b> 4:12 <b>mckinney</b> 29:8 <b>mean</b> 55:19 56:8 <b>meaning</b> 13:15 18:9 33:7 36:12 45:5 <b>means</b> 33:14 <b>mechanism</b> 32:15 46:6 <b>meet</b> 10:6 27:17 27:20 <b>meeting</b> 25:6 <b>meets</b> 15:2 26:23 <b>mere</b> 12:19 42:1 <b>merely</b> 24:1 40:20 <b>mess</b> 44:17 <b>met</b> 19:6 22:17,22 27:1 37:13 53:24 <b>method</b> 19:19 <b>mf</b> 17:16 <b>michael</b> 4:2 <b>million</b> 13:14 14:8 18:17 20:4 21:9</p>	<p>21:12,17,20 22:2 32:24 37:13 38:3 41:10 43:4,14 44:9 <b>mineola</b> 58:23 <b>minimal</b> 37:22 48:6 <b>minimization</b> 39:9 <b>minimize</b> 49:23 <b>minimum</b> 17:2 <b>minor</b> 49:6 <b>misstated</b> 48:15 <b>mitsui</b> 8:13 <b>mizuho</b> 8:12 11:23 17:6 45:10 45:14,15 <b>modest</b> 49:3 <b>modification</b> 14:22 <b>modifications</b> 49:3 <b>modified</b> 49:8 <b>modify</b> 47:25 <b>moment</b> 54:24 <b>moments</b> 47:2 <b>monday</b> 49:18,25 50:6 <b>mondragon</b> 5:4 <b>monetary</b> 44:3 <b>money</b> 30:13 33:17 <b>monies</b> 33:15 <b>mooted</b> 48:3 <b>mootness</b> 52:16 54:19 <b>morning</b> 6:2 <b>morrissey</b> 4:13 <b>mortgage</b> 9:20,20 <b>motion</b> 6:7,13 11:17,21 12:6,8,9 13:10 14:9,10 21:5 23:7 24:6,6</p>
	<p><b>m</b></p>		
	<p><b>m</b> 4:20 47:8,12 <b>main</b> 21:7 34:6 <b>major</b> 31:16 47:15 <b>majority</b> 10:16 <b>management</b> 8:5 21:17 40:6,9,9,12 40:14 41:7 44:11 45:3 50:18 <b>managing</b> 40:23 <b>mandatory</b> 19:14 <b>manipulate</b> 49:15 <b>manner</b> 55:6 <b>mannone</b> 15:22 16:1 <b>manufacturing</b> 37:14 <b>march</b> 1:16 6:21 7:8,10 14:19 17:19 25:9 26:1 32:23 40:8 49:4 54:9 58:25</p>		

24:23 34:4,5 35:21 48:24 49:3 49:14 52:14 57:5 <b>motions</b> 6:19 22:7 <b>movants</b> 14:5 <b>move</b> 52:23 <b>moved</b> 11:20 <b>multiple</b> 28:19 46:2 <b>murphy</b> 5:5	29:5,8 40:23 41:18 <b>newly</b> 26:8 <b>non</b> 13:20 29:2 30:9 35:25 36:10 <b>nonexistent</b> 37:22 <b>note</b> 14:19 18:3 43:22 44:21 46:25 49:1 53:17 <b>noted</b> 15:13 47:24 56:3 <b>notes</b> 35:8 41:11 <b>notice</b> 6:6 7:3 10:22 11:3 17:9 26:24 28:10 49:1 49:11 55:9 <b>noticed</b> 6:20 27:3 <b>notwithstanding</b> 11:25 33:21 39:14 40:22 45:11 55:2 <b>number</b> 7:20 49:3 <b>numbers</b> 46:23 <b>ny</b> 1:14 3:6,20 58:23	35:2,11,13,14 36:3,6 38:12 45:7 45:22 46:9 <b>obligor</b> 29:7 33:20 45:5 <b>observations</b> 48:2 <b>observe</b> 31:10 <b>obstructionist</b> 42:9 <b>obviously</b> 33:25 49:17 56:4 <b>occur</b> 10:21 21:25 34:15 48:7 <b>occurred</b> 11:1 25:12 <b>offer</b> 13:13,13,14 18:4 <b>offered</b> 13:4,5 14:7,21 <b>offers</b> 12:23 18:2 27:4 <b>official</b> 29:9 30:6 <b>oh</b> 21:24 <b>okay</b> 48:20 49:2 50:8 51:8 52:1,7 54:1 56:6,17 <b>old</b> 58:21 <b>omitted</b> 48:15 <b>omnibus</b> 24:22 <b>operate</b> 16:13 <b>operative</b> 12:17 <b>opining</b> 24:3 <b>opinion</b> 12:7 <b>opportunity</b> 13:2 18:5 52:15 <b>oppose</b> 17:7 <b>opposed</b> 11:19,21 40:20 52:12 <b>oppositional</b> 42:9 <b>opted</b> 13:8 <b>oral</b> 2:1 6:7 7:13 48:13 52:13 53:19	<b>order</b> 6:13 12:21 12:25 18:21 19:6 21:6 23:3,11 25:11,14 34:4 44:7 45:9 46:17 48:9,11,13 49:1,2 49:7,13 50:9 53:9 53:19 54:5,7 <b>ordered</b> 13:7 <b>orders</b> 47:17,23 47:24 <b>ordinarily</b> 20:5 48:12 <b>ordinary</b> 22:16 <b>organized</b> 7:22 8:21 36:20 <b>orientation</b> 7:15 <b>originally</b> 8:2,19 <b>ortiz</b> 3:8 48:17,18 50:25 51:1,22 <b>outcome</b> 43:21 46:3 55:21 <b>outlined</b> 7:7 <b>outstanding</b> 13:17 20:3 21:1 42:15 <b>overall</b> 14:20 <b>overcame</b> 26:11 <b>overly</b> 42:9 <b>owed</b> 6:14 32:18 42:1 <b>owing</b> 33:19 <b>owned</b> 8:19 <b>owner</b> 25:3,5 29:19 <b>owners</b> 23:6 <b>ownership</b> 29:5 29:16 39:21 <b>owning</b> 40:20 <b>owns</b> 14:23 <b>ozen</b> 5:6
