Docket #0009 Date Filed: 5/17/2019

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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re WAYPOINT LEASING HOLDINGS LTD. *et al.*, Debtors.	Chapter 11 Case No. 18-13648 (SMB) Jointly Administered
MACQUARIE ROTORCRAFT LEASING HOLDINGS LIMITED, Plaintiff, v. LCI HELICOPTERS (IRELAND) LIMITED, Defendant.	Adversary Proceeding No. 19-01107 (SMB) **RETURN DATE AND TIME**: MAY 21, 2019, 10:00 AM/EST **OPPOSITION DEADLINE**: MAY 14, 2019

REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF LCI HELICOPTERS (IRELAND) LIMITED'S MOTION TO DISMISS

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PRELIMINARY STATEMENT

Defendant LCIH respectfully submits this reply memorandum of law in further support of its motion, pursuant to Fed. R. Bankr. P. 7012(b) and Fed. R. Civ. P. 12(b)(6), for an Order dismissing Plaintiff Macquarie's First Amended Adversary Complaint in its entirety and with prejudice for failure to state a claim.[1] As set forth in LCIH's Opening Mem., Macquarie's claims against LCIH arising out of Lombard's court-approved 100% credit bid for the WAC 9 assets fail as a matter of law. Specifically, LCIH demonstrated that Macquarie failed to allege the elements of its claims for breach of the LCIH NDA (which Macquarie brings as Debtors' successor as of March 13, 2019) (Opening Mem. at pp. 18-21) and tortious interference with business relations (Opening Mem. at pp. 22-25). In addition, LCIH demonstrated that such claims are barred by the doctrine of collateral estoppel. (Opening Mem. at pp. 25-29)

Macquarie responded to LCIH's motion to dismiss solely by filing a First Amended Adversary Complaint dated May 14, 2019 ("FAC") (Docket No. 7).[2] (Morrison Reply Decl. Ex. A) As set forth below, the FAC fails to cure the fatal defects of the original pleading and purports to assert an additional claim under 11 U.S.C. §363(n), which is similarly meritless, and, in any event, can only be brought by a trustee (*see infra* at pp. 9-11).

Macquarie attempts to cure its fatal pleading defects by alleging that the same operative facts reflect an alleged tainted bidding process caused by an alleged undisclosed collusive agreement between Lombard and LCIH. The FAC now seeks to recover damages for a lost breakup fee due to the alleged collusion. If this sounds familiar to the Court, it is. Macquarie

[1] Defined terms have the same meanings ascribed to them in LCIH's opening memorandum of law dated May 3, 2019 ("Opening Mem.") (Docket No. 6-1).

[2] A true and correct copy of the FAC redlined to show changes against the original Adversary Complaint filed in this action (Docket No. 1) is annexed as Exhibit "B" to the accompanying Reply Declaration of Andrew L. Morrison in Further Support of LCI Helicopters (Ireland) Limited's Motion to Dismiss ("Morrison Reply. Decl.") dated May 17, 2019.

made precisely the same allegations and arguments when it opposed Lombard's credit bid and sought a breakup fee from the Debtors' estate. The Court overruled these Objections, with prejudice, and rejected these theories during the February 12, 2019 evidentiary hearing and in the February 14th Final Order.

Although Macquarie alleges Lombard's central role in the allegedly collusive scheme to taint the bidding process, it does not name Lombard as a defendant in this action. This omission is indicative of the true motive behind this lawsuit. Macquarie seeks to punish LCIH, a smaller competitor in an already small market of competitors, by publicly alleging unsupported claims of misconduct against LCIH which interferes with LCIH's borrowing relationships and causes LCIH to incur the significant costs of defending this action.

The FAC now emphasizes that LCIH and Lombard schemed to deprive Macquarie of a "court-ordered break-up fee." (Morrison Reply Decl. Ex. A ¶ 38; *see also id*. ¶¶ 3, 49) Macquarie's focus on its breakup fee demonstrates that this action is actually a collateral attack on the Court's February 14, 2019 Order (Docket No. 441), which approved Lombard's 100% credit bid, overruled Macquarie's objections and denied Macquarie's application for a breakup fee. (*See* Declaration of Andrew L. Morrison in Support of LCI Helicopters (Ireland) Limited's Motion to Dismiss the Adversary Complaint dated May 3, 2019 ("Morrison Decl.") Ex. E) Macquarie elected not to appeal the Court's Order, which would have been the appropriate procedure to review the Court's findings of fact and conclusions of law. Macquarie's attempt to revisit its allegations and theories by bludgeoning LCIH with this meritless lawsuit should end immediately.

Accordingly, for the reasons set forth in the Opening Mem.—unopposed by Macquarie—and for the additional reasons set forth below, LCIH respectfully requests the Court to dismiss

this action with prejudice.

ARGUMENT

POINT I

THE COURT MAY CONSIDER THE MERITS OF LCIH'S MOTION IN LIGHT OF THE FAC

Within the Second Circuit, "[w]hen a plaintiff amends its complaint while a motion to dismiss is pending, the court then has a variety of ways in which it may deal with the pending motion to dismiss, from denying the motion as moot to considering the merits of the motion in light of the amended complaint." *Saye v. First Specialty Ins. Co.*, No. 14–cv–5946 (JG)(LB), 2015 WL 1737949, at *3-4 (E.D.N.Y. Apr. 16, 2015) (electing to consider the merits of the motion to dismiss in light of the amended complaint, notwithstanding the addition of a new defendant, and dismissing the amended pleading on collateral estoppel grounds). As set forth in Wright and Miller's *Federal Practice and Procedure*: "[D]efendants should not be required to file a new motion to dismiss simply because an amended pleading was introduced while their motion was pending. If some of the defects raised in the original motion remain in the new pleading, the court simply may consider the motion as being addressed to the amended pleading. To hold otherwise would be to exalt form over substance." § 1476 Effect of an Amended Pleading, 6 Fed. Prac. & Proc. Civ. § 1476 (3d ed.); *see also Howard v. John Moore, L.P.,* No. H–13–1672, 2014 WL 5090626, at *1 n.1 (S.D. Tex. Oct. 9, 2014) ("Because the factual allegations relevant to this motion did not change in plaintiff's second amended complaint, the court will address the merits of defendants' motion with respect to the allegations made in plaintiffs' second amended complaint."); *Ellipso, Inc. v. Mann,* 460 F. Supp.2d 99, 103 (D.D.C. 2006) ("Because the amendments to the counterclaim do not change the legal issues underlying the motion to dismiss and do not alter the outcome, the Court will consider the motion as one to

dismiss the amended counterclaim.").

Here, LCIH respectfully requests the Court to exercise its discretion and consider the outstanding motion in light of the FAC. Macquarie alleges the same claims (breach of contract and tortious interference with business relations) based upon the same operative facts, e.g., Lombard's preliminary discussions with LCIH regarding Lombard's intention to sell the WAC 9 assets after it closed on its credit bid with Debtors. (*Cf.* Morrison Decl. Ex. A ¶¶ 30-42 *with* Morrison Reply Decl. Ex. A ¶¶ 39-53) The putative additional claim, for violation of 11 U.S.C. §363(n), is a desperate attempt to keep this action alive based upon the same facts and does not introduce any new facts. (*See* Morrison Reply Decl. Ex. A ¶¶ 54-59) The arguments set forth in LCIH's Opening Mem. apply with equal force to the FAC.

POINT II

THE AMENDMENTS DO NOT SAVE MACQUARIE'S CLAIMS

LCIH's motion to dismiss demonstrates that Macquarie's claims arising out of Lombard's successful 100% credit bid for the WAC 9 assets and Lombard's preliminary discussions with its servicer, LCIH, about allegedly selling the WAC 9 assets, fail as a matter of law. In response, Macquarie attempts to rescue its claims by using the identical facts to suggest that Lombard and LCIH colluded to harm Debtors and Macquarie. (*See* Morrison Reply Decl. Ex. A. ¶¶ 3, 36, 38, 55-58) Putting aside that this narrative—which Macquarie alleges upon information and belief—is not supported by any facts, it cannot be disputed that Macquarie previously advanced its collusion theory in support of its objection to Lombard's credit bid and the Court overruled it, with prejudice. (*See infra* at pp. 5-7)

A. Macquarie's Unsupported Allegations Of An Undisclosed Collusive Agreement Are Not New

The FAC alleges "Defendant entered into an undisclosed and impermissible agreement

with the eventual winning credit bidder for certain assets of the Debtors. This agreement enabled the Defendant to avoid a competitive auction with Macquarie for such assets, thereby depriving Macquarie of the opportunity to acquire the assets and of a beak-up (sic) fee to which it was otherwise entitled. The agreement further deprived the Debtors of the opportunity to maximize the value it received for such assets." (Morrison Reply Decl. Ex. A ¶ 3) The FAC alleges no facts to support its conclusion that Lombard and LCIH colluded to harm Debtors and Macquarie. For instance, FAC ¶ 20 states: "*[u]pon information and belief*, and unbeknownst to Macquarie at the time, Lombard and LCI[H] entered into an agreement for Lombard to acquire the WAC 9 assets through a credit bid and then subsequently sell the assets to LCI[H] . . . ." (Morrison Reply Decl. Ex. A ¶ 20) (emphasis supplied) There are no facts to support this conclusion. The FAC then alleges, again upon information and belief, that LCIH "has purchased from Lombard . . . the WAC9 assets in question, which transaction was consummated within days of Lombard's acquisition of the assets from Waypoint." (*Id*. ¶ 35) Macquarie concludes that the alleged sale of assets to LCIH that allegedly occurred ten days after Lombard closed on its credit bid "are indicative of improper advance collusion between LCIH and Lombard, which facts were withheld from Macquarie and the Debtors and not disclosed to the Court at the time of the February 12, 2019 hearing." (*Id*. ¶ 36) Macquarie again alleges, without factual support, that LCIH "circumvent[ed] the Court-ordered bidding procedures" and "the improper collusion between LCI[H] and Lombard deprived the Debtors of the opportunity to obtain competing cash bids for the WAC 9 assets and the additional value that such bids may have realized." (*Id*. ¶ 38)

These identical allegations formed the basis for Plaintiff's objection to Lombard's credit bid whereby Macquarie sought a breakup fee on the theory that Lombard had an undisclosed agreement with LCIH. The transcript of the February 12, 2019 sale hearing is replete with

Macquarie's references to the alleged agreement between LCIH and Lombard. (*See* Morrison Reply. Decl. Ex. C at 170:17("joint bidding arrangements"); 174:7-9("if they are disguising a transaction as a joint transaction then we would be entitled to a breakup fee.");180:2-3 ("I think they colluded"); and 182:5("this is a disguised third part[y] bid"))

In fact, the FAC's allegation that collusion can be inferred from the amount of time that elapsed between Lombard's closing of its credit bid and its alleged sale of the WAC 9 assets to LCIH (Morrison Reply Decl. Ex. A ¶ 36) figured prominently in Macquarie's cross-examination of Lombard's representative at the February 12, 2019 Evidentiary Hearing:

> Q: How can you make this statement in your declaration that you could soon close after the consummation if no one's talked about anything? You're --
> A: Well, they know that there's 17 aircraft that -- that we owe. They know the total revenue of the leases, and they've had access now to the data room. So we're hoping that once they get access to the data room and get the information from the leases that we should be able to move forward quite quickly thereafter to consummate a transaction.
> Q: So you've started having discussions about a subsequent transaction?
> A: I reiterate what I've said now I don't know how many times, but I reiterate that we can't talk specific numbers because they don't know the aircraft and they haven't inspected the aircraft and they don't have the details of the leases, nor did they have the details of the lessees, and nor did they have the details of the PBH.

(Morrison Reply Decl. Ex. C at 196:18 to 197:10; *see also id.* at 193:21-194:7) Accordingly, Lombard's representative destroyed any basis for Macquarie's information and belief allegation of collusion based upon an allegedly short time period between Lombard's closing on its credit bid and subsequent alleged sale to LCIH.

The Lombard representative also destroyed Macquarie's timeline for such alleged collusion. Lombard's representative testified on February 12, 2019 that Lombard decided to credit bid for the WAC 9 assets "close to" November 20, 2018. (*Id*. at 186:10-11) The FAC

contains no factual support for its conclusion that LCIH and Lombard had an undisclosed collusive agreement prior to November 20, 2018. The preliminary discussions upon which this lawsuit is based took place in February 2019 (*see* Morrison Decl. Ex. F) after Debtors accepted Lombard's credit bid on or about January 23, 2019 (*see* Morrison Decl. Ex. D).

In addition, Lombard's representative testified that Lombard told Macquarie in December 2018 that if it wanted to purchase Lombard's collateral in WAC 9, Macquarie would have to pay par plus interest. (Morrison Reply Decl. Ex. C at 186:10-20) Notwithstanding these discussions, the FAC acknowledges—as it must—that Macquarie agreed in the Bidding Procedures that it would not match Lombard's 100% credit bid and that Lombard insisted upon this as a condition to making its credit bid. (Morrison Reply Decl. Ex. A ¶¶ 19, 21)

Lombard made its intention to credit bid clear to all, including Macquarie, both in the Bidding Procedures and in private meetings. In fact, at the hearing to approve the Bidding Procedures, Lombard announced that it would credit bid in full for the WAC 9 assets. (*See* Morrison Decl. Ex. H at p. 2 ¶ 3) Lombard made clear to Macquarie what the price would be for Macquarie to purchase the WAC 9 assets (par plus interest). Macquarie elected not to purchase them at that price. Accordingly, Macquarie's allegations that Debtors' estate suffered when it received from Lombard a higher price than Macquarie or anyone else was willing to pay is patently absurd. In any event, Macquarie fails to allege any facts to support its conclusion that LCIH and Lombard had entered into a collusive agreement at this time.

The Lombard representative was asked directly whether Lombard agreed to sell the WAC 9 assets to LCIH prior to the closing of Lombard's credit bid, and she denied that an agreement either existed or was being negotiated. (Morrison Reply Decl. Ex. C at 188:22-189:18) In addition, Lombard's representative denied disclosing any information to LCIH beyond what was

permitted by Debtors. (*Id*. at 207:5-11; *see also id*. at 193:21-194:7) The Court found such testimony to be credible. (*See id*. at 236:9-17) The FAC's allegations effectively accuse Lombard's witness of perjury without any factual basis to do so.

B. Macquarie's Collusion Allegations Do Not Satisfy Rule 9(b)'s Heightened Pleading Standards

Rule 7009 of the Federal Rules of Bankruptcy Procedure incorporates Fed. R. Civ. P. 9(b) and, accordingly, requires claims of fraud in bankruptcy proceedings to be pled with particularity. *See In re Motors Liquidation Co.*, No. 12 Civ. 4138(RA), 2013 WL 143805 at, *2 (S.D.N.Y. Jan. 10, 2013). It is well settled that allegations of collusion are subject to Rule 9(b)'s heightened pleading requirements. *See, e.g., Robinson v. Nat'l R.R. Passenger Corp.*, No. 93 CIV. 8376 (RPP), 1995 WL 444322, at *8-9 (S.D.N.Y. July 26, 1995) (dismissing collusion claim under Rule 9(b)); *In re Miner*, 185 B.R. 362, 367 (N.D. Fla. 1995), *aff'd sub nom. Miner v. Bay Bank & Tr. Co.*, 83 F.3d 436 (11th Cir. 1996) (upholding bankruptcy bourt's dismissal of adversary proceeding seeking to avoid a foreclosure sale because "bald statement" of collusion did not satisfy Rule 9(b)).

Here, the FAC's allegations of collusion between Lombard and LCIH are conclusory and not supported by facts. The FAC does not allege when the alleged collusive agreement was entered into and does not identify any of the specific terms and conditions of the alleged collusive agreement. (*See* Morrison Reply Decl. Ex. A ¶¶ 55-58) Macquarie has failed to allege specific facts to raise a strong inference that a fraudulent scheme occurred. *See Wexner v. First Manhattan Co.*, 902 F.2d 169, 172 (2d Cir. 1990). Moreover, Macquarie's conclusory allegations of collusion are based upon information and belief (*see, e.g.,* Morrison Reply Decl. Ex. A ¶ 20), which further dooms its collusion claim. *See In re Kanaley*, 241 B.R. 795, 803 (Bankr. S.D.N.Y. 1999) ("FRCP 9(b) pleadings cannot be based on information and belief.");

Segal v. Gordon, 467 F.2d 602, 606-08 (2d Cir. 1972) (dismissing conclusory claims under Rule 9(b), acknowledging the "general rule that Rule 9(b) pleadings cannot be based 'on information and belief'" and finding that "[o]nly the distorted inferences and speculations of plaintiff's counsel supply the grounds for his countervailing hypotheses.").[3]

C. Macquarie's Claim Under 11 U.S.C. §363(n) Fails As A Matter Of Law

Desperate to keep this action alive, Macquarie alleges: "By entering into a collusive pre-auction agreement with Lombard to acquire the WAC9 assets after Lombard's successful credit bid, LCI[H] violated 11 U.S.C. §363(n)." (Morrison Reply Decl. Ex. A ¶ 58) Section 363(n) provides, in pertinent part:

> The trustee may avoid a sale under this section if the sale price was controlled by an agreement among potential bidders at such sale, or may recover from a party to such agreement any amount by which the value of the property sold exceeds the price at which such sale was consummated, and may recover [attorney fees and expenses].

11 U.S.C.A. §363(n) (West).

1. Macquarie Lacks Standing

Macquarie lacks standing to bring this claim. The plain terms of the statute provide the trustee with standing and not a disappointed bidder. *See In re Gucci*, 126 F.3d 380, 388 (2d Cir. 1997) ("[U]nsuccessful bidders usually lack standing to challenge a bankruptcy court's approval of a sale."); *In re Butan Valley, N.V.*, No. ADV 09-3291, 2009 WL 5205343, at *2 (S.D. Tex. Dec. 23, 2009) (affirming bankruptcy court's dismissal of adversary proceeding brought by

[3] Failure to plead collusion is an additional failure to plead "more culpable conduct" required for Macquarie's tortious interference claim. (*See* Opening Mem. at pp. 23-24) In addition, under New York law, the FAC cannot rely upon conclusory allegations of willfulness to bootstrap an alleged breach of contract (the LCIH NDA) into an independent tort. *See Axa Mediterranean Holdings S.P. v. ING Insur. Intern., B.V.,* 106 A.D.3d 457, 458, 965 N.Y.S.2d 89 (1st Dep't 2013) ("The mere allegation that the alleged breach of contract was 'maliciously intended' or constituted 'willful misconduct' does not render the breach of contract claim a separate and independent tort claim."); *OFSI Fund II, LLC v. Canadian Imperial Bank of Commerce,* 82 A.D.3d 537, 539, 920 N.Y.S.2d 8(1st Dep't 2011) (same).

Alkasabi, a frustrated bidder, and holding: "Alkasabi is not the 'trustee' and, as a result, he lacks standing to file and pursue a claim under §363(n)." (citing *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.,* 530 U.S. 1, 8 (2000)).

There is a limited exception to that allows standing for an equitable challenge to the "intrinsic fairness" of the sale transaction. *See In re Colony Hill Assocs.,* 111 F.3d 269, 273-74 (2d Cir. 1997) (recognizing that an unsuccessful bidder "usually lacks standing to challenge a bankruptcy court's approval of a sale transaction" but finding that a late bidder could challenge whether successful bidder was a "good faith" purchaser). However, it does not apply here because Macquarie (i) was not a creditor of WAC 9 (Morrison Decl. Ex H at p. 3 ¶ 5); (ii) rejected the opportunity to bid more than the actual sale price; and (iii) is not seeking to maximize the creditor's recovery because it agreed it would not match the creditor's 100% credit bid. *See In re New Energy Corp.*, No. 12-33866, 2013 WL 1192664 at *3-4 (N.D. Ind. Mar. 22, 2013) (finding unsuccessful bidder lacked standing to challenge a sale and holding "Natural Chem's allegations of collusion are harming the creditors, not helping maximize their recovery.") Accordingly, Macquarie's §363(n) claim fails for the fundamental reason that it lacks standing to assert it.

2. Macquarie's Claim Is A Collateral Attack On The Court's February 14, 2019 Final Order

Macquarie's §363(n) claim is precluded by the terms of the Court's February 14th Final Order which explicitly addressed potential §363(n) claims:

> The Purchase Price in respect of the Transferred Interests and the PPN Agreements was not controlled by any agreement among potential bidders. Neither the Debtors nor Buyer have engaged in any conduct that would cause or permit the Purchase Agreement to be avoided or costs and damages to be imposed under section 363(n) of the Bankruptcy Code.

(Morrison Decl. Ex. E at p. 7)

Accordingly, the Court has ruled that Lombard ("Buyer") did not enter into a collusive agreement with any potential bidders (including LCIH) and did not "control" the price for the WAC 9 assets through such collusion. (*See id*.) Macquarie's claim against LCIH under §363(n) amounts to a collateral attack on the Court's February 14th Final Order. Macquarie did not appeal the Court's findings regarding §363(n). It should not be allowed to collaterally attack the Order by way of this adversary proceeding.[4]

3. Macquarie's §363(n) Claim Is Meritless

In any event, Macquarie's §363(n) claim is not supported by any facts. As set forth above (and in LCIH's Opening Mem.), Macquarie cannot allege that LCIH "controlled" the price for the WAC 9 assets. Macquarie agreed in the Bidding Procedures to not match Lombard's 100% credit bid. (*See* Morrison Decl. Ex. B at p. 8) Lombard insisted upon this before making the credit bid and Macquarie agreed. (Morrison Reply Decl. Ex. A ¶¶ 19, 21) There are no allegations of fact that demonstrate that LCIH had anything to do with the agreed upon Bidding Procedures. The preliminary conversations between LCIH and Lombard regarding Lombard's intention to sell the WAC 9 assets after it closed on its credit bid occurred after Debtors accepted Lombard's credit bid. (*See supra* at p. 7) Clearly, control of the sale price that Lombard offered to Debtors through its credit bid (which Debtors accepted on January 23, 2019) (*see* Morrison Decl. Ex. D) was not an intended objective of LCIH's preliminary discussions with Lombard in February 2019. Accordingly, Macquarie cannot establish the elements of a §363(n) claim even if it had standing to do so. *See In re New York Trap Rock Corp. (Compania Naviera Perez Companc, S.A.C.F.I.M.F.A., Sudacia, S.A.)*, 42 F.3d 747, 752 (2d Cir. 1994).

[4] Fed. R. Civ. P. 60(b) is made applicable by Fed. R. Bankr. P. 9024. Macquarie has also failed to pursue this alternative procedural avenue to collaterally attack the Court's February 14th Final Order.

POINT III

The FAC Should Be Dismissed With Prejudice

LCIH argued in its Opening Mem. that the Adversary Complaint should be dismissed with prejudice because Macquarie will never be able to cure the Adversary Complaint's defects. (Opening Mem. at 29-30) The defective FAC, confirms this. Accordingly, "having twice been given the opportunity to assert claims," Macquarie "cannot try again[,]" and the Court should dismiss the FAC with prejudice. *Kranser v. Rahco Funds LP*, No. 11 CV 4092(VB), 2012 WL 4053805, at *3 (S.D.N.Y. Aug. 9, 2012) (dismissing with prejudice and holding that "Plaintiffs have had two chances to assert their various claims" and "[t]he Court will not permit them a third by granting leave to replead"); *Campagnello v. Ponte*, 16 Civ. 7432 (PAE) (JCF), 2017 WL 4124337, at *1 (S.D.N.Y. Sep. 13, 2017) ("As Campanello has already had the opportunity to amend his Complaint, and indeed has done so, the Court agrees with Judge Francis that this dismissal shall be with prejudice to Campanello's ability to file any further amendments.").

CONCLUSION

For all the foregoing reasons, and for the reasons set forth in LCIH's Opening Mem., defendant LCIH respectfully requests the Court to grant its motion and dismiss the FAC in its entirety and with prejudice and to award LCIH such further relief as the Court deems appropriate.

Dated: New York, New York.
May 17, 2019

Respectfully submitted,

By: /s/ Andrew L. Morrison

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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re WAYPOINT LEASING HOLDINGS LTD., *et al.*, Debtors.	Chapter 11 Case No.: 18-13648 (SMB) Jointly Administered
MACQUARIE ROTORCRAFT LEASING HOLDINGS LIMITED, Plaintiff, v. LCI HELICOPTERS (IRELAND) LIMITED, Defendant.	Adversary Proceeding No. 19-01107 (SMB) **REPLY DECLARATION OF ANDREW L. MORRISON IN FURTHER SUPPORT OF LCI HELICOPTERS (IRELAND) LIMITED'S MOTION TO DISMISS** **RETURN DATE AND TIME**: MAY 21, 2019, 10:00 AM/EST **OPPOSITION DEADLINE**: MAY 14, 2019

ANDREW L. MORRISON, pursuant to 28 U.S.C. § 1746, declares as follows:

1. I am an attorney admitted to practice law in the State of New York and a member of the Bar of this Court. I am a partner with the law firm of Manatt, Phelps & Phillips, LLP,

counsel for Defendant LCI Helicopters (Ireland) Limited ("LCIH") in the above captioned adversary proceeding.

2. I respectfully submit this reply declaration in further support of LCIH's motion to dismiss Plaintiff Macquarie Rotorcraft Leasing Holdings Limited's First Amended Adversary Complaint ("Macquarie") with prejudice and to place before the Court true and correct copies of the documents identified below. I have personal knowledge of the facts set forth below.

3. A true and correct copy of the First Amended Adversary Complaint, dated May 14, 2019 and filed in the above-captioned adversary proceeding (*see* Docket No. 7) (the "First Amended Adversary Complaint"), with annexed Exhibits A-D thereto, is annexed as Exhibit "A" hereto.

4. A true and correct copy of a redline comparison of Macquarie's Adversary Complaint, dated April 3, 2019 (*see* Docket No. 1), without exhibits, with the First Amended Adversary Complaint, without exhibits, is annexed as Exhibit "B" hereto.

5. A true and correct copy of a transcript of the February 12, 2019 hearing before this Court in the Chapter 11 proceeding styled *In re Waypoint Leasing Holdings LTD., et al.*, No. 18-13648 (SMB) (*see* Docket No. 537), is annexed as Exhibit "C" hereto.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 17th day of May 2019, in New York, New York.

s/ Andrew L. Morrison
Andrew L. Morrison

EXHIBIT A

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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re	)	Chapter 11
WAYPOINT LEASING HOLDINGS LTD., *et al*.,	)	Case No. 18-13648 (SMB)
Debtors.	)	Jointly Administered
MACQUARIE ROTORCRAFT LEASING HOLDINGS LIMITED,	)	
Plaintiff,	)	
v.	)	Adversary Proceeding No. 19-01107
LCI HELICOPTERS (IRELAND) LIMITED,	)	
Defendant.	)	

FIRST AMENDED ADVERSARY COMPLAINT

Plaintiff Macquarie Rotorcraft Leasing Holdings Limited ("Macquarie" or "Plaintiff"), for its Adversary Complaint (this "Complaint") against Defendant LCI Helicopters (Ireland) Limited ("LCI" or "Defendant"), alleges as follows:

INTRODUCTION

1. This case results from LCI's brazen disregard of explicit confidentiality obligations to which it was and remains contractually obligated, and explicit court-ordered bidding procedures and requirements to which it was bound, and the resultant damages caused thereby. More specifically, the Defendant engaged in discussions with third parties, contrary to its contractual promises, to purchase assets belonging to Waypoint Leasing Holdings Ltd. ("Waypoint") and certain of its subsidiaries and affiliates, as debtors and debtors in possession (collectively, the "Debtors"), outside of the court-ordered sale process, thereby causing substantial damages to both Debtors and Plaintiff.

2. Although the Defendant willingly entered into a non-disclosure agreement with Waypoint on August 29, 2018, attached as **Exhibit A** (the "NDA"), and although the Defendant knew of its obligations under the NDA—including the strict requirement in section 4 of the NDA that it may only engage in discussions with any person or entity other than the Debtors' financial advisor regarding the purchase of any of the Debtors' assets upon receiving explicit prior permission to do so—the Defendant disregarded its obligations and actively pursued such discussions. To make matters worse, the Debtors and Macquarie repeatedly cautioned the Defendant that its actions violated the NDA and warned that legal action would be necessary if the Defendant did not cease and desist immediately. It chose to ignore such warnings.

3. Simply put, the Defendant knowingly engaged in discussions forbidden by the NDA without seeking or obtaining the advance approvals to do so as required by the unambiguous terms of the NDA. By virtue of such discussions, the Defendant entered into an undisclosed and impermissible agreement with the eventual winning credit bidder for certain assets of the Debtors. This agreement enabled the Defendant to avoid a competitive auction with Macquarie for such assets, thereby depriving Macquarie of the opportunity to acquire the assets and of a beak-up fee to which it was otherwise entitled. The agreement further deprived the Debtors of the opportunity to maximize the value it received for such assets. As a result, the Defendant benefitted from its misconduct and now possesses assets to which it is not entitled.

JURISDICTION AND VENUE

4. The United States Bankruptcy Court for the Southern District of New York (the "Court") has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. §§ 157 and 1334 and the *Amended Standing Order of Reference from the United States District Court for the Southern District of New York*, dated January 31, 2012. Venue is proper in this Court pursuant to 28 U.S.C. § 1409.

5. This adversary proceeding is commenced pursuant to Rule 7001 of the Federal Rules of Bankruptcy Procedures (the "Bankruptcy Rules"). Pursuant to Bankruptcy Rule 7008, Plaintiff consents to the entry of final orders and judgments by this Court in connection with this Complaint.

6. This Court retained jurisdiction to hear and determine all matters, including adjudication of any disputes, relating to and arising from the implementation of the *Order (I) (A) Approving Purchase Agreement among Debtors and Successful Credit Bidder, (B) Authorizing Sale of Certain of Debtors' Assets Free and Clear of Liens, Claims, Encumbrances, and Other Interests, (C) Authorizing Assumption and Assignment of Certain*

Executory Contracts and Unexpired Leases in Connection Therewith, and (D) Granting Related Relief, and (II) Authorizing Debtors to Take Certain Actions with Respect to Related Intercompany Claims in Connection Therewith [Docket No. 525] (the "Sale Order") and the *Order Approving (A) Bidding Procedures, (B) Bid Protections, (C) Form and Manner of Notice of Cure Costs, Auction, Sale Transaction, and Sale Hearing, and (D) Date for Auction, If Necessary, and Sale Hearing* [Docket No. 159] (the "Bidding Procedures Order").

7. Pursuant to paragraph 10 of the NDA, LCI irrevocably and unconditionally consented to submit to the exclusive jurisdiction of this Court for any lawsuits, actions, or other proceedings arising out of or relating to the NDA.

PARTIES

8. Plaintiff Macquarie is a wholly owned subsidiary of Macquarie Group Limited ("Macquarie Group"), a multinational financial services group providing asset management, finance, banking, advisory, risk, and capital services. Macquarie Group is headquartered in Australia and is listed on the Australian Securities Exchange.

9. Upon information and belief, Defendant LCI is a privately owned aircraft lessor founded in 2004. LCI is owned by the Libra Group, a privately held international conglomerate operating in the aviation, energy, hospitality, real estate, and shipping industries, among others.

BACKGROUND

The Waypoint Non-Disclosure Agreement with LCI

10. On November 25, 2018, the Debtors filed voluntary cases under chapter 11 of the Bankruptcy Code (the "Chapter 11 Cases").

11. Prior to the filing of the Chapter 11 Cases, the Debtors engaged in an out-of-court sale and marketing process for substantially all of their assets. LCI was involved in the bidding process and, accordingly, executed the NDA on August 29, 2018.

12. The NDA allowed LCI to obtain Confidential Information[1] from Waypoint relevant to the sale of certain of the Debtors' assets. The NDA significantly restricted the information provided by Waypoint that LCI could consider during the sale process and in contemplation of acquiring the Debtors' assets as well as the purposes for which such information could be used. In executing the NDA, LCI agreed to use such Confidential Information "***solely*** for the purpose of evaluating and participating in discussions with the Company[2] regarding, a possible Transaction ***and for no other purpose***." NDA § 2 (emphasis added). The NDA defines Confidential Information as:

> . . . all notes, memoranda, summaries, analyses, compilations, forecasts, data, studies, interpretations or other documents or materials prepared by the Company or its Representatives, or [LCI] or [its] Representatives, which use, contain, reflect or are based upon or derived from, in whole or in part, information furnished to [LCI] or [its] Representatives by or on behalf of the Company.

Id. § 1(a).

LCI's Violations of the NDA's Restrictions on the Use of Confidential Information

13. Under the NDA, Confidential Information excluded information that "becomes available to [LCI] on a non-confidential basis from a source other than the Company or any of its Representatives," with the important caveat "that such source is ***not known by you (after reasonable inquiry) to be bound by a contractual, legal or fiduciary obligation of confidentiality to the Company or any other party with respect to such information***." *Id*. (emphasis added).

14. Upon information and belief, LCI has continuously possessed, and still possesses, Confidential Information, and used such Confidential Information to evaluate proposed

[1] Capitalized terms used but not defined herein shall have the meanings ascribed to them in the NDA.
[2] "Company," as defined in the NDA, generally refers to Waypoint and its subsidiaries.

acquisitions of certain of the Debtors' assets outside of the Court-ordered sale process, in violation of the NDA, and to consummate such acquisitions.

Lombard Acquires the WAC9 Assets

15. On December 7, 2018, Macquarie and certain of its affiliates entered into an agreement to purchase certain assets of Waypoint pursuant to that certain Stock and Asset Purchase Agreement [Docket No. 64, Ex. C] (the "Macquarie APA," as amended, supplemented, or otherwise modified). The Macquarie APA initially contemplated the sale of substantially all of the Debtors' assets to Macquarie in consideration of approximately $650 million, plus the assumption of certain assumed liabilities. The Macquarie APA specifically contemplated the purchase of the WAC9 assets, which were explicitly identified therein.