<b>n</b>	<b>n</b> 3:1 6:1 24:25,25 39:2 57:1 58:1 <b>name</b> 24:16 39:2 54:12 <b>nature</b> 32:11 45:25 <b>nava</b> 4:7 <b>nearly</b> 6:20 <b>necessary</b> 14:11 19:4 31:19 32:12 <b>need</b> 6:4 14:23 15:2,4 19:15 22:7 22:25 23:3 24:7 32:5 43:9 49:7 50:11,18 52:8 53:22 54:6,18 56:7,15,16,21 <b>needed</b> 18:18 32:13,13 51:21 53:14 <b>needn't</b> 31:9 <b>needs</b> 49:10 <b>negotiated</b> 16:23 19:24 23:10 39:11 45:18 46:6 <b>negotiation</b> 17:22 <b>negotiations</b> 17:23 36:20 <b>nevertheless</b> 38:20 45:20 <b>new</b> 1:2,14 3:6,20 9:21,21 10:17	<b>o</b> <b>o</b> 1:21 6:1 39:2 58:1 <b>object</b> 40:10 41:19 <b>objected</b> 11:12 26:6 28:3 <b>objection</b> 7:4 26:7 <b>objections</b> 23:15 47:15 <b>objective</b> 41:15 43:1 <b>objectives</b> 42:21 <b>objector</b> 18:10 <b>obligation</b> 33:18 <b>obligations</b> 9:10 10:4,7 20:24 21:8 23:22 25:6 32:18 33:10,14,15 34:25	

<b>p</b>	<b>party's</b> 56:15	<b>persuade</b> 20:7	<b>posture</b> 32:7 41:1 42:24
<b>p</b> 3:1,1 4:10 6:1	<b>pass</b> 9:5,8	<b>persuaded</b> 39:6	<b>potential</b> 14:3 41:6 44:1
<b>pace</b> 51:19 55:8 55:20	<b>passed</b> 7:5	<b>persuasive</b> 17:1	<b>potentially</b> 25:2 44:10,11
<b>page</b> 30:4,5 35:20 57:4	<b>passenger</b> 10:7	<b>pertinent</b> 18:8	<b>practical</b> 25:8 44:2 49:16 50:3
<b>pages</b> 21:5 24:22 34:4 54:17	<b>path</b> 42:14	<b>petitions</b> 11:5	<b>pre</b> 16:11
<b>paid</b> 27:14 30:24 46:14	<b>patrick</b> 5:9	<b>phone</b> 51:5	<b>precise</b> 40:4
<b>pamela</b> 5:10	<b>pause</b> 31:9	<b>pike</b> 55:10	<b>precludes</b> 30:2
<b>pandemic</b> 10:5,8	<b>pay</b> 15:5 22:21 33:19 37:23 38:16 41:20 42:15 43:21 46:3,18	<b>places</b> 21:5 34:2	<b>predecessors</b> 23:20
<b>paragraph</b> 18:7 18:13	<b>payment</b> 10:4,13 11:11,24 13:14,15 19:19 20:20,24 23:5,8 28:15 33:17 34:14,24 35:2,4,14,15 45:6 45:9,18,22 46:6,9	<b>plain</b> 26:12	<b>prejudice</b> 38:4 44:22 53:12,25
<b>paragraphs</b> 35:8	<b>payments</b> 9:7 10:8 21:9 34:17 34:22 35:3,10 39:20	<b>plan</b> 18:9,10,16 18:17,19	<b>premature</b> 50:14
<b>parent</b> 7:22 8:19 11:23 21:14 35:22 38:9,12 44:15	<b>pays</b> 14:12	<b>plausibly</b> 36:18	<b>premise</b> 34:16
<b>parlance</b> 24:2	<b>pending</b> 7:1 36:2 36:9 52:14,18 55:22	<b>play</b> 19:22	<b>premiered</b> 26:16
<b>part</b> 7:24 13:25 21:18 30:6 33:9	<b>penn</b> 3:5	<b>played</b> 40:22	<b>prepared</b> 37:24 52:10,11,17
<b>partially</b> 6:12	<b>people</b> 50:21 51:9 53:15 55:24 56:1	<b>plaza</b> 3:5	<b>prepetition</b> 39:4
<b>participants</b> 23:7 33:3	<b>perceive</b> 37:16	<b>pledges</b> 37:20	<b>present</b> 3:24 17:21 27:8 37:17
<b>participating</b> 23:6	<b>percent</b> 43:15	<b>pledging</b> 24:9	<b>presentation</b> 6:16
<b>particular</b> 27:12	<b>percentage</b> 39:12	<b>plus</b> 7:19 13:15,18 20:4,4 32:1 35:18 35:24 44:10,11,12 44:13,14	<b>presentations</b> 43:19
<b>particularly</b> 15:3 16:19 37:24	<b>perfect</b> 51:22	<b>pm</b> 56:25	<b>presented</b> 16:7 40:1
<b>parties</b> 7:7 11:11 11:22 14:2 17:5 23:5 24:8 25:3 27:19 29:23 32:8 32:12,15 33:20,21 36:1,7 41:2,21 42:2 43:19 44:6 44:22 45:17 46:6 46:7,20 49:11 50:12 51:3,5 54:6 55:18	<b>perform</b> 45:6	<b>pocket</b> 50:6	<b>presentment</b> 7:4
<b>partly</b> 44:24 45:15	<b>period</b> 10:3 53:2 53:18	<b>point</b> 7:11 37:25 42:16	<b>preserve</b> 41:6