16. On December 10, 2018, the Debtors filed the *Motion of Debtors for Entry of Orders Approving: (I) (A) Bidding Procedures, (B) Bid Protections, (C) Form And Manner of Notice of Auction, Sale Transaction, and Sale Hearing, and (D) Procedures for the Assumption and Assignment of Certain Executory Contracts and Unexpired Leases; and (II) (A) Sale of Substantially All of the Debtors' Assets Free and Clear of Liens, Claims, Encumbrances, and Other Interests, (B) Assumption and Assignment of Certain Executory Contracts and Unexpired Leases, and (C) Related Relief* (the "Bidding Procedures Motion") [Docket No. 64], which attached as Exhibit C a redacted copy of the Macquarie APA. Thus, all parties interested in the Debtors assets, including LCI, were aware and on notice that Macquarie had entered into a contract for the purchase of those assets, including the WAC9 assets.

17. On December 21, 2018, the Bankruptcy Court entered the Bidding Procedures Order approving global bidding and sale procedures, substantially in the form attached to the Bidding Procedures Order as Exhibit 1, in connection with the sale or disposition of substantially all of the Debtors' assets.

18. The Bidding Procedures Order authorized each Waypoint Asset Co debt facility ("WAC") agent (each, a "WAC Facility Agent") to submit "either a streamlined credit bid (a '**Streamlined Credit Bid**') or a standard credit bid (a '**363(k) Credit Bid**' and together with a Streamlined Credit Bid, a '**Credit Bid**')." *See* Bidding Procedures Order, Ex. 1, at 12.

19. The Bidding Procedures Order prohibited Macquarie from matching or exceeding a credit bid by Lombard North Central plc ("Lombard"), the sole lender and agent of the Waypoint Asset Co 9 Limited ("WAC9") secured debt facility, if Lombard's credit bid was for the full amount of its claim against the Debtors estates. Lombard was the only creditor to insist on such language, and refused to agree to the bidding procedures and the sale process unless such language was included in the Bidding Procedures Order. Notably, such language was not included in the proposed bidding procedures submitted with the Bidding Procedures Motion.

20. Upon information and belief, and unbeknownst to Macquarie at the time, Lombard and LCI entered into an agreement for Lombard to acquire the WAC9 assets through a credit bid and then subsequently sell the assets to LCI upon the completion of the sale to Lombard. LCI and Lombard's agreement leveraged Lombard's hold-up power over the Macquarie APA, by virtue of which Lombard could demand additional protections for its potential credit bid. Lombard extracted such protections with the sole purpose and intent of immediately reselling the WAC9 assets to LCI, pursuant to their agreement.

21. Macquarie was unaware at the time it agreed to the language permitting an unmatched Lombard credit bid for the WAC9 assets that Lombard—which is not in the business of helicopter leasing—would necessarily submit a credit bid for WAC9 assets in the full amount of its claim. Moreover, Lombard intended to block the entire sale process absent inclusion of the WAC9 credit bid language in the Bidding Procedures Order. Thus, Macquarie would have been

unable to consummate the transaction for substantially all of the Debtors assets contemplated by the Macquarie APA without acceding to Lombard's demands regarding a potential full-value credit bid.

22. At the time the Bidding Procedures Order was entered, in the absence of a qualifying credit bid, Macquarie still believed that it would—and intended to—acquire the WAC9 assets under the terms of the Macquarie APA.

23. Lombard submitted a Streamlined Credit Bid (the "Lombard Credit Bid") for (a) 100 percent of the equity interests of WAC9 and its subsidiaries and (b) all profit participating notes issued by the subsidiaries of WAC9 being transferred pursuant to the transaction. The aggregate consideration comprised, *inter alia*, a credit bid for 100 percent of the obligations under the WAC9 credit facility.

24. On January 23, 2019, the Debtors filed a notice [Docket No. 297] that the Lombard Credit Bid was successful.

LCI's Violation of the NDA's No-Contact Provisions

25. Section 4 of the NDA contains the following provision imposing certain no-contact obligations on LCI:

> **[LCI] further agree[s] that, without the prior written consent of Houlihan Lokey,[3] neither [LCI] nor any of [its] Representatives shall, directly or indirectly, initiate, solicit or maintain, or cause to be initiated solicited or maintained, contact with any** officer, director, employee, any person known to [LCI] to be a former (within the past twelve (12) months) employee of the Company or its affiliates, stockholder, **creditor**, affiliate, supplier, distributor, vendor, customer, provider, agent, regulator (other than as permitted in Section 2(b) [of the NDA]) **or other commercial counterparty of the Company or any subsidiary of the Company regarding the Company or its business**, financial condition, operations, strategy, prospects, **assets**, or liabilities (except as such communications regarding the Company's business,

[3] Houlihan Lokey Capital, Inc. ("Houlihan Lokey") has served as the Debtors' investment banker in the Chapter 11 Cases.

> financial condition, operation, strategy, prospects, assets or liabilities may occur in the ordinary course of business on matters unrelated to, and otherwise not in connection with, the Possible Transaction) or concerning any Confidential Information, any Transaction Information or any Possible Transaction.

Id. at § 4 (emphasis added).

26. As such, the NDA bars LCI from making contact with any creditor of the Debtors regarding the Debtors' assets, without first obtaining express written permission to do so from Houlihan Lokey.

27. Despite this prohibition, a Lombard representative admitted on the Court's record that Lombard and LCI had made improper contact regarding LCI's acquisition of WAC9 assets. In addition to making improper contact, upon Plaintiff's information and belief, LCI furthermore received confidential information, originally compiled by Waypoint, from Lombard during the Debtors' sale process. LCI moreover, upon information and belief, has continuously possessed, and continues to possess, that Confidential Information and has improperly used such information to evaluate, and to ultimately consummate, acquisitions of certain of the Debtors' assets outside of the Court-ordered sale process.

28. On February 11, 2019, Lombard filed an affidavit by its representative Ms. Jacqueline McDermott in the Chapter 11 Cases [Docket No. 410] (the "Lombard Affidavit"). Paragraph 6 of the Lombard Affidavit stated:

> ***Lombard is discussing with its servicer [LCI] a subsequent transaction pursuant to which the Designated Transferee and/or the underlying business would be recapitalized and sold to the servicer***. Neither Lombard, the Designated Transferee, or the servicer have reached an agreement or arrangement with respect to this subsequent sale, but discussions continue and a subsequent sale could occur soon after consummation of Lombard's credit bid if outstanding items are resolved and a binding agreement is reached among the parties.

Lombard Aff. at ¶ 6 (emphasis added).

29. On February 12, 2019, Ms. McDermott testified, under penalty of perjury, that: (a) the "servicer" referred to in the Lombard Affidavit was LCI; (b) at no time had the Debtors or Houlihan Lokey given permission to Lombard for Lombard to discuss with LCI the sale of WAC9 or its assets to LCI; and (c) at no time had the Debtors or Houlihan Lokey given permission to Lombard for Lombard to disclose to LCI information regarding WAC9 or its assets for the purposes of discussions relating to LCI purchasing WAC9 or its assets.

30. Also on February 12, 2019, Mr. Matthew Niemann (a senior representative of Houlihan Lokey) testified before this Court. Mr. Niemann testified that (a) he was aware of the NDA and (b) Houlihan Lokey never consented to LCI discussing a purchase of WAC9 or its assets from Lombard.

31. At the conclusion of testimony on February 12, 2019, the Court acknowledged Macquarie's claim that the testimony indicated an apparent violation of the NDA, but specifically instructed that any claims for alleged wilful violations of the NDA should be left "for another day." *See* Sale Hr'g Tr. [Docket No. 537], at 251–52.

32. On February 15, 2019, the Court entered the *Order (I) Approving Purchase Agreement Among Debtors and Macquarie, (II) Authorizing Sale of Certain of Debtors' Assets Free and Clear of Liens, Claims, Encumbrances, and Other Interests, (III) Authorizing Assumption and Assignment of Certain Executory Contracts and Unexpired Leases in Connection Therewith, and (IV) Granting Related Relief* (the "Macquarie Sale Order") [Docket No. 444], which explicitly preserved in favor and for the benefit of Macquarie a right to damages for all intentional violations of the Bidding Procedures or the Bidding Procedures Order:

> Notwithstanding any other terms herein or in any other orders of the Court, any damages flowing from any ~~intentional~~ violations of the Bidding Procedures and/or the Bidding Procedures Order **arising from intentional misconduct** are hereby expressly reserved and preserved ~~for the benefit of~~

> ~~Macquarie and the Debtors~~ and, upon the occurrence of the Closing, all such rights **held by the Debtors prior to the Closing** shall be assigned to and be held for the benefit of Macquarie pursuant to the terms of the Purchase Agreement.

Macquarie Sale Order, ¶ 42.

Macquarie's Acquisition of the NDA Rights and Warnings to LCI

33. As of March 13, 2019, Macquarie closed its acquisition of the assets in the Macquarie APA that were not included in the Credit Bids, with a modified sale price to reflect the exclusion of the assets that were subject to the Credit Bids. The assets acquired by Macquarie included all of the Debtors' rights and interests under the NDA, which Macquarie assumed. These rights and interests include any and all claims arising from any breach of the NDA. As such, as of March 13, 2019, all of LCI's obligations under the NDA constitute obligations owed to Macquarie, and Macquarie has the right to enforce the NDA and seek redress for any breaches thereof.

34. The record of warnings to LCI stretches over the course of several months. *First*, on December 27, 2018, the Debtors made LCI aware that the Debtors believed LCI had received confidential information in violation of confidentiality agreements between the Debtors and their lenders (the "December Letter," attached hereto as **Exhibit B**). *Second*, on February 14, 2019, Macquarie advised LCI of additional breaches of the NDA's no-contact provisions and demanded that LCI immediately cease from any further violations of the NDA, including, but not limited to, making further contact with Lombard regarding the purchase of any assets of the Debtors (the "February Letter," attached hereto as **Exhibit C**). *Third*, on March 14, 2019, Macquarie again advised LCI of its breaches of the NDA and again demanded that LCI cease and desist from any ongoing breaches of the NDA and to immediately bring itself into

compliance with its contractual obligations thereunder (the "March Letter," attached hereto as **Exhibit D**).

35. Notwithstanding these warnings, upon information and belief, LCI has purchased from Lombard, and continues to possess, the WAC9 assets in question, which transaction was consummated within days of Lombard's acquisition of the assets from Waypoint. Specifically, upon information and belief, on March 7, 2019, LCI closed its purchase of the equity in the WAC9 assets. Simultaneously, certain directors of Waypoint Leasing UK 9A Limited resigned and were immediately replaced by employees of LCI and the Libra Group. Furthermore, Waypoint Leasing UK 9A changed its registered address to the Libra Group's London location.

36. All of these aforementioned changes occurred merely 10 days after the closing of the equity purchase of the WAC9 entities by Lombard and are indicative of improper advance collusion between LCIH and Lombard, which facts were withheld from Macquarie and the Debtors and not disclosed to the Court at the time of the February 12, 2019 hearing. The ability of LCI to diligence, structure, document, fund, and close its acquisition of the WAC9 assets within 10 days of Lombard closing on its own equity purchase of the WAC9 assets is further indicative of improper and undisclosed collusive activity between LCI and Lombard prior to completion of Lombard's purchase of the WAC9 assets. Such activity is particularly egregious in light of Lombard's representation in the WAC9 Equity Purchase Agreement that it did not enter into any agreement or other arrangement to sell the WAC9 assets to a third party.

37. Notably, had LCI fairly participated in the WAC9 asset auction and won the assets outright, Macquarie would have been due a break-up fee under the Bidding Procedures Order, comprised of the following:

> Specifically, Macquarie shall be entitled to payment of (i) an expense reimbursement up to a cap of $3,000,000 (the "**Expense**

> **Reimbursement**") for the actual, documented and reasonable out of pocket costs, fees and expenses that are incurred or to be incurred by Macquarie in connection with or related to the authorization, preparation, investigation, negotiation, enforcement, execution, implementation and performance of the transactions contemplated by the Macquarie APA and (ii) a break-up fee in an amount equal to three percent (3%) of the Base Purchase Price, or $19,500,000 (the "**Break-Up Fee**"), in each case, subject and pursuant to the terms and conditions in the Macquarie APA and this Order.

Bidding Procedures Order, ¶ 8.

38. By circumventing the Court-ordered bidding procedures, LCI deprived Macquarie of the opportunity to consummate its intended purchase of the WAC 9 assets, of its contractually-entitled, and court-ordered break-up fee, and deprived the Debtors' estates of additional bid value. Specifically, the improper collusion between LCI and Lombard deprived the Debtors of the opportunity to obtain competing cash bids for the WAC 9 assets and the additional value that such bids may have realized.

CLAIMS FOR RELIEF

COUNT I
Breach of the Non-Disclosure Agreement

39. Plaintiff repeats and re-alleges each and every allegation contained in the preceding paragraphs and incorporates them by reference as though fully set forth herein.

40. Plaintiff, as successor to the Debtors, and the Defendant are parties to the NDA. The NDA is a valid and binding contract.

41. Plaintiff (and the Debtors) have fully performed their obligations under the NDA.

42. LCI breached the confidentiality and no-contact provisions of the NDA through its improper contact with Lombard regarding LCI's acquisition of WAC9 assets.

43. LCI's breaches of the NDA have caused damage to Plaintiff, as successor to the Debtors, by depriving the Debtors of obtaining potential competing cash bids for the WAC 9 assets and the additional value that such bids may have realized.

44. In defiance of Plaintiff's repeated objections, LCI's past and continuing breaches are wilful and blatant. Accordingly, Plaintiff seeks relief in the form of specific performance of the return of any and all Confidential Information as well as compensatory and indirect, incidental, special, and/or punitive damages in an amount to be determined at trial.

COUNT II
Tortious Interference with Business Relations

45. Plaintiff repeats and re-alleges each and every allegation contained in the preceding paragraphs and incorporates them by reference as though fully set forth herein.

46. Plaintiff had engaged in discussions with the Debtors regarding the acquisition of substantially all of the Debtors' assets—including the WAC9 assets—and executed a stalking-horse sale agreement, subject to certain eligible credit bids, to this effect. The Macquarie APA, as approved by the Sale Order, ultimately did not include the WAC9 assets due to LCI's interference—despite Plaintiff's continued interest in those assets. But for LCI's interference, Plaintiff would have purchased the WAC9 assets as initially contemplated.

47. LCI was aware of Macquarie's business relationship with Debtor, and of Macquarie's interest in purchasing the WAC9 assets. Specifically, LCI was aware of the Macquarie APA, which was publicly filed on the Court's docket and which covered the Debtors' WAC9 assets. The Macquarie APA was an integral part of the court-ordered bidding procedures governing the sale of the WAC9 assets, regarding which LCI executed the NDA at issue.

48. LCI acted with malice by dishonestly, unfairly, and improperly breaching its obligations under the NDA by failing to adhere to its no-contact and confidentiality provisions,

and by dishonestly, unfairly, and improperly circumventing the Court-ordered bidding procedures to avoid fairly competing against Macquarie in an auction for the WAC9 assets.

49. LCI breached its NDA obligations with the intent and object to enter into an agreement with Lombard that would specifically prevent Macquarie from purchasing the WAC9 assets and intentionally deprive Macquarie of its break-up fee. LCI's conduct targeted Macquarie, its relationship with Debtor, and its anticipated purchase of the WAC9 assets.

50. LCI's intentional breaches of its NDA obligations and circumvention of the Court's Bidding Procedures Order enabled Lombard's purchase of the WAC9 assets, with the intention of then reselling those assets to LCI.

51. LCI's breaches precluded Plaintiff from fully and fairly participating in the WAC9 asset sale process, deprived Plaintiff of the benefit of completing the acquisition of said assets under the Macquarie APA, and prevented Plaintiff from receiving the court-ordered break-up fee to which it otherwise was entitled.

52. Plaintiff's damages are a direct and proximate result of LCI's breach of its NDA obligations and circumvention of the Court-ordered bidding procedures.

53. LCI's conduct set forth herein was fraudulent, wanton, malicious, or wilful in complete disregard of Plaintiff's rights. Accordingly, Plaintiff seeks relief in the form of compensatory and indirect, incidental, special, and/or punitive damages in an amount to be determined at trial.

COUNT III
Violation of 11 U.S.C. § 363(n)

54. Plaintiff repeats and re-alleges each and every allegation contained in the preceding paragraphs and incorporates them by reference as though fully set forth herein.

55. LCI colluded with Lombard to enter into an agreement to control and artificially depress the sale price of the WAC9 assets by leveraging Lombard's hold-up power over the Macquarie APA to demand additional protections for Lombard's potential credit bid. Lombard extracted such protections with the sole purpose and intent of immediately reselling the WAC9 assets to LCI, pursuant to their pre-auction agreement.

56. LCI had an interest in the WAC9 assets, as evidenced by its execution of the NDA, and its subsequent, near-immediate acquisition of the WAC9 assets from Lombard.

57. The agreement between LCI and Lombard did control the price of the WAC9 assets, as it deprived Macquarie—the only other known interested bidder—of any ability to submit a cash bid for those assets, at or potentially above the value of Lombard's secured claim.

58. By entering into a collusive pre-auction agreement with Lombard to acquire the WAC9 assets after Lombard's successful credit bid, LCI violated 11 U.S.C. § 363(n).

59. Accordingly, Plaintiff seeks compensatory and indirect, incidental, special, and/or punitive damages in an amount to be determined at trial.

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PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays for relief and judgment as follows:

Awarding compensatory damages in favor of Plaintiff against Defendant LCI for all damages sustained as a result of the Defendant's wrongdoing, in an amount to be proved at trial, including interest thereon;

Awarding damages in favor of Plaintiff against Defendant LCI for all damages sustained as a result of the Defendant's unjust enrichment, in an amount to be proved at trial, including interest thereon;

Awarding Plaintiff indirect, incidental, special, and/or punitive damages where such damages are available;

Awarding injunctive relief precluding Defendant LCI from using improperly obtained Confidential Information to purchase any assets sold pursuant to any Credit Bids or further retaining or utilizing the Confidential Information;

Awarding Plaintiff reasonable costs and expenses incurred in this action, including attorneys' fees and expert fees; and

Such other and further relief as the Court may deem just and proper.

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Dated: May 14, 2019
New York, New York

Respectfully submitted,

/s/ G. Alexander Bongartz

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Counsel to Macquarie Rotorcraft Leasing Holdings Limited

EXHIBIT A

Non-Disclosure Agreement

CONFIDENTIAL

Waypoint Leasing Holdings Ltd.
c/o Maples Corporate Services Limited
PO Box 309, Ugland House
Grand Cayman
KY1-1104
Cayman Islands

August 29, 2018

LCI HELICOPTERS (IRELAND) LIMITED C/O LEASE CORPORATION INTERNATIONAL LIMITED
6 GEORGE'S DOCK, IFSC
DUBLIN 1 IRELAND

DEAR LADIES AND GENTLEMEN:

In connection with the consideration by LCI Helicopters (Ireland) Limited or any affiliate thereof ("you" or "your") of a possible negotiated transaction (the "Possible Transaction") with Waypoint Leasing Holdings Ltd., ("Target") and/or its direct and indirect subsidiaries (together with Target, the "Company") (each of you and the Company, a "Party," and collectively, the "Parties"), the Company is prepared to make available to you certain information concerning the business, financial condition, operations, strategy, prospects, assets, liabilities and other non-public, confidential and/or proprietary information of the Company. In consideration for and as a condition to such information being furnished to you and your Representatives (as defined below), you agree that you and your Representatives will treat any information concerning the Company (whether prepared by the Company, its advisors or other Representatives or otherwise and irrespective of the form of communication) which has been or will be furnished, or otherwise made available, to you or your Representatives by or on behalf of the Company (collectively referred to as the "Confidential Information") in accordance with the provisions of this letter agreement (this "Agreement"), and to take or abstain from taking certain other actions hereinafter set forth.

1. Confidential Information. (a) The term "Confidential Information" shall include all notes, memoranda, summaries, analyses, compilations, forecasts, data, studies, interpretations or other documents or materials prepared by the Company or its Representatives, or you or your Representatives, which use, contain, reflect or are based upon or derived from, in whole or in part, information furnished to you or your Representatives by or on behalf of the Company. The term "Confidential Information" does not include information that you can reasonably demonstrate (i) at the time of disclosure by you is generally available to the public other than as a result of a disclosure by you or your Representatives in breach of this Agreement, (ii) was within your possession prior to it being furnished to you or your affiliates or your respective Representatives by or on behalf of the Company; *provided* that the source of such information was not known by you (after reasonable inquiry) to be bound by a contractual, legal or fiduciary obligation of confidentiality to the Company with respect to such information, (iii) becomes available to you on a non-confidential basis from a source other than the Company or any of its Representatives; *provided* that such source is not known by you (after reasonable inquiry) to be bound by a contractual, legal or fiduciary obligation of confidentiality to the Company or any other party with respect to such information, or (iv) has been independently conceived or developed by you or your Representatives without use of or reference to, in whole or in part,

any Confidential Information or any information from a source known to you to be bound by a contractual, legal or fiduciary obligation of confidentiality to the Company or any of its affiliates, and not otherwise in breach of this Agreement.

(b) For purposes of this Agreement:

(i) "Representatives" shall mean:

(A) with respect to you: your affiliates and your and such affiliates' members, general partners, managers, directors, officers, employees and professional advisors (including, without limitation, accountants, attorneys and financial advisors); *provided that* "Representatives" of you shall not include, without the Target's prior written consent: (1) any of your actual or potential bidding partners or equity financing sources, or (2) any of your actual or potential debt financing sources (the "Named Partners"), and *provided further* that the Target and its advisors hereby undertakes: (aa) to keep the identity of any such Named Partners confidential and not disclose to any third party without your prior consent, unless otherwise demonstrably public information, that you are working with any such Named Party in connection with the Possible Transaction (other than (x) if any of the Company or its Representatives is Legally Compelled to do so or (y) in connection with internal communications among the Company and its Representatives); and (bb) other than in the ordinary course of the Company's business, not to contact any such Named Partner in connection with a Possible Transaction with you, or discuss the Possible Transaction with you with such Named Partner without either you being present or your prior consent.

(B) Notwithstanding the foregoing, nothing in this Agreement shall preclude the Company from contacting or discussing a Possible Transaction with you with any Named Partner if such Named Partner is an existing lender or debt financing source of the Company or any of its affiliates.

(C) with respect to the Company: each of the Company's and its affiliates' respective directors, officers, employees, representatives and professional advisors (including, without limitation, accountants, attorneys and financial advisors).

(ii) the term "person" shall be broadly interpreted to include the media and any corporation, partnership, group, individual or other entity; and

(iii) the term "affiliates" means any person directly or indirectly controlling or controlled by or under direct or indirect common control with such specified person; and for purposes of this definition, "control," as used with respect to any person, means the possession, directly or indirectly, of the power to direct or cause the direction of the management or policies of such person, whether through the ownership of voting securities, by agreement or otherwise (and the terms "controlling," "controlled by" and "under common control with" have correlative meanings).

2. Use and Disclosure of Confidential Information.

(a) You hereby agree that (i) you and your Representatives shall use the Confidential Information solely for the purpose of evaluating and participating in discussions with the Company regarding, a Possible Transaction and for no other purpose and (ii) for the period commencing upon the execution of this Agreement by both Parties and ending on the second (2nd) anniversary of the date of this Agreement or such earlier date as the Target or the Company ceases to be active in the helicopter leasing market, (such period, as it may be extended by mutual written agreement of the Parties, the "Confidentiality Period"), the Confidential Information will be kept confidential by you and your Representatives and that you and your Representatives will not disclose any of the Confidential Information to any third parties; *provided* that (A) you may make any disclosure of such information to which Target gives its prior written consent, (B) such information may only be disclosed to those of your Representatives who have a need to know such information for the sole purpose of evaluating a Possible Transaction on your behalf, who are provided with a copy of this Agreement and who agree to be bound by the applicable terms hereof to the same extent as if they were parties hereto, (C) you may disclose and discuss Confidential Information to your actual or potential bidding partners, equity financing sources or debt financing sources which Houlihan Lokey (as defined herein) has confirmed in good faith has also signed a confidentiality agreement with the Company or Target regarding the Possible Transaction with you, the Confidential Information and the Transaction Information (a "Permitted Third Party") and (D) subject to paragraph 2(c), you may make disclosure of such information to the extent Legally Compelled (as defined below) to do so (provided that such requirement did not arise from discretionary acts by you or your Representatives). In any event, you agree, at your sole expense, to (x) undertake reasonable precautions to safeguard and protect the confidentiality of the Confidential Information and Transaction Information (as defined below) (which shall be no less stringent than measures taken with respect to your own confidential and proprietary information and in any event no less than a reasonable degree of care), (y) be responsible for any breach of this Agreement by any of your Representatives, including, without limitation, any actions or inactions by your Representatives that would constitute a breach of this Agreement if such Representatives were parties hereto (it being understood that such responsibility shall be in addition to and not by way of limitation of any right or remedy the Company may have against your Representatives with respect to such breach), and (z) take all reasonable measures to restrain your Representatives from prohibited or unauthorized disclosure or use of the Confidential Information or Transaction Information. Notwithstanding the foregoing, the Company recognizes that you are a competitor of the Company in that you lease helicopters to many of the same customers, solicit many of the same potential or actual customers for the leasing of helicopters, borrow from many of the same financial institutions, in each case, as the Company and have business relationships

with many of the same manufacturers as the Company, and nothing contained in this Agreement shall in impair your ability to conduct your business with any third parties in the ordinary course so long as you do not, directly or indirectly, use, disclose or refer to the Possible Transaction, the Confidential Information or the Transaction Information in connection with such activities or otherwise in violation of this Agreement.

(b) In addition, you agree that, without the prior written consent of Target, except as Legally Compelled (and provided that such requirement did not arise from discretionary acts by you or any of your Representatives that triggered such disclosure or requirement and only in compliance with paragraph 2(c)), you and your Representatives will not disclose to any other person (other than your Representatives or any other Permitted Third Party who have a need to know such information for the sole purpose of evaluating a Possible Transaction on your behalf) the fact that the Parties are considering a Possible Transaction, that this Agreement exists or the contents hereof, that the Confidential Information has been made available to you or your Representatives, that the Parties and their respective Representatives are engaged in discussions with respect to the matters contemplated by this Agreement, that discussions, negotiations or investigations are taking place or have taken place concerning a Possible Transaction or any of the terms, conditions or other facts with respect thereto (including, without limitation, the status thereof) (all of the foregoing being referred to as "Transaction Information"). Without limiting the generality of the foregoing, you further agree that neither you nor any of your affiliates (who are provided with or granted access to the Confidential Information or Transaction Information) will, directly or indirectly, share the Confidential Information or the Transaction Information with or enter into any agreement, arrangement or understanding that relates to the Possible Transaction, with any other person (in each case, other than your Representatives or Permitted Third Parties as permitted above), including, without limitation, other potential bidders, bidding partners or actual or potential source of equity or debt financing, the Company's lenders, or the Company's competitors without the prior written consent of Target and only upon such person executing a confidentiality agreement in favor of Target with terms and conditions consistent with this Agreement.

(c) In the event that you or any of your Representatives are required by applicable law or regulation or by deposition, interrogatories, requests for information or documents in legal or administrative proceedings, subpoena, civil investigative demand or other similar legal process ("Legally Compelled") to disclose any of the Confidential Information or Transaction Information, you shall provide Target with prompt (and in any event prior to any disclosure) written notice to the extent not legally prohibited of the existence, terms and circumstances of any such requirement, including a list of any Confidential Information or Transaction Information that you intend (or any of your Representatives intend) to disclose so that the Company may seek a protective order or other appropriate remedy and/or waive compliance with the provisions of this Agreement. If, in the absence of a protective order or other remedy or the receipt of a waiver by Target, you or any of your Representatives are nonetheless, upon advice of outside counsel, Legally Compelled to disclose Confidential Information or Transaction Information or else stand liable for contempt or suffer other censure or penalty, you or your Representatives may, without liability hereunder, disclose only that portion of the Confidential Information or Transaction Information which such outside counsel advises is legally required to be disclosed; provided that (i) you exercise (and cause your Representatives to exercise) reasonable efforts, at Company's expense, to preserve the confidentiality of the Confidential Information and Transaction Information, including, without limitation, exercising reasonable efforts, at Company's expense, to obtain

an order or other reliable assurance that confidential treatment shall be accorded to such information and (ii) such disclosure was not caused by or resulted from a previous disclosure by you or any of your Representatives in violation of this Agreement. In no event will you or any of your Representatives oppose action by Target to obtain a protective order or other relief to prevent or narrow the disclosure of the Confidential Information and Transaction Information or to obtain reliable assurance that confidential treatment will be afforded the Confidential Information and Transaction Information and, if the Company seeks such an order, you agree to (and shall cause your Representatives to) cooperate as Target shall reasonably request at the Company's expense.

3. Destruction of Confidential Information. If you determine you do not wish to proceed with a Possible Transaction, you will reasonably promptly notify the Company in writing of that decision. In that case or if requested by the Company or one of its Representatives, you will promptly (and in any event within ten (10) days of such event) return to Target or destroy or erase (including, without limitation, expunging all such Confidential Information or Transaction Information from any computer, system, server, word processor or other device containing such information) all Confidential Information and Transaction Information (and all copies, reproductions, summaries, analyses or extracts thereof or based thereon) furnished to you or your Representatives by or on behalf of the Company, including, without limitation, any materials prepared by you or your Representatives containing, based upon, reflecting or derived from Confidential Information or Transaction Information, and you shall deliver within ten (10) days of such request a certificate in writing executed by an authorized officer supervising the return or destruction that such return or destruction has occurred; *provided* that you and your Representatives may retain one copy of any Confidential Information or Transaction Information to the extent required to comply with legal or regulatory requirements or established document retention policies for use solely to demonstrate compliance with such requirements (and, to the extent such Confidential Information or Transaction Information is retained electronically, ordinary access thereto shall be limited to information technology personnel in connection with their information technology duties and shall solely be accessed to demonstrate compliance with legal or regulatory requirements). Notwithstanding the return, destruction or retention of the Confidential Information and Transaction Information, you and your Representatives will continue to be bound by your obligations of confidentiality, use restrictions and other obligations hereunder.

4. Inquiries. You agree that Houlihan Lokey Capital, Inc. ("Houlihan Lokey") has responsibility for arranging appropriate contacts for due diligence in connection with the Possible Transaction and that (i) all communications regarding a Possible Transaction, (ii) requests for additional information and requests for facility tours, management or similar meetings in connection with a Possible Transaction, Confidential Information or Transaction Information, and (iii) discussions or questions regarding procedures with respect to a Possible Transaction will be submitted or directed only to Houlihan Lokey or such other person as may be expressly designated by Houlihan Lokey in writing, and not to any other Representative of the Company. You further agree that, without the prior written consent of Houlihan Lokey, neither you nor any of your Representatives shall, directly or indirectly, initiate, solicit or maintain, or cause to be initiated, solicited or maintained, contact with any officer, director, employee, any person known to you to be a former (within the past twelve (12) months) employee of the Company or its affiliates, stockholder, creditor, affiliate, supplier, distributor, vendor, customer, provider, agent, regulator (other than as permitted in Section 2(b) above) or other commercial counterparty of the Company or any subsidiary of

the Company regarding the Company or its business, financial condition, operations, strategy, prospects, assets or liabilities (except as such communications regarding the Company's business, financial condition, operation, strategy, prospects, assets or liabilities may occur in the ordinary course of business on matters unrelated to, and otherwise not in connection with, the Possible Transaction) or concerning any Confidential Information, any Transaction Information or any Possible Transaction.

5. No Representations or Warranties; No Agreement. You understand and acknowledge that neither the Company nor any of its Representatives make any representation or warranty, express or implied, as to the timeliness, accuracy or completeness of the Confidential Information or Transaction Information, including, without limitation, any projections, estimates, budgets or information relating to the assets, liabilities, results of operations, condition, customers, suppliers or employees of the Company. Under no circumstances is the Company obligated to provide or make available any information, including, without limitation, any Confidential Information, that in its sole and absolute discretion it determines not to provide. You agree that neither the Company nor any of its Representatives shall have any obligation or liability to you or to any of your Representatives on any basis (including, without limitation, in contract, tort, under federal or state securities law or otherwise) relating to or resulting from the use of the Confidential Information or Transaction Information (including but not limited to any obligation to update any Confidential Information or any Transaction Information). You agree that only those representations, covenants or warranties which are made in a final definitive agreement regarding a Possible Transaction, subject to such limitations and restrictions as may be specified therein (a "Definitive Transaction Agreement"), when, as and if executed, will be relied on by you or your Representatives and have any legal effect. You agree, and you agree to direct your Representatives, not to make or facilitate in the making of any claims whatsoever against the Company or any of its Representatives with respect to or arising out of: (i) a Possible Transaction, as a result of this Agreement, any other written or oral expression or otherwise; (ii) the participation of you and your Representatives in evaluating a Possible Transaction; (iii) the review or use of any Confidential Information or any Transaction Information or any errors therein or omissions therefrom; or (iv) any action taken or any inaction occurring in reliance on the Confidential Information or any Transaction Information, except and solely to the extent as may be included in any Definitive Transaction Agreement. You agree that unless and until a Definitive Transaction Agreement between the Company and you has been executed and delivered, none of the Parties will be under any legal obligation with respect to such a transaction by virtue of this Agreement, any other written or oral expression or otherwise, except for the rights and obligations specifically agreed to herein. Neither the Company nor any advisor to the Company, nor any of their respective Representatives shall have any legal, fiduciary or other duty to any prospective or actual purchaser with respect to the manner in which any sale process is conducted. You further acknowledge and agree that the Company reserves the right, in its sole discretion, to conduct the process leading up to a Possible Transaction, if any, as the Company and its Representatives determine, including, without limitation, by negotiating with any third party and entering into a preliminary or definitive agreement with a third party, rejecting any and all proposals made by you or any of your Representatives with regard to a Possible Transaction, and terminating discussions and negotiations with you at any time and for no reason and that you have no right to participate in any Possible Transaction whether by virtue of this Agreement, any other written or oral expression or otherwise. Furthermore, nothing contained in this Agreement nor the furnishing of Confidential Information shall be construed as granting or conferring any rights by license or otherwise in any intellectual property of the

Company, except for the limited right of use expressly set forth herein. All right, title and interest in the Confidential Information shall remain with the Company.

6. No Waiver of Privilege. To the extent the Confidential Information includes materials subject to work product, attorney-client or similar privilege, the Company is not waiving, and shall not be deemed to have waived or diminished, its attorney work-product protections, attorney-client privileges or similar protections and privileges as a result of disclosing any Confidential Information to you or any of your Representatives.

7. No Solicitation. In consideration of and as a condition to the Confidential Information and Transaction Information being furnished to you, you hereby agree that, for a period of eighteen (18) months from the date hereof or such earlier date as the Target or the Company ceases to be active in the helicopter leasing market, neither you nor any of your affiliates will, directly or indirectly, solicit, interfere with or endeavor to entice away, offer to employ or employ (including, without limitation, as an independent contractor) any of the current officers or employees of the Company or any of its subsidiaries without obtaining the prior written consent of Target; *provided* that nothing herein shall restrict you or any of your affiliates from (i) making any general solicitation for employment by use of advertisements in the media that is not specifically directed at employees of the Company and (ii) hiring any such employee who responds to any such general solicitation or who first contacts you or your Representatives regarding employment without any solicitation in violation of this paragraph 7.

8. Material Non-Public Information. You acknowledge and agree that you are aware (and that your Representatives are aware or, upon providing any Confidential Information or Transaction Information to such Representatives, will be advised by you) that Confidential Information and Transaction Information being furnished to you may contain material non-public information regarding the Company and that the United States securities laws generally prohibit any persons who have such material, non-public information from purchasing or selling securities of the Company on the basis of such information or from communicating such information to any person under circumstances in which it is reasonably foreseeable that such person is likely to purchase or sell such securities on the basis of such information.

9. Remedies. You recognize and acknowledge the competitive value and confidential nature of the Confidential Information and the Transaction Information and the damage that would result to the Company and its affiliates if any of the Confidential Information and/or the Transaction Information is disclosed to any third party. You hereby agree that any breach of this Agreement by you or any of your Representatives would result in irreparable harm to the Company, that money damages would not be a sufficient remedy for any such breach of this Agreement and that the Company shall be entitled to equitable relief, including injunction and specific performance, as a remedy for any such breach or threatened breach and that neither you nor your Representatives shall oppose the granting of such relief. Such relief shall be available without the obligation to prove any damages underlying such breach or threatened breach. You further agree to waive, and to use commercially reasonable efforts to direct your Representatives to waive, any requirement for the securing or posting of any bond in connection with any such remedy. Such remedies shall not be deemed to be the exclusive remedies for a breach by you of this Agreement but shall be in addition to all other remedies available at law or equity to the Company. In the event of a breach of any obligations under this Agreement by you or your Representatives, you shall, immediately following the discovery of such breach, give notice to the Company of

the nature of such breach and, upon consultation with the Company, take all necessary steps to limit the extent of such breach. In the event of litigation relating to this Agreement, if a court of competent jurisdiction determines that you or any of your Representatives have breached this Agreement, then you shall be liable and pay to the Company the reasonable legal fees incurred by the Company in connection with such litigation, including, without limitation, any appeal therefrom.

10. Governing Law; Jurisdiction; Waiver of Jury Trial. This Agreement shall be governed by, construed and enforced in accordance with the laws of the State of New York, without regard to the conflict of laws provisions thereof. You hereby irrevocably and unconditionally consent to submit to the exclusive jurisdiction of the courts of the State of New York located in New York County (except that in the event that Target or any of its direct or indirect subsidiaries becomes the subject of any bankruptcy cases under chapter 11 of Title 11 of the United States Code, then the presiding bankruptcy court, or, if under applicable law exclusive jurisdiction over such matters is vested in federal courts, the United States District Court for the Southern District of New York) (collectively, the "New York Courts") for any lawsuits, actions or other proceedings arising out of or relating to this Agreement and agree not to commence any such lawsuit, action or other proceeding except in such courts. You further agree that service of any process, summons, notice or document by mail to your address set forth below shall be effective service of process for any lawsuit, action or other proceeding brought against you in any such court. Service made in such manner, to the fullest extent permitted by applicable law, shall have the same legal force and effect as if served upon such party personally within the State of New York. Nothing herein shall be deemed to limit or prohibit service of process by any other manner as may be permitted by applicable law. You hereby irrevocably and unconditionally waive any objection to the laying of venue of any lawsuit, action or other proceeding arising out of or relating to this Agreement in the New York Courts, and hereby further irrevocably and unconditionally waive and agree not to plead or claim in any such court that any such lawsuit, action or other proceeding brought in any such court has been brought in an inconvenient forum. **ANY RIGHT TO TRIAL BY JURY WITH RESPECT TO ANY LAWSUIT, CLAIM OR OTHER PROCEEDING ARISING OUT OF OR RELATING TO THIS AGREEMENT IS EXPRESSLY AND IRREVOCABLY WAIVED.**

11. Authority to Enter into Agreement. You hereby represent and warrant to the Company that this Agreement has been duly authorized, executed and delivered by one of your officers and is enforceable in accordance with its terms.

12. Third Party Beneficiaries. Each person included in the definition of the Company, other than Target, is an express third-party beneficiary of, and shall have the right to enforce the terms of, this Agreement.

13. Entire Agreement. This Agreement constitutes the entire agreement between the Parties regarding the subject matter hereof, and supersedes all negotiations, understandings, arrangements and agreements, oral or written, made prior to the execution hereof. In the event of any conflict between this Agreement, on the one hand, and the terms of any confidentiality legend set forth in a confidential information memorandum (or similar documents) related to a Possible Transaction or the terms of any "click-through" agreement related to an internet-based data room or similar repository of Confidential Information, on the other hand, the terms of this Agreement shall govern.

14. Assignment. This Agreement and the rights and obligations herein may not be assigned or otherwise transferred, in whole or in part, by you without the written consent of Target. The benefits of this Agreement shall inure to the respective successors and permitted assigns of the Parties hereto and the obligations and liabilities of the Parties under this Agreement shall be binding upon their respective successors and permitted assigns. Any attempted assignment not in compliance with this Agreement shall be void ab initio.

15. No Modification. No provision of this Agreement can be waived, modified or amended without the prior written consent of a duly authorized officer of the parties hereto, which consent shall specifically refer to the provision to be waived, modified or amended and shall explicitly make such waiver, modification or amendment. It is understood and agreed that no failure or delay by the Company in exercising any right, power or privilege hereunder shall operate as a waiver thereof, nor shall any single or partial exercise thereof preclude any other or further exercise thereof or the exercise of any other right, power or privilege hereunder. The failure of a party to insist upon strict adherence to any term of this Agreement on one or more occasions shall not be considered a waiver or deprive that party of the right thereafter to insist upon strict adherence to that term or any other term of this Agreement.

16. Counterparts. This Agreement may be executed in counterparts and exchanged by electronic means, each of which shall be deemed an original and all such counterparts shall together constitute one instrument.

17. Severability. If any term or provision of this Agreement is found to violate any statute, regulation, rule, order or decree of any governmental authority, court, agency or exchange, such invalidity shall not be deemed to affect any other term or provision hereof or the validity of the remainder of this Agreement, and there shall be substituted for the invalid term or provision a substitute term or provision that shall as nearly as possible achieve the intent of the invalid term or provision.

18. Term. This Agreement shall expire upon the expiration of the Confidentiality Period; *provided* that the final sentence of Section 3 of this Agreement shall survive such termination; *and provided further*, that any liability for breach of this Agreement arises prior to termination, such liability shall survive such termination.

19. Notices. All notices to be given to the Company hereunder shall be in writing and by electronic mail or fax, or delivered personally or by overnight courier, addressed to Waypoint Leasing Holdings Ltd. c/o Waypoint Leasing Services LLC, 19 Old Kings Highway South, Darien, CT 06820 ATTN: Todd Wolynski. All notices to be given to you hereunder shall be in writing and delivered personally or by overnight courier, addressed to: LCI Helicopters (Ireland) Limited, C/O Lease Corporation International Limited, 6 George's Dock, IFSC, Dublin 1, Ireland, Attn: General Counsel (copied to: Libra Group Services Limited, 13-14 Hobart Place, London SW1W 0HH, UK, Attn: Group General Counsel).

[*Remainder of Page Intentionally Left Blank*]

Please confirm your agreement with the foregoing by signing and returning one copy of this letter to the undersigned, whereupon this Agreement shall become a binding agreement between you and Target.

Very truly yours,

WAYPOINT LEASING HOLDINGS LTD.

By: _____
Name: Hooman Yazhari
Title: Director

Accepted and agreed as of
the date first written above:

LCI HELICOPTERS (IRELAND) LIMITED

By: _____
Name: T FOLEY
Title: DIRECTOR

EXHIBIT B

December Letter

Weil, Gotshal & Manges LLP

1395 Brickell Avenue, Suite 1200
Miami, FL 33131-3368
+1 305 577 3100 tel
+1 305 374 7159 fax

Edward Soto
+1 (305) 577-3177
edward.soto@weil.com

BY E-MAIL

December 27, 2018

LCI Helicopters (Ireland) Limited C/O
Lease Corporation International Limited
Ground Floor
6 George's Dock, IFSC
Dublin 1 Ireland
+353 1 6728708
Attn: Michael Platt (CEO), Jaspal Jandu (CFO)

Re: Waypoint Leasing Holdings Ltd.

Dear Messrs. Platt and Jandu:

We are not aware of the counsel LCI Helicopters (Ireland) Limited ("**LCI**") is using in connection with the issues addressed herein. If LCI has retained counsel to address these issues, we ask that you pass this communication on to your counsel as immediately as possible.

I am a litigation partner at the law firm Weil, Gotshal & Manges LLP. We represent Waypoint Leasing Holdings Ltd. ("**Waypoint**") and certain of its subsidiaries and affiliates as debtors and debtors in possession (collectively, the "**Company**" and the "**Debtors**") in the jointly administered chapter 11 cases captioned *In re Waypoint Leasing Holdings Ltd., et al.*, Case No. 18-13648 (SMB), currently pending before the Honorable Judge Stuart Bernstein in the United States Bankruptcy Court for the Southern District of New York (the "**Bankruptcy Court**").

As you know, before the Debtors filed their chapter 11 petitions, they engaged in an out-of-court sale and marketing process of the Company. As you also know, LCI was one of the potential bidders for the Company and, accordingly, executed a non-disclosure agreement dated August 29, 2018 (the "**NDA**"). The Company required potential bidders like LCI to execute the NDA because, in connection with the sale and marketing process, the Company made available to LCI certain non-public, commercially-sensitive, and/or otherwise proprietary information about the Company. The NDA and all obligations thereunder remain effective and binding.

In executing the NDA, LCI agreed to treat certain Confidential Information[1] "solely for the purpose of evaluating and participating in discussions with the Company regarding, a Possible Transaction and for no other purpose." Under the NDA, Confidential Information was defined to

[1] Capitalized terms used but not defined herein shall have the meanings ascribed to them in the NDA.

exclude information that "becomes available to you [LCI] on a non-confidential basis from a source other than the Company or any of its Representatives, *provided* that such source is not known by you (after reasonable inquiry) to be bound by a contractual, legal or fiduciary obligation of confidentiality to the Company or any other party with respect to such information."

The Debtors have provided certain information to their lenders—also subject to certain non-disclosure obligations—in connection with the pre-petition sale and marketing process, the pre-petition forbearance negotiations, and now their chapter 11 cases. It has come to our attention that one or more lenders may have provided LCI with Confidential Information in violation of the lenders' confidentiality agreements. As such, to the extent LCI has come to possess such information, that information is included in the definition of Confidential Information under the NDA. LCI, therefore, is contractually obligated to treat that Confidential Information in accordance with the NDA, including maintaining the confidentiality thereof. Moreover, the only allowable use of that Confidential Information is to evaluate and participate in discussions with the Company regarding a Possible Transaction.

In addition, the Company has permitted its lenders to speak with certain third parties about the possible provision of asset management services in the event that such lenders successfully credit bid for certain of the Company's assets. The Company's agreement to permit these discussions, however, is conditioned on the Company having prior consent rights over any information shared by the lenders with any such alternative asset manager, and in such circumstances all obligations to maintain the confidentiality of the Company's information remain effective. To the extent that LCI is engaged in any discussions with any lenders regarding the provision of asset management services, these restrictions apply.

Please be advised that the Debtors have a fiduciary duty to protect their Confidential Information and must (and will) enforce any breach of non-disclosure obligations and use restrictions to the fullest extent allowable under the law. If the Company determines that the NDA or any of its terms were breached, or that any Confidential Information was shared and/or used in a manner causing harm to the Company and its assets, the Company will enforce any and all resulting claims and causes of action before the Bankruptcy Court, and will seek damages and other available relief.

Thank you for your prompt attention to this matter.

Sincerely,

Edward Soto

Edward Soto

cc: Gary T. Holtzer
Kelly DiBlasi

EXHIBIT C

February Letter

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HASTINGS

February 14, 2019

VIA OVERNIGHT MAIL AND PDF EMAIL

LCI Helicopters (Ireland) Limited C/O
Lease Corporation International Limited
Ground Floor
6 George's Dock, IFSC
Dublin 1 Ireland

Attn: Michael Platt (CEO), michael.platt@lciaviation.com
Jaspal Jandu (CFO), jaspal.jandu@lciaviation.com

Re: *Waypoint Leasing Holdings Ltd.*

Dear Messrs. Platt and Jandu:

I am writing concerning LCI Helicopters (Ireland) Limited's ("LCI" or "you") material and ongoing breaches of the non-disclosure agreement between LCI and Waypoint Leasing Holdings Ltd. ("Waypoint") dated August 29, 2018 (the "NDA").

We are not aware of LCI having retained counsel in connection with the matters addressed in this letter. If LCI has retained counsel to address these issues, we ask that you promptly forward this communication to your attorneys.

We serve as legal counsel to Macquarie Rotorcraft Holdings Limited and its affiliates (collectively, "Macquarie"). As you would be aware, Macquarie is the purchaser of certain assets of Waypoint and certain of its affiliates as debtors and debtors in possession (collectively, the "Debtors") in the jointly administered chapter 11 cases captioned *In re Waypoint Leasing Holdings Ltd., et al.*, Case No. 18-13648 (SMB) (the "Bankruptcy Proceedings"), currently pending before the Honorable Judge Stuart Bernstein in the United States Bankruptcy Court for the Southern District of New York (the "Court").

Macquarie will acquire all of the Debtors' rights and interests under the NDA pursuant to a Stock and Asset Purchase Agreement dated December 7, 2018 (Court Docket 64 Exhibit C). Therefore, all of LCI's obligations under the NDA will be obligations owed to Macquarie.

By letter dated December 27, 2018 (attached as **Exhibit A**), the Debtors made LCI aware that the Debtors believed LCI had received Confidential Information in violation of confidentiality agreements between the Debtors and their lenders. The Debtors reminded LCI of its obligations under the NDA and advised LCI that the Debtors intended to enforce any breach of the NDA to the fullest extent permitted by law.

An affidavit by a representative of Lombard North Central plc ("Lombard") (the sole lender and agent of the Waypoint Asset Co 9 Limited ("WAC9") secured debt facility) was filed in the Bankruptcy Proceedings on February 11, 2019 (Court Docket 410) (the "Lombard Affidavit"). The Lombard Affidavit contained the following statement:

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"Lombard is discussing with its servicer a subsequent transaction pursuant to which the Designated Transferee and/or the underlying business would be recapitalized and sold to the servicer. Neither Lombard, the Designated Transferee, or the servicer have reached an agreement or arrangement with respect to this subsequent sale, but discussions continue and a subsequent sale could occur soon after consummation of Lombard's credit bid if outstanding items are resolved and a binding agreement is reached among the parties."

The Lombard Affidavit was declared under penalty of perjury by Ms. Jacqueline McDermott. Ms. McDermott was cross-examined before Justice Bernstein in Court on February 12, 2019. Amongst other matters, Ms. McDermott testified, again under penalty of perjury:

(a) that the "servicer" referred to in the Lombard Affidavit was "LCI";

(b) at no time had the Debtors or Houlihan Lokey given permission to Lombard for Lombard to discuss with LCI the sale of WAC9 or its assets to LCI; and

(c) at no time had the Debtors or Houlihan Lokey given permission to Lombard for Lombard to disclose to LCI information regarding WAC9 or its assets for the purposes of discussions relating to LCI purchasing WAC9 or its assets.

Clause 4 of the NDA contains the following provision (emphasis added):

*"**You [LCI] further agree that, without the prior written consent of Houlihan Lokey, neither you nor any of your Representatives shall, directly or indirectly, initiate, solicit or maintain, or cause to be initiated, solicited or maintained, contact with any** officer, director, employee, any person known to you to be a former (within the past twelve (12) months) employee of the Company or its affiliates, stockholder, **creditor**, affiliate, supplier, distributor, vendor, customer, provider, agent, regulator (other than as permitted in Section 2(b) above) **or other commercial counterparty of the Company or any subsidiary of the Company regarding the Company or its business,** financial condition, operations, strategy, prospects, **assets** or liabilities (except as such communications regarding the Company's business, financial condition, operation, strategy, prospects, assets or liabilities may occur in the ordinary course of business on matters unrelated to, and otherwise not in connection with, the Possible Transaction) or concerning any Confidential Information, any Transaction Information or any Possible Transaction.*

A senior representative of Houlihan Lokey (Mr. Matthew Niemann) testified before Justice Bernstein in Court on February 12, 2019 that he was aware of the NDA and that Houlihan Lokey had never consented to LCI discussing a purchase of WAC9 or its assets from Lombard.

The evidence presented to the Court in the Lombard Affidavit and the testimony under oath of Ms. McDermott and Mr. Niemann clearly establishes that LCI has breached the NDA and that the breaches are continuing.

LCI's past and continuing breaches of the NDA are willful and blatant. They are the source of ongoing irreparable harm to Macquarie, with such harm to be further aggravated upon the closing of Macquarie's impending asset acquisition. Accordingly, you are liable or will be liable to Macquarie for, among other things, tortious interference with contract, tortious interference with prospective business

PAUL
HASTINGS

relations, and/or breach of your contractual obligations and duties owed to Macquarie. Macquarie reserves the right to pursue any and all remedies available to it, including, but not limited to: injunctive relief, specific performance, rescission, money damages, and attorneys' fees.

Macquarie demands that LCI immediately cease and desist from engaging in further breaches of the NDA, including engaging in any discussions with Lombard or any other party regarding the purchase of any assets of the Debtors.

This letter shall serve as a formal document preservation demand in anticipation of litigation. Macquarie hereby places you on notice of your obligation not to access, alter, modify, or destroy (including by erasure) any evidence relating to this matter, including any hard or soft-copy documents, corporate or personal email accounts, cloud storage accounts, text messages, Instant Messages, Instant Message archives, notes, journals, logs, servers, back-up tapes, electronic files, voicemail messages, telephone records, corporate or personal communication devices (i.e., iPhones, BlackBerries, etc.), corporate or personal electronic storage devices (i.e. USB drives, stand-alone hard drives, software that pushes or copies communications to a desktop, etc.) intranet web pages, or any other data or evidence related to the Debtors, Macquarie, the purchase of the Debtors' assets, any option relating to the purchase of the Debtor's assets, WAC9, any servicing arrangement with WAC9, any secured collateral of WAC9, Lombard, Waypoint Asset Co 12 Limited ("WAC12"), lenders to WAC12, the administrative agent for the WAC12 secured debt facility, any other lender to the Debtors, the NDA, or Confidential Information, in each case, created or modified on or after June 19, 2018. This obligation applies to you as well as all of your affiliates, subsidiaries, agents, and assigns.

Macquarie waives no rights or remedies it may have at law or in equity, and expressly reserves all rights with regard to this matter, including all past, ongoing, and future breaches of the NDA, both known and unknown.

Very truly yours,

Chris Dickerson
of PAUL HASTINGS LLP

EXHIBIT D

March Letter

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March 14, 2019

VIA OVERNIGHT MAIL AND PDF EMAIL

LCI Helicopters (Ireland) Limited C/O
Lease Corporation International Limited
Ground Floor
6 George's Dock, IFSC
Dublin 1 Ireland

Attn: Michael Platt (CEO), michael.platt@lciaviation.com
Jaspal Jandu (CFO), jaspal.jandu@lciaviation.com

Re: *Waypoint Leasing Holdings Ltd.*

Dear Messrs. Platt and Jandu:

I am writing in follow-up to my letter dated February 14, 2019 ("February 14th Letter"), which advised LCI Helicopters (Ireland) Limited's ("LCI" or "you") of its material and ongoing breaches of the non-disclosure agreement between LCI and Waypoint Leasing Holdings Ltd. ("Waypoint") dated August 29, 2018 (the "NDA"). We have not received any response from you or your counsel to the February 14th Letter.

We advise that Macquarie Rotorcraft Leasing Holdings Limited and its affiliates (collectively, "Macquarie") closed its acquisition of certain assets of Waypoint and certain of its affiliates as debtors and debtors in possession (collectively, the "Debtors") on March 13, 2019, pursuant to a Stock and Asset Purchase Agreement dated December 7, 2018 (Court Docket 64 Exhibit C) in the jointly administered chapter 11 cases captioned *In re Waypoint Leasing Holdings Ltd., et al.,* Case No. 18-13648 (SMB) (the "Bankruptcy Proceedings"), currently pending before the Honorable Judge Stuart Bernstein in the United States Bankruptcy Court for the Southern District of New York (the "Court"). Those assets included all of the Debtors' rights and interests under the NDA. Therefore, as of yesterday, all of LCI's obligations under the NDA are obligations owed to Macquarie and Macquarie has the right to enforce the NDA and seek redress for any breaches thereof.

By letter dated December 27, 2018 (attached as **Exhibit A**), the Debtors made LCI aware that the Debtors believed LCI had received Confidential Information[1] in violation of confidentiality agreements between the Debtors and their lenders. The Debtors reminded LCI of its obligations under the NDA and advised LCI that the Debtors intended to enforce any breach of the NDA to the fullest extent permitted by law. In the February 14th Letter (attached as **Exhibit B**), Macquarie advised LCI of additional breaches of the NDA's no-contact provisions, and demanded that LCI immediately cease from any further violations of the NDA, including, but not limited to, making further contact with Lombard North Central plc ("Lombard") (the sole lender and agent of the Waypoint Asset Co 9 Limited ("WAC9"). Macquarie has now also succeeded to the Debtors' rights and interests under the aforementioned confidentiality agreements.

Because you have failed to comply with your legal duties and obligations, and failed to comply with or respond to the demand in the February 14th Letter, it is apparent that LCI has made no effort to cease and desist from its violations of the NDA, or comply with its ongoing obligations thereunder. In

[1] All capitalized terms not defined herein shall have the meanings ascribed to them in the NDA.

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view of such violations and non-compliance, Macquarie has no choice but to seek legal redress to vindicate and protect its rights. Before initiating legal claims, however, Macquarie is willing to give LCI the opportunity to immediately return any and all Confidential Information in LCI's possession violative of the NDA and confidentiality agreements between the Debtors and their lenders. Macquarie will consider LCI's prompt compliance with this request as it continues to evaluate its legal options to redress the NDA violations to date. Macquarie further repeats and reiterates its demand that LCI immediately cease and desist from engaging in further breaches of the NDA.

Macquarie requests that LCI immediately provide its undersigned counsel with the following documents, communications, and information, along with a sworn certification attesting to the fact that LCI no longer retains any Confidential Information received pursuant to or in violation of the NDA or the confidentiality agreements between the Debtors and their lenders:

1. Any and all documents and communications regarding the Debtors, Macquarie, the purchase of the Debtors' assets, any option relating to the purchase of the Debtor's assets, WAC9, assets of WAC9 (or subsidiaries of WAC9), any servicing arrangement with WAC9, any proposal to purchase WAC9 or assets of WAC9 (or subsidiaries of WAC9), any proposal to enter into an option to purchase WAC9 or assets of WAC9 (or subsidiaries of WAC9), any secured collateral of WAC9, Lombard, Waypoint Asset Co 12 Limited ("WAC12"), lenders to WAC12, the administrative agent for the WAC12 secured debt facility, any other lender to the Debtors, any aircraft assets owned by the Debtors or their subsidiaries and affiliates as of June 19, 2018, the NDA, or Confidential Information, in each case, created or modified on or after June 19, 2018.

2. Any and all Confidential Information obtained from Lombard or any other source regarding the Debtors, Macquarie, the purchase of the Debtors' assets, any option relating to the purchase of the Debtor's assets, WAC9, assets of WAC9 (or subsidiaries of WAC9), any servicing arrangement with WAC9, any proposal to purchase WAC9 or assets of WAC9 (or subsidiaries of WAC9), any proposal to enter into an option to purchase WAC9 or assets of WAC9 (or subsidiaries of WAC9), any secured collateral of WAC9, Lombard, WAC12, lenders to WAC12, the administrative agent for the WAC12 secured debt facility, any other lender to the Debtors, any aircraft assets owned by the Debtors or their subsidiaries and affiliates as of June 19, 2018, the NDA, or Confidential Information, in each case, created or modified on or after June 19, 2018.

3. A list of all individuals involved in contact between LCI and Lombard regarding the Debtors, Macquarie, the purchase of the Debtors' assets, any option relating to the purchase of the Debtor's assets, WAC9, assets of WAC9 (or subsidiaries of WAC9), any servicing arrangement with WAC9, any proposal to purchase WAC9 or assets of WAC9 (or subsidiaries of WAC9), any proposal to enter into an option to purchase WAC9 or assets of WAC9 (or subsidiaries of WAC9), any secured collateral of WAC9, Lombard, WAC12, lenders to WAC12, the administrative agent for the WAC12 secured debt facility, any other lender to the Debtors, any aircraft assets owned by the Debtors or their subsidiaries and affiliates as of June 19, 2018, the NDA, or Confidential Information, in each case, created or modified on or after June 19, 2018.

4. A list of any and all Confidential Information obtained from Lombard or any other source, whether retained, disposed, or destroyed, regarding Debtors, Macquarie, the purchase of the Debtors' assets, any option relating to the purchase of the Debtor's assets, WAC9, assets of WAC9 (or subsidiaries of WAC9), any servicing arrangement with WAC9, any proposal to purchase WAC9 or assets of WAC9 (or subsidiaries of WAC9), any proposal

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to enter into an option to purchase WAC9 or assets of WAC9 (or subsidiaries of WAC9), any secured collateral of WAC9, Lombard, WAC12, lenders to WAC12, the administrative agent for the WAC12 secured debt facility, any other lender to the Debtors, any aircraft assets owned by the Debtors or their subsidiaries and affiliates as of June 19, 2018, the NDA, or Confidential Information, in each case, created or modified on or after June 19, 2018.

We previously cautioned that LCI's failure to immediately cease and desist from its breaches of the NDA would result in Macquarie's pursuit of all remedies available to it, including, but not limited to: injunctive relief, specific performance, rescission, money damages, and attorneys' fees. LCI's lack of response to the February 14th Letter sends a clear message that such remedies are now necessary. **Please respond to this letter within seven (7) days, and in no event later than March 21, 2019 at 5:00 p.m. Eastern Daylight Time, confirming your (i) compliance with the cease and desist demands and (ii) willingness to immediately provide Macquarie's undersigned counsel, and in no event later than March 25, 2019, with the documents and information requested herein, along with a sworn certification that LCI has not retained copies of any Confidential Information received pursuant to or in violation of the NDA or the confidentiality agreements between the Debtors and their lenders.** Failure to so respond will result in immediate legal action by Macquarie to protect its rights under the NDAs and all other applicable agreements, laws, and regulations.

Nothing in this letter shall be construed as in any way affecting, altering, or obviating Macquarie's earlier formal document preservation demand. LCI continues to be subject to all applicable document preservation obligations, including its obligation not to access, alter, modify, or destroy (including by erasure) any evidence relating to this matter, including any hard or soft-copy documents, corporate or personal email accounts, cloud storage accounts, text messages, Instant Messages, Instant Message archives, notes, journals, logs, servers, back-up tapes, electronic files, voicemail messages, telephone records, corporate or personal communication devices (i.e., iPhones, BlackBerries, etc.), corporate or personal electronic storage devices (i.e. USB drives, stand-alone hard drives, software that pushes or copies communications to a desktop, etc.) intranet web pages, or any other data or evidence related to the Debtors, Macquarie, the purchase of the Debtors' assets, any option relating to the purchase of the Debtor's assets, WAC9, assets of WAC9 (or subsidiaries of WAC9), any servicing arrangement with WAC9, any proposal to purchase WAC9 or assets of WAC9 (or subsidiaries of WAC9), any proposal to enter into an option to purchase WAC9 or assets of WAC9 (or subsidiaries of WAC9), any secured collateral of WAC9, Lombard, WAC12, lenders to WAC12, the administrative agent for the WAC12 secured debt facility, any other lender to the Debtors, any aircraft assets owned by the Debtors or their subsidiaries and affiliates as of June 19, 2018, the NDA, or Confidential Information, in each case, created or modified on or after June 19, 2018. This obligation applies to you as well as all of your affiliates, subsidiaries, agents, and assigns.

Macquarie waives no rights or remedies it may have at law or in equity, and expressly reserves all rights with regard to this matter, including all past, ongoing, and future breaches of the NDA, both known and unknown.

Very truly yours,

/HCW

Chris Dickerson
of PAUL HASTINGS LLP

Exhibit A

December 27, 2018 Letter

Weil, Gotshal & Manges LLP

1395 Brickell Avenue, Suite 1200
Miami, FL 33131-3368
+1 305 577 3100 tel
+1 305 374 7159 fax

Edward Soto
+1 (305) 577-3177
edward.soto@weil.com

BY E-MAIL

December 27, 2018

LCI Helicopters (Ireland) Limited C/O
Lease Corporation International Limited
Ground Floor
6 George's Dock, IFSC
Dublin 1 Ireland
+353 1 6728708
Attn: Michael Platt (CEO), Jaspal Jandu (CFO)

Re: Waypoint Leasing Holdings Ltd.

Dear Messrs. Platt and Jandu:

We are not aware of the counsel LCI Helicopters (Ireland) Limited ("**LCI**") is using in connection with the issues addressed herein. If LCI has retained counsel to address these issues, we ask that you pass this communication on to your counsel as immediately as possible.

I am a litigation partner at the law firm Weil, Gotshal & Manges LLP. We represent Waypoint Leasing Holdings Ltd. ("**Waypoint**") and certain of its subsidiaries and affiliates as debtors and debtors in possession (collectively, the "**Company**" and the "**Debtors**") in the jointly administered chapter 11 cases captioned *In re Waypoint Leasing Holdings Ltd., et al.*, Case No. 18-13648 (SMB), currently pending before the Honorable Judge Stuart Bernstein in the United States Bankruptcy Court for the Southern District of New York (the "**Bankruptcy Court**").

As you know, before the Debtors filed their chapter 11 petitions, they engaged in an out-of-court sale and marketing process of the Company. As you also know, LCI was one of the potential bidders for the Company and, accordingly, executed a non-disclosure agreement dated August 29, 2018 (the "**NDA**"). The Company required potential bidders like LCI to execute the NDA because, in connection with the sale and marketing process, the Company made available to LCI certain non-public, commercially-sensitive, and/or otherwise proprietary information about the Company. The NDA and all obligations thereunder remain effective and binding.

In executing the NDA, LCI agreed to treat certain Confidential Information[1] "solely for the purpose of evaluating and participating in discussions with the Company regarding, a Possible Transaction and for no other purpose." Under the NDA, Confidential Information was defined to

[1] Capitalized terms used but not defined herein shall have the meanings ascribed to them in the NDA.

exclude information that "becomes available to you [LCI] on a non-confidential basis from a source other than the Company or any of its Representatives, *provided* that such source is not known by you (after reasonable inquiry) to be bound by a contractual, legal or fiduciary obligation of confidentiality to the Company or any other party with respect to such information."

The Debtors have provided certain information to their lenders—also subject to certain non-disclosure obligations—in connection with the pre-petition sale and marketing process, the pre-petition forbearance negotiations, and now their chapter 11 cases. It has come to our attention that one or more lenders may have provided LCI with Confidential Information in violation of the lenders' confidentiality agreements. As such, to the extent LCI has come to possess such information, that information is included in the definition of Confidential Information under the NDA. LCI, therefore, is contractually obligated to treat that Confidential Information in accordance with the NDA, including maintaining the confidentiality thereof. Moreover, the only allowable use of that Confidential Information is to evaluate and participate in discussions with the Company regarding a Possible Transaction.

In addition, the Company has permitted its lenders to speak with certain third parties about the possible provision of asset management services in the event that such lenders successfully credit bid for certain of the Company's assets. The Company's agreement to permit these discussions, however, is conditioned on the Company having prior consent rights over any information shared by the lenders with any such alternative asset manager, and in such circumstances all obligations to maintain the confidentiality of the Company's information remain effective. To the extent that LCI is engaged in any discussions with any lenders regarding the provision of asset management services, these restrictions apply.

Please be advised that the Debtors have a fiduciary duty to protect their Confidential Information and must (and will) enforce any breach of non-disclosure obligations and use restrictions to the fullest extent allowable under the law. If the Company determines that the NDA or any of its terms were breached, or that any Confidential Information was shared and/or used in a manner causing harm to the Company and its assets, the Company will enforce any and all resulting claims and causes of action before the Bankruptcy Court, and will seek damages and other available relief.

Thank you for your prompt attention to this matter.

Sincerely,

Edward Soto

Edward Soto

cc: Gary T. Holtzer
Kelly DiBlasi

Exhibit B

February 14, 2019 Letter

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February 14, 2019

VIA OVERNIGHT MAIL AND PDF EMAIL

LCI Helicopters (Ireland) Limited C/O
Lease Corporation International Limited
Ground Floor
6 George's Dock, IFSC
Dublin 1 Ireland

Attn: Michael Platt (CEO), michael.platt@lciaviation.com
Jaspal Jandu (CFO), jaspal.jandu@lciaviation.com

Re: *Waypoint Leasing Holdings Ltd.*

Dear Messrs. Platt and Jandu:

I am writing concerning LCI Helicopters (Ireland) Limited's ("LCI" or "you") material and ongoing breaches of the non-disclosure agreement between LCI and Waypoint Leasing Holdings Ltd. ("Waypoint") dated August 29, 2018 (the "NDA").

We are not aware of LCI having retained counsel in connection with the matters addressed in this letter. If LCI has retained counsel to address these issues, we ask that you promptly forward this communication to your attorneys.