<b>party</b> 24:9 29:7 29:11,12	<b>permissible</b> 23:4	<b>pools</b> 24:23	<b>presumably</b> 36:9
	<b>permit</b> 22:10 25:17 31:21	<b>portion</b> 38:5	<b>prevailing</b> 20:6
	<b>permits</b> 29:2 30:9	<b>portions</b> 39:14	<b>prevent</b> 29:19
	<b>person</b> 5:7 33:22	<b>position</b> 8:12 11:22 37:4,7 41:25	<b>preventing</b> 29:15
	<b>persons</b> 21:19	<b>positions</b> 55:3	<b>preview</b> 50:9
		<b>possesses</b> 29:16	<b>price</b> 17:11 20:2,7 20:10,16,18 22:1 23:4
		<b>possibility</b> 44:23 44:25	<b>principal</b> 13:17 20:3 21:1 28:22 31:18 32:1 34:15 46:19
		<b>possible</b> 9:23 20:22 37:20 39:16 39:17 40:2 46:11 51:16 53:21 55:14 56:20	
		<b>possibly</b> 34:13 35:22 41:18 45:24	



<p><b>prior</b> 10:11 11:1 18:15 24:6,15 26:3 39:22 44:7</p> <p><b>privately</b> 7:21</p> <p><b>probably</b> 51:3</p> <p><b>problem</b> 42:22</p> <p><b>problematic</b> 47:20</p> <p><b>procedural</b> 6:18 6:25 22:16 26:25 32:7 48:22 50:11</p> <p><b>procedurally</b> 50:24</p> <p><b>procedures</b> 11:18 12:9,21 13:7 17:10 24:6</p> <p><b>proceed</b> 11:10 12:22 44:6 50:23 52:9,10</p> <p><b>proceeded</b> 6:24</p> <p><b>proceeding</b> 6:6 17:15 30:13,23 31:3 34:7 45:25</p> <p><b>proceedings</b> 6:16 7:11 32:17 46:2 56:24 58:4</p> <p><b>proceeds</b> 9:10 15:5 28:21 30:24 33:11 35:7 45:3,9 45:13,15</p> <p><b>process</b> 6:4,10 12:10,24 13:3 14:9 17:14 18:1,5 27:4 42:6 50:15 51:2 55:13</p> <p><b>processing</b> 49:21</p> <p><b>productive</b> 51:11</p> <p><b>professional</b> 42:11 55:6</p> <p><b>professionalism</b> 55:5</p> <p><b>profit</b> 42:20</p>	<p><b>progression</b> 26:22</p> <p><b>promised</b> 41:20</p> <p><b>promptly</b> 11:10 11:17</p> <p><b>prongs</b> 28:14</p> <p><b>proper</b> 16:1 28:25</p> <p><b>properly</b> 6:20 18:9,11 27:3 38:19</p> <p><b>properties</b> 22:12</p> <p><b>property</b> 14:14 15:1,3,9,12,14,17 15:20 19:3,8,17 20:10 22:9,11,13 22:20 23:13,22 24:10,19,20 25:13 25:21 26:20 29:17 29:20 30:17,18 31:5,15,23</p> <p><b>proponents</b> 48:1 53:5</p> <p><b>propose</b> 14:2</p> <p><b>proposed</b> 6:8 11:24 12:3,15 15:1 17:25 18:17 18:21,22,25 20:10 22:3,15,23 23:13 26:19,23 27:9 31:20 38:7 43:21 45:9 49:2,7,9,13 50:9,17,17</p> <p><b>proposes</b> 22:10</p> <p><b>prospective</b> 55:16 55:16</p> <p><b>protect</b> 15:6 22:21 22:25 31:21 42:17 46:7 56:15</p> <p><b>protected</b> 18:5 19:18 27:15 44:2</p> <p><b>protecting</b> 43:10</p> <p><b>protection</b> 19:4 34:22 37:6 38:22 44:4 53:10</p>	<p><b>protections</b> 18:12 47:8</p> <p><b>protects</b> 14:13</p> <p><b>provide</b> 6:7 7:15 19:4 32:23 38:2 44:4 49:12 52:13</p> <p><b>provided</b> 19:12 21:2 32:2,6 33:5,9 33:23 48:12</p> <p><b>provides</b> 18:17 35:13 52:20</p> <p><b>provision</b> 19:14 29:9 33:14 35:15 45:8 46:8</p> <p><b>provisions</b> 7:2 9:24 12:17,25 16:12 27:25 36:18 54:14</p> <p><b>prudent</b> 12:8</p> <p><b>purchase</b> 12:22 17:11 20:2,10 22:1 54:7,14</p> <p><b>purchaser</b> 6:9 12:3 17:15,21 22:2 25:14 32:25 47:6,7,7,11,19 55:16,17,20</p> <p><b>purchaser's</b> 17:18 25:10</p> <p><b>purport</b> 14:24,25</p> <p><b>purported</b> 12:15 22:11 24:12</p> <p><b>purporting</b> 26:20</p> <p><b>purports</b> 15:14 18:21</p> <p><b>purpose</b> 6:6 8:15 28:11 39:7</p> <p><b>purposes</b> 19:22,25 46:12</p> <p><b>pursuant</b> 6:24 9:20 13:22 15:4 33:20</p>	<p><b>pursue</b> 13:9 40:19</p> <p><b>pursued</b> 10:18</p> <p><b>pursuing</b> 17:4 39:8 40:21</p> <p><b>pursuit</b> 11:13 39:4</p> <p><b>put</b> 51:9</p> <p><b>puts</b> 55:12</p> <p><b>putting</b> 14:2</p> <p style="text-align: center;"><b>q</b></p> <p><b>qualified</b> 13:7</p> <p><b>qualifying</b> 6:10 13:8,13 30:18</p> <p><b>quantify</b> 42:23</p> <p><b>question</b> 22:18 24:3 27:16,24 31:23</p> <p><b>questioning</b> 20:20</p> <p><b>questions</b> 22:24 23:11 29:21 38:15</p> <p><b>quick</b> 10:15</p> <p><b>quinn</b> 3:10 52:4</p> <p><b>quite</b> 41:18 52:19</p> <p><b>quote</b> 36:17</p> <p><b>quoted</b> 43:4</p> <p style="text-align: center;"><b>r</b></p> <p><b>r</b> 1:21 3:1 5:8 6:1 24:16,16,25 37:9 39:2,2 58:1</p> <p><b>raise</b> 37:20 56:8</p> <p><b>raising</b> 52:24</p> <p><b>rate</b> 39:11</p> <p><b>rates</b> 21:18</p> <p><b>ratified</b> 29:24</p> <p><b>reach</b> 31:9</p> <p><b>reached</b> 50:7</p> <p><b>read</b> 27:23</p> <p><b>ready</b> 55:24</p> <p><b>reality</b> 17:4 36:23 37:3 41:4 47:14</p> <p><b>really</b> 53:7</p> <p><b>reason</b> 8:25</p>
---	---	--	--

<p><b>reasonable</b> 13:19 13:22,25 17:2,12 19:11 20:4,11 28:22 31:17 32:2 32:6 33:6 42:6 43:11 53:9</p> <p><b>reasonably</b> 16:17 42:19 56:14</p> <p><b>reasoning</b> 35:5</p> <p><b>reasons</b> 13:20 17:20 23:16 37:9 47:9 48:23</p> <p><b>recap</b> 22:7 48:21</p> <p><b>recapped</b> 7:12</p> <p><b>receive</b> 9:7</p> <p><b>received</b> 13:8</p> <p><b>receiving</b> 20:20 46:3</p> <p><b>recipient</b> 32:21</p> <p><b>recited</b> 46:23</p> <p><b>reconvene</b> 51:14</p> <p><b>record</b> 7:1,7 17:20 27:24 32:23 39:6 43:4 47:2 48:24 58:4</p> <p><b>recourse</b> 33:21,22</p> <p><b>recover</b> 35:5</p> <p><b>recoveries</b> 16:18 35:1</p> <p><b>recovery</b> 43:11</p> <p><b>redeem</b> 29:6,11 30:17 31:5</p> <p><b>redemption</b> 24:10 24:18 25:18,21 26:17 30:3,16,20</p> <p><b>reduce</b> 40:8</p> <p><b>reduces</b> 52:20</p> <p><b>reduction</b> 38:6 43:16,17</p> <p><b>reductions</b> 39:17 40:3</p> <p><b>reef</b> 3:18</p>	<p><b>reenforced</b> 25:9</p> <p><b>refer</b> 8:20 9:14</p> <p><b>reference</b> 12:7 20:6</p> <p><b>referred</b> 7:19,23 8:3,12,24 9:14</p> <p><b>reflecting</b> 26:15 49:12</p> <p><b>reflects</b> 34:22 43:15</p> <p><b>refusals</b> 38:12</p> <p><b>refuse</b> 20:15</p> <p><b>regard</b> 44:1 50:9</p> <p><b>regroup</b> 51:6</p> <p><b>regularity</b> 26:25</p> <p><b>reinforced</b> 29:22</p> <p><b>reiterate</b> 47:10</p> <p><b>reject</b> 23:16 26:18 29:3 39:25</p> <p><b>rejected</b> 26:19</p> <p><b>rejecting</b> 43:20</p> <p><b>related</b> 17:21 45:1</p> <p><b>relating</b> 9:15 35:23 36:15 44:12</p> <p><b>relatively</b> 49:6</p> <p><b>release</b> 38:5</p> <p><b>released</b> 32:20</p> <p><b>relevant</b> 7:24 8:7 14:16 25:2 26:12 32:6 36:10</p> <p><b>reliably</b> 20:6</p> <p><b>relief</b> 21:6 48:5,24 53:24</p> <p><b>remain</b> 16:13 38:14 47:5</p> <p><b>remaining</b> 32:18</p> <p><b>remarks</b> 26:25 48:14</p> <p><b>remedies</b> 11:14 39:4,8 40:20</p> <p><b>removed</b> 26:3</p> <p><b>rendered</b> 39:16</p>	<p><b>renders</b> 23:21</p> <p><b>renegotiation</b> 40:21</p> <p><b>rent</b> 9:10 34:9,17 34:21 35:16</p> <p><b>rental</b> 35:10</p> <p><b>rents</b> 9:7</p> <p><b>reorganized</b> 38:15</p> <p><b>repaid</b> 16:15 41:23</p> <p><b>repayment</b> 13:16 25:6 42:1</p> <p><b>repeat</b> 27:2</p> <p><b>replacement</b> 16:22</p> <p><b>reply</b> 24:22</p> <p><b>report</b> 56:4</p> <p><b>reportedly</b> 10:2</p> <p><b>represented</b> 17:24 34:19</p> <p><b>request</b> 26:5 46:17 47:6,16 50:19</p> <p><b>requested</b> 