We serve as legal counsel to Macquarie Rotorcraft Holdings Limited and its affiliates (collectively, "Macquarie"). As you would be aware, Macquarie is the purchaser of certain assets of Waypoint and certain of its affiliates as debtors and debtors in possession (collectively, the "Debtors") in the jointly administered chapter 11 cases captioned *In re Waypoint Leasing Holdings Ltd., et al.*, Case No. 18-13648 (SMB) (the "Bankruptcy Proceedings"), currently pending before the Honorable Judge Stuart Bernstein in the United States Bankruptcy Court for the Southern District of New York (the "Court").

Macquarie will acquire all of the Debtors' rights and interests under the NDA pursuant to a Stock and Asset Purchase Agreement dated December 7, 2018 (Court Docket 64 Exhibit C). Therefore, all of LCI's obligations under the NDA will be obligations owed to Macquarie.

By letter dated December 27, 2018 (attached as **Exhibit A**), the Debtors made LCI aware that the Debtors believed LCI had received Confidential Information in violation of confidentiality agreements between the Debtors and their lenders. The Debtors reminded LCI of its obligations under the NDA and advised LCI that the Debtors intended to enforce any breach of the NDA to the fullest extent permitted by law.

An affidavit by a representative of Lombard North Central plc ("Lombard") (the sole lender and agent of the Waypoint Asset Co 9 Limited ("WAC9") secured debt facility) was filed in the Bankruptcy Proceedings on February 11, 2019 (Court Docket 410) (the "Lombard Affidavit"). The Lombard Affidavit contained the following statement:

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"Lombard is discussing with its servicer a subsequent transaction pursuant to which the Designated Transferee and/or the underlying business would be recapitalized and sold to the servicer. Neither Lombard, the Designated Transferee, or the servicer have reached an agreement or arrangement with respect to this subsequent sale, but discussions continue and a subsequent sale could occur soon after consummation of Lombard's credit bid if outstanding items are resolved and a binding agreement is reached among the parties."

The Lombard Affidavit was declared under penalty of perjury by Ms. Jacqueline McDermott. Ms. McDermott was cross-examined before Justice Bernstein in Court on February 12, 2019. Amongst other matters, Ms. McDermott testified, again under penalty of perjury:

(a) that the "servicer" referred to in the Lombard Affidavit was "LCI";

(b) at no time had the Debtors or Houlihan Lokey given permission to Lombard for Lombard to discuss with LCI the sale of WAC9 or its assets to LCI; and

(c) at no time had the Debtors or Houlihan Lokey given permission to Lombard for Lombard to disclose to LCI information regarding WAC9 or its assets for the purposes of discussions relating to LCI purchasing WAC9 or its assets.

Clause 4 of the NDA contains the following provision (emphasis added):

*"**You [LCI] further agree that, without the prior written consent of Houlihan Lokey, neither you nor any of your Representatives shall, directly or indirectly, initiate, solicit or maintain, or cause to be initiated, solicited or maintained, contact with any** officer, director, employee, any person known to you to be a former (within the past twelve (12) months) employee of the Company or its affiliates, stockholder, **creditor**, affiliate, supplier, distributor, vendor, customer, provider, agent, regulator (other than as permitted in Section 2(b) above) **or other commercial counterparty of the Company or any subsidiary of the Company regarding the Company or its business,** financial condition, operations, strategy, prospects, **assets** or liabilities (except as such communications regarding the Company's business, financial condition, operation, strategy, prospects, assets or liabilities may occur in the ordinary course of business on matters unrelated to, and otherwise not in connection with, the Possible Transaction) or concerning any Confidential Information, any Transaction Information or any Possible Transaction.*

A senior representative of Houlihan Lokey (Mr. Matthew Niemann) testified before Justice Bernstein in Court on February 12, 2019 that he was aware of the NDA and that Houlihan Lokey had never consented to LCI discussing a purchase of WAC9 or its assets from Lombard.

The evidence presented to the Court in the Lombard Affidavit and the testimony under oath of Ms. McDermott and Mr. Niemann clearly establishes that LCI has breached the NDA and that the breaches are continuing.

LCI's past and continuing breaches of the NDA are willful and blatant. They are the source of ongoing irreparable harm to Macquarie, with such harm to be further aggravated upon the closing of Macquarie's impending asset acquisition. Accordingly, you are liable or will be liable to Macquarie for, among other things, tortious interference with contract, tortious interference with prospective business

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relations, and/or breach of your contractual obligations and duties owed to Macquarie. Macquarie reserves the right to pursue any and all remedies available to it, including, but not limited to: injunctive relief, specific performance, rescission, money damages, and attorneys' fees.

Macquarie demands that LCI immediately cease and desist from engaging in further breaches of the NDA, including engaging in any discussions with Lombard or any other party regarding the purchase of any assets of the Debtors.

This letter shall serve as a formal document preservation demand in anticipation of litigation. Macquarie hereby places you on notice of your obligation not to access, alter, modify, or destroy (including by erasure) any evidence relating to this matter, including any hard or soft-copy documents, corporate or personal email accounts, cloud storage accounts, text messages, Instant Messages, Instant Message archives, notes, journals, logs, servers, back-up tapes, electronic files, voicemail messages, telephone records, corporate or personal communication devices (i.e., iPhones, BlackBerries, etc.), corporate or personal electronic storage devices (i.e. USB drives, stand-alone hard drives, software that pushes or copies communications to a desktop, etc.) intranet web pages, or any other data or evidence related to the Debtors, Macquarie, the purchase of the Debtors' assets, any option relating to the purchase of the Debtor's assets, WAC9, any servicing arrangement with WAC9, any secured collateral of WAC9, Lombard, Waypoint Asset Co 12 Limited ("WAC12"), lenders to WAC12, the administrative agent for the WAC12 secured debt facility, any other lender to the Debtors, the NDA, or Confidential Information, in each case, created or modified on or after June 19, 2018. This obligation applies to you as well as all of your affiliates, subsidiaries, agents, and assigns.

Macquarie waives no rights or remedies it may have at law or in equity, and expressly reserves all rights with regard to this matter, including all past, ongoing, and future breaches of the NDA, both known and unknown.

Very truly yours,

Chris Dickerson
of PAUL HASTINGS LLP

EXHIBIT B

PAUL HASTINGS LLP
G. Alexander Bongartz, Esq.
200 Park Avenue
New York, New York 10166
Telephone: (212) 318-6000
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alexbongartz@paulhastings.com

-and-

PAUL HASTINGS LLP
Chris L. Dickerson (admitted *pro hac vice*)
Mark D. Pollack (admitted *pro hac vice* ~~admission pending~~)
Nathan S. Gimpel (admitted *pro hac vice*)
Michael C. Whalen (admitted *pro hac vice* ~~admission pending~~)
71 S. Wacker Drive, Suite 4500
Chicago, Illinois 60606
Telephone: (312) 499-6000
Facsimile: (312) 499-6100

Counsel for Macquarie Rotorcraft Leasing Holdings Limited

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re	)	Chapter 11
WAYPOINT LEASING HOLDINGS LTD., *et al*.,	)	Case No. 18-13648 (SMB)
Debtors.	)	Jointly Administered
MACQUARIE ROTORCRAFT LEASING HOLDINGS LIMITED,	)	
Plaintiff,	)	
v.	)	Adversary Proceeding No. 19-~~_____~~01107
LCI HELICOPTERS (IRELAND) LIMITED,	)	
Defendant.	)	

_____)

FIRST AMENDED ADVERSARY COMPLAINT

Plaintiff Macquarie Rotorcraft Leasing Holdings Limited ("Macquarie" or "Plaintiff"), for its Adversary Complaint (this "Complaint") against Defendant LCI Helicopters (Ireland) Limited ("LCI" or "Defendant"), ~~allege~~alleges as follows:

INTRODUCTION

1. This case results from LCI's brazen disregard of explicit confidentiality obligations to which it was and remains contractually obligated, and explicit court-ordered bidding procedures and requirements to which it was bound, and the resultant damages caused thereby. More specifically, the Defendant engaged in discussions with third parties, contrary to its contractual promises, to purchase assets belonging to Waypoint Leasing Holdings Ltd. ("Waypoint") and certain of its subsidiaries and affiliates, as debtors and debtors in possession (collectively, the "Debtors"), outside of the court-ordered sale process, thereby causing substantial damages to ~~the~~both Debtors and Plaintiff ~~and its business~~.

2. Although the Defendant willingly entered into a non-disclosure agreement with Waypoint on August 29, 2018, attached as **Exhibit A** (the "NDA"), and although the Defendant knew of its obligations under the NDA—including the strict requirement in section 4 of the NDA that it may only engage in discussions with any person or entity other than the Debtors' financial advisor regarding the purchase of any of the Debtors' assets upon receiving explicit prior permission to do so—the Defendant disregarded its obligations and actively pursued such discussions. To make matters worse, the Debtors and Macquarie repeatedly cautioned the Defendant that its actions violated the NDA and warned that legal action would be necessary if the Defendant did not cease and desist immediately. It chose to ignore such warnings.

3. Simply put, the Defendant knowingly engaged in discussions forbidden by the NDA without seeking or obtaining the advance approvals to do so as required by the unambiguous terms of the NDA. By virtue of such discussions, the Defendant entered into an undisclosed and impermissible agreement with the eventual winning credit bidder for certain assets of the Debtors. This agreement enabled the Defendant to avoid a competitive auction with Macquarie for such assets, thereby depriving Macquarie of the opportunity to acquire the assets and of a beak-up fee to which it was otherwise entitled. The agreement further deprived the Debtors of the opportunity to maximize the value it received for such assets. As a result, the Defendant benefitted from its misconduct and now possesses assets to which it is not entitled.

JURISDICTION AND VENUE

4. The United States Bankruptcy Court for the Southern District of New York (the "Court") has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. §§ 157 and 1334 and the *Amended Standing Order of Reference from the United States District Court for the Southern District of New York*, dated January 31, 2012. Venue is proper in this Court pursuant to 28 U.S.C. § 1409.

5. This adversary proceeding is commenced pursuant to Rule 7001 of the Federal Rules of Bankruptcy Procedures (the "Bankruptcy Rules"). Pursuant to Bankruptcy Rule 7008, Plaintiff consents to the entry of final orders and judgments by this Court in connection with this Complaint.

6. This Court retained jurisdiction to hear and determine all matters, including adjudication of any disputes, relating to and arising from the implementation of the *Order (I) (A) Approving Purchase Agreement among Debtors and Successful Credit Bidder, (B) Authorizing Sale of Certain of Debtors' Assets Free and Clear of Liens, Claims, Encumbrances, and Other Interests, (C) Authorizing Assumption and Assignment of Certain Executory Contracts and*

Unexpired Leases in Connection Therewith, and (D) Granting Related Relief, and (II) Authorizing Debtors to Take Certain Actions with Respect to Related Intercompany Claims in Connection Therewith [Docket No. 525] (the "Sale Order") and the *Order Approving (A) Bidding Procedures, (B) Bid Protections, (C) Form and Manner of Notice of Cure Costs, Auction, Sale Transaction, and Sale Hearing, and (D) Date for Auction, If Necessary, and Sale Hearing* [Docket No. 159] (the "Bidding Procedures Order").

7. Pursuant to paragraph 10 of the NDA, LCI irrevocably and unconditionally consented to submit to the exclusive jurisdiction of this Court for any lawsuits, actions, or other proceedings arising out of or relating to the NDA.

PARTIES

8. Plaintiff Macquarie is a wholly owned subsidiary of Macquarie Group Limited ("Macquarie Group"), a multinational financial services group providing asset management, finance, banking, advisory, risk, and capital services. Macquarie Group is headquartered in Australia and is listed on the Australian Securities Exchange.

9. Upon information and belief, Defendant LCI is a privately owned aircraft lessor founded in 2004. LCI is owned by the Libra Group, a privately held international conglomerate operating in the aviation, energy, hospitality, real estate, and shipping industries, among others.

BACKGROUND

The Waypoint Non-Disclosure Agreement with LCI

10. On November 25, 2018, the Debtors filed voluntary cases under chapter 11 of the Bankruptcy Code (the "Chapter 11 Cases").

11. Prior to the filing of the Chapter 11 Cases, the Debtors engaged in an out-of-court sale and marketing process for substantially all of their assets. LCI was involved in the bidding process and, accordingly, executed the NDA on August 29, 2018.

12. The NDA allowed LCI to obtain Confidential Information[1] from Waypoint relevant to the sale of certain of the Debtors' assets. The NDA significantly restricted the information provided by Waypoint that LCI could consider during the sale process and in contemplation of acquiring the Debtors' assets as well as the purposes for which such information could be used. In executing the NDA, LCI agreed to use such Confidential Information "***solely*** for the purpose of evaluating and participating in discussions with the Company[2] regarding, a possible Transaction ***and for no other purpose***." NDA § 2 (emphasis added). The NDA defines Confidential Information as:

> . . . all notes, memoranda, summaries, analyses, compilations, forecasts, data, studies, interpretations or other documents or materials prepared by the Company or its Representatives, or [LCI] or [its] Representatives, which use, contain, reflect or are based upon or derived from, in whole or in part, information furnished to [LCI] or [its] Representatives by or on behalf of the Company.

Id. § 1(a).

LCI's Violations of the NDA's Restrictions on the Use of Confidential Information

13. Under the NDA, Confidential Information excluded information that "becomes available to [LCI] on a non-confidential basis from a source other than the Company or any of its Representatives," with the important caveat "that such source is ***not known by you (after reasonable inquiry) to be bound by a contractual, legal or fiduciary obligation of confidentiality to the Company or any other party with respect to such information***." *Id*. (emphasis added).

14. Upon information and belief, LCI has continuously possessed, and still possesses, Confidential Information, and used such Confidential Information to evaluate proposed

[1] Capitalized terms used but not defined herein shall have the meanings ascribed to them in the NDA.
[2] "Company," as defined in the NDA, generally refers to Waypoint and its subsidiaries.

acquisitions of certain of the Debtors' assets outside of the Court-ordered sale process, in violation of the NDA, and to consummate such acquisitions.

Lombard Acquires the WAC9 Assets

15. On December 7, 2018, Macquarie and certain of its affiliates entered into an agreement to purchase certain assets of Waypoint pursuant to that certain Stock and Asset Purchase Agreement [Docket No. 64, Ex. C] (the "Macquarie APA," as amended, supplemented, or otherwise modified). The Macquarie APA initially contemplated the sale of substantially all of the Debtors' assets to Macquarie in consideration of approximately $650 million, plus the assumption of certain assumed liabilities. The Macquarie APA specifically contemplated the purchase of the WAC9 assets, which were explicitly identified therein.

16. On December 10, 2018, the Debtors filed the *Motion of Debtors for Entry of Orders Approving: (I) (A) Bidding Procedures, (B) Bid Protections, (C) Form And Manner of Notice of Auction, Sale Transaction, and Sale Hearing, and (D) Procedures for the Assumption and Assignment of Certain Executory Contracts and Unexpired Leases; and (II) (A) Sale of Substantially All of the Debtors' Assets Free and Clear of Liens, Claims, Encumbrances, and Other Interests, (B) Assumption and Assignment of Certain Executory Contracts and Unexpired Leases, and (C) Related Relief* (the "Bidding Procedures Motion") [Docket No. 64], which attached as Exhibit C a redacted copy of the Macquarie APA. Thus, all parties interested in the Debtors assets, including LCI, were aware and on notice that Macquarie had entered into a contract for the purchase of those assets, including the WAC9 assets.

17. ~~15.~~ On December 21, 2018, the Bankruptcy Court entered the Bidding Procedures Order approving global bidding and sale procedures, substantially in the form attached to the Bidding Procedures Order as Exhibit 1, in connection with the sale or disposition of substantially all of the Debtors' assets.

18. ~~16.~~ The Bidding Procedures Order authorized each Waypoint Asset Co debt facility ("WAC") agent (each, a "WAC Facility Agent") to submit "either a streamlined credit bid (a '**Streamlined Credit Bid**') or a standard credit bid (a '**363(k) Credit Bid**' and together with a Streamlined Credit Bid, a '**Credit Bid**')." *See* Bidding Procedures Order, Ex. 1, at 12.

19. ~~17.~~ The Bidding Procedures Order prohibited Macquarie from matching or exceeding a credit bid by Lombard North Central plc ("Lombard"), the sole lender and agent of the Waypoint Asset Co 9 Limited ("WAC9") secured debt facility, if Lombard's credit bid was for the full amount of its claim against the Debtors estates. Lombard was the only creditor to insist on such language, and refused to agree to the bidding procedures and the sale process unless such language was included in the Bidding Procedures Order. Notably, such language was not included in the proposed bidding procedures submitted with the Bidding Procedures Motion.

20. Upon information and belief, and unbeknownst to Macquarie at the time, Lombard and LCI entered into an agreement for Lombard to acquire the WAC9 assets through a credit bid and then subsequently sell the assets to LCI upon the completion of the sale to Lombard. LCI and Lombard's agreement leveraged Lombard's hold-up power over the Macquarie APA, by virtue of which Lombard could demand additional protections for its potential credit bid. Lombard extracted such protections with the sole purpose and intent of immediately reselling the WAC9 assets to LCI, pursuant to their agreement.

21. Macquarie was unaware at the time it agreed to the language permitting an unmatched Lombard credit bid for the WAC9 assets that Lombard—which is not in the business of helicopter leasing—would necessarily submit a credit bid for WAC9 assets in the full amount of its claim. Moreover, Lombard intended to block the entire sale process absent inclusion of the

WAC9 credit bid language in the Bidding Procedures Order. Thus, Macquarie would have been unable to consummate the transaction for substantially all of the Debtors assets contemplated by the Macquarie APA without acceding to Lombard's demands regarding a potential full-value credit bid.

22. At the time the Bidding Procedures Order was entered, in the absence of a qualifying credit bid, Macquarie still believed that it would—and intended to—acquire the WAC9 assets under the terms of the Macquarie APA.

23. Lombard submitted a Streamlined Credit Bid (the "Lombard Credit Bid") for (a) 100 percent of the equity interests of WAC9 and its subsidiaries and (b) all profit participating notes issued by the subsidiaries of WAC9 being transferred pursuant to the transaction. The aggregate consideration comprised, *inter alia*, a credit bid for 100 percent of the obligations under the WAC9 credit facility.

24. ~~18.~~ On January 23, 2019, the Debtors filed a notice [Docket No. 297] that the Lombard Credit Bid was successful.

LCI's Violation of the NDA's No-Contact Provisions

25. ~~19.~~ Section 4 of the NDA contains the following provision imposing certain no-contact obligations on LCI:

> **[LCI] further agree[s] that, without the prior written consent of Houlihan Lokey,[3] neither [LCI] nor any of [its] Representatives shall, directly or indirectly, initiate, solicit or maintain, or cause to be initiated solicited or maintained, contact with any** officer, director, employee, any person known to [LCI] to be a former (within the past twelve (12) months) employee of the Company or its affiliates, stockholder, **creditor**, affiliate, supplier, distributor, vendor, customer, provider, agent, regulator (other than as permitted in Section 2(b) [of the NDA]) **or other commercial counterparty of the Company or any subsidiary of the Company regarding the Company or its business**,

[3] Houlihan Lokey Capital, Inc. ("Houlihan Lokey") has served as the Debtors' investment banker in the Chapter 11 Cases.

> financial condition, operations, strategy, prospects, **assets**, or liabilities (except as such communications regarding the Company's business, financial condition, operation, strategy, prospects, assets or liabilities may occur in the ordinary course of business on matters unrelated to, and otherwise not in connection with, the Possible Transaction) or concerning any Confidential Information, any Transaction Information or any Possible Transaction.

Id. at § 4 (emphasis added).

26. ~~20.~~ As such, the NDA bars LCI from making contact with any creditor of the Debtors regarding the Debtors' assets, without first obtaining express written permission to do so from Houlihan Lokey.

27. ~~21.~~ Despite this prohibition, a Lombard representative admitted on the Court's record that Lombard and LCI had made improper contact regarding LCI's acquisition of WAC9 assets. In addition to making improper contact, upon Plaintiff's information and belief, LCI furthermore received confidential information, originally compiled by Waypoint, from Lombard during the Debtors' sale process. LCI moreover, upon information and belief, has continuously possessed, and continues to possess, that Confidential Information and has improperly used such information to evaluate, and to ultimately consummate, acquisitions of certain of the Debtors' assets outside of the Court-ordered sale process.

28. ~~22.~~ On February 11, 2019, Lombard filed an affidavit by its representative Ms. Jacqueline McDermott in the Chapter 11 Cases [Docket No. 410] (the "Lombard Affidavit"). Paragraph 6 of the Lombard Affidavit stated:

> ***Lombard is discussing with its servicer [LCI] a subsequent transaction pursuant to which the Designated Transferee and/or the underlying business would be recapitalized and sold to the servicer***. Neither Lombard, the Designated Transferee, or the servicer have reached an agreement or arrangement with respect to this subsequent sale, but discussions continue and a subsequent sale could occur soon after consummation of Lombard's credit bid if outstanding items are resolved and a binding agreement is reached among the parties.

Lombard Aff. at ¶ 6 (emphasis added).

29. ~~23.~~ On February 12, 2019, Ms. McDermott testified, under penalty of perjury, that: (a) the "servicer" referred to in the Lombard Affidavit was LCI; (b) at no time had the Debtors or Houlihan Lokey given permission to Lombard for Lombard to discuss with LCI the sale of WAC9 or its assets to LCI; and (c) at no time had the Debtors or Houlihan Lokey given permission to Lombard for Lombard to disclose to LCI information regarding WAC9 or its assets for the purposes of discussions relating to LCI purchasing WAC9 or its assets.

30. ~~24.~~ Also on February 12, 2019, Mr. Matthew Niemann (a senior representative of Houlihan Lokey) testified before this Court. Mr. Niemann testified that (a) he was aware of the NDA and (b) Houlihan Lokey never consented to LCI discussing a purchase of WAC9 or its assets from Lombard.

31. ~~25.~~ At the conclusion of testimony on February 12, 2019, the Court acknowledged Macquarie's claim that the testimony indicated an apparent violation of the NDA, but specifically instructed that any claims for alleged wilful violations of the NDA should be left "for another day." *See* Sale Hr'g Tr. [Docket No. 537], at 251–52.

32. On February 15, 2019, the Court entered the *Order (I) Approving Purchase Agreement Among Debtors and Macquarie, (II) Authorizing Sale of Certain of Debtors' Assets Free and Clear of Liens, Claims, Encumbrances, and Other Interests, (III) Authorizing Assumption and Assignment of Certain Executory Contracts and Unexpired Leases in Connection Therewith, and (IV) Granting Related Relief* (the "Macquarie Sale Order") [Docket No. 444], which explicitly preserved in favor and for the benefit of Macquarie a right to damages for all intentional violations of the Bidding Procedures or the Bidding Procedures Order:

> Notwithstanding any other terms herein or in any other orders of the Court, any damages flowing from any ~~intentional~~ violations of the Bidding

> Procedures and/or the Bidding Procedures Order **arising from intentional misconduct** are hereby expressly reserved and preserved ~~for the benefit of Macquarie and the Debtors~~ and, upon the occurrence of the Closing, all such rights **held by the Debtors prior to the Closing** shall be assigned to and be held for the benefit of Macquarie pursuant to the terms of the Purchase Agreement.

Macquarie Sale Order, ¶ 42.

Macquarie's Acquisition of the NDA Rights and Warnings to LCI

~~26. On December 7, 2018, Macquarie and certain of its affiliates entered into an agreement to purchase certain assets of Waypoint pursuant to that certain Stock and Asset Purchase Agreement [Docket No. 64, Ex. C] (the "Macquarie APA," as amended, supplemented, or otherwise modified). The Macquarie APA initially contemplated the sale of substantially all of the Debtors' assets to Macquarie in consideration of approximately $650 million, plus the assumption of certain assumed liabilities.~~

33. ~~27.~~ As of March 13, 2019, Macquarie closed its acquisition of the assets in the Macquarie APA that were not included in the Credit Bids, with a modified sale price to reflect the exclusion of the assets that were subject to the Credit Bids. The assets acquired by Macquarie included all of the Debtors' rights and interests under the NDA, which Macquarie assumed. These rights and interests include any and all claims arising from any breach of the NDA. As such, as of March 13, 2019, all of LCI's obligations under the NDA constitute obligations owed to Macquarie, and Macquarie has the right to enforce the NDA and seek redress for any breaches thereof.

34. ~~28.~~ The record of warnings to LCI stretches over the course of several months. *First*, on December 27, 2018, the Debtors made LCI aware that the Debtors believed LCI had received confidential information in violation of confidentiality agreements between the Debtors and their lenders (the "December Letter," attached hereto as **Exhibit B**). *Second*, on February

14, 2019, Macquarie advised LCI of additional breaches of the NDA's no-contact provisions and demanded that LCI immediately cease from any further violations of the NDA, including, but not limited to, making further contact with Lombard regarding the purchase of any assets of the Debtors (the "February Letter," attached hereto as **Exhibit C**). *Third*, on March 14, 2019, Macquarie again advised LCI of its breaches of the NDA and again demanded that LCI cease and desist from any ongoing breaches of the NDA and to immediately bring itself into compliance with its contractual obligations thereunder (the "March Letter," attached hereto as **Exhibit D**).

35. ~~29.~~ Notwithstanding these warnings, upon information and belief, LCI has purchased from Lombard, and continues to possess, the WAC9 assets in question, which transaction was consummated within days of Lombard's acquisition of the assets from Waypoint. Specifically, upon information and belief, on March 7, 2019, LCI closed its purchase of the equity in the WAC9 assets. Simultaneously, certain directors of Waypoint Leasing UK 9A Limited resigned and were immediately replaced by employees of LCI and the Libra Group. Furthermore, Waypoint Leasing UK 9A changed its registered address to the Libra Group's London location.

36. All of these aforementioned changes occurred merely 10 days after the closing of the equity purchase of the WAC9 entities by Lombard~~.~~ and are indicative of improper advance collusion between LCIH and Lombard, which facts were withheld from Macquarie and the Debtors and not disclosed to the Court at the time of the February 12, 2019 hearing. The ability of LCI to diligence, structure, document, fund, and close its acquisition of the WAC9 assets within 10 days of Lombard closing on its own equity purchase of the WAC9 assets is further indicative of improper and undisclosed collusive activity between LCI and Lombard prior to completion of Lombard's purchase of the WAC9 assets. Such activity is particularly egregious

in light of Lombard's representation in the WAC9 Equity Purchase Agreement that it did not enter into any agreement or other arrangement to sell the WAC9 assets to a third party.

37. Notably, had LCI fairly participated in the WAC9 asset auction and won the assets outright, Macquarie would have been due a break-up fee under the Bidding Procedures Order, comprised of the following:

> Specifically, Macquarie shall be entitled to payment of (i) an expense reimbursement up to a cap of $3,000,000 (the "**Expense Reimbursement**") for the actual, documented and reasonable out of pocket costs, fees and expenses that are incurred or to be incurred by Macquarie in connection with or related to the authorization, preparation, investigation, negotiation, enforcement, execution, implementation and performance of the transactions contemplated by the Macquarie APA and (ii) a break-up fee in an amount equal to three percent (3%) of the Base Purchase Price, or $19,500,000 (the "**Break-Up Fee**"), in each case, subject and pursuant to the terms and conditions in the Macquarie APA and this Order.

Bidding Procedures Order, ¶ 8.

38. By circumventing the Court-ordered bidding procedures, LCI deprived Macquarie of the opportunity to consummate its intended purchase of the WAC 9 assets, of its contractually-entitled, and court-ordered break-up fee, and deprived the Debtors' estates of additional bid value. Specifically, the improper collusion between LCI and Lombard deprived the Debtors of the opportunity to obtain competing cash bids for the WAC 9 assets and the additional value that such bids may have realized.

CLAIMS FOR RELIEF

COUNT I
Breach of the Non-Disclosure Agreement

39. ~~30.~~ Plaintiff repeats and re-alleges each and every allegation contained in the preceding paragraphs and incorporates them by reference as though fully set forth herein.

40. ~~31.~~ Plaintiff, as successor to the Debtors, and the Defendant are parties to the NDA. The NDA is a valid and binding contract.

41. ~~32.~~ Plaintiff (and the Debtors) have fully performed their obligations under the NDA.

42. ~~33.~~ LCI breached the confidentiality and no-contact provisions of the NDA through its improper contact with Lombard regarding LCI's acquisition of WAC9 assets.

43. ~~34.~~ LCI's breaches of the NDA have caused damage to Plaintiff ~~in an amount to be proven at trial.~~, as successor to the Debtors, by depriving the Debtors of obtaining potential competing cash bids for the WAC 9 assets and the additional value that such bids may have realized.

44. ~~35.~~ In defiance of ~~the~~ Plaintiff's repeated objections, LCI's past and continuing breaches are wilful and blatant. Accordingly, ~~the~~ Plaintiff seeks relief in the form of specific performance of the return of any and all Confidential Information as well as compensatory and indirect, incidental, special, and/or punitive damages in an amount to be determined at trial.

COUNT II
Tortious Interference with Business Relations

45. ~~36.~~ Plaintiff repeats and re-alleges each and every allegation contained in the preceding paragraphs and incorporates them by reference as though fully set forth herein.

46. ~~37. The~~ Plaintiff had engaged in discussions with the Debtors regarding the acquisition of substantially all of the Debtors' assets—including the WAC9 assets—and executed a stalking-horse sale agreement, subject to certain eligible credit bids, to this effect. The Macquarie APA, as approved by the Sale Order, ultimately did not include the WAC9 assets due to LCI's interference—despite ~~the~~ Plaintiff's continued interest in those assets. But for

LCI's interference, ~~the~~ Plaintiff would have purchased the WAC9 assets as initially contemplated.

47. ~~38.~~ LCI ~~intentionally breached~~was aware of Macquarie's business relationship with Debtor, and of Macquarie's interest in purchasing the WAC9 assets. Specifically, LCI was aware of the Macquarie APA, which was publicly filed on the Court's docket and which covered the Debtors' WAC9 assets. The Macquarie APA was an integral part of the court-ordered bidding procedures governing the sale of the WAC9 assets, regarding which LCI executed the NDA at issue.

48. LCI acted with malice by dishonestly, unfairly, and improperly breaching its obligations under the NDA by failing to adhere to its no-contact and confidentiality provisions, and by dishonestly, unfairly, and improperly circumventing the Court-ordered bidding procedures to avoid fairly competing against Macquarie in an auction for the WAC9 assets.

49. ~~39.~~ LCI~~'s~~ breached its NDA obligations with the intent and object to enter into an agreement with Lombard that would specifically prevent Macquarie from purchasing the WAC9 assets and intentionally deprive Macquarie of its break-up fee. LCI's conduct targeted Macquarie, its relationship with Debtor, and its anticipated purchase of the WAC9 assets.

50. LCI's intentional breaches of its NDA obligations ~~had the result of enabling~~and circumvention of the Court's Bidding Procedures Order enabled Lombard's purchase of the WAC9 assets, with the intention of then reselling those assets to LCI.

51. ~~40. Such~~LCI's breaches ~~interfered with~~precluded Plaintiff~~'s ability to~~ from fully and fairly ~~participate~~participating in the WAC9 asset sale process ~~and subsequent resale by Lombard~~, deprived Plaintiff of the benefit of completing the acquisition of said assets under the

Macquarie APA, and prevented Plaintiff from receiving the court-ordered break-up fee to which it otherwise was entitled.

52. ~~41. The~~ Plaintiff ~~has been harmed by this lost opportunity as~~'s damages are a direct and proximate result of LCI's breach of its NDA obligations and circumvention of the Court-ordered bidding procedures.

53. ~~42.~~ LCI's conduct set forth herein was fraudulent, wanton, malicious, or wilful in complete disregard of ~~the~~ Plaintiff's rights. Accordingly, ~~the~~ Plaintiff seeks relief in the form of compensatory and indirect, incidental, special, and/or punitive damages in an amount to be determined at trial.

COUNT III
Violation of 11 U.S.C. § 363(n)

54. Plaintiff repeats and re-alleges each and every allegation contained in the preceding paragraphs and incorporates them by reference as though fully set forth herein.

55. LCI colluded with Lombard to enter into an agreement to control and artificially depress the sale price of the WAC9 assets by leveraging Lombard's hold-up power over the Macquarie APA to demand additional protections for Lombard's potential credit bid. Lombard extracted such protections with the sole purpose and intent of immediately reselling the WAC9 assets to LCI, pursuant to their pre-auction agreement.

56. LCI had an interest in the WAC9 assets, as evidenced by its execution of the NDA, and its subsequent, near-immediate acquisition of the WAC9 assets from Lombard.

57. The agreement between LCI and Lombard did control the price of the WAC9 assets, as it deprived Macquarie—the only other known interested bidder—of any ability to submit a cash bid for those assets, at or potentially above the value of Lombard's secured claim.

58. By entering into a collusive pre-auction agreement with Lombard to acquire the WAC9 assets after Lombard's successful credit bid, LCI violated 11 U.S.C. § 363(n).

59. Accordingly, Plaintiff seeks compensatory and indirect, incidental, special, and/or punitive damages in an amount to be determined at trial.

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PRAYER FOR RELIEF

WHEREFORE, ~~the~~ Plaintiff prays for relief and judgment as follows:

Awarding compensatory damages in favor of ~~the~~ Plaintiff against Defendant LCI for all damages sustained as a result of the Defendant's wrongdoing, in an amount to be proved at trial, including interest thereon;

Awarding damages in favor of ~~the~~ Plaintiff against Defendant LCI for all damages sustained as a result of the Defendant's unjust enrichment, in an amount to be proved at trial, including interest thereon;

Awarding ~~the~~ Plaintiff indirect, incidental, special, and/or punitive damages where such damages are available;

Awarding injunctive relief precluding Defendant LCI from using improperly obtained Confidential Information to purchase any assets sold pursuant to any Credit Bids or further retaining or utilizing the Confidential Information;

Awarding ~~the~~ Plaintiff reasonable costs and expenses incurred in this action, including attorneys' fees and expert fees; and

Such other and further relief as the Court may deem just and proper.

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Dated: ~~April 3,~~May 14, 2019
New York, New York

Respectfully submitted,
/s/ G. Alexander Bongartz

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EXHIBIT C

UNITED STATES BANKRUPTCY COURT

SOUTHERN DISTRICT OF NEW YORK

Case No. 18-13648-smb

- x

In the Matter of:

WAYPOINT LEASING HOLDINGS Ltd.,

Debtor.