23:7 33:23 40:2,9 45:21</p> <p><b>require</b> 12:10 44:18 49:6</p> <p><b>required</b> 38:6</p> <p><b>requirement</b> 9:22 18:24 19:6 22:19 41:16 45:11 46:16</p> <p><b>requirements</b> 15:3,19 22:4,6,17 22:22 24:21 26:23 27:1,17,20 31:2 31:25 55:22 56:13</p> <p><b>requires</b> 19:2,7,25 27:20 48:16</p> <p><b>requiring</b> 28:6 41:3 43:25</p>	<p><b>reservation</b> 41:2,2</p> <p><b>reserve</b> 41:4 43:13,25</p> <p><b>reserving</b> 6:15</p> <p><b>resolution</b> 18:20 38:17 41:20</p> <p><b>resolve</b> 12:8</p> <p><b>resolved</b> 18:22 48:25</p> <p><b>respect</b> 6:13 21:11 36:2</p> <p><b>respective</b> 9:13 33:2</p> <p><b>responds</b> 40:16</p> <p><b>responsibility</b> 7:25</p> <p><b>rest</b> 51:12</p> <p><b>restrictions</b> 30:2</p> <p><b>restructuring</b> 16:12</p> <p><b>result</b> 11:11 13:11 30:23 37:3 38:5 40:18 42:24 45:4 46:14</p> <p><b>resulting</b> 11:24 20:16 32:19 38:11 39:17 49:21</p> <p><b>results</b> 27:24</p> <p><b>retain</b> 39:1,2</p> <p><b>retaining</b> 39:7</p> <p><b>retains</b> 24:9</p> <p><b>retire</b> 23:22</p> <p><b>return</b> 21:23 41:25</p> <p><b>reveals</b> 38:23</p> <p><b>revenue</b> 10:7,9,9 16:8</p> <p><b>revenues</b> 9:15 16:9</p> <p><b>reviewing</b> 34:8</p> <p><b>richard</b> 4:4,13</p> <p><b>right</b> 15:9 22:9 23:12 24:14 29:6</p>
--	---	---	---

<p>30:3,3,17 35:2 50:21 51:2,8 <b>rights</b> 6:9 9:15 18:11 31:4 33:2 37:15 44:1 <b>rise</b> 24:19 36:6 37:1 <b>risk</b> 39:23 46:3 48:3 <b>road</b> 58:21 <b>robert</b> 4:8 <b>robustly</b> 18:5 <b>role</b> 40:12,22 <b>room</b> 41:15 48:6 53:16 <b>rosa</b> 18:9,16,17 <b>roughly</b> 22:2 24:2 41:10 <b>royale</b> 3:18 <b>rule</b> 6:17 38:21 43:1 52:15 <b>ruled</b> 56:5 <b>rules</b> 47:18,23 48:12 52:13 <b>ruling</b> 2:1 6:7,12 7:13 47:9 48:13 49:8 50:8,15 53:20 54:16 56:13 <b>rulings</b> 52:8 57:3 <b>run</b> 53:19 <b>rush</b> 56:8 <b>rushed</b> 48:4 <b>russell</b> 5:8</p>	<p>18:12,15,17,20,21 18:23 19:2,24 22:10,13,15,19,23 23:3,4,14 24:21 25:15,17,20 26:19 26:23 27:3,22 28:11,12,20 29:2 29:15 30:1,4,9,23 31:6 32:16 34:15 35:13 37:5,14 38:2 42:15 44:19 45:9 47:17,23 57:5 <b>sale's</b> 43:21 <b>sales</b> 15:3 22:3,17 27:18 39:13 <b>satisfaction</b> 19:18 28:6 30:13 31:6,7 31:22 34:19 <b>satisfied</b> 17:20 23:5 24:21 28:3,9 28:19,20 29:1 30:10,12 31:3,11 31:12 41:16 <b>satisfies</b> 28:23 <b>satisfy</b> 9:10 15:18 18:18 22:4,19 27:21 30:24 31:24 34:25 <b>says</b> 21:10 33:14 39:13 <b>schedule</b> 49:17 <b>scheduled</b> 10:21 <b>schedules</b> 51:17 <b>scheduling</b> 50:11 50:18 51:6 <b>scheme</b> 45:18 <b>scott</b> 3:22 54:13 <b>second</b> 26:22 28:8 29:1 47:13 52:17 <b>secondary</b> 29:7 <b>section</b> 13:22 15:4 15:12,18,21 19:1</p>	<p>19:5,7,13,18 20:12,22 22:22 27:17,20 28:3,7,8 28:14,18,19,24 29:1,5,8,10,12,13 29:14 30:10,11 31:2,8,25 33:3,7 33:11 41:16 45:3 45:18,23 47:8,12 <b>secure</b> 11:24 <b>secured</b> 6:14 7:24 7:25 8:6 9:11 10:11,16 12:2,17 13:1,17,18 18:18 19:9,16,20 20:2 20:13,17,24 21:1 21:6 23:1 24:13 25:4,7 27:14 29:7 29:11,12,15,20 30:24 31:18 32:1 33:10,14 34:5,19 34:20 35:11,13,14 36:6,7 37:1 42:3 42:15,18 46:13 47:15 <b>secures</b> 35:11 <b>security</b> 8:1,1,6,9 9:12,24 10:11,17 11:25 12:16,19 15:7 19:1,9,10 22:20 23:19,25 28:10,17 31:1,15 34:22 35:3 40:15 40:17,18,24 42:18 45:4,12 <b>see</b> 15:21,23 16:1 17:16 18:6,12 24:21 30:4,5 35:7 55:5,21 <b>seeing</b> 18:1 <b>seeking</b> 11:17 41:23</p>	<p><b>seeks</b> 41:8 <b>seemingly</b> 10:22 12:1 22:12 <b>seen</b> 11:2 42:25 43:6 <b>segal</b> 3:3,3 48:18 48:18 51:1 <b>selection</b> 9:21 <b>self</b> 41:24 42:20 46:12 <b>sell</b> 14:24,25 15:8 15:14,20 18:25 23:21 24:20 25:5 26:20 30:4 <b>seller</b> 56:4 <b>selling</b> 29:20 <b>sense</b> 51:4,22 55:19 <b>sensitive</b> 49:22 53:4 <b>separate</b> 25:16 <b>serious</b> 38:15 42:12 56:14 <b>serve</b> 9:6 46:12 <b>served</b> 42:19,20 <b>serves</b> 42:6 <b>services</b> 39:15 41:17 <b>set</b> 20:2,14 33:11 34:1 43:18 45:15 47:1 <b>setting</b> 16:16 <b>seven</b> 41:9 48:11 52:12 53:8,18 <b>severely</b> 16:9 <b>shah</b> 24:17 <b>share</b> 49:24 <b>shaughnessy</b> 4:14 <b>short</b> 6:6 35:9 <b>shorten</b> 48:10 <b>shortfall</b> 10:9 <b>shortly</b> 9:18 28:25</p>
<p><b>s</b></p>			
<p><b>s</b> 1:22 3:1 6:1 31:8 37:9 <b>s.d.n.y.</b> 15:24 17:17 <b>sale</b> 6:8 10:20,21 11:6,11,19,24 12:10,11,15 13:10 14:9,12 15:1,2,21 16:4 17:6,7,9 18:8</p>			

<b>show</b> 15:20 37:22 <b>showing</b> 15:25 17:1,10 <b>shown</b> 18:16 <b>shows</b> 41:22 <b>side</b> 24:23 <b>sides</b> 17:24 <b>sidney</b> 4:10 <b>sign</b> 6:4 <b>signatories</b> 26:14 <b>signature</b> 58:7 <b>significant</b> 27:10 43:9 <b>significantly</b> 43:18 <b>signing</b> 54:17 <b>simply</b> 34:13 <b>single</b> 8:15,17 26:4 <b>six</b> 23:3 40:6 <b>skilled</b> 17:24 <b>slam</b> 54:20 <b>slight</b> 49:21 <b>slightly</b> 7:14 22:6 38:22 <b>slow</b> 55:20,25 <b>social</b> 16:16 <b>sold</b> 14:14 19:17 22:11 28:18 29:17 <b>solely</b> 40:14 <b>solutions</b> 58:20 <b>solvent</b> 38:14 <b>somewhat</b> 7:15 31:16 <b>sonya</b> 2:25 58:3,8 <b>soon</b> 55:19 <b>sorry</b> 21:24 54:2 54:13 <b>sort</b> 49:19 <b>sounds</b> 51:8 54:5 <b>source</b> 25:2 <b>south</b> 24:23	<b>southern</b> 1:2 <b>speak</b> 12:1 <b>specific</b> 12:25 18:11 39:16 47:1 47:6 <b>specifically</b> 6:15 12:15 18:3 44:21 53:11 54:15 55:7 <b>speech</b> 36:20 <b>spelled</b> 21:16 24:16 <b>spot</b> 50:15 51:9 <b>squared</b> 37:8 <b>staff</b> 46:22 <b>stage</b> 12:3 <b>stages</b> 16:20 <b>stalking</b> 6:9 11:18 12:21 13:5,11 14:7 22:1 32:22 47:5,19 <b>stance</b> 41:12 <b>standard</b> 53:23 <b>standards</b> 52:18 <b>start</b> 50:23 <b>state</b> 14:16 19:12 24:1 32:3 37:18 44:16 46:22 <b>stated</b> 6:25 11:10 17:20 25:10 44:20 47:2,9 48:23,25 53:3 <b>states</b> 1:1,12 27:23 29:9,24 <b>status</b> 9:25 <b>statute</b> 19:12 27:23 32:3 52:20 <b>statutes</b> 32:7 <b>stay</b> 45:2 47:17,23 48:1 52:12,14,18 53:1,5 54:19 56:13 <b>stayed</b> 10:3	<b>stays</b> 53:24 <b>steeply</b> 10:7 <b>steps</b> 6:18 45:1 48:22 50:9,10,24 <b>stipulated</b> 32:8 <b>stipulation</b> 6:25 7:2 50:12 <b>stock</b> 56:5 <b>strain</b> 55:13 <b>street</b> 3:12 <b>strenuously</b> 47:14 <b>strips</b> 23:21 <b>structure</b> 9:1,4 39:13 <b>sub</b> 18:8,15,17 28:14 <b>subject</b> 9:23,23 10:1 12:22 15:19 19:1,3,8 22:19 24:3 25:6 29:20 39:16 40:2 49:3 <b>subjected</b> 27:3 <b>submissions</b> 7:7 32:10 <b>submit</b> 49:1,9 <b>submitted</b> 49:2,13 <b>subordination</b> 45:19 <b>subparts</b> 28:19 <b>subsection</b> 29:10 31:10,12 <b>subsections</b> 31:8,9 <b>subsequent</b> 32:13 32:17 46:17 <b>substance</b> 11:2 <b>substantial</b> 8:5,11 13:24 15:13 30:11 43:23 <b>substantively</b> 7:18 <b>succeeded</b> 8:6 <b>succession</b> 10:15	<b>sufficient</b> 13:16 15:1,17 19:19 22:9,14 23:12 24:19 26:24 29:16 31:8 38:21 53:10 <b>suggested</b> 43:20 <b>suggests</b> 20:19 <b>suitable</b> 16:22 <b>suite</b> 58:22 <b>sullivan</b> 3:10 <b>sum</b> 44:9,19 48:23 <b>sumitomo</b> 8:13 11:23 17:6 45:11 <b>summarized</b> 34:3 <b>superhuman</b> 56:2 <b>superior</b> 13:4 18:2 <b>supplementation</b> 48:16 <b>support</b> 14:8 15:1 17:6 21:14 22:15 26:5 37:21 38:9 44:15 49:2,13 <b>supported</b> 11:22 35:6 37:3 <b>sure</b> 13:1 53:17 54:21 56:16 <b>suspect</b> 50:14 <b>swain</b> 5:9 <b>sweepingly</b> 36:19 <b>sympathetic</b> 48:1 <b>syndicate</b> 23:6  <b>t</b> <b>t</b> 24:16,25 37:8,8 47:20 58:1,1 <b>take</b> 6:4 10:12 34:21 56:5,21 <b>taken</b> 41:11 45:1 <b>takes</b> 36:11 37:4 <b>talk</b> 22:5 48:22 <b>talked</b> 54:5 <b>task</b> 42:25
--	---	--	---

<p><b>tax</b> 9:1  <b>taylor</b> 5:1  <b>telephonically</b> 3:8              3:15,22,24  <b>tell</b> 55:18  <b>tells</b> 33:4  <b>tend</b> 50:4  <b>term</b> 33:10  <b>termed</b> 44:13  <b>terms</b> 16:23 23:8              35:9 36:16 55:10  <b>terrorism</b> 36:21  <b>terry</b> 5:10  <b>tested</b> 17:25  <b>testimony</b> 6:24              16:19 24:4,12,15              29:18 30:14,19  <b>thank</b> 6:5 48:20              52:1,24 54:23              55:1 56:6,11,19              56:22,23  <b>thing</b> 44:17  <b>things</b> 7:12 9:19              10:14 21:9 38:13              49:20,24 50:5,5,7              56:2  <b>think</b> 42:5 50:21              51:1,3,10,22              52:18 53:6,8,21              56:14  <b>third</b> 27:13 30:10              37:3  <b>thorsness</b> 5:11  <b>thought</b> 54:25              56:14  <b>three</b> 22:18 38:9  <b>thursday</b> 49:18  <b>tie</b> 36:24  <b>tight</b> 50:3  <b>time</b> 10:13 11:8              14:16 27:11 33:19              33:19 38:1 39:18              40:3 42:7 43:8</p>	<p>49:22 51:21 52:21              52:25 53:4,10  <b>timely</b> 10:13  <b>times</b> 19:20 20:19              42:9 47:22  <b>title</b> 12:14,18 15:9              22:9 23:12,21,25              24:11 25:4,13,15              28:10  <b>today</b> 6:5 11:8              14:19 16:11 19:23              20:1 22:18 37:24              49:6,17 56:7  <b>today's</b> 6:6 49:8  <b>togut</b> 3:3 5:12              48:18 51:1  <b>told</b> 8:25 9:3  <b>top</b> 13:15  <b>topic</b> 27:14  <b>total</b> 20:3 34:12              36:12 40:11 44:16              46:23  <b>touch</b> 54:21  <b>tough</b> 55:2  <b>town</b> 29:22 30:2,6  <b>track</b> 49:12  <b>training</b> 49:19  <b>transaction</b> 8:7              10:2 14:2 16:24              20:15,25 21:15              23:8 24:1 27:9              28:23 31:20,24              33:2,20 35:9 38:8              43:13 44:7 45:7              46:4,15 53:4  <b>transactions</b> 8:11              14:1 33:3 34:16  <b>transcribed</b> 2:25  <b>transcript</b> 30:4              58:4  <b>transcripts</b> 6:23  <b>transfer</b> 26:13</p>	<p><b>transition</b> 16:23  <b>transportation</b>              27:12  <b>travel</b> 16:10 49:17  <b>traveling</b> 49:25  <b>treated</b> 9:16  <b>treaty</b> 29:22 30:2  <b>tregear</b> 24:15              29:19  <b>tried</b> 20:7  <b>true</b> 28:8 58:4  <b>trust</b> 8:13  <b>trustee</b> 15:25  <b>try</b> 49:22 51:23              55:10,13  <b>trying</b> 54:24  <b>turn</b> 8:22 9:8,9              14:15 50:10  <b>turning</b> 43:23  <b>tweaked</b> 44:16  <b>twice</b> 35:5  <b>two</b> 7:16,17 8:20              22:16 33:3 34:10              35:17 47:4</p>	<p><b>understand</b> 35:21              52:11  <b>understanding</b>              14:20  <b>understood</b> 56:18  <b>undisputed</b> 9:13  <b>undisputedly</b>              28:17  <b>unilaterally</b> 24:13  <b>united</b> 1:1,12              29:24  <b>unknown</b> 1:25              21:14  <b>unliquidated</b>              35:19,24 37:7  <b>unnecessarily</b>              56:2  <b>unpaid</b> 34:9 35:16  <b>unquantified</b>              13:15  <b>unquestionably</b>              42:10  <b>unreasonable</b>              27:7 34:13 37:4              39:9 42:13,16              44:24,24 46:11              53:6  <b>unreasonably</b>              42:10  <b>unrelated</b> 36:20  <b>unresolved</b> 37:7  <b>unsettled</b> 16:21  <b>unusual</b> 45:17  <b>unwilling</b> 48:2,4  <b>urge</b> 55:6  <b>urquhart</b> 3:10  <b>usc</b> 19:13  <b>use</b> 9:9</p>
		<b>u</b>	
		<p><b>u</b> 21:16 36:4  <b>u.s.</b> 1:23  <b>ucc</b> 29:6,8  <b>uday</b> 4:23  <b>ultimate</b> 16:9              34:18 44:8  <b>ultimately</b> 10:11              13:6 16:15 40:21              42:19 43:9  <b>unable</b> 10:6 23:21  <b>unaware</b> 10:24  <b>uncertain</b> 47:21  <b>uncertainty</b> 39:22  <b>unchanged</b> 40:23  <b>unclear</b> 16:22  <b>underlying</b> 34:16              35:4 45:11</p>	
			<b>v</b>
			<p><b>v</b> 35:19  <b>validly</b> 28:4  <b>valuation</b> 27:8</p>

<b>value</b> 13:4 14:11 19:8,15,21 20:5 34:5 37:10 <b>variety</b> 10:18 <b>various</b> 14:5 26:7 51:3 <b>veritext</b> 58:20 <b>version</b> 7:1,3 49:9 <b>vests</b> 25:4 <b>viability</b> 38:24 <b>viable</b> 16:23 42:14 <b>vietnam</b> 8:23 29:25 <b>view</b> 31:10 41:14 42:3 <b>viewed</b> 12:7 <b>vigorously</b> 41:13 42:4 <b>vindication</b> 37:15 <b>violate</b> 36:15 45:3 <b>violation</b> 37:20 <b>violations</b> 45:1 <b>virtue</b> 17:9 40:24 <b>vna</b> 8:24 9:3,7 10:3,6 16:13 <b>voiced</b> 47:15 <b>void</b> 26:6	<b>way</b> 12:19 23:19 23:25 32:16 48:21 51:23 56:17 <b>ways</b> 9:17 <b>wednesday</b> 49:25 50:6 <b>week</b> 49:18 50:1,2 50:3,4,6 <b>weinstock</b> 5:13 <b>welcome</b> 50:16 <b>whatsoever</b> 44:4 <b>white</b> 3:17 54:13 <b>whiting</b> 24:23 <b>willing</b> 32:25 <b>willingness</b> 25:11 <b>winston</b> 3:15 52:2 52:4,4,7,23,24 54:2,3,4,18 56:7 56:10,18,23 <b>wish</b> 44:6 <b>wishes</b> 16:24 30:25 <b>witness</b> 6:23 <b>word</b> 12:20 36:13 49:9 53:2 <b>worded</b> 27:25 <b>words</b> 22:10 48:21 54:24 <b>work</b> 49:17 51:21 <b>working</b> 49:17 55:6 <b>works</b> 51:7 <b>worry</b> 54:18 <b>worth</b> 20:1,10 31:23 <b>written</b> 7:1,3,7 <b>wrong</b> 14:21	<b>yakuza</b> 21:16 36:4 36:18 <b>yeah</b> 52:22 53:23 54:3,22 <b>year</b> 40:11 <b>yield</b> 46:4,4 <b>yielded</b> 6:10 <b>yihung</b> 5:2 <b>york</b> 1:2,14 3:6,20 9:21,21 29:5,8 41:18
<b>w</b>		<b>z</b>
<b>wait</b> 55:21 <b>waiting</b> 51:24 <b>waive</b> 47:16 <b>want</b> 6:17 44:17 50:15,23 51:9,9 51:13 52:20 54:4 54:25,25 55:23 <b>wanted</b> 53:5 56:10 <b>wants</b> 54:1 55:17 55:21 <b>washington</b> 49:19 <b>waste</b> 52:21 <b>waterfall</b> 23:10 35:6	<b>white</b> 3:17 54:13 <b>whiting</b> 24:23 <b>willing</b> 32:25 <b>willingness</b> 25:11 <b>winston</b> 3:15 52:2 52:4,4,7,23,24 54:2,3,4,18 56:7 56:10,18,23 <b>wish</b> 44:6 <b>wishes</b> 16:24 30:25 <b>witness</b> 6:23 <b>word</b> 12:20 36:13 49:9 53:2 <b>worded</b> 27:25 <b>words</b> 22:10 48:21 54:24 <b>work</b> 49:17 51:21 <b>working</b> 49:17 55:6 <b>works</b> 51:7 <b>worry</b> 54:18 <b>worth</b> 20:1,10 31:23 <b>written</b> 7:1,3,7 <b>wrong</b> 14:21	<b>z</b> 21:16 36:4 <b>zachary</b> 5:8 <b>zakia</b> 4:15 <b>zero</b> 37:11,17 <b>zoom</b> 6:4
	<b>x</b>	
	<b>x</b> 1:4,10 57:1	
	<b>y</b>	
	<b>y</b> 21:16 24:25,25 36:4	