- x

United States Bankruptcy Court

One Bowling Green

New York, NY 10004

February 12, 2019

11:07 AM

B E F O R E :

HON STUART M. BERNSTEIN

U.S. BANKRUPTCY JUDGE

ECRO: K. HARRIS

HEARING re Initial Case Conference.

HEARING re Emergency Motion Of Debtors Pursuant To 11 U.S.C. 105(A) For Entry Of An Order Approving Proposed Updated Dip Budget And Resolving Allocation Methodology For Winddown Account [Doc. #357].

HEARING re Sale Hearing re: Motion of Debtors for Entry of Orders Approving: (I) (A) Bidding Procedures, (B) Bid Protections, (C) Form and Manner of Notice of Auction, Sale Transaction, and Sale Hearing, and (D) Procedures for the Assumption and assignment of Certain Executory Contracts and Unexpired Leases; and (II) (A) Sale of Substantially all of the Debtors Assets Free and Clear of Liens, Claims, Encumbrances, and Other Interests, (B) Assumption and Assignment of Certain Executory Contracts and Unexpired Leases, and (C) Related Relief [Doc. #64].

HEARING re Motion of Lombard North Central PLC, Asset Financing And Leasing, To Dismiss The WAC 9 Chapter 11 Cases Upon Consummation Of The WAC 9 Credit Bid And Granting Related Relief [Doc. #333].

Transcribed by: Sonya Ledanski Hyde

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P R O C E E D I N G S

CLERK: All rise.

THE COURT: Please be seated. Waypoint.

MS. DIBLASI: Good morning, Your Honor.

THE COURT: Good morning.

MS. DIBLASI: Kelly DiBlasi from Weil Gotschal & Manges on behalf of the Debtors. With me in the courtroom today, to handle portions of the hearing, are my colleagues Ed Soto and Bryan Podzius.

Your Honor, we appreciate that we have a long and complicated looking agenda before you today. We burdened the Court with lots of papers and binders.

THE COURT: You sure did.

MS. DIBLASI: And there are a lot of people here today, many who -- many of whom are prepared to take the lectern and speak. But today's hearing actually is not as complicated as it may seem on its face. The headline here is there are no objections to the sales we're looking for approval of.

THE COURT: Well, the -- one of the questions I had is can the sales go forward without a resolution of the allocation issue, for example?

MS. DIBLASI: No, Your Honor. We need to be able to --

THE COURT: So how can you say there's no

objection?

MS. DIBLASI: Well, there's objections to provisions in the sale order, but no one is saying they don't think the sale should be approved.

THE COURT: Okay.

MS. DIBLASI: So we have a few issues inside of these transactions to get resolved, but we delivered transactions that with a little guidance from the Court can be approved today. We've resolved many of the issues, and we'll talk about that in a little bit. and we basically narrowed it down to two key points plus the objections that Macquarie has raised has raised to the WAC 9 sale.

THE COURT: It's still set to the WAC 12 sale, I thought.

MS. DIBLASI: Those have been resolved.

THE COURT: It was the other streamlined bid sale.

MS. DIBLASI: That's right. There were two objections lodged by Macquarie to the WAC 9 and WAC 12 --

THE COURT: Right.

MS. DIBLASI: -- credit bids. The objections to WAC 12 have been resolved, so that just leaves WAC 9.

THE COURT: Well, aren't they the same objection?

MR. EDELMAN: They were.

THE COURT: Okay.

MR. EDELMAN: But WAC 12 was able to accommodate

us. And we actually had discussions over the weekend, they opened their kimono, they showed us their transactions or described their transactions and they talked to us and actually gave us a few revisions to their declaration. And the --

THE COURT: So your pending objection is to 9 or 12 now?

MR. EDELMAN: So we have pending objections to 9.

THE COURT: Okay. And the other is the allocation issue. And what's the other issue?

MS. DIBLASI: The holdback dispute.

THE COURT: Okay.

MS. DIBLASI: So Your Honor, let's -- let me try to distill things down and lay out a proposed roadmap for the day.

THE COURT: Go ahead.

MS. DIBLASI: We've got three sale transactions for which we're seeking approval. As I mentioned, two streamlined credit bids for equity interests and an asset sale for substantially all of the remaining assets to Macquarie. Again, subject to the limited objections we have, I think today is largely a story about consensus and success. Since the bidding procedures order was entered, we completed our third party marketing process, negotiated and executed two equity purchase agreements, negotiated and

executed a plan and sale support agreement, and largely resolved three proposed sale orders. We were able to pull this together through significant efforts of the Debtor, Macquarie, and the secured lenders over the past several weeks. And we're pleased to present these transactions to the Court for approval.

So as we discussed, there's two key global issues to be resolved, the intercreditor dispute over the allocation methodology and the objections from the lenders whose collateral is being sold to Macquarie regarding the holdback. Beyond that we have Macquarie's limited objections to the WAC 9 equity purchase agreement and proposed order. All other issues, including with respect to cure objections, have either been resolved or a few of the cure issues will be adjourned, and we'll talk about these points in more detail in a little bit.

With the Court's permission, here's how we suggest proceeding. First, we'd like to address the emergency motion and ask the Court to resolve the expense allocation dispute with respect to both the DIP budget and the wind down budget. For this motion the Debtors have one witness and after we conclude with the evidence we have a brief presentation and then can turn it over to the objecting lenders to raise their arguments.

Next we will present the Macquarie transaction for

approval. For this the Debtors have two witnesses and Macquarie has one witness. And again, we suggest getting the witness testimony in first and then we can present argument.

Finally, we'll present the two equity credit bids for approval, first WAC 12 then WAC 9, with a similar structure for evidence and argument followed by the WAC 9 motion to dismiss. So --

THE COURT: Okay. Anybody else want to be heard on the proposed schedule?

MR. EDELMAN: Your Honor, Mike Edelman from Vedder Price on behalf of Macquarie Rotorcraft, the stalking horse bidder.

We actually think that the sale motion should be heard first because without that we don't think anything --

THE COURT: But I'm being told that nothing can be resolved until the allocation issue is resolved.

MR. EDELMAN: We actually think that everything should be resolved today, but we actually think that the sale could be approved and whatever the subsequent allocation that will be -- that will obviously affect how the proceeds are distributed.

MS. DIBLASI: I just -- Your Honor, this is Kelly DiBlasi again for the record.

There's two remaining objections to the Macquarie

sale order, one of which is the allocation dispute. So --

THE COURT: Well, you had both --

MS. DIBLASI: -- I feel like we're going to get there anyway.

THE COURT: -- possibilities in the sale order, as I recall.

MS. DIBLASI: We did, because there's the intercreditor dispute on the issue. So I think we're going to get there anyway. And we also need it resolved for the DIP, which is why we proposed just getting that done first.

THE COURT: All right.

MS. DIBLASI: So --

THE COURT: I'll hear the allocation dispute. I don't know if it can be resolved today, but I'll hear it.

MS. DIBLASI: Understood, Your Honor.

So the allocation dispute is raised in the Debtors' --

THE COURT: Can I ask -- let me ask you this. Why can't I resolve the streamlined credit bid sales? You know, it seems to me that they had a credit bid, include the wind down expenses which were in that budget, which were based on an allocation method and as soon as those sales are approved the case is going to be dismissed, so they have no further wind down liability. They're really not involved that allocation dispute, are they?

MS. DIBLASI: For lack of a better phrase, they've been dragged into that allocation dispute.

THE COURT: Okay. But if somebody can explain to me why they're in the dispute, that's one thing, but when I read --

MS. DIBLASI: Well --

THE COURT: -- all these papers, it didn't seem like the streamlined credit bidders had anything to do but, you know, bid the debt and the wind down expenses based on the net book value allocation in that, I guess, it was attached as Exhibit D or E to the DIP order, whichever -- or the bidding procedure order, the milestones rather, and then they're out of the case and they have no wind down liability. Isn't that right?

MS. DIBLASI: The Debtors agree with you, Your Honor. We're --

THE COURT: Okay. I want to hear from anybody who thinks that I have to resolve the allocation issue before I can approve or not approve, I guess, the WAC 9 or WAC 12 sale subject to Macquarie's objection, which I can deal with separately.

MR. TRUST: Good morning, Your Honor.

THE COURT: Good morning.

MR. TRUST: Brian Trust, Mayer Brown, counsel for GLAS Trust Company, LLC, that's the WAC 3 administrative

agent.

Not to spend too much time on process, I just want to note from the WAC 3 agent's prospective, we concur with the remarks made by counsel to Macquarie. We believe, given that there are no pending objections to the sale --

THE COURT: That's not the -- Mr. Trust, that's not the question I asked. Why can't --

MR. TRUST: I was going to link them both together.

THE COURT: Okay. Why can't I just deal with the streamlined credit bids first, since the allocation issue, as I look at it, doesn't really affect them? Or tell me how it does.

MR. TRUST: Okay. Well, the way I kind of look at this is that I think that if we do the sale, we should do the entirety of the sale transaction and then the allocation and it all gets wrapped up together. It's not clear why we would want to extract two WACs on the credit bid, which is the credit bid, which is the equity transaction, in advance, but I think that the entirety of the sale should be done inclusive of the two and then deal with the allocation. And then we will know precisely where every stakeholder in way WAC or silo stands. And there's real logic to that for a lot of reasons.

And it doesn't harm the Debtor or any other WAC.

It's an ordering today in front of the Court that allows us to deal with arguments that may be made, and in fact might have impact on the totality of the issues.

THE COURT: Just tell me why I can't resolve the WAC 9 and the WAC 12 sales without resolving the allocation issue. How are they affected by it? Unless you're telling me I can't approve those sales if I don't approve the Macquarie sale.

MR. TRUST: I think that they're linked, Your Honor. And I think that latter comment makes the most sense, which is why, from where I stand -- and again, Your Honor will decide the order, there's a lot of time spent on it. The totality of the sales, they're inextricably linked. I suggest we do the sales and then deal with the intercreditor issue subsequently.

THE COURT: Could I approve the WAC 9 and WAC 12 sales without approving the Macquarie sale?

MR. TRUST: I --

THE COURT: Let me hear from the Debtor.

MR. TRUST: We can make, from WAC 3's prospective, the various arguments pertaining to the allocation, and I get that, and I think it works for us, but it's certainly -- I'm not prepared, nor should I speak for either WAC 9 or 12. My global comment is they're so inextricably linked those transactions, the overriding Macquarie transaction, it just

strikes me that's a no-brainer to do the sale and then leave over the intercreditor issue.

THE COURT: Tell me why I can't approve the deal with 9 and 12 and possibly not approve the Macquarie sale. You tell me they're inextricably linked.

MR. TRUST: To the extent there's any linkage or arguments made --

THE COURT: What's the linkage?

MR. TRUST: -- by 9 and 12 to the expense allocation issue --

THE COURT: I don't see an expense allocation issue with 9 and 12.

MR. TRUST: And that may be Your Honor's view.

THE COURT: I've read the documents --

MR. TRUST: I just don't know. Okay.

THE COURT: -- for the last, you know, four days.

Let me just hear from the Debtor whether I could, for example, under the greater scheme of things you have a better understanding than I do, approve the 9 and 12 sales and not approve the Macquarie sale.

MS. DIBLASI: We agree, Your Honor.

THE COURT: Okay.

MS. DIBLASI: They're separate. I suspect people will object to the allocation methodology comprised in those lenders exit payment and that's when I said, you know,

they're dragging 9 and 12 --

THE COURT: All right. All right.

MS. DIBLASI: -- into this dispute, that's how they're linked. But from the Debtors' prospective, the exit payment calculation in those credit bids is consistent with the bidding procedures and contractually that's what we're bound to with those parties.

THE COURT: Right. Okay. Then I'll consider the proposed sales to 9 and 12 now, because I don't see an allocation issue with them.

The bidding procedures order says, very clearly, what the exit payments consist of. The exit payments consist of the allocable share of -- I don't want to call them the wind down costs because technically it's not wind down costs with them, but the allocated share of the expenses that are set forth in the bidding procedures order, the omnibus letter, the omnibus amendment and everything else. They were required to bid a payment that was allocated to them based on the net book value. If it's approved they're out of this court, they have no wind down expenses and that seems to me to be the end of it, unless somebody thinks differently.

Yes, Mr. Trust?

MR. TRUST: Thank you. Let me just kind of rephrase my concern because I know we're dealing with

ordering. I think --

THE COURT: Actually, we have an application right now. There's an application to approve the sales to 9 and 12.

MR. TRUST: Of course. It strikes me that the ultimate resolution of how to allocate wind down the indirect costs and expenses will ultimately affect the estates in the aggregate, and I'm not sure it's correct. We won't find out until later, depending on this Court's ruling on the expense allocation, whether in fact it does, and it probably would affect the exit payment. I don't know that we can assume that or presume that --

THE COURT: The exit payment is -- no, no, no. The exit payment is defined in the bidding procedures order as the allocable share that was attached as -- it was in some exhibit, I think it was Exhibit J or N to the DIP financing order. And --

MR. TRUST: Well, that might be part of the argument and the litigation and Your Honor will be asked to decide that today. I would just respectfully suggest that we see whether that issue is in fact as you said, or perhaps there are arguments that suggest otherwise. It will be a domino effect across the silos.

THE COURT: Now is your time to explain to me how -- and I've asked you this several times, how the allocation

issue that's been raised with the other bidders affects whether or not I approve the transactions with WACs 9 and 12.

MR. TRUST: Easy. Let's assume, arguendo, that those said WACs theoretically would determine if we used the market based valuations.

THE COURT: But there's no basis to do that. You're saying assuming that, but there's no basis to do that.

MR. TRUST: I think that will be decided today and argued.

THE COURT: Tell me -- make an offer of proof. What's your offer of proof?

MR. TRUST: I would argue very clearly that once we know, with certainty, the market based allocation for each WAC -- if you take a look, for example, I'll speak to WAC 3. WAC 3 shows a net book value -- net book value is the original cost of an asset, less depreciation for accounting purposes, that's it. We now have better information. We have the market based --

THE COURT: I understand the market based allocation argument, I've been reading it for the last four days.

MR. TRUST: Of course.

THE COURT: I don't understand how it affects the

streamlined credit bidders whose exit payment bid, or the portion of the bid relating to the exit payment is clearly defined in the bidding procedures order, that's all.

MR. TRUST: I think the domino effect across the WACs will change that number and it's not clear -- and it's not -- the DIP cannot -- it will affect the distribution to every single creditor in every other WAC.

THE COURT: It may well be that as to all the other bidders there's going to be a market allocation.

MR. TRUST: That's right.

THE COURT: But as to them, they -- you know, they bid and they got adequate protection based upon their right to make a bid including an exit payment computed on the net book value as attributed to them, and that's the deal they struck.

MR. TRUST: If the Court were to determine, as I suggest it does, that the market has spoken and we will correct the disparity between market and net book value, it strikes me that it may in fact, unless it's dispositive, that a draft budget attached to a draft term sheet not incorporated in the actual DIP credit agreement is dispositive, that that domino effect may harm --

THE COURT: I'm not so sure --

MR. TRUST: -- creditors in every other WAC.

THE COURT: -- I agree with you that it wasn't

incorporated.

MR. TRUST: But we have to test that, Your Honor, by argument.

THE COURT: All right. All right.

Let me hear anybody else who wants to be heard about why I can't go forward and decide the WAC 9 and WAC 12 sales or how the allocation -- this allocation issue affects that decision.

Yes, sir?

MR. DAUCHER: Good morning, Your Honor. For the record, Eric Daucher from Norton Rose Fulbright on behalf of Bank of Utah as the WAC 6 agent.

I just want to touch briefly on one point that I think Mr. Trust hinted at at the end.

THE COURT: Hinted?

MR. DAUCHER: You've been asking why it is that we'll call them the credit bidding WACs, WAC 9 and WAC 12, haven't already definitively struck a deal as to what their exit payment issue. There are a couple of reasons. The document in question has actually been submitted now to the Court for the first time in connection with the February 7th declaration of Mr. Del Genio. It appears in Exhibit E and then you have to flip all the way over to page 57 of 89 at the top -- of numbered at the top.

And turning over to the next page to the actual

substance of the wind down budget, you see a couple of things here.

THE COURT: What -- I'm sorry, what page do you want me to look at? Exhibit -- which exhibit?

MR. DAUCHER: Exhibit E.

THE COURT: D?

MR. DAUCHER: To the February 7th declaration --

THE COURT: Okay. That's the amendment --

MR. DAUCHER: -- of Mr. Del Genio.

THE COURT: -- to the omnibus consent letter.

MR. DAUCHER: Correct.

THE COURT: Right. And you never saw this until February 7th, you're saying?

MR. DAUCHER: I'm not saying I never saw this until February 7th. What I'm saying is it was never submitted to the Court, it was never addressed by the Court until this document. And --

THE COURT: But it was incorporated by reference in documents that I've reviewed.

MR. DAUCHER: That's an interesting question, Your Honor.

THE COURT: It's right in the --

MR. DAUCHER: You'll --

THE COURT: -- DIP financing order.

MR. DAUCHER: It's -- there's -- in the bidding --

THE COURT: It's a default under the -- for the use of cash collateral for the final order to be inconsistent with, among other things, this -- the omnibus letter and the amendment to the omnibus letter. So how can you say it's not incorporated?

MR. DAUCHER: So --

THE COURT: It's also incorporated in several places in the DIP credit agreement.

MR. DAUCHER: It's also referenced in the bidding procedures.

THE COURT: Right, so --

MR. DAUCHER: Although you'll find that if you actually try to trace the definitions through for a clear incorporation by reference, you'll find it doesn't actually clearly connect.

But setting that aside, let's focus on the document itself.

THE COURT: Right.

MR. DAUCHER: Top right is really what tells the story --

THE COURT: I'm sorry, where -- what page am I looked at?

MR. DAUCHER: Page 58 of 89, as numbered at the top.

THE COURT: 58? I got it. Okay.

MR. DAUCHER: The word right there, "Draft."

THE COURT: Right.

MR. DAUCHER: Then look over to what this is actually describing right -- on the left side, right below where it says Waypoint Leasing, estimated wind down cost.

THE COURT: Well, and the costs and estimated, right?

MR. DAUCHER: Exactly. And then keep reading past that, assuming all aircraft is transferred to lenders through an equity assignment on 1/18/19. We've got a draft document, we have an estimated amount, and we have an estimated amount in the context of a scenario that is the lenders across all the WACs taking all of the assets by January 18th. None of these things happened.

THE COURT: But isn't that a risk that you assumed?

MR. DAUCHER: I don't believe --

THE COURT: In other words, if I -- let me stop you. Look at the bidding procedures order, and among the definitions of exit payments are the allocated share of the wind down account up to the amounts and in the allocable portion set forth in the wind down budget attached as NXF to the term sheet, which is what we're talking about, right?

MR. DAUCHER: I'm going to assume that's what we're talking about.

THE COURT: Okay. So --

MR. DAUCHER: But term sheet isn't a defined term.

THE COURT: -- that's the deal. That's the deal, that's what they bid. How can I change that deal?

MR. DAUCHER: If you actually look at the contract they've set forth there's actually a fairly complicated procedure in there for the Debtors to provide their assessment of what the exit payment is and for a dispute mechanism --

THE COURT: Well, I'm not --

MR. DAUCHER: -- to then move forward.

THE COURT: Okay. But I'm not aware of a dispute between the Debtors and the WAC 9 and WAC 12 bidders regarding the exit payment.

MR. DAUCHER: What --

THE COURT: Is there a dispute?

MR. DAUCHER: -- I think we've seen, at least from what the Debtors have put forward is they've effectively -- they haven't taken a side on this, they've called, for lack of a better word, a jump ball and asked the Court to resolve it. So maybe they'll change their position now, but that isn't the argument.

THE COURT: Well, let's ask them. The Debtors are in the best position to say that. Is there a dispute -- what's the --

MS. DIBLASI: Your Honor, there is no dispute. The calculation's not completed because we don't know their closing date yet and there has to be real-time numbers to account for the days leading up to the closing. But we're not in any dispute with the credit bidders over the exit payment calculation.

THE COURT: Okay.

MR. DAUCHER: But so --

THE COURT: So much for the jump ball.

MR. DAUCHER: No, so we've just heard an interesting acknowledgement there, though, right? The Debtors have just told the Court that whatever the numbers are, they aren't set in stone as per this document. It's going to actually have to move to account for how many days roll forward to get this closed out.

THE COURT: But the Debtors -- the parties to this contract are telling me they don't have a dispute and you, as a stranger to the contract, say there's a dispute. What am I supposed to do with that?

MR. DAUCHER: Your Honor, I'm frankly, not looking to increase the costs of WAC 9 or WAC 12, and so at the end of the day, if it is your view that their costs are set in stone and I am truly a stranger to the dispute and the costs aren't flowing back across on to WAC 6, so be it.

THE COURT: All right.

MR. DAUCHER: There is some risk then, I think, to what becomes of the estates of WAC 9 and WAC 12. But again, that -- if that is the outcome, that's not my concern, I agree.

THE COURT: All right.

MR. DAUCHER: Thank you, Your Honor.

THE COURT: Anybody else want to be heard? I'm sorry.

MS. DIBLASI: Well, for the record, Kelly DiBlasi.

Just on that last point, Your Honor, the estate cannot be in a position where costs are calculated and allocated one way for some and another way for --

THE COURT: Well, don't you face that possibility, though?

MS. DIBLASI: Well, we didn't think so, Your Honor, which is we thought the allocation methodology was consistent across the board.

THE COURT: Right.

MS. DIBLASI: If there's a way to reallocate whatever remaining costs there are among the WACs who are selling their assets to Macquarie, and the way that they want to split that up is through a market value determination, okay. We can't have any gaps, though. I can't have wind down costs that aren't covered by anybody leaving the estate administratively insolvent.

THE COURT: But have you built that into your system? Because you have -- the WAC -- the streamlined bidders had certain rights which are probably the most clearly defined rights in all of these agreements and then the other parties are telling me they have other rights that are not covered by these agreements.

MS. DIBLASI: Our system, our calculations, our documents are all net book value across the board.

THE COURT: I understand your argument. You know, I have a hint of what the evidence is going to show, but I mean I guess you face the possibility that you can have different allocation methods based upon the deals -- different deals that you struck, basically with the streamlined credit bidders as opposed to those entities whose assets are being sold to Macquarie or the other credit bidder.

MS. DIBLASI: And again, if it's taking whatever remaining wind down costs there are and splitting them up via a different methodology, that's okay.

THE COURT: It sounds like you're arguing that I should decide the allocation issue before anything else.

MS. DIBLASI: Well, that's where we started, Your Honor.

THE COURT: Because you're saying that you can't have two different allocation methods.

MS. DIBLASI: I think it's challenging. And based on the objections that the lenders have raised --

THE COURT: Okay.

MS. DIBLASI: -- they want it changed across the board as well.

THE COURT: Yes, Mr. Dietderich, I see you leaping up.

MR. DIETDERICH: Thank you, Your Honor. For the record, Andy Dietderich for the oft mentioned WAC 9.

Your Honor is, in our view, exactly right. We use the word allocation, but we're actually talking about three different things, I think. The first one is an historical allocation, which I don't think any party is challenging. The case has been run on net book value under the cash management procedures and the adequate protection order and value has been allocated to the different estates on that basis.

THE COURT: And in the approved budget, at least through March 1st.

MR. DIETDERICH: Precisely. So that's done.

The second is a contractual term, and it's a contractual term in the WAC 9 and the WAC 12 streamlined credit bids. And Your Honor is exactly right, that provision is crystal clear. There's an exit payment as defined in our contract by reference to other documents.

And as an M&A matter, as an acquisition agreement matter, that's a contract that can't be changed.

Now, the contract has another element here that Your Honor could not approve a contract normally but can change the contract, here it's also embedded as a core term of adequate protection. And we submit that wind down amount is also crystal clear.

The third piece is what happens after we're gone. After WAC 9 and WAC 12 are gone and how you allocate proceeds and wind up the estate. The Debtor has done a very good job, in our mind, of negotiating a finite payment from my client that's much higher than what my client wanted to pay, but it's a finite payment. It might be that when we turn to the question, which is not a question for us, the question of how do we allocate value in the estate, the net book value, the evidence shows, is the right approach, in part because it was the historical approach, in part because it was the approach sized with finite payments in WAC 9 and WAC 12 on exit, and in part because whatever evidence exists that it's fair. But they're three completely separate questions.

And I think Your Honor has a little bit more discretion on the third question than with respect to Your Honor probably does on the second. And so I would -- we very much support the idea of WAC 9 and WAC 12 going first.

We've not heard any credible argument that our contract is anything other than a finite term. If there's to be argument or evidence on that, we're welcome to have it. We think it's very straightforward. And when that is done, our client's rights are protected under the streamlined credit bid and the estate can figure out how to pay its bills and get out. In that context, I don't think we have standing to weigh in, but I would say that all of the evidence for net book value here is quite, in our mind, quite overwhelming. Thank you.

MS. DEMARCO: Your Honor, Jennifer DeMarco from Clifford Chance for SMBC as administrative agent for WAC 12.

We agree with what Your Honor was saying with respect to the payment of the exit payment and with what Mr. Dietderich was saying with respect to WAC 9. These provisions, and the provisions for the streamlined credit bid and the exit payment were the subject of intense negotiations over an extended period of time. And we negotiated exactly what we would have to pay on exit. And no, you don't know the exact numbers because it's temporal for time and you have to add up the days that the estates are using money, but it -- the methodology itself was negotiated.

THE COURT: But one of the arguments that I'm starting to hear is in addition to everything you bid you

might be liable for some additional payments until your cases are dismissed. Is that what I'm hearing?

MS. DEMARCO: I don't think that's what you're hearing. I think what you're hearing there are certain wind down costs to other estates, not WAC 12, that they want us to pick up. We agreed to pay a certain portion of those in the exit payment in that methodology we agreed to, notwithstanding the fact that we weren't required to, but we agreed to it for the streamlined credit bid and to get out of the estate. Those costs include severance costs, they include costs to wind down -- the legal fees in winding down the other estates. It has nothing to do with WAC 12. We intend to make a motion to dismiss that would be effective on the closing date. These estates will be removed from these cases. We will have the benefits and burdens of that estates.

THE COURT: Is it the Debtors contention that either 9 or 12 will be liable for additional costs aside from whatever they bid and have to pay?

MS. DIBLASI: No, Your Honor. Their exit payment will be comprised of the elements that Ms. DeMarco just described. And once they pay that multiple releases are exchanged and the parties part ways.

THE COURT: All right.

MS. DEMARCO: Thank you.

THE COURT: Yes, Mr. Daucher?

MR. DAUCHER: For the record again, Eric Daucher of Norton Rose Fulbright.

I just wanted to make two quick points. The first of which is that I should have begun by saying we're not here to oppose any of the sales, per se. With that said our preference would in fact be to here to have the approval of at least the Macquarie sale heard first. We don't want to get in the way of the approval of that sale.

Second point, we're not asking WAC 9 or WAC 12 to bear expenses that aren't theirs. We're simply asking that WAC 6 not made to be -- not made -- sorry, not made to be bear a disproportionate share of the expenses

THE COURT: I hear you, but that's a dispute with the Debtor and it may be that your particular estate is administratively insolvent, if that's what it comes to, I don't know, but that doesn't seem to involve WACs 9 or 12. That's my point.

MR. DAUCHER: And I don't disagree with that point, Your Honor. Our point is that to the extent WAC 9 or WAC 12 would be left administratively insolvent --

THE COURT: They're leaving.

MR. DAUCHER: Correct.

THE COURT: There is not going to be a plan in WACs 9 or 12, or relating to WACs 9 or 12, or a plan that

will deal with WACs 9 or 12, they're gone.

MR. DAUCHER: There are, however, costs associated with the remaining cleanup of those estates, as I understand it, that's why the wind down budget is there.

THE COURT: But they're saying that under the agreements, particularly the sale order and the adequate protection provisions of the DIP financing, this is what -- the bargain they struck, they make -- they're going to make their exit payments and then they're done, they're leaving.

MR. DAUCHER: Correct. And so if they leave and the bargain they have struck is to leave insufficient funds behind, WAC 6 should not be made to make up that shortfall.

THE COURT: I hear you, but that's a separate argument.

MR. DAUCHER: Understood, Your Honor.

THE COURT: Okay.

MR. DAUCHER: Thank you.

THE COURT: Yes, sir?

MR. HYMAN: Good morning, Your Honor. Rick Hyman from Mayer Brown on behalf of Wells Fargo as agent for the WAC 2 lenders.

It seems as good a time as any to just make a brief reservation of rights and then I will --

THE COURT: What are you --

MR. HYMAN: -- leave this Court to it.

THE COURT: -- what rights are you reserving? Any in particular or --

MR. HYMAN: You may be aware, Your Honor, WAC 2 has submitted a 363(k) credit bid, rather than a streamlined credit bid. We've not finalized the asset purchase agreement with the Debtors, although we anticipate doing so in very short order. We have very specific provisions in the bid procedures as to what costs and expenses we are required to pay. We agree and have paid a deposit and we look forward to complying with those obligations. There may be in a time in the future, however, that we anticipate that the Debtors may seek some reimbursement of expenses under --

THE COURT: Well, I thought --

MR. HYMAN: -- some theory --

THE COURT: -- I saw that in one of the documents that the 363(k) credit bidders, although their exit payment was computed in the same way for bid purposes, that that might be further liability.

MR. HYMAN: It's unclear, Your Honor. I think the --

THE COURT: I saw it in one of the orders and it may have been one of the earlier orders.

MR. HYMAN: The reason why we ultimately were a nonparticipant in the DIP facility, as you may recall from earlier hearings, was largely because of these allocation

issues. And not only the allocation of the Macquarie proposed purchase at that time, but also the allocation of expenses. We were one of the WACs that had objected to the cash management motion, you may recall, because we -- particularly because of the allocation on the net book value basis, we reserved on that issue.

And to the extent Your Honor, that this comes back again, I don't plan to speak again today, but in future hearings I don't want to have been prejudiced for making arguments as to what appropriate allocation of value might be. Thank you.

THE COURT: Yes, sir?

MR. WENDER: David Wender with Alston & Bird, counsel to SunTrust as agent for the WAC 7 lenders.

Your Honor, I wanted to note just one little nuance as in talking about the actual wind down amounts for WAC 9, well their exit payment. They did agree, contractually, to pay a portion of an allocated share of what those wind down costs would be. For sure none of these are not for everybody and I don't think anyone agreed to fund for anybody.

But one thing I'd like to note, and we're going to hear about this later with Mr. Del Genio, is that -- and it's -- and we're not sure whether it's reflected in the exit payment, is that the Debtors' estimate of exit

payments, they've come out and said they think it's low. And so in leaving behind, and I'll note under the DIP order, which includes cash collateral provisions, there are provisions relative to intercompany claims, to the extent there's allocable costs. And to release those they need consents from all the WAC participating lenders and the like. And we don't have enough data, we've asked for more, to determine whether the exit payment that's being proposed actually provides for the allocable share of the wind down costs of those entities. What was submitted to the Court in XF, I could be wrong, as to my letter, was an estimate based on -- now we're hearing, and we will hear later from Mr. Del Genio, the fact that their estimate is low.

And so one thing I'll note is, it's not an issue for approval of the sale hearing, but for them to get free and clear.

THE COURT: Are you saying 9 and 12 may have to pay more money?

MR. WENDER: That's -- under our reading of the documents and the fact that we -- our intercompany liens and the Debtors can't release theirs -- can't get -- until there's -- until those amounts are satisfied, is our position. So I think it's important. It's not a sale objection issue, because the sale says that they don't get released until they pay these amounts. But it's just

something to know when we talk about what impact they --

THE COURT: Pay what amounts, though? What do they have to --

MR. WENDER: For example, the intercompany it's -- I apologize, Your Honor, give me one second, I think I've got it in here.

THE COURT: Are they getting released from any obligations that are enforceable by your WAC or any of the other WACs?

MR. WENDER: Upon payment of the exit payment --

THE COURT: Right.

MR. WENDER: -- and that exit payment is based on the estimate and -- but again, the lien of WLIL against them for intercompany costs don't get released without our consent based on our review of the order.

THE COURT: But, you know --

MR. WENDER: And so again --

THE COURT: -- the bidding procedure said that they make their bid, if it's accepted they exchange releases so they can't be liable to the Debtor for anything more, right?

MR. WENDER: But they can be obligated under the WLIL intercompany claims and the intercompany liens that were granted in the cash collateral.

THE COURT: But what I'm saying is -- are you

saying that the Debtor is releasing those -- releasing rights that you have?

MR. WENDER: Under their language, I think they're saying is that upon payment of the exit payment, because it satisfies those things, then they're getting releases. We don't know -- we haven't seen the calculations in depth behind it. I've received information that's changing on, it seems to be, an hourly basis.

And so again, it's not a sale issue, because the sale order says they have to pay those amounts. But when we talk about --

THE COURT: And then they exchange general releases. It doesn't just say they have to pay the exit payment, it says then they close at that price and they exchange general releases, right?

MR. WENDER: But the Debtors --

THE COURT: So what's the (indiscernible)?

MR. WENDER: -- can't release under the cash -- DIP/cash collateral they can't release without the participating WAC lenders.

THE COURT: If you have a separate enforceable right to compel 9 or 12, and I'm not ruling on this --

MR. WENDER: Yeah, no. That's --

THE COURT: -- to make a payment, then I guess you have that right. The Debtor can't release your rights.

MR. WENDER: Thank you, Your Honor.

MS. DIBLASI: Just to clarify. Kelly DiBlasi for the record.

Your Honor, in Mr. Wender's statements he has mixed a few concepts here. The intercompany protection claims and liens that he's referring to are effectively intercompany DIP liens for the money that goes back and forth pursuant to the cash sweep and WLIL paying the expenses on behalf of these entities, all of that gets netted out, and pursuant to the terms of the DIP order, there are claims and liens.

And he's correct, that the WAC agents have a consent right to the extent that the Debtors are looking to extinguish, or settle, or subordinate those claims. First of all, we're not settling or subordinating anything. The credit bidders are paying those claims and they're paying them based on the intercompany exchanges which are shared periodically in the court-ordered reporting obligations and our DIP budgets, and they're knowable numbers, there's nothing subjective there. That is separate from the estimated wind down costs and the wind down budget and that bucket of expenses that the credit bidders have to pay.

Remember, the exit payment has a few components. Those are two of them. Mr. Wender is kind of mixing them and thinking about them together and suggesting that he --

his client has a consent right over how much of the exit payment is going towards wind down costs, and that's not correct. It's limited to the intercompany claims under the DIP order, which in effect are like intercompany DIP claims.

THE COURT: Okay. Thank you.

All right. I'll hear the -- having heard all this, you've convinced me that the deals that WACs 9 and 12 made entitle them to make a bid for an exit payment -- in part for an exit payment computed based upon the net book value allocation, which is attached as Exhibit F to the amendment to the consent letter and incorporated by reference into the bidding procedures order, the cash collateral order and just about every other order I've signed in this case.

I appreciate that these were hard-fought negotiations from the beginning and you can't change that deal. And once they make that bid at consummation, they're entitled to release -- well, both sides are entitled to mutual releases. 9 already has a pending motion to dismiss once the case is consummated and I'm sure one will follow with 12, I can't speak to two because a 363(k) credit bid is still a little different, there's still administration involved in that particular matter, although it's all one estate.

So I will go forward and I will hear any

objections. Let me deal with 12, because it sounds like those -- at least Macquarie's objections were resolved already.

MS. DIBLASI: Thank you, Your Honor.

So 12, you're correct, is a little bit more simple than 9, given the pending objections. In support of the WAC 12 sale transaction, the Debtors have filed an amended equity purchase agreement which provided for nonmaterial changes to the terms of the equity purchase agreement to reflect some accounting and tax treatment adjustments and the allocation of the consideration being given by those lenders, and how that's accounted for.

In support of this transaction, the Debtors filed the declaration of Matthew Niemann at Docket Number 67, which was his original declaration filed in support of the sale motion and was previously entered into the record. We also filed a supplemental declaration of Matthew Niemann at Docket Number 405. And the WAC 12 lenders filed, in support of the transaction, the declaration of Alistair Monk, at Docket Number 391 and a supplemental declaration of Alistair Monk at Docket Number 403.

I believe that at the Court's permission Mr. Monk is appearing telephonically. Mr. Niemann is in the court today and available for cross-examination. At this time I'd like to submit these declarations into evidence as these

witnesses' direct testimony.

THE COURT: Which is the document number for the Niemann declaration?

MS. DIBLASI: The supplemental Niemann declaration is 405.

THE COURT: And what are Mr. Monk's declarations?

MS. DIBLASI: The first one is 391, the supplemental is 403.

THE COURT: Does anybody object to the receipt of the declarations as the witnesses' direct testimony and want to cross-examine the witnesses?

Hearing no response, I'll accept the declarations as their testimony.

(Declarations of Matthew Niemann and Alistair Monk Received into Evidence.)

MS. DIBLASI: Thank you, Your Honor.

So as we mentioned, Macquarie was the only party to file a limited objection. Their objections were resolved in the additional representation contained in Mr. Monk's supplemental declaration, as well as a modification in the revised proposed sale order confirming that the releases in the equity purchase agreement do not release third parties from any NDA obligations they have with the Debtors.

I will add, Your Honor, I'm not certain if this is still a live objection, yesterday, late in the day, counsel

to the WAC 7 agent, Mr. Wender, did notify us that they have objections to the WAC 12 sale. Those were not filed and I don't think that they're properly before the Court, but if the Court's inclined to hear them, you know, the Debtors are prepared to respond.

THE COURT: They didn't file an objection?

MS. DIBLASI: That's correct, Your Honor.

THE COURT: Mr. Wender?

MR. WENDER: Thank you, Your Honor. It's not, as I noted before, it wasn't --

THE COURT: Let's hear your silent objection.

MR. WENDER: Your Honor, as I noted before, and I specifically said, all of two minutes ago, it wasn't an objection to the sale. But what I did note is that under our view of the documents and with respect to the cash collateral liens and the like, is that our lien does not get released or extinguished in any -- without the satisfaction of the allocable share of the wind down costs.

And so that's not an objection to the sale, but it is just saying that -- and the order provides that liens don't get extinguished until those amounts are paid. And so that might be an intercompany claim that we have, as Your Honor noted, and it might affect 9 -- I think we're in 12's right now, ability to have free of our lien, but that's just something I noted.

THE COURT: But the releases don't release any of your liens.

MR. WENDER: And that's what the clarification was, is to the extent they were seeking to do so, we don't think that it is. But that -- and so that --

THE COURT: But how could --

MR. WENDER: -- I was interested to hear her characterize it as an objection.

THE COURT: -- the Debtor release your liens?

MR. WENDER: And that's -- and I was just clarifying the issue with the Debtors yesterday about this point. I didn't say it was an objection, I just told them that we had an issue on this point. And so I was not prepared to stand at this point and so this is, as I said two minutes ago, we weren't objecting to the sale but we had this issue with respect to our liens. Thank you.

THE COURT: Thank you. I have a question of one of the proposed findings in your overly long order, but nothing compared to the Macquarie order, but --

MS. DIBLASI: We'll get to that one.

THE COURT: -- it says, the Debtors, the buyer -- I'm reading from page 7 of the proposed order, it says, "The Debtors, the buyer and WAC 12 lenders complied with the bidding procedures in all respects." What's the evidence that they've complied in all respects?

MS. DIBLASI: That would be in Mr. Niemann's supplemental declaration.

THE COURT: He might have facts setting forth that they complied, but how could I make a finding that they complied in all respects?

MS. DIBLASI: Would it make Your Honor more comfortable if we deleted those words?

THE COURT: I will delete them anyway, but --

MS. DIBLASI: We can do that.

THE COURT: -- I'm just curious, when you put something like that in a finding.

All right. Does anybody else want to be heard?

MR. EDELMAN: Yes, Your Honor.

THE COURT: You want to tell me your objections are resolved?

MR. EDELMAN: I -- yeah, and I'd like to detail --

THE COURT: You don't have to, but go ahead.

MR. EDELMAN: I'm pleased to report that, you know, our objections are resolved.

THE COURT: Okay.

MR. EDELMAN: We -- I'd like to go a little bit into detail because I think it highlights the difference with what you're going to hear in a few minutes.

THE COURT: Well, why don't we deal with that when I hear it in a few minutes. I'm serious, Mr. Edelman. We

have a long calendar. If your objections are to 9 rather than 12, then I'll hear it with respect to 9. But if the objections are resolved with respect to 12 and you have no objection to the documents that have been handed, that's -- you know, that's all you really have to say.

MR. EDELMAN: We do. But there's one other element that 12 did, which is we had objected to the breakup fee arrangements. We thought that there was -- could have been a potential end run around and also the scope of the releases. And WAC 12 actually sat down with us and they described the transactions, they detailed exactly what they were doing and we got comfortable that they were not violating the breakup fee arrangements. And they also agreed to amend the order to narrow the scope of the releases to make it clear that no third parties were being released. And we got comfortable that they themselves were not violating the nondisclosure arrangements, because of how they described the arrangements with us and they sat down with us.

So based upon WAC 12's conduct in opening the transactions to us, and also their actions, we agreed to resolve the rejections and we accepted their modification to the Monk declaration and the release. And so on that basis we withdrew our -- we report to the Court that our objection is resolved.

THE COURT: So you don't object?

MR. EDELMAN: Yes, in short.

THE COURT: Thank you. Anybody else?

All right. The application to approve the WAC 12 sale is granted. I'll review the order in chambers. I will probably shorten it, but I'll review it in chambers. I haven't reviewed the revised materials that were delivered this morning. Okay. Next, 9.

You're excused if you want to leave.

MS. DIBLASI: Your Honor, next is the WAC 9 sale transaction which is Agenda Item Number 5. Yesterday we filed a revised WAC 9 equity purchase agreement at Docket Number 416. Similar nonmaterial changes to reflect agreement on the allocation of the consideration being given and to reflect the appropriate accounting and tax treatment of the exit payment, and in addition to align with the mutual releases set forth in the bidding procedures, we made an amendment to delete a provision that would have provided the directors and officers with continued indemnification rights against the transferred entities.

The only filed objection to the WAC 9 sale transaction is the objection filed by Macquarie. The objection, which I'm sure Mr. Edelman will describe, relates to certain representations and warranties of the buyer, NDA rights, and the scope of the releases.

From the Debtors' perspective, Your Honor, subject to approval of the Court, we are bound by the current terms of this equity purchase agreement. Many of the changes that Mr. Edelman seeks are really issues between Macquarie and the buyer and do not involve the Debtors' estate.

THE COURT: Unless you have to pay a breakup fee.

MS. DIBLASI: My understanding is he's asserting the breakup fee against the buyer itself and not the estate.

THE COURT: Is that who's liable for the breakup fee in the -- under the bid procedures?

MR. EDELMAN: Your Honor, the estate is liable for the breakup fees.

THE COURT: That's what I would normally think.

MR. EDELMAN: But the Debtors would then have a claim against that estate. Under the bidding procedures they would have a claim against the credit bidders or a third party bidder for the breakup fee.

THE COURT: Well, whether or not that's the case, that would be an issue between the Debtor and the credit bidders. In other words, one of your concerns, we'll put the NDA aside, is that WAC 9 may be circumventing the obligation to -- or rather the way that it's structured there may be an obligation to make -- pay a breakup fee by the Debtor and that would be under an existing document, not under the purchase agreement, or under the proposed sale

order, right?

MR. EDELMAN: That's correct. Although --

THE COURT: All right. So then, you know, whatever the document says between WAC 9 and the Debtor, if you have a right to a breakup fee from the Debtor based upon the sale to WAC 9, you can assert that right, right? It doesn't have anything to do with the deal between WAC 9 and the Debtor.

MR. EDELMAN: Well, that is technically correct, but under the bidding procedures, Macquarie has the right -- if a breakup fee is due, they have a right to assert that against the Debtor. It's only payable from when that transaction closes.

THE COURT: Right.

MR. EDELMAN: And it's payable from the third party who closes their transaction, so it flows through. So if the Debtors are releasing the third party and we've agreed that we only get that payment from that transaction, their release actually does affect us.

THE COURT: I don't understand how them giving a release --

MR. EDELMAN: The Debtors are --

THE COURT: -- to WAC 9 could affect their obligation to pay you a breakup fee.

MR. EDELMAN: It's their obligation to pay the

breakup fee, actually at close, to the Debtor. And we agreed that the Debtors would pay us, but we agreed that it would only be payable from the transaction proceeds.

THE COURT: But for a streamlined credit bid, other than the wind down expenses, there are no -- and the exit payment, there are no proceeds. So how is the streamlined credit bid -- if you had a streamlined credit bid that didn't comply with -- or for which a breakup fee was required, how is that going -- supposed to get paid?

MR. EDELMAN: Well, that -- if a breakup fee is required, that would be required to be added to the exit payment.

THE COURT: Is that so?

MS. DIBLASI: The --

MR. EDELMAN: If it's not a credit bid, that is so.

MS. DIBLASI: The provisions don't contemplate the situation. I think what would have to happen is the Court would have to determine it no longer a streamlined credit bid and characterize it as a third party bid and require the buyer to pay the breakup fee pursuant to the bidding procedures, just like any other third party successful bidder would have had to.

THE COURT: I see.

MS. DIBLASI: The whole point with the credit bid

process and the agreements with Macquarie for the vacation from those breakup fees would be as long as credit bidders complied with the bidding procedures, no breakup fee would be triggered, no burden would be on the estate that it couldn't pay.

THE COURT: So if he's right, Mr. Edelman is right, and for one reason or another WAC 9 would be liable for the breakup fee, then I couldn't approve their sale today, right?

MS. DIBLASI: I think that may be problematic, Your Honor, unless we figured out a way to add that on to their exit payment or something. But it certainly is outside --

THE COURT: Or they just convinced them --

MS. DIBLASI: -- the existing procedures.

THE COURT: -- as WAC 12 did, that we're not -- you know, this is not going to trigger a breakup fee.

MS. DIBLASI: You know, I think it's also -- my understanding of Mr. Edelman's comments to the EPA in the order were to preserve the right to later try to assert this claim, and not necessarily assert it today. So I suppose another alternative would be approve the streamlined credit bid, if you're convinced that he needs the protections and reservations that he's asking for, he can have those and he could preserve his claim in the future.

THE COURT: Well, this is really -- isn't this an issue involving WAC 9 and what WAC 9 is willing to agree to?

MS. DIBLASI: Yes, Your Honor.

MR. DIETDERICH: Thank you, Your Honor. Andy Dietderich for WAC 9.

The argument is ridiculous and we have no --

THE COURT: What's your next point?

MR. DIETDERICH: -- and we have no desire to change our transaction. Right? There is no privity of contract on a break fee between WAC 9 and the Macquarie bidder. I've heard no basis under which that could be established.

THE COURT: Well, I guess they're saying you're liable -- or the Debtor is liable for a breakup fee based upon your transaction. And if the Debtor closes your transaction, gives you a release, there's no way to collect the breakup fee. Is that what you're saying, Mr. Edelman?

MR. EDELMAN: That is, because the Debtors are giving a release, but under normal circumstances if a breakup fee is due it would flow -- it would be due by the buyer and then flow through the Debtor to us.

MR. DIETDERICH: And that we agree with. In other words, if we close our transaction the releases do not establish a basis for Mr. Edelman's client to sue us or for the Debtor to sue us on a break fee. Right?

THE COURT: Okay. So the releases don't cover the possibility of a liability for a breakup fee?

MR. DIETDERICH: No, they do not. This is a streamlined credit bid. There's an order determining that it is a streamlined credit bid. If, for some reason, there were later an argument that under the Macquarie transaction, to which we're not a party, that our streamlined credit bid is not an exempt transaction, which by the way is defined to be a credit bid, then that's a question under the Macquarie contract for the Debtors. It should have nothing to do with us, we're released from that liability and we're not --

THE COURT: But you are released from that liability.

MR. DIETDERICH: We understand us as being released from that liability and if that's not clear we shouldn't proceed.

THE COURT: And tell me why they wouldn't be released. How you would have rights against them. I understand that the Debtor wouldn't be able to sue them for the breakup fee, but the Debtor would still be liable for the breakup fee, wouldn't it?

MR. EDELMAN: We've agreed, under our contract, that the Debtors would be liable, but from the transaction proceeds that result from any transaction. And under the bidding procedures any transaction that gives rise to a

breakup fee has to add that cost into the price that they're paying. So this -- they're asking to actually deviate from --

THE COURT: Oh, I see what you're saying.

MR. EDELMAN: -- the bidding procedures by having a transaction without paying a full breakup fee.

THE COURT: You know what? This is the kind of matter, this is a 363(b) sale, I'll hear -- I'll try that case today. So if you want to put on evidence that they are liable for a breakup fee, I'll hear it today and just decide it today.

Okay. Next. So we'll put you aside. Now, let's get to the allocation issue.

MS. DIBLASI: Thank you, Your Honor.

MR. SINGER: Your Honor, this is Kelly Singer on the line appearing for Omni and Omni International. We did file an objection to the WAC 9 sale as well. I believe we have language in -- I believe we have an agreement on language, at least with the buyer we do, we haven't received confirmation from the Debtor. But paragraph 33 is what's still being hammered out. And as long as we have confirmation with the Debtor that our latest language is fine, then we are okay with the WAC 9 sale.

THE COURT: I don't know. There's a lot of new language in paragraph 33, but I don't know if you've seen

it. It's filed as Document 432-2 on ECF, so you can take a look at it.

MR. SINGER: Yes. Thank you, Your Honor. I do have that and we have further revised that language this morning and we got confirmation from the buyer this morning that the further revised language was fine, we just don't have it from the Debtor yet.

MR. PODZIUS: Good morning, Your Honor. Bryan --

THE COURT: Wait a minute, before you start. Have you had an opportunity to address this particular language?

MS. DIBLASI: That's what he's about to address, Your Honor.

THE COURT: Oh, okay. Sorry. Go ahead.

MR. PODZIUS: Good morning, Your Honor. Bryan Podzius, Weil Gotschal for the Debtors.

We have worked out some additional language with Mr. Singer that the language is acceptable to the Debtors. And subject to Your Honor's approval we would insert the language into the proposed order.

THE COURT: Okay. Thank you.

MR. SINGER: Thank you, Your Honor.

THE COURT: Thank you.

MS. DIBLASI: Okay, Your Honor. That brings us -- Kelly DiBlasi from Weil Gotschal, for the record.

That brings us to the emergency budget allocation

motion filed on February 6th at ECF Number 357. As we've mentioned, this motion seeks resolution of the intercreditor dispute regarding the appropriate method of allocating expenses, shared expenses, among the different WAC groups both in the DIP budget and the wind down budget.

I think, from the discussion we've had today, that Your Honor clearly understands the context of this dispute and how the Debtors' cash management system works with respect to these indirect expenses and we've already heard from some of the lenders on each side of this issue about their desire to change the allocation methodology.

In support of this motion we filed a declaration of Robert A. Del Genio, at Docket Number 366. Mr. Del Genio is present and available for questioning. We would like to submit his declaration as his direct testimony.

THE COURT: Is there anybody who rejects to the receipt of Mr. Del Genio's declaration as his direct testimony or wants to cross-examine Mr. Del Genio?

Hearing no response, I'll receive his declaration.

(Declaration of Robert Del Genio Received into Evidence.)

MS. DIBLASI: Thank you, Your Honor.

THE COURT: Are you also offering into evidence the documents that are attached?

MS. DIBLASI: Yes, Your Honor. There was one

attachment to his declaration.

THE COURT: One attachment? I have Exhibits --

MS. DIBLASI: Oh, I apologize, Your Honor.

THE COURT: -- A through J.

MS. DIBLASI: I'm sorry. I'm confusing declarations. Yes, there are several letters, consent letters, exhibits from the DIP documents. All of those we would ask to be included in evidence with his declaration.

THE COURT: All right. Is there any objection to the receipt of Exhibits A through J, although A is just a list of the Debtors, I guess, but is there any objection to the receipt of those exhibits?

Hearing no objection, I will receive them as Exhibits A through J.

(Debtors' Exhibits A through J Received into Evidence.)

MS. DIBLASI: Thank you, Your Honor.

Your Honor, the Debtors somewhat are stuck in the middle here and largely do not have a stake in this dispute, except as follows:

First, we need this dispute resolved before the current DIP budget period expires so we can have continued use of our DIP funds and cash collateral.

Second, as we've heard today, we need to understand how the wind down expenses are going to be allocated so that we can appropriately prepare and refine

our budget and be prepared to fund our wind down account and our fee reserve account when the sale closes.

And third, what's really come to light today is we cannot have a disparity between methodologies applied to the credit bidders if doing so -- versus those who are selling their assets to Macquarie, if doing so leaves the estate with a gap that -- where we don't have funds to cover those expenses. So if it is the case that the Court decides that for those WAC lenders whose collateral is being sold to Macquarie, whatever the remaining wind down expenses are and whatever the DIP expenses are, those things get allocated based on those WACs, Macquarie purchase price allegations and all of that gets covered, that's probably okay. But if it's determined that whatever additional expenses WACs 9 and 12 would have picked up had that methodology also been applied to them, are not covered, that's a problem for the estate because that leaves us with expenses for which we have no funds, we're left administratively insolvent, we can't confirm a plan, no one wants to see that happen. So --

THE COURT: I understand, but that may be the box that you put yourself in.

MS. DIBLASI: We don't think we did, Your Honor. We thought this was resolved. Your Honor clearly has read all of the orders and the exhibits. We have not only the incorporation of the DIP budget and the wind down budget as

attachments and approved pursuant to the DIP order, but every participating WAC signed consent letters, with requisite lenders on behalf of each WAC, consenting to those forms of budgets. So going into this process and agreeing to the terms of the DIP and the bidding procedures and the credit bid provisions, the Debtors were under the assumption that net book value would apply across the board.

THE COURT: Let me ask you a question. I think everybody seems to agree that prior to any sales the net book value allocation was the one -- the only allocation really that made sense. And the argument is that once the sales occurred there should be a different market based allocation. What is the evidence that while the parties were negotiating they negotiated for a continuation of the net book value allocation after the sales in computing wind down expenses?

MS. DIBLASI: The evidence in Mr. Del Genio's declaration is the -- is a little bit of the reverse, I would say. Everyone knew, since August, that we're selling this company and no one ever said, when we have a successful third party bid the methodology should change.

THE COURT: So there's -- so there were no discussions amongst the parties that the methodology would change --

MS. DIBLASI: No, Your Honor.

THE COURT: -- either before or after the sale? And then --

MS. DIBLASI: That's right. And that's in Mr. Del Genio's declaration.

THE COURT: Let me ask you, this Exhibit D, which is the -- happens to be the WAC 3 consent letter, who agreed to the amended consent letter?

MS. DIBLASI: Requisite lenders from each of the participating WAC facilities signed these consent letters.

THE COURT: Who's not participating? In other words, who's not bound?

MS. DIBLASI: WACs 2 and 10.

THE COURT: Okay. And when you tell me that the requisite lenders signed it as a matter of corporate governance, does that mean that they bind all of the lenders in their WAC?

MS. DIBLASI: Yes, Your Honor, pursuant to the credit agreement provisions in each WAC.

THE COURT: Okay. All right. Because the reason I ask is when I look at Exhibit D to Mr. Del Genio's declaration, the computation, I'm looking at page 26 of 70 the WAC 3 consent letter, the computation of the wind down costs, which are obviously post-sale are still specifically on a net book value method.

But now I'll hear any evidence that anybody has,

whether it was an understanding of the parties or a different agreement was reached. It just seems to me that the parties agreed that it was contemplated that even after a sale, in computing the wind down expenses, net book value would be used. Does anybody have any witnesses on this issue?

Okay. It sounds like the record is closed. I'll hear argument.

MS. DIBLASI: Thank you, Your Honor. So --

THE COURT: You'll get your chance. Don't worry. You've already had two.

MS. DIBLASI: You know, I think, at the outside I really summarized my argument. Based on the evidence the net book value allocation methodology has been used since the Debtors --

THE COURT: How do you deal with 2 and 10 who are not parties to the DIP order?

MS. DIBLASI: So 2 and 10 right now are footing their own bills, for lack of a better phrase.

THE COURT: Even for the indirect costs?

MS. DIBLASI: Through their -- they are not taking on any indirect costs, they're paying their own direct expenses.

THE COURT: Right.

MS. DIBLASI: The other WACs who are participating

in the DIP and these other agreements and arrangements, have effectively picked up the costs on behalf of those entities with the reservation of their 506(c) surcharge claim, which you might remember back from --

THE COURT: Yeah, but only the Debtor can surcharge (indiscernible).

MS. DIBLASI: That's right. And the Debtors agreed to commercially reasonable efforts, or something of the like to pursue those claims. They are preserved.

THE COURT: Okay.

MS. DIBLASI: So Your Honor, based on the evidence that net book value has been used to date in these cases and there was no contemplation of a change, and it appears to be necessary to ensure that these estates remain administratively insolvent, we would submit that there's no basis to change the allocation methodology at this time.

THE COURT: Okay. Anyone else want to be heard?

MR. DAUCHER: Good morning, Your Honor.

THE COURT: Good morning.

MR. DAUCHER: Afternoon at this point.

THE COURT: Good afternoon.

MR. DAUCHER: For the record, Eric Daucher of Norton Rose Fulbright on behalf of the WAC 6 agent, as you note, for the third time at this point.

THE COURT: Third time's a charm.

MR. DAUCHER: Well, hopefully things are.

I'll start with the fact that I think you actually made this really easy for us --

THE COURT: Well, I'm glad. That's why I'm here.

MR. DAUCHER: -- with the rulings you've already issued today, which is by my count there were exactly two WACs that objected to changing to a market based value.

THE COURT: And those are the ones who are paying more under the net book value method?

MR. DAUCHER: Those are also the WACs, 9 and 12 --

THE COURT: Actually three of them objected. WAC 1 objected also, Macquarie objected.

MR. DAUCHER: No, no, sorry. There are two WACs that objected to the -- to our proposal to move to a market based methodology.

THE COURT: Oh.

MR. DAUCHER: WACs 9 and 12. You've already ruled that costs of the other WACs aren't going to move over to WACs 9 and 12.

THE COURT: Then let me ask the question, of the remaining WACs, other than 9 and 12, is there anybody who objects to using a market based allocation method for the wind down costs? Does that resolve it?

MS. DIBLASI: Kelly DiBlasi, for the record.

Again, it resolves it if those WAC lenders commit

that they're not going -- that they will cover the expenses that otherwise would have been allocated to 9 and 12 had 9 and 12's obligations been calculated pursuant to --

THE COURT: It sounds like we don't have --

MS. DIBLASI: -- Macquarie.

THE COURT: -- agreement on that, so we still have a dispute. So it's not as easy as you thought, Mr. Daucher.

MR. DAUCHER: Well, I don't know about that, Your Honor, because we should look at what the Debtors actually put before the Court in their papers.

THE COURT: Look, all they're saying is that the remaining WACs have to pick up a hundred percent of the expenses and they probably don't care whether it's on the market based allocation method or the net book allocation or the Martian allocation method, as long as a hundred percent of the expenses are picked up and the estate is not administratively insolvent, that's all.

MR. DAUCHER: No, I understand that that's what --

THE COURT: So are you willing, or I'll ask all the WACs whether they're willing to use a market based -- that a hundred percent of the wind -- remaining wind down expenses will be applicable to the remaining WACs, will be picked upon a market basis?

MR. DAUCHER: I would need to --

THE COURT: Isn't -- can I ask you, isn't there a

cap built into some of this where they never have to contribute more than the amount or the percentage that's set forth in one of the budgets?

MS. DIBLASI: That's pursuant to the DIP order, Your Honor. There's a cap on the extent to which each WAC that participates in the DIP can be primed.

THE COURT: Oh, that's a priming provision?

MS. DIBLASI: Correct.

THE COURT: Okay. Never mind.

MS. DIBLASI: And I guess, Your Honor, certain what you just proposed would work for the wind down budget. I'm not quite sure how that works with the DIP budget given that 9 and 12 are participating in the DIP, so that one I think would have to change across the board, if we're talking about a change.

MR. DAUCHER: You know, Your Honor, it's interesting that the Debtors are now expressing a strong view on this, because I'm looking at their papers right now --

THE COURT: The Debtors just want their administrative expenses paid and they don't care how it gets done.

MR. DAUCHER: Oh, I understand that perfectly clearly, but let's look at page 5 of their omnibus reply. Let's look at exactly what they said. Quote, "The Debtors

view this as an intercreditor issue to be resolved by the emergency motion and will amend the proposed sale orders to accommodate any changes to the allocation methodology mandated by this Court."

Then, if you look at paragraph 28 of the emergency motion itself they again say, and there's a reason I used the phrase "jump ball" before, the Debtors say they are caught in the middle of this. It isn't their issue.

THE COURT: I tell you, it's an issue without regard to the allocation method because if the remaining WACs don't pick up a hundred percent of the expenses under either allocation method, you're administratively insolvent. So what does their really matter? In other words, you can't really ask them to commit either to a market based or a net book value, you're really asking them to commit to pick up the remaining expenses. And do they have to do that under one allocation method as opposed to the other?

MS. DIBLASI: We never contemplated a scenario where some people would be allocated one way or others would be allocated another. So this is sort of a new concept that --

THE COURT: Let me ask the question a different way.

MS. DIBLASI: Yeah.

THE COURT: 9 and 12 get out.

MS. DIBLASI: Correct.

THE COURT: And I agree with you that it should be a net book value allocation, but you basically underestimated the allocable expenses when you made that estimate on which 9 and 12 made their bids. So you have a shortfall even under that method, don't you?

MS. DIBLASI: So the remaining estates, which are still going to be part of the Chapter 11 case, will have to be wound down and the rest of the WACs will have to ensure that we have sufficient funds to pay those wind down costs.

THE COURT: What's their obligation to ensure that they pick up the remaining wind down costs? And if that's the case, why does it matter which allocation method I use?

MS. DIBLASI: As long as we have certainty that they are picking up those costs, it doesn't matter how it's allocated. And --

THE COURT: What's their obligation to do that? Or does that just happen because these are the costs, these are the remaining WACs and you're just going to divide it up amongst the remaining WACs?

MS. DIBLASI: I mean, that's really the answer, Your Honor. We hope to eventually get to a plan stage. We'd like to get a liquidating plan confirmed. We'd like to be able to pay all admin claims in full so we can make distributions to these creditors. They have committed to

set aside sale proceeds to fund the wind down expenses of this estate and it's on that basis that we would ensure that all of those expenses are covered.

THE COURT: So if they committed to cover the wind down expenses, and that's not exactly what Mr. Daucher agreed to, but if they committed to cover the wind down expenses, the allocation method doesn't really matter.

MS. DIBLASI: That's right, Your Honor, except given the discourse today and prior to today, I need certainty that they're not going to come back to the Debtors and say, whatever gap there was, because 9 and 12 got a different methodology, they're not picking up. And I'd love to hear that from the lenders' counsel today so that this estate can move forward with the comfort that we are administratively solvent.

THE COURT: You know what I think, this is a good time to take the lunch break. You can talk about this. We'll reconvene at 2:00. Okay?

MS. DIBLASI: Thank you, Your Honor.

THE COURT: All right. Thank you.

MR. DAUCHER: Thank you, Your Honor.

(Recess)

MR. DAUCHER: Good afternoon, Your Honor. Once again, Eric Daucher from Norton Rose Fulbright at Bank of Utah as WAC 6 Agent. I think where we left off was making

the point there's no WAC left in this fight, as it were, has actually stood up, filed any papers, opposed a market allocation, nor for that matter, have the debtors done so. I've heard some statements in the courtroom today to that effect. But if you look at what they've filed, it's quite clear they were not opposing a market allocation. If you want to be perfectly clear on that, we can look to their emergency motion. First, as I described, they announced that they felt caught in the middle.

But I think what really tells the tale, is if you look at their proposed order. And what their proposed order says is really quite straightforward what their asking for. The appropriate allocation methodology for charging the WAC groups any allocated costs is based is on bracketed, based on NBV or bracketed, based on Macquarie. This isn't a -- they are asking the Court to order one or they're asking the Court to order the other. They've asked the court to order one of them -- either of them. So I had a very nice argument outlined put together premised on the fact that I'd be arguing against somebody. Now, I'm not really sure that we have it --

THE COURT: So are you going to sit down?

MR. DAUCHER: -- for all intents and purposes unopposed. If you tell me you're inclined to grant the relief and order --

THE COURT: No. You told me you don't have anything to argue, so --

MR. DAUCHER: No. I told you I don't have anybody to argue against.

THE COURT: Well, I think you're arguing against the debtors because the debtor is arguing that you have to use the same method. And I've already concluded that as to WACs 9 and 12, the method is net book value. So --

MR. DAUCHER: So and, again, I think we're hearing that from them in the courtroom, but we don't see that anywhere occurring.

THE COURT: Okay.

MR. DAUCHER: This is a new position and not to throw debtors' counsels words right back in your face again, what we heard earlier in the hearing that when WAC 7 hadn't filed an objection, they were not properly before the court on a particular (indiscernible) that is out of the debtors' counsel's mouth. That's exactly where they are on this issue.

THE COURT: Well, no, they had consistently argued that the net book valuation is the valuation that should be used.

MR. DAUCHER: But they haven't actually staked out that position in their paper.

THE COURT: That's how I read Mr. Del Genio's --

MR. DAUCHER: Declaration -- the evidence.

THE COURT: Okay. I got you. Why don't you move on --

MR. DAUCHER: Okay. Fair enough. So our point is really straightforward at the end of the day. WAC 6 should bear the costs of these cases in proportion to the benefit that's actually received, not really a remarkable request as we have outlined in our papers already, that's really what the bankruptcy code calls for. It's what the case law interpreting the bankruptcy code calls for. And, frankly, I don't think the documents dictate a different result. But let's talk about consequences for a minute because the consequences of adopting a net book value approach are particularly harsh for WAC 6.

If you were to adopt a net book value approach, according to the papers the debtors have put forward, and they're incidentally not consistent in how it's applied -- net book value. But WAC 6 is either a 7.1 percent net book value, and that's from the Houlihan analysis that was attached as Exhibit B to Mr. Del Genio's February 7th declaration or it's a 7.5 share of a net book value, and that's from initial DIP budget, and their proposed budget, so they're not even consistent with one another.

In contrast, WAC 6 stands to receive only 3.8 percent of Macquarie's base purchase price, and that's set

out in the proposed sale order. So what you're talking about is almost doubling the share of the direct costs allocable to WAC 6, nothing justifies that sort of thing (indiscernible). And as we reviewed the debtors' papers and the papers, frankly, from WACs 9 and 12, when they were still part of this dispute, we're really struck by one key thing. None of them actually take the position that working from first principles, a net book value allocation makes sense.

THE COURT: Unless, that's what the parties agreed to.

MR. DAUCHER: Unless, that's what the parties agreed to in a way that bound them all the way through the end of (indiscernible). But they don't actually take the position, I don't see it laid out anywhere that this is fundamentally (indiscernible). In one sense, that's not really surprising as net book value, it's just an accounting trick. It's initial cost minus depreciation and other charges. In contrast, courts have been -- I don't want to say unanimous because, I suppose, there's always some case out there I might not be aware of -- but the cases I've seen in this district are consistent in saying that net book value doesn't reflect real value.

THE COURT: But that's for valuation purposes, and I agree with you on that, but this isn't a valuation.

MR. DAUCHER: No, that's right. It's not a net value. But it doesn't reflect anything other than the debtor's particular accounting methodology that they adopted prepetition. And understand that this isn't a criticism of the debtors using that methodology prepetition. And it's not a criticism of them even using it earlier in the cases, and the parties agreeing to use it at the early stages of the cases, subject to the DIP budget being revised. And the reason it's not a criticism on those points is that there wasn't necessarily a better metric to use at the time. We didn't know the true value of the assets.

The debtors certainly prepetitioned, they're operating in one integrated -- they're doing the best they can to share out costs with the numbers they have available to them. So not a criticism of them taking that approach. But with change is we now have the true value of the (indiscernible) we know the benefits that are going to flow to the different vendors. The benefits are set right out there at the sale order. Here's the percentage that's going to go to each of the different groups. And we've heard testimony earlier in these cases from the debtors own witnesses saying that the Macquarie allocation was the market clearing (indiscernible). And so we really needed to move to what is the better methodology. And it's remarkable that we have sophisticated parties still asking -- well,

asking the Court to adopt a obviously inferior method of determining the value of the different WACs when it has this better tool available.

THE COURT: Well, couldn't you agree to pay more? I mean, even if you had to pay less out of the bankruptcy code, you couldn't contractually -- you could agree to pay more than you have to pay, right?

MR. DAUCHER: Could I agree to pay more?

THE COURT: No, could you client. You're not paying.

MR. DAUCHER: No. So my client is the agent, and this is an interesting point. My client is the agent, didn't sign any consent letter. Some of the lenders at the time, which incidentally are not the same lenders that we have today.

THE COURT: Well, I'm being -- well, that's one of the questions I had had earlier. I mean, I asked, and I was told that if the requisite number of lenders that was in a WAC signed the consent letter that bound all the lenders in the WAC; isn't that the case?

MR. DAUCHER: That's not going to be the case on every point for certain. Under any credit agreement, you have certain rights that can't be given up except by unanimous consent. And so you're talking about for modifying collateral rights, standard practice -- that's

going to require --

THE COURT: Well, we're not modifying any collateral rights here, are we?

MR. DAUCHER: Well, we are if you are effectively asking that our WAC be surcharged, a collateral surcharge, for the benefit of other estates. That's exactly what you're doing.

THE COURT: But I -- I guess, I thought -- I thought that DiBlasi said that putting aside the bidding here and methodology that the WACs agree to pick up the wind down costs, right?

MR. DAUCHER: She certainly said that.

THE COURT: You're telling me that's not what was agreed to in the DIP order or --

MR. DAUCHER: What I would tell you is that certain of the lenders, which I believe, at the time, did constitute requisite lenders under WAC 6, I don't want to dispute that, agreed to sign a consent to certain terms of DIP documents.

THE COURT: Right.

MR. DAUCHER: Now, those rights were, of course, subject to these final terms of the DIP order.

THE COURT: Right.

MR. DAUCHER: And the final DIP order -- right where the language appears that NB DIP term sheet contains

that language according to net book value.

THE COURT: Let me address it. The only evidence I have in this case is that the only allocation that the parties ever discussed was a net book value allocation. And that in the omnibus consent letter, and then the amendment to the omnibus consent letter, those who agreed to it or were bound by it, agreed to use that same method post-sale of the wind down expenses. Is there any evidence that anybody, at any time said -- because these are heavily negotiated agreements -- hey, wait a minute, once we know the prices, what the market value of these assets are, we'll use a different method, at least going forward from that point after March 1st.

MR. DAUCHER: So when you ask did anybody --

THE COURT: I mean, but this is an evidentiary -- (indiscernible) at evidentiary hearings -- tell me what the record shows.

MR. DAUCHER: So the record shows, as we pivot to Mr. Del Genio's February 7th declaration, and we flip to Tab I.

THE COURT: Tab I.

MR. DAUCHER: Exhibit I, I can provide, Your Honor, with a binder that --

THE COURT: I have it, but these are after-the-fact objections. Mr. Del Genio's testimony, which is

unrefuted, is in paragraph 16. And it says "It's noted above that at no point during the negotiations of the DIP facility or the approved process for the DIP facility, did any party request that once a third-party bid was received and accepted, such bidders purchase price allocation should be used in place of the NBV methodology." That's the only evidence I have on this.

MR. DAUCHER: And I don't dispute that --

THE COURT: Okay.

MR. DAUCHER: -- the only evidence you have on that. But what it is important is that the very same documents we're talking about, the DIP order, the DIP agreement preserves the right expressly to revisit the DIP budget. In fact requires that the DIP budget be revisited.

THE COURT: You know, but what does that mean, you can always revisit the DIP budget if they're paying too much in severance pay or they're paying too much for this. But that doesn't suggest that you can revisit the allocation method.

MR. DAUCHER: I disagree, Your Honor. And the reason --

THE COURT: So tell me the parameters of revisiting it.

MR. DAUCHER: The DIP budget after 10 weeks, the debtors are obligated to submit to the prepetition approving

parties a revised DIP.

THE COURT: Which they did.

MR. DAUCHER: Which they did. And the constraint on that is that the new formal budget must be in the same form -- not the same form itself.

THE COURT: Right. This is substance we're talking about. We're not talking about --

MR. DAUCHER: Correct. So the only constraint is, first, that it has to be in the same form. Second, that whatever is then put forward, has to be reasonably satisfactory to all of those.

THE COURT: So you don't agree the debtor says use the net book value -- you say let's use the market value. How is that resolved in terms of the contract?

MR. DAUCHER: Paragraph 14(c) of the DIP order specifically provides.

THE COURT: 14(c) says what?

MR. DAUCHER: It tells you that if the debtors put forward a budget and one or more of the prepetition approving parties disagrees with that budget --

THE COURT: Right.

MR. DAUCHER: -- there are 21 -- until the end of the budget period, 21 days, to work out their differences.

THE COURT: Do you disagree with any of the expenses set forth in the updated budget or just how they're

allocated?

MR. DAUCHER: We have not, at this time, been able to fully analyze the expenses that have been put forward --

THE COURT: Well, the motion is on for today, though --

MR. DAUCHER: Correct.

THE COURT: -- so tell me.

MR. DAUCHER: I haven't challenged any of the line items.

THE COURT: Okay. So tell me -- so we're back where we started from now. You don't agree -- disagree on the expenses. You have a disagreement on allocations. So how's that supposed to be resolved?

MR. DAUCHER: So at the end of the period, if the parties have not resolved their differences, the Court has a hearing, and that's what it says.

THE COURT: That's what we're doing.

MR. DAUCHER: Correct. And so there is not a particular standard that is required to be applied by the Court. What we have is a DIP budget that is not satisfactory to WAC 6. It is not satisfactory to WAC 3. And I don't want to speak for any other individual parties. But it's a matter that is live before the Court. So given that as Your Honor said, what we're debating here is substance, not forms. We agree the budget that's been put

forward is in the same form, roughly speaking, as the original budget. It's missing some items, but roughly the same -- where we have a difference is substance. And there's nothing that constrains the WAC 6 agent or any other agent, for the matter, from saying, now, at this stage of the cases, we built in this methodology for revisiting the DIP budget and revisiting, as Your Honor, said all of the substance, not the form, all of the substance of the DIP budget for bringing the matter before the Court, and that's what we've done.

And so when the debtors say -- well, "we" meaning the WAC 6 agent -- has somehow consented to this prepetition, even though the WAC 6 agent and at least one of the WAC 6 lenders did not sign off on this consent letter, but asked to, to my knowledge, but certainly did not sign the consent letter. We're in a position where we are able to revisit the issue. And so we teed up the issue, the debtors teed up the issue, and we've put before Your Honor the case law that states how the issue should be resolved. We don't see anybody on the other side putting forth case law saying that net book value must be carried forward.

And one point I want to raise when we're talking about revisiting the DIP budget itself. NBV is -- net book value -- isn't a footnote, it's everything in here shall be governed by NBV. It's a column line, there's an allocation

column, and some of the columns currently have direct expenditure next to them and some of them have net book value expenditure next to them. And if we can revisit any other --

THE COURT: Yeah. Doesn't that relate to the loans themselves? So, for instance, each party would have the bear the interest on their loan not proportionate to the value of their assets.

MR. DAUCHER: Correct. And so my point is that we're talking about the substantive item. If we can revisit any other column item in the DIP budget under the terms of the DIP order, surely we can revisit the allocations especially when there's a really good reason to do so, which there is.

THE COURT: So what does the DIP order say that it's an event of default for the use of cash collateral if the final cash collateral order doesn't comply with the amended -- the omnibus consent -- rather the amended omnibus consent letter. What is that?

MR. DAUCHER: It means that in the event a party wishes to take the position that the final DIP order somehow wasn't in compliance, yeah, we would have the problem of cash collateral.

THE COURT: So if the final DIP provided -- didn't provided for a net book value allocation, it wouldn't be

consistent with the omnibus letters, right?

MR. DAUCHER: No, I don't think that's right. Because under the consent letters, the consent was specifically conditioned on whatever rights Wheldon had under the final DIP documents. And, frankly, the DIP order controls over the DIP turn sheet itself.

THE COURT: So tell me what the DIP order says that you use the market value once there's a sale?

MR. DAUCHER: Nothing says that. And I won't pretend anything says it. What I will say is that nothing says at all terms and forever more you must use net book value. And it would've been silly to include such a provision because we're certainly hopeful. There's always the possibility that lenders across the board we're going to take their -- all of the collateral. We wouldn't have necessarily a true market resolution of each. In fact, if you look at the wind down budget initially propounded that's exactly what that budget, which was using net book value, contemplated.

Here, however, we do have a sale of the overwhelming majority of the WACs. We have a market tested resolution of the issue, and we have the debtors own witnesses are now saying that's the market clearing bid that actually determines where value is. In light of all of that, there's really just not reason to continue to adhere

to net book value approach. If you have questions about specific documents, I can actually walk you through one by one why they don't mandate a net book value approach. But we've had a substantial colloquy at this point. I'm not sure if you have further questions.

THE COURT: You have the podium.

MR. DAUCHER: One moment. Thanks. One point I want to touch on just because I think it highlights to difference between the WACs you've already ruled on -- WACs 9 and WAC 12 and the remaining WACs. There's been some suggestion that this Annex F to the DIP term sheet mandates net book value allocation for all the remaining WACs. But the bidding procedures, which is what incorporates that particular annex, specifically did so only in the context of credit bids, stream line credit bids, 363 credit bids. It doesn't purport to apply it in the context of a noncredit bid. Language, again, similar to this, although, without the express --

THE COURT: I thought third party did have to pay the exit payment as reflected on the -- on that same document, though.

MR. DAUCHER: It doesn't clearly state that the exit payment needs to be pay by third-party bid. It says overbids, third-party overbids of credit bids --

THE COURT: That would exclude the exit payment,

right?

MR. DAUCHER: Yes.

THE COURT: Any exit payment to the final term?

MR. DAUCHER: Correct.

THE COURT: And the final term is the allocable portion of those expenses based on the net book value allocation, right?

MR. DAUCHER: Correct. And so, again, it makes sense, in light of your ruling on WACs 9 and 12, that if WAC 9 or WAC 12 or any other WAC for that matter, came in, made a credit bid, here's the exit payment, here's what we're obligated to pay, any third party coming in and overbidding them, sure we need to also make that same payment as (indiscernible). But that doesn't mean that every other WAC, which didn't credit bid is stuck --

THE COURT: No. But you started out by saying only those who credit bid have their exit payments computed in accordance with the net book value allocation. And then I said, well, if a third party came in and wanted to bid, then they'd have make the same exit payment --

MR. DAUCHER: And --

THE COURT: -- well, bid the same exit payment.

MR. DAUCHER: And perhaps I wasn't clear, yes. The requirement is that there be a credit bid. And then you sort of step into the exit payment world. Which is, if one

of the WACs makes a credit bid, it's obligated to put up the exit payment. If a third party then overbids that credit bid, they too are in the context of topping that credit bid, obligated to also top the exit bid. That doesn't flow through outside the context of credit bids. And that is where WAC sits and some of the other WACs find themselves outside of the context of the credit bid. So unless there are any further questions, that's my (indiscernible).

THE COURT: Yeah, thank you. Does anyone else want to be heard on this issue?

MR. TRUST: Me.

THE COURT: Go ahead.

MR. TRUST: Good afternoon, Your Honor. For the record --

THE COURT: Good afternoon.

MR. TRUST: -- counsel to the WAC 3 admin agent. You just had a very lengthy colloquy. I will not walk you through what's in the verbiage, just focus on a couple of narrow few points. We continued to believe that in the context of the Macquarie sale, the only way to determine value is on the basis of market value. I just want to note for the record that it's important to note that the harm that would come out of the net book value allocation in the case of WAC 3 is very stark. As I think I understand the numbers, and they have, in fact, appeared to be somewhat

moving target. But based on what I've seen, if the fair market value by a market-driven process is correct, WAC 3 is allocated, roughly, and I believe this to be correct, roughly, 16.5 or 16.6 percent.

And, again, I believe it's changed, and that's the gross Macquarie purchase price. The debtors' books and records have shown and continue to show that WAC 3 on a net book value basis is roughly 23.6, slightly under 24 percent.

THE COURT: What's the difference in real dollars under that price?

MR. TRUST: This would -- perfect. This would impose an additional $3 million extra surcharge on the secured lenders in WAC 3. And I want to focus on that harm, so no subcon here. These states are not subsequently consolidated, distinct and separate estates. We have to look at each silo as its own estate. There's no liens.

THE COURT: Well, it's only one debtor, isn't there?

MR. TRUST: Excuse me.

THE COURT: It's the same debtors?

MR. TRUST: No. There's different silos that each secured lender looks towards.

THE COURT: I understand --

MR. TRUST: This is not a subcon.

THE COURT: I understand --

MR. TRUST: So we have these separate estates, they're separate and distinct, no substantive consolidation. The debtors' fiduciary duties cannot allocate expenses that don't correspond --

THE COURT: Unless you agree to it, though, that's the whole point.

MR. TRUST: Well, that's --

THE COURT: I understand what your argument is under the bankruptcy code --

MR. TRUST: Well, let me --

THE COURT: This is a contract case, at least in --

MR. TRUST: I disagree.

THE COURT: Fine.

MR. TRUST: There is no contract that can possibly bind every -- 100 percent of every creditor in every distinct estate to an allocation that, in fact, opposes an expense that's properly charged to another silo, here's why.

THE COURT: Well, sure you can do that. Your lenders may have a problem with that, and they may have remedies against the administrative agent if they did that, but, you know, that's the debtors' concern.

MR. TRUST: But that's the facts in place. Those are not the facts. In --

THE COURT: The only fact I have -- wait a minute.

The only facts I have are Mr. Del Genio's declaration, and the exhibits I've received in evidence A through J.

MR. TRUST: Okay. So it is not possible -- let's talk about Mr. Del Genio's dec. What he has said was nobody said anything effectively. That in and of itself cannot constitute an amendment to an array of prepetition enforceable under New York law loan documents. People are not obligated to call up someone and say, there's a problem --

THE COURT: Does that include the omnibus letters?

MR. TRUST: The omnibus letters --

THE COURT: So you can't amend through silence is what I'm saying.

MR. TRUST: I'm sorry. You can't amend through silence --

THE COURT: Okay.

MR. TRUST: -- or say nothing. I don't think there's a contract enforceable under New York law that says you've got to call someone up, and say I think I've got a problem with it. That contract speaks for itself, and let's be really clear about it.

THE COURT: Which contracts are you talking now?

MR. TRUST: You raised the omnibus consent letter.

THE COURT: Right. Okay.

MR. TRUST: And I'm going to relate that to --

because it relates to the underlying prepetition secured credit agreements.

THE COURT: I don't have that before me.

MR. TRUST: Right. And the debtors did not submit that into evidence. There was a suggestion that somehow a 50, a mere 50 percent vote might bind everybody. Well, we know it doesn't do it for a plan, two thirds an amount, which are already a number. We know that's not possible, in fact, I submit that unless the debtors provide evidence that the prepetitioned credit agreement allows a 50 percent vote to modify the credit agreement for any and all purposes. I don't see where the evidence is for that at all, Your Honor.

THE COURT: I don't see where you're modifying the credit agreement. I don't have the evidence. If you're telling me that --

MR. TRUST: You don't have the evidence, but the statement was made, and it seems to have picked up traction.

THE COURT: Are you telling me that you are not -- I'm sorry -- which WAC are you?

MR. TRUST: We represent WAC 3, sir.

THE COURT: Are you saying that WAC 3 is not bound by the consent of the -- the omnibus consent letter, the amendment?

MR. TRUST: They are bound by what it says with respect to what it said in it.

THE COURT: Okay.

MR. TRUST: It doesn't mean, and it cannot mean it carries the cases for all purposes. We have distinct and separate estates. We're literally asking, and I submit no prepetitioned lender was asked whether they would care to pick up extra expenses that are effectively allocable to another debtor. And by the way --

THE COURT: But isn't that what they agreed to when they agreed that the wind down expenses would be, at least in the amendment to the omnibus consent letter, the wind down expenses would be allocated under net book value basis regardless of the purpose price of the assets?

MR. TRUST: I don't think that's correct, Your Honor. And I think --

THE COURT: Why? Isn't that what the letter says?

MR. TRUST: I don't think that -- in this case it's different for the credit bid situation, as it is -- well, when you have a third-party buyer.

THE COURT: This has nothing to do with the credit bids. This is just how the wind down expenses are going to be allocated.

MR. TRUST: I think the question in front of the Court is are we going to take expenses from another silo and impose it on a silo when we don't have -- and we've talked about it that the prepetition credit agreement would require

-- you said it's not evidence -- it is not a 50 percent vote.

THE COURT: I asked you whether or not the amendment to the consent letter was binding on your WAC group, and I thought you said yes.

MR. TRUST: For the purposes stated therein.

THE COURT: Okay.

MR. TRUST: But not for the purpose, and I can't -- it's not for this purpose. And there are people, by the way, in other WACs that are not party to any contract. How could it be that we allocate value or in this case expenses from another silo to their collateral and effectively -- although, I think there was a surcharge waiver -- effectively surcharge them. I think the Court -- as to the only party disputing this intercreditor issue because the creditors are okay with marketplace value. The only party that's in this dispute facing all of the WACs, other than the credit bid WACS, is the debtor. There's no intercreditor dispute at this point. Parties are okay with market data, so I'm not quite sure. There's no WAC that's gotten up here and said -- excuse me -- that's a bad idea. There's no intercreditor dispute. The market's spoken, we're fine with that.

THE COURT: Well, the debtor doesn't -- I don't want to put words in the debtor's mouth. We've been going

at this for hours now. The debtor doesn't care as long as all of the wind down expenses --

MR. TRUST: Well, Your Honor, that's not our problem as a WAC lender. There's alternatives --

THE COURT: Well, it may be your problem. Let me tell you. If there's a separate agreement -- I've been told there is -- if there's an agreement that the WAC -- at least the WAC lenders, maybe more -- agreed to fund the wind down expenses, then you'd agree to fund down the wind down expenses, and it doesn't matter which allocation method is used, right? You still have to fund the 100 percent of the expenses, if that's the agreement. That's what I'm told the agreement is.

MR. TRUST: I would recommend that the Court approve the market-based methodology. There's no intercreditor dispute. I think that's fiction. If there is an issue, it can and will be dealt with at a later point in time. But I would suggest that we approve the Macquarie sale. The WACs that have the alleged intercreditor issue of saying there's no issue, there's no case or controversy on in front of you, and the chips lay -- all were they fall, and that could be dealt with. And whatever rights people think they have, they have, cases can be dismissed. They don't have to be confirmed through a plan of liquidation. There's alternatives. But there's no dispute in front of

with the WACs who are asking you to go market, nobody's quarreling with you.

THE COURT: Okay. Anyone else?

MR. TRUST: Thank you.

MR. LOMAZOW: Very briefly, Your Honor. Tyson Lomazow of Milbank, Tweed on behalf of the steering committee of prepetition WAC and DIP lenders. I just wanted to make one note for the record, Your Honor, and it relates to a point that came from the bench earlier when Your Honor made an observation with respect to the way that the DIP facility operates mechanically. And that is, that pursuant to the omnibus consents, the debtors did obtain consent to priming with respect to each individual prepetition WAC facility's collateral. And the consent to priming was set forth in certain amounts that were listed on -- what we're looking at is Annex C, to the DIP term sheet, which was also next to the omnibus consent.

The way that this works, Your Honor, is that each of the three petition WACs that consented to the use of their collateral and the priming, up to a certain amount. And that amount was calculated by the debtors' advisors working in conjunction with the steering committee in order to fix those amounts in amounts that we believed -- at the time believed would not be exceeded; in other words, that the case would be able to proceed to conclusion without the

expenses for a particular WAC exceeding those, what we call the WAC-specific caps. The point I just wanted to know for Your Honor was that those WAC-specific caps were calculated based upon an NBV formula. And to the extent that the NBV formula were to be modified, it's unclear whether or not the debtors would still maintain the consent to priming, it will be necessary to play out the rest of the DIP facility. And just that's the observation that I wanted to make for the Court.

THE COURT: I believe we have one more.

MS. COLEMAN: Come around the front way? Good afternoon, Your Honor, Kathryn Coleman of Hughes Hubbard & Reed for First Source bank. First Source is a member of the WAC 6 group.

THE COURT: Are you the ones with the secret document?

MS. COLEMAN: No, Your Honor, I don't think so. At least, if it is, it's a secret from me as well. Our filings are Docket 348 and Docket --

THE COURT: No, no, you're the ones with the secret document. You said -- suggested you had never seen the omnibus consent letters.

MS. COLEMAN: Okay.

THE COURT: Was that an overstatement?

MS. COLEMAN: No. It's a little bit of an

overstatement, Your Honor, but it's understandable. We are not a party to the DIP. We are not a part of the steering committee. All of these discussions that were either had or not had were -- had or not had without my client's knowledge.

THE COURT: You didn't lend under the DIP?

MS. COLEMAN: They did not and nor did we sign the consent letter relating to the DIP.

THE COURT: Did your administrative agent sign it or did he --

MS. COLEMAN: The requisite lenders under the prepetitioned contract signed it, and I would echo what Mr. Trust said, which is that as far as that goes, we are bound by that because of the requisite lenders. But that doesn't go far enough to justify changing our collateral rights, which I disagree with Your Honor a little bit -- what you said Mr. Trust, it does affect our collateral rights. Because, at the end of the day, if you adopt a net book value methodology rather than the market value methodology, which is as everybody else has already ably argued, and I'm not going to repeat -- clearly the preferred method when it's available.

All of these other uses of NBV were when an actual market value wasn't available. But my client cannot be bound to a valuation results in it it's -- it not getting

the full value of its collateral. And if we have to make a 506(c) motion to determine the secured versus unsecured, we can't be bound by the requisite lenders in the prepetition to that division between a secured claim and unsecured claim in a situation where we're going back somewhere between 25 percent and 31 percent of the amount of our debt. So I wanted to point out --

THE COURT: I won't ask you what you paid for the debt, but go ahead.

MS. COLEMAN: Yeah, and I don't know either, Your Honor. I'm blessedly free of that knowledge. But, Your Honor, the only reason I'm rising to speak is that First Source is in a relatively unique scenario because it is a truly a stranger to the DIP contract. And it is truly a stranger to everything other than the prepetition credit agreement, which like the WAC-free credit agreement, isn't before the Court today. So if the court needs to make an assessment based on that document --

THE COURT: The prepetition credit agreement is not before me? That's part of the final DIP order because it was approved.

MS. COLEMAN: Well, yes, Your Honor, but it is not before you today on the emergency motion. And I want to close simply by saying that --

THE COURT: Are you a party to the DIP credit

agreement?

MS. COLEMAN: We are not. What we are is a -- is an interested party in the emergency motion that the debtors made to resolve an intercreditor dispute that, as Mr. Trust just ably pointed out, no longer exists. All the WACs that are left, under the 9 and 12, agree that market value is the way to go. And there's nothing -- there's no -- there's no ability, at least as to my client, that anybody can show consent, nothing in the evidence in the record shows that the debtor has made a case that, even if they were trying to, which I don't actually think they were, based on with their filings, but even if the debtor were trying to hold us to a net book value based on all these postpetition discussions and credit agreements and DIP credit agreements and consent letters and all that, that is -- that is completely removed from my client.

So my client, I think, uniquely cannot be held to -- if not be implied to have consented to the use of net book value. And, obviously, the other -- all the other arguments about well, we've always done it this way, and this is what we had to us because we didn't have a real value, those have all be ably argued by my co-counsel. But I just wanted to point out that if you can't -- if you can't change the allocation as to one party, then I don't think it's possible to change it as to all parties. And I think

you have to default to actual market value when that is available and when there's no evidence, at least as to my client, you're not going to speak as to the weight of the evidence as to everybody else because I don't think it there's enough there either. But certainly --

THE COURT: I think you just said I have to use the same valuation method for everybody.

MS. COLEMAN: No.

THE COURT: Okay.

MS. COLEMAN: I think -- I think what I did say is that I believe that if you're dividing up a wind down budget among similarly situated parties, and that is all the remaining WACs other than leaving out 2 and 10, I'm not sure what's going on with them -- but leaving out 9 and 12, who are the credit bidders, all of those parties -- again, there is no intercreditor dispute anymore. The only -- the only possibility is the debtor because it doesn't want the administrative insolvency in two of silos. And I'm not even sure if that would result in administrative insolvency because -- because, as you pointed out, there's only one debtor. But --

THE COURT: Well --

MS. COLEMAN: Okay.

THE COURT: Go ahead.

MS. COLEMAN: But in any event, Your Honor --

THE COURT: I guess a separate debtors for each silo.

MS. COLEMAN: But if you asked me -- if you asked me what do I want, what does my client want, my client wants the sale to be approved, and the Court to adopt the market value allocation method subject as Mr. Trust said for another day when -- once we know what the actual expenses are. Now, all we have is a budget and a guess.

THE COURT: Should I approve the sale, but escrow all of the proceeds --

MS. COLEMAN: Yes.

THE COURT: -- and hold them distributed under a plan, and then I'll decide this issue?

MS. COLEMAN: Yes, Your Honor, that's exactly right. That's what plans are for. Thank you, Your Honor.

THE COURT: Okay.

MR. DIETDERICH: Andy Dietderich, for the record, Your Honor, Sullivan & Cromwell -- a technical thing, which is a sequence thing, which is we're not out of yet.

THE COURT: Right.

MR. DIETDERICH: And to the extent --

THE COURT: It's a calendaring issue, I guess.

MR. DIETDERICH: A calendaring issue, except just for the record, to the extent we're not free today, and our motion for the sale approval and motion to dismiss is not

granted. We would very much to the extent listed out in this case seek to enforce the net book value.

THE COURT: Okay. So we have a dispute. All right.

MR. HYMAN: Your Honor, I thought I used my two minutes earlier this morning. I just wanted to correct a statement from the record earlier. There had been a comment that where the stream line to 363(k) that those credit DIP lenders had agreed to pay some expense reimbursement based on net book value.

THE COURT: I said it with the stream line. The credit --the 363 credit bidders is a little less clear.

MR. HYMAN: Understood. So I think that we're all on the same page then, Your Honor, that's all I wanted to clarify. One other comment, though, with respect to the comment regarding the borrower, at least as it relates to WAC 2. WAC 2 lends to a WAC 2 entity or to WAC 2 borrowers, coborrowers, and then the parent debtor is the guarantor of the facility.

THE COURT: Okay. Thank you. Here's my question, and I raised it this morning your issue is really whether the remaining WACs are obligated to cover all of the wind down expenses, whatever they are, regardless of the allocation method that's used. Isn't that really the question?

MS. DiBLASI: Yes, Your Honor.

THE COURT: Because it doesn't matter, from your point of view, which allocation method is used as long as they cover the expenses. and in fact even with the net book value allocation, if the expenses grow and 9 and 12 got off of the cheap, basically, you're still -- you're still in the same boat, unless everybody is on board to cover all of the remaining expenses.

MS. DiBLASI: That's right, Your Honor. And I just want to be clear because I think the point that -- for the record, Kelly DiBlasi, the point that's getting glossed over here, and what I fear, and the reason I fear it is because these lenders would have no incentive to argue for this unless they saw this outcome coming. Is they're going to say that they want to use the Macquarie purchase price of allocations in the Macquarie letter, which add up to 100 percent, if you include WACs 9 and 12.

THE COURT: But my point is it's not going to add up to 100 percent if the costs are more than were in the budget.

MS. DiBLASI: That's right. And I think that risk of the costs being in excess of the budget always existed, and we can fight or discuss with them over whether they committed --

THE COURT: Well, I guess you could say they

committed -- because they committed -- at least the ones who committed to the auction agreed that anybody who streamlined it, and that could have been anybody could just get out of the case --

MS. DiBLASI: That's right, Your Honor.

THE COURT: -- exit (indiscernible).

MS. DiBLASI: And they all have the option of exiting.

THE COURT: Right.

MS. DiBLASI: But instead they decided to participate in the Macquarie sale. And we started these cases with consent letters from every participating WAC. And I hear counsel today saying, yes, requisite lenders signed those letters. But they seemed to say those letters are binding for some purposes, but not others. Those letters clearly provide for consent to priming, use of cash collateral, adequate protection, the cash management provision as described in our system, as described in our cash management order. An entry into the DIP facility and the terms substantially consistent with the terms set forth in the DIP term sheet, including the approved budget attached thereto, the carve out, and the wind down account.

I just don't understand how counsel can stand here and say their lenders are not bound by this because they didn't -- their particular lender or agent didn't sign this

letter. And what else are they going to come forward say they're not bound by either. These were critical concessions that we got out at the outset of these cases. As Your Honor has noted, no one has come forward with evidence suggesting that anyone contemplated any other allocation methodology.

And, in fact, Your Honor, the lenders negotiated for a provision in the Macquarie purchase agreement that specifically says that Macquarie allocations are not binding for purposes of distributions to the lenders. The lenders did not want to commit to any -- to Macquarie's purchase price allocations until now. Until you have a group of them that see it benefits them to change it. And I can certainly understand where that's coming from, but it puts the estates at risk. To clarify and perhaps correct something that Mr. Daucher said. He pointed to the terms of the order attached to our emergency motion. Yes, it is true we have the alternative language in that order, but it refers to the allocation applying to the WAC groups -- all of them.

As I said earlier, we never contemplated disparate treatment between people that would leave gaps in our ability to pay for expenses. On this question of whether this is something that requires unanimous consent, again, I don't think anyone has articulated a basis for that assertion. Moreover, the DIP budget itself and approval of

the amended DIP budget pursuant to the DIP order does not require unanimous consent. It's the DIP agent and the participating WAC facility agents acting at the direction of requisite lenders.

Your Honor, with respect to the terms of the DIP Order, there was some back and forth regarding paragraph 14(c), and I would argue that the allocation methodology is not mere form and is substance. And 14(c) of the DIP order says -- excuse me -- is form. And the substance is the numbers and the form is, in part, the allocation methodology.

THE COURT: Is there any extrinsic evidence, that you're aware of, relating to the negotiation of that particular provision and what it's supposed to mean or what the parties understood it to me.

MS. DiBLASI: There's certainly none in the record today. I would say the fact that the debtors put forward an amended budget that's consistent with that allocation methodology --

THE COURT: You've gotten objections based on 14. So I'm asking you if there's any extrinsic evidence relating to the negotiation and what the parties' understanding was relating to that provision and what it meant.

MS. DiBLASI: I would point to Mr. Del Genio's declaration that -- where he said no one discussed anything

other than net book value.

THE COURT: Well, but I'm asking a different --

MS. DiBLASI: No, Your Honor, there's no evidence that I'm aware of about the negotiation of 14(c), specifically.

THE COURT: Okay.

MS. DiBLASI: So, Your Honor, I think I've stated the debtors' positions. It appears that while we thought we were in more of a neutral position, unfortunately, we now do have a very important interest in this dispute, both to have it resolved for the DIP budget as well as the wind down budget. Thank you.

THE COURT: Does anybody want to be heard on this issue? As I've indicated, this is essentially a contract dispute. And maybe parties -- the parties can always agree to pay more than they might have to pay under some other allocation. All of the evidence indicates that the only allocation method that was ever discussed among the parties was the allocation of wind down expenses. That's really what we're talking about at this particular point under a net book value method. There is no evidence, and, in fact, it seems to be a concession that no one ever talked about changing an allocation method once there was a sale, and once there was an idea of what the market value of these assets were.

Furthermore, under both the consent letter and the amended consent letter, the parties agreed that even after the sale, the wind down expenses specified in the letter, would be based on a net book value method. So there was some understanding, and there's been a suggestion that these omnibus letters and amended omnibus letters somehow were just kind of -- they didn't go any farther than that, they didn't relate to the case. These letters were the roadmap to the case. They set forth the cash management rules, the debtor-in-possession lending rules, the bidding rules. They were tied together, and they were heavily negotiated. So the suggestion that -- of course, in retrospect, now, that we know the prices, some have to pay more and some have to pay less, depending on the allocation method that's used, doesn't change what the parties agreed to.

The allocation is also relevant to the priming of the parties' collateral under the DIP financing order. So under the circumstances, I'm satisfied that the parties agreed that the net book value allocation would be the allocation that would be used, and that's the allocation that will be used. So that resolves that issue. What's the next issue?

MS. DiBLASI: Thank you, Your Honor. The remaining two issues are the WAC 9 sale transaction and the Macquarie sale transaction.

THE COURT: Well, there was an issue also with the amount of money withheld.

MS. DiBLASI: Yes. That dispute comes up in the context of the Macquarie sale.

THE COURT: Why not just withhold everything and distribute it under the plans?

MS. DiBLASI: That certain is an option, Your Honor, the debtors --

THE COURT: Anybody object to that?

MAN 1: Yes, Your Honor.

THE COURT: Well, that may be the issue. I don't know. We can't agree on the holdback.

MS. DiBLASI: And, for the record, Your Honor, the debtors did commit contractually in the plan and sales support agreement to put forward a sale order that sought approval of an interim distribution. Originally, that was only to be granted to the WAC 7 and 8 lenders who made concessions in that plan and sales support agreement and committed their assets to be part of the Macquarie sale --

THE COURT: Okay.

MS. DiBLASI: -- which got us past important thresholds in that purchase agreement. After further negotiations, the debtors agreed to expand that relief and provide for a partial distribution to all parties who are selling their assets to Macquarie, their collateral. We're

now, unfortunately, having made those accommodations, fighting over the appropriate holdback amount, which consistent with my statements today, is a very important issue for the debtors to ensure that we're --

THE COURT: Yeah. It's not clear how you computed the holdback amount. I mean, your original number was 80 or 90 million, and now it's 40 million, I think, so --

MS. DiBLASI: And we have -- Mr. Del Genio is here today. We have his declaration that we would be putting into the evidence in support of that, and if there are additional questions, he's available for questioning.

THE COURT: He has a declaration relating to the amount of the holdback?

MS. DiBLASI: Yes, Your Honor.

THE COURT: Is it the one we have in evidence?

MR. WENDER: No, Your Honor.

THE COURT: So --

MS. DiBLASI: I can't remember if we got that far. I don't think so.

THE COURT: You're talking about an aggregate $40 million holdback from the Macquarie sale proceeds?

MS. DiBLASI: Correct.

THE COURT: And what do the -- and what -- what's your position?

MR. WENDER: Good afternoon, Your Honor. For the

record, David Wender with Alston & Bird. (indiscernible) SunTrust as agent of the WAC 7 credit facility. And, Your Honor, and Ms. DiBlasi accurately said that -- just a little bit of background, we submitted a plain support agreement in order to effectuate to get us to agree to a potential 363 sale to Macquarie. We contractually agreed that certain provisions to make it more plan-like. One, there'd be no transfer taxes because that was one of the benefits presented under the plan. And, two, that there would be the distribution of monies. That was part of our consent, and in fact it's --

THE COURT: But if there's a dispute, what am I supposed to do?

MR. WENDER: Well, Your Honor, it's actually -- I'll read the provisions -- there's one --

THE COURT: What are you reading from?

MR. WENDER: It's Docket 383.

THE COURT: What is --

MR. WENDER: Page 19 of 48.

THE COURT: What is the document, though?

MR. WENDER: Your Honor, it is notice of filing of unredacted plan and sales support agreement. I have a copy of it, Your Honor.

THE COURT: Was it attached to Mr. Del Genio's declaration?

MR. WENDER: It was not attached to the declaration. It was separately filed under Docket 383.

THE COURT: Okay. But that's not before me today.

MR. WENDER: It is, Your Honor.

THE COURT: No, it's not. It's not on the -- I even looked at it.

MR. WENDER: It's actually incorporated into proposed sale agreement.

THE COURT: I saw that. And I have a problem with that because I haven't reviewed it, and it hasn't been teed up for approval.

MR. WENDER: That is an expressed condition to the WAC 7 lenders --

MS. DiBLASI: Well, to be clear, we're not seeking approval of the plan and sales support agreement. There are provisions that the debtors committed to contractually and the plan and sales support agreement to get approved in the Macquarie sale order, and those provisions are in the Macquarie sale order, including this partial distribution amount.

THE COURT: Okay. I understand you've agreed to it. But if there's a dispute, and I can't resolve that dispute today, and you want the sale to go forward, it seems to me that the sale goes forward, and the proceeds just get held in escrow pending the resolution.

MR. WENDER: Our consent is subject to approval of this. And without this, we don't have to -- we have creditor rights to get resurrected.

MS. DiBLASI: Unless -- the plan and sales support agreement, as Mr. Wender notes, does provide them with a termination right. I mean, I can't say whether they'll exercise that --

THE COURT: Okay. But what are you saying should be -- do you disagree that something should be withheld to cover future expenses or to secure future expenses, I guess.

MR. WENDER: Two things, Your Honor, just by way of background, under the wind down budget, and I'll be clear, and I'll go through this later (indiscernible). But today, there was $10 million that's been replaced by about $10.3 million for the project wind down expenses.

THE COURT: So you're a WAC?

MR. WENDER: Associated with the credit -- sorry -- with the sale accepting WACs, the APA WACs, and there's an allocable portion to WAC 7 that we're okay with. The issue that we have relates to the debtors' desire to hold four times, though, ten million plus an additional 40 to fund additional amounts that may come up. And the problem that we have, and it's really a two-fold, and it's multiple the way that it's structured. And I'll tell you the numbers have been -- not moving, but less than clear, and we're

finally within spitting distance of understanding what the numbers are. But there's problems in the debtors' projections. First of all, we don't believe four times ten and an additional 40 million is reasonable --

THE COURT: Is that the standard what the reasonable amount is based on the projected expenses?

MR. WENDER: Your Honor, if you don't mind me reading it --

THE COURT: Go ahead.

MR. WENDER: -- and I can hand it to you, if you would like as well.

THE COURT: I have it somewhere. I have a copy.

MR. WENDER: And it's page 1948. It's actually paragraph 10 subparagraph (c).

THE COURT: 10(c). Okay.

MR. WENDER: Okay. And about two thirds of the way down, there's defined an equity for an aircraft.

THE COURT: Right.

MR. WENDER: And right after that it starts the relevant -- it's a long sentence, but a sentence apparently nonetheless. I can read that out now or if you want to take a second to read it to yourself.

THE COURT: Okay. I'm reading. But from what it sounds like, it's got to be a reasonable amount, right?

MR. WENDER: So, Your Honor, the way I break it

down it's four elements, and I can make it 12, I can make it 2, probably.

THE COURT: Well, less is more, go ahead.

MR. WENDER: We need to negotiate in good faith as to what the amount is.

THE COURT: No. But, ultimately, it's a reasonable amount.

MR. WENDER: It's a reasonable amount to provide sufficient funds to fund the supporting WAC facilities allocable share of the wind down and administrative costs.

THE COURT: Right.

MR. WENDER: That's the question. What's reasonable and what, in fact, is their allocable share. And we'll go through it with Mr. Del Genio later with that issue (indiscernible) today is that -- in view of what happened with 9 and 12, and their argument that leads go away, et cetera, et cetera, that there's actually costs built in, additional costs because WAC 9 and 11, based on the debtor's position, and you can hear from Ms. DiBlasi. I don't want to -- I'm going to try to and characterize, is that, A, that we would be left with expenses for WAC 2, WAC 10, WAC 11 -- without those entities giving up their allocable share. And then also potentially 9 and 12, if they, in fact, get a -- lack of a better term -- "get out of jail free" card, and they're done from this point, is that we reach our allocable

share being a sufficient (indiscernible), so what's reasonable in taking into consideration our allocable share. We've made a proposal of what we think was -- is okay, which is in addition to the $770,000 specifically allocated under Mr. Del Genio's budget.

THE COURT: These are additional sums that are being allocated?

MR. WENDER: Yes, Your Honor, and in fact, it's --

THE COURT: They've been set aside, I should say.

MR. WENDER: Well, yeah. Well, what it is, so there's two things -- there's the one number --

THE COURT: Which is about $47 million?

MR. WENDER: Well, there's different numbers, Your Honor. We're going to focus just on the wind down number itself because we're -- we've agreed to leave behind -- "we" being the debtors collectively, not just WAC 7 lenders -- (indiscernible) debtors' (indiscernible).

THE COURT: Right.

MR. WENDER: We're leaving behind monies for the keep. We're leaving behind money for the sellouts, we're leaving money behind for health care. I think there's a couple of others. But when you look at Mr. Del Genio's declaration, there's a schedule that says now, based on the fact that we did a 363, we can -- potentially consenting to a 363 sale. There's now 9 additional WAC 7 entities who

want that, four trusts and five SPEs -- SPCs (indiscernible) but I think it's an SPE. And so they estimate $150,000 to wind down as SPE and 5,000 to wind down a trust, that equals $770,000. We're okay --

THE COURT: That's in the existing wind down budget?

MR. WENDER: That's in the budget that's attached to Mr. Del Genio's declaration.

THE COURT: Where's this other declaration we're --

MR. WENDER: It (indiscernible) 4/18, Your Honor, if I remember correctly. It's 4/18, Your Honor.

THE COURT: Let's see if we have it.

MR. WENDER: I have an extra copy if you need one, sir.

THE COURT: I don't think I have it, no.

MR. WENDER: It's right here, if that helps.

THE COURT: Oh yeah, I have it.

MR. WENDER: Okay. Turning to page -- turn to the last page.

THE COURT: I'm looking at the last page.

MR. WENDER: Page 2 of 2. It's the exhibit, Your Honor.

THE COURT: I have 9 of 9.

MR. WENDER: Okay. Then there should be Exhibit B

-- there's should be an Exhibit A, Exhibit B.

THE COURT: I have it. The wind down budget?

MR. WENDER: Yes, Your Honor. And I have some issues as to how certain amounts are included in this, when they were included in a different budget in Annex F, but we won't get into that now. At some point, it costs more to argue these than the actual numbers are in the allocable basis.

THE COURT: So what's the issue?

MR. WENDER: So if you look at WAC 7 -- it's actually 4, 5, and 7. Do you see four trusts, 5 SPCs for a nine total, so there's nine entities that (indiscernible). And we acknowledge that, to a degree, and then the estimate of 5,000 to wind down trust, and 150,000 to wind down an SPE and so that's 770,000. We're okay leaving that behind.

THE COURT: Okay.

MR. WENDER: There's also an additional, if you look down to the bottom, the other wind down costs. And, although, again, I could quibble over 400,000 here and there and that number is 3.657 or allocable -- we're responsible for a portion of that -- and I think Mr. Del Genio, I think the number is about 180-ish of that. It's close, but I think grand total we're responsible for $960,000, in wind down --

THE COURT: Is that the $3,657,000?

MR. WENDER: Yes, Your Honor. That's the total amount, which is 75 -- I'm sorry -- 76 percent of the number in the bottom right, which is the 4.796. Now, what's interesting, though, and I could quibble because if you're look in that 4.796 includes costs for 10 and 11, well, I never agreed, WACs or I -- WAC 7 and the lenders of the agents never agreed to fund the admin costs of 10 and 11, wasn't in the earlier budget, showed up in this one. But, Your Honor, for purposes of today, I'll agree to that 770 plus the others. I'll call it a million dollars, I'll round up. We'll probably be a million dollars behind, which is more than what they have in the wind down budget. We think that's reasonable, and that's our allocable share.

THE COURT: Okay.

MR. WENDER: And so, and as we get into more evidence and then such later, but that's -- those are their numbers in their wind down budget. And I could definitely quibble with their numbers, Your Honor --

THE COURT: So what you're saying is it's unreasonable for you to leave more than a million dollars behind?

MR. WENDER: Yes, Your Honor.

THE COURT: I understand. All right.

MS. DAILEY: Good afternoon, Your Honor, Renee Dailey, I'm from Akin Gump on behalf of the WAC 8

noteholders. I share many of Mr. Wender's comments. But, just for the record, I would note that we too are a party to the plan and sales agreement that Mr. Wender read you from -- or read to you from -- excuse me. And our consent to the sale is based on a distribution, a distribution that we were supposed to agree would maximize the initial distribution and only retain reasonable expenses regarding our allocable share of WAC 8 expenses.

So we object to the 40 million that's being proposed to be held back. One, because we think that the four times multiple is excessive, and, therefore, not reasonable. And, two, as you can see from the attachment there attached to Mr. Del Genio's declaration, which I believe might be changing and updating a little bit. However, there are expenses in there that do not relate to either WAC 8's direct costs or WAC 8's share. I'll go with net book value, I'll call net book value share of what I'll call the whole co. and shared expenses up top. So, therefore, we disagree that those amounts are reasonable.

THE COURT: Okay. So as I understand it, Mr. Del Genio is estimating $4.8 million in additional wind down costs? What the total wind down costs? I'm sorry. It's almost 12 million.

MS. DiBLASI: Kelly DiBlasi on behalf of the debtors.

THE COURT: How much --

MS. DiBLASI: The total current wind down budget is the number in the middle, 11.841 million. The 4.796 that you see at the bottom, is a breakdown of some of the comments above just so that parties could understand --

THE COURT: Okay.

MS. DiBLASI: -- how some of those costs were allocated.

THE COURT: So he's estimating or he has estimated that it will take about $11.9 million. It this on a going forward basis to wind down the estates?

MS. DiBLASI: Yes, Your Honor.

THE COURT: And you want to withhold $40 million?

MS. DiBLASI: We would like a $40 million cushion on top of that in the event that additional funds -- additional expenses are identified. We are not asking the Court to approve now whether we use those funds. We're agreeing to leave those funds in the lenders' cash collateral accounts.

THE COURT: Well, it's their money.

MS. DiBLASI: It's their money. We won't have authority to use it without their consent or court order. We just can't tolerate the risk of all the dollars going out the door. We didn't anticipate there being a partial distribution in the first place. We thought the funds were

staying in the estate, which is typically what happens. We agreed to negotiate a reasonable cushion on top of the wind down budget. And I think we're here today with a dispute over what's reasonable. We have Mr. Del Genio's declaration, which we would like to submit into evidence, and he's available for questioning, so he can explain to the court why he believes the $40 million number is reasonable.

THE COURT: Well, I'd like to hear -- and I haven't approved the plan and support agreement. It's not the format that I'd to hear. What the discussions were regarding the cushion that you were talking about, that's really the issue.

MS. DiBLASI: There were no discussion about the dollar amount of the cushion --

THE COURT: Or the percentage amount.

MS. DiBLASI: There were no discussions about specific percentage amounts. We told -- I told counsel to the supporting WAC lenders, we needed to ensure that the wind down account is funded, that the fee reserve was funded, and that we had a reasonable cushion on top of that to get the directors and the estate representatives comfortable, that we would have something to look to and something to talk to them about if the budget was wrong and if we needed additional funds. And we said, let's agree to agree, basically, and that's how it got documented.

THE COURT: This only relates to 7 and 8?

MS. DiBLASI: Originally, only 7 and 8 --

THE COURT: Oh, but --

MS. DiBLASI: -- and that plan and sale support agreement was only -- then the request was expanded.

THE COURT: Okay. Well, I'll hear Mr. Del Genio's testimony on what he thinks is reasonable or ultimately it's a question that I have to decide.

MS. DiBLASI: Excuse me, Your Honor.

THE COURT: I'll hear Mr. Del Genio's testimony, you're offering his declaration into evidence?

MS. DiBLASI: Yes. We filed his declaration at Docket Number 418, Your Honor, and he is in the courtroom today and available for questioning. We would like to request that his declaration be submitted as his direct testimony?

THE COURT: Does anybody object to that or want to cross-examine Mr. Del Genio on this issue?

MR. WENDER: We definitely would like to cross Mr. Del Genio on this issue.

THE COURT: All righty. But you don't object to the receipt of his declaration as his direct testimony?

MR. WENDER: I have no objection to that being his direct testimony.

THE COURT: Okay. Mr. Del Genio.

MR. WENDER: It is, what it is.

THE COURT: Raise your right hand, please. You solemnly swear that the testimony you're about to give will be the truth?

MR. DEL GENIO: I do.

THE COURT: Okay. Please take a seat and speak into the microphone. All right. Mr. Wender. If we can just take a minute, I want to read the declaration also.

MR. WENDER: Would you like to take a five-minute break, Your Honor?

THE COURT: Yeah. I'd also like to deal with the WAC 9 issues because maybe they can get out of here.

MAN 2: I'm not sure they're leaving, but --

MR. EDELMAN: Your Honor, that would be evidentiary, and I do want to --

THE COURT: Do you have witnesses?

MR. EDELMAN: I intend to cross, and I do --

THE COURT: Who are you going to cross?

MR. EDELMAN: Their witness.

THE COURT: What makes you think they have a witness? You've made an objection that the sale is unreasonable to you, don't you have to demonstrate that?

MR. EDELMAN: Your Honor, they have. Unless, I understood that -- all declarations that they have, and I do have a declaration that they submitted, and I --

THE COURT: Is there a declarant here?

MR. EDELMAN: I understand that she is.

THE COURT: All right.

MR. EDELMAN: And also I asked -- I also intend to call Matt Niemann, that's an additional witness, and the debtors' consented.

THE COURT: How long will that take?

MR. EDELMAN: Probably about an hour.

THE COURT: All right. Let's deal with this. Go ahead.

MR. WENDER: Your Honor, would like to read it first?

THE COURT: Oh, yeah, why don't we take a two minutes. I'll stay up here, but let me just read this.

(Recess)

THE COURT: All right, please be seated. Let's continue.

MR. WENDER: Your Honor, did you swear in the witness?

THE COURT: I did, you're still sworn in, notwithstanding Mr. Wender's bathroom break.

MR. WENDER: Thank you, Your Honor. Thank you for accommodating.

THE COURT: Sure.

CROSS-EXAMINATION OF ROBERT DEL GENIO

BY MR. WENDER:

Q Mr. Del Genio, for the record, David Wender, with Alston Bird. We met earlier today. In connection with your -- with this cross-examination, I want to walk you through a couple statements, and understand where and how we got to the numbers that are being presented, and subject to your declaration.

By way of background, the Debtors prepared the original wind down budget back in November and December of 2018, is that correct?

A That's correct.

Q And that's the budget that was attached as Annex F to the Amendment Number 1 to omnibus consent letter, is that your recollection?

A I don't have it in front of me, if you can show it to me, I'll confirm it.

MR. WENDER: Yes, I can. Your Honor, may I approach the witness?

THE COURT: Yes.

MR. WENDER: Your Honor, I noted it was included in his prior declaration, which I think was Exhibit 366 -- sorry, Docket Number 366.

THE COURT: Right, the first amendment was Exhibit E to that.

MR. WENDER: Yes, Your Honor, then if you go back

to Annex F, I can hand over a copy of just the Amendment Number 1 that we had left.

THE COURT: I have it.

MR. WENDER: Okay, great. If you go to -- if we flip to – you had it, oh, I apologize, counsel. And I should have it tabbed in blue in Mr. Del Genio's copy.

THE COURT: I'm sorry, I don't --

MR. WENDER: You don't have the same -- because I just, the problem (indiscernible) --

THE COURT: All right, why don't you just give me a copy?

MR. WENDER: Yes, Your Honor, thank you. May I approach?

THE COURT: Yeah, thank you.

MR. WENDER: You flip to the blue tab, it's the wind-down budget assignment.

THE COURT: All right. Why don't we mark this --

MR. WENDER: As WAC 7 Exhibit 1, Your Honor?

THE COURT: Yes.

(WAC 7 Exhibit 1 Marked for Identification)

Q Mr. Del Genio, could you take a moment to look at WAC 7 Exhibit Number 1, please?

A Yes, I'm looking at that now.

Q Do you have an understanding of what WAC 7 Exhibit 1? It is the Amendment Number 1 to omnibus consent letter,

correct?

THE COURT: Are you going to ask the questions and answer them also?

MR. WENDER: I was trying to get him to --

THE COURT: You asked him if he had an understanding of what it was?

MR. WENDER: Yeah, I was trying to expedite it, Your Honor.

THE COURT: Was he -- do you have an understanding regarding it, what is it?

MR. DEL GENIO: I do, Your Honor, yes.

MR. WENDER: And what is you understanding -- I was trying to --

MR. DEL GENIO: It is the --

MR. WENDER: Sorry, I was trying to --

MR. DEL GENIO: It is the Amendment Number 1 to the omnibus --

THE COURT: Why don't you just lead him?

Q I can. I will, Your Honor. And turn to the blue flagged page, that's the wind down budget, as prepared, which is the original wind down budget, is that correct?

A Yes, although because we're going to be talking about terms, I'd like to level-set everybody in terms of wind-down budget and terms. Because I think the Court also made a distinction --

THE COURT: I'm sorry, could you speak into the mic?

A I would like to level-set, in terms of when we use the term wind-down budget, this was, a wind-down budget was prepared. Throughout these documents, people are using some terms interchangeably, so if you don't mind, I'd like to explain what some the differences are.

THE COURT: Sure.

A So there's cost to dissolve entities. That's the cost to really dissolve the SPCs, which are special purpose corporation, or trusts. And the employer-related costs are what's outlined here, keep, and these other items here, are part of the exit costs, in the current wind-down budget that's being discussed, the statutory severance for non-U.S. employees, the 808 incremental wind down costs, that's in -- when I'm going to be talking about a wind down budget today, that's in that number.

Then other costs, you have a carveout for $4 million, that was negotiated as part of the APA, and the Macquarie expense reimbursements. The carveout clearly is an item that will be discussed, but I'm not referring to that as the wind down. When I talk about wind down, I'm talking about costs to dissolve entities, the statutory severance for the nine U.S. employees, and then also we're talking about the additional health insurance, which is the 504,000.

All these other costs are picked up as part of exit costs, or obviously the expense reimbursement is part of the APA, and the carveout is part of a cost left behind. So to me, that's not the entity. Those are separate, like exit costs that are set aside. Because this, the reason I'm going through this, as we go through different budgets, that will become relevant.

Q Okay, and just to make sure I understand it, is that the consenting lenders have already agreed to leave $4 million behind as a carveout to fund the wind down, to fund the estates, post-transaction, correct?

A That's correct.

Q And they've agreed to leave 3000 behind to satisfy Macquarie expense reimbursements, correct?

A Three million.

Q Three million, I apologize. Three million, correct?

A That's correct.

Q And an additional -- for transaction fees, an additional 10.775 million, right?

A Well, that -- `

Q Those are being covered by the DIP, and --

A Well, let me just correct you, because there is a new calculation for the transaction-related fees, and I'm sure Mr. Niemann doesn't want me to undersell his transaction-related fee. So they have agreed to pay the transaction-

related fees. The numbers have changed because of the auction process, since this wind down budget was put in place.

Q Okay, so it's actually that 10.775 million is going up, leaving -- the lender's leaving more money behind to satisfy transaction expenses, is that correct?

A That's correct.

Q Okay. And if you look at before, you talked about the keep and the transformation amount, those are separately being funded under the DIP budget, correct, and they're not included in your current wind down expense, the entity-specific expense that we're going to talk about today, correct? The 4.173 million, and the 2.439, correct?

A They're not included in the wind down budgets, and those also are subject to court approval, those are subject to court approval.

Q That's fair, but those amounts aren't subject to -- here's what I don't get. Under the original budget, the original wind down budget, attached to WAC 7 Exhibit Number 1, there is 504,000 for additional health insurance, and it says wind down covered by DIP budget. I now see that on your entity-specific budget, which you have listed attached to the end of your declaration.

A Let me explain. So when we did the DIP budget, one of the things that I always liked to do is remind everybody who

is looking at a DIP budget that there's exit costs. And so as we roll the DIP budget, the last week, we always built in the exit costs, which would be the employee-related costs, as well as the transaction-related fees and any accrued and unpaid expenses.

And so then we got to a point where there was a waterfall in how the proceeds would be paid, because there's a variety of different things that affect the net distributable proceeds. So that document became the main document. So then these dollars were effectively, even though we rolled them in the DIP budget, were categorized separately in the analysis that Houlihan put together, because they were the banker that were dealing with all the different parties.

And that's why, now in that analysis they put out when we talk about wind down costs, were focused on the costs to dissolve the entitles, the statutory severance for the U.S. employees, and the additional health insurance. That's in today's vernacular in one of my declarations, those are the "wind down costs". On top of that, there are some small items for storage costs, because there is aircraft being left behind. So not a typical to a very complex deal.

At this point in time, the idea was top-level credit bids, and a wind down of 13 entities. What we've

turned into, as you've heard today, is two streamlined credit bids, a 363 asset bid, and then a purchase of -- asset purchase agreement with Macquarie. The nature of that has changed, how these costs get categorized, and how we calculated the wind down budget. All these parts are still the same, they've just moved around in terms of the way that people discuss them.

Q Let's get back to I think what my underlying question was. The Annex F wind down budget that we agreed to in connection with the omnibus consent, Amendment 1 to omnibus consent letter, WAC 7 Exhibit Number 1, had the 504,000 as a wind down DIP budget, such that that was the agreement in connection with the Amendment Number 1, correct? For this document.

A Yes.

Q Okay, are you aware of any agreement to take it out of Annex F of the wind down budget, agreed to in WAC 7 Exhibit Number 1, Amendment Number 1, omnibus consent letter?

A I don't understand your question.

Q It was agreed by the parties that it would be in the wind down budget, covered by the DIP. And it says here, wind down covered by DIP budget, correct?

A And our current DIP budget, as I mentioned, has all these costs in there.

Q Okay, and then I'm trying -- why is it then reasonable

to include that number in a non-DIP, holdback wind down budget, which is attached and included in exhibit -- the exhibit you have in front of you.

A I mean, the dollars haven't changed here. It's talking about the same dollars.

THE COURT: Let me see the -- is the argument that 9 and 12 would be liable for the DIP budget wind down costs, but not, would be wind down costs post-sale, let's say?

MR. WENDER: It's not exactly clear who's responsible for what, Your Honor. What does appear like, more credible is because if it's in the DIP as opposed to this other, it is more clearly taxable to, and the Debtor's ability to surcharge that, as against 10, 11, and 2, I think those rights were --

THE COURT: But aren't we really talking about how much money you need to finish off these cases?

MR. WENDER: We're going to get there, Your Honor. But there's, it's, there's (indiscernible), I'm trying to figure out, because it's, unfortunately, this information was provided yesterday for the first time. And we're trying to get our arms around it. And so please, Your Honor, I'm going to get there. Unfortunately, the answers have taken me a little off-path. Okay.

Under the Debtor's original budget, and I think you just said this, the Debtors assumed that all of the

lenders would credit bid, and take back their entities, correct?

A It was an equity top co-credit bit, yes. And there would be no entities except for 13 that would need to be wound down.

Q And it was the exit -- was it your understanding -- it was your understanding, though, that the exit payment concept would provide a cash cushion to wind down the estates, is that right?

A I don't understand your question.

Q Okay, in Paragraph 7 of your declaration, and I'll read it just for the record, at the time the Debtors consented to establish a wind down budget, even given the numerous certainties surrounding the structure of a proposed sale transaction, because they understood that as part of any sale transaction, the Debtors would receive sale proceeds that would remain in the estates, subject to a lien of the applicable secured lenders, until such proceeds were distributed under a Chapter 11 plan.

These sale proceeds would serve as a cushion, in the event unexpected wind down expenses arose, so that the Debtors and their advisors could ensure that the estates remained administratively solvent. So I'm trying to get a sense of what failed proceeds were you talking about that would provide a cushion?

A All the sales proceeds, as you heard Ms. DiBlasi inform the court before, our expectation was that all the sales proceeds would be in the estate until a plan was filed and went effective.

Q And let's talk about what you estimated. You estimated 150,000 to wind down an SPC, is that correct?

A Yeah.

THE COURT: Are we talking about the exhibit to his declaration now?

MR. WENDER: We're actually talking about both, Your Honor. Under both situations, under the original wind down budget, in the exhibit to your declaration, you've estimated $150,000 to wind down an SPC, correct?

MR. DEL GENIO: At the time, the estimate was 150,000, assuming there were 13 SPCs. We now have 129 SPCs and trusts, so the complexity is much more significant than 13.

THE COURT: You're talking about two different budgets, and it's getting a little confusing. Why don't you just ask him how much he thinks is needed to finish off these cases?

MR. WENDER: Well, Your Honor, the problem -- and let me ask just the next question, and then --

THE COURT: Go ahead.

Q Just a little leniency, Your Honor. Under the exhibit,

last exhibit to your declaration, you're still estimating the costs for winding down an SPC at $150,000 per SPC, correct?

A That's the -- what, that's the current estimate that we're using, using the same methodology that we applied in the initial budget.

Q So the actual cost of winding down an SPC, you haven't changed the number of what it would cost in your budget.

A It's an estimate, it's an estimate.

Q Okay, so 150,000 is your estimate.

A It's 150,000.

Q Per SPC, correct? That number hasn't changed.

A That's our estimate, but if you look at my declaration, what I said in my declaration, because you can't just take one piece of this out of context, is I said there's a lot more complexity here with that many entities, and that estimate might not be valid. It's an estimate.

Q Okay.

THE COURT: What was the basis of the estimate?

MR. DEL GENIO: What we did, Your Honor, is we had conversations with different professionals in terms of -- in Ireland, to wind down Irish entities. We talked to the Weil professionals, to get a sense on what the costs would be, to wind some of these entities down. Again, it was a much more limited role at that time, because there wasn't as many

SPCs.

And we also felt that if it was controlled in a tight process, that that was a pretty reasonable estimate. I'm not saying we can't get it done now. All I'm saying is, because of the fact that there's a lot more of these entities spreading a lot of different jurisdictions, that the time, and the cost, and the complexity could be greater. Not, I can't tell you for certain --

THE COURT: How much greater?

MR. DEL GENIO: Well --

THE COURT: On average.

MR. DEL GENIO: Well, on average -- how I came up with the four -- maybe I can give you a little context, in terms of original, when the Weil professionals approached us and said that we're negotiating with 7 and 8 for an interim distribution, how much would you be comfortable with talking to our boards around the world who are personally liable, saying that you could distribute before a plan?

And I thought I was being generous, saying 70 percent, and would hold back 30, because I was very comfortable there was enough dollars there, that I could say, or make a representation to the boards around the world, as well as this Court. Then through negotiations last week, and over the weekend, the lenders challenged that saying look, you're being way too conservative.

So then what I did I is went back, and I looked at this sheet here, that you see in terms of Exhibit, whatever exhibit this is, B, and I said all right, now really what I have is 25 entities, 18 that are Whole Co, Service Co, four with WAC 10, and three with WAC 11. So I got 25, that was kind of the, where I thought the 13 would be coming out before. And now I'm left with 104, which is 98 plus 6. That's four times as many WAC entities. Remember, I had to justify this to our board as well.

So I said, look, I told you 30 percent, I was comfortable, that was a lot of money, I'm getting a lot of pressure from the lenders here. But if I think about this, I have four times as much complexity, I think my estimate is ten, $40 million, four times that. It wasn't -- that's my thinking using this.

Now, I also told them that we're going to do everything possible to see if we can get a number that's within the initial wind down budget or less. It's not like, give me as much money, and I'll spend everything I want. We're going to be very prudent in this. Obviously, the lenders' advisors have been -- the ad hoc committee's advisors have looked at all this analysis we put together.

My experience on wind down budgets is, you negotiate them. You lay out what it takes to do that, and you negotiate that. And I clearly know every dollar over

this is less recovery from the lenders, and I appreciate that. But that was my logic on how I establish that number.

THE COURT: Okay.

Q Mr. Del Genio, there are nine WAC 7 entities: four trusts and five SPCs, correct?

A That is correct.

Q Tell me what's more complex about winding down four trusts.

A Again, it depends on where they're at, and --

THE COURT: The issue is, is it more expensive per trust, or per SPC if you have 100, as opposed to 10, or something.

Q Well, and I'm trying to understand, there's four here. What analysis, if any, was done to determine the extra costs of winding down the four trusts for WAC 7?

A As you and I have talked over the weekend, so this is not a new topic, I read you, in terms of the type of accounting on these entities. You have to -- they're all single-purpose entities. A number of these -- all these entities you have to do basically a financial statement, you have to file a tax return.

There's just more to do, and in today's world, no one agrees to, until they understand the complexity, to say, "I'll do this for X cost." We have very competent professionals here. They're going to look at this, we're

going to try to figure out if there is a way to do it more cost-effectively. But I can tell you, based on conversations I've had with management, trying to shut down an entity in Italy, is very different than trying to shut down one in Ireland, that's different than trying to shut down one that happens to be in the U.S.

So those are the types of issues: you have a worldwide business with entities that were set up to make it as tax-efficient as possible. When you unwind these entities, there's a lot more complexity than meets the eye. This was our best estimate this time, but I wasn't comfortable telling our board, the Debtor's management, that this was bulletproof.

Q Mr. Del Genio, let's talk about your estimate. Your best estimate is not -- is intended to be conservative, though, correct? You don't want to leave the estate administratively insolvent.

A I absolutely don't want to leave the estate administratively insolvent. The other thing which I will say it, if you leave some dollars behind, creates a great incentive for people to work quickly to get those proceeds back. You can see how much interest there is today in that topic. I would say that holding on to those kind of dollars --

THE COURT: Do you think that goes into the

computation of reasonableness?

MR. DEL GENIO: Yes, I do. Yes, I do, because I think that people will work harder to see those dollars distributed.

THE COURT: And we shouldn't pay any professional fees until the end of the case. That'll be the incentive, go ahead.

MR. DEL GENIO: I've suffered from that before, Your Honor, I understand the pain involved in that.

THE COURT: It's a very convincing argument.

Q I want confirm, though, that you did not separate analysis with respect to the nine WAC 7 entities, to determine what's reasonable in respect of those nine entities, is that correct?

A Let me explain what I did. We did work for the --

Q Can you answer my question first?

THE COURT: Let him answer.

A I am answering your question, thank you. We did the analysis on the 13. When all of a sudden, we move have 129, we said, just by the sheer fact that if we use 5000 per trust and 150,000 per SPC, our number went up from that 1.9 million to a number that's much greater than that, the 11.8.

But I know with 129 entities, there's a lot more complexity. Therefore I wasn't willing to give anyone a guarantee, that this number would not leave the estate

administratively insolvent. And clearly the boards are very focused on the fact they want the estate to be administratively solvent.

Q Okay, because I still don't think I've gotten an answer. Is there anything particular that you're aware of, with respect to the nine, that make them more or less complex?

A I don't know, because I told you how I did that. If I knew for certainty, then maybe I'd be taking a different position.

Q But you don't know for certainty, with respect to the WAC 7 on the boards, what's reasonably necessary for those nine? You just know generally you've got some concerns.

A What I said in my declaration is, during this period of time, we're going to do detailed work, and come up with a detailed wind down budget, and discuss with all the WACs and their respective professionals on what's an appropriate wind down budget.

Q Okay.

A Hopefully the number is the number we have here or less. It could be greater. I don't know that now.

Q But you haven't done that calculation as what the actual, what a reasonable wind down budget is, is that what I'm hearing?

A I did an estimate as it related to 13. I used the same

methodology for 129, but I clearly stated in my declaration, there's a lot more complexity, and I wasn't willing to say that this number is bulletproof.

Q But you didn't do an analysis with respect to the WAC 7 obligors.

THE COURT: I think he answered the question.

Q Okay, Your Honor. Question, aren't there efficiencies of having to do -- for example, let's say there's four Irish entities that have to file tax returns, or 100 Irish entities. Aren't there efficiencies to having the same person do it, so the costs would actually go down?

A Possibly.

Q Okay, but there's no reduction that you would consider in determining reasonableness?

A Because again, I haven't done a detailed wind down, and I don't know the complexity. But I do know that each of these entities, you have to do financial statements, and then you'll be filing tax returns.

Q Even though you don't know where there non-WAC 7 entities are based, correct?

A We sent a -- the management of Waypoint sent an email to Macquarie about the activities under a transition service agreement. There was a lot of different tasks that were described in there that would be a basis for further work, in terms of the way -- a lot of that I read to you on the

phone, I think it was either Saturday or Sunday.
Q Okay. In determining the exit payments for WACs 9 and 12, you did not build into any additional amounts into their expense wind down, for these additional complexities of winding down what started out as 13, and at least increased to 18, with respect to the holding companies, is that correct?
A That's correct, but they have a different deal. They're not leaving any WACs behind.
Q Yeah, but our deal is our allocable share, correct?
A I'm sorry?
Q The deal between the Debtors, and WACs 7 and 8, and the plan and sale support agreement, was reasonable, and with respect to -- hold on, let me pull the language again, our allocable share of the wind down administrative costs. And so if you --
A They're getting their allocable share of the other wind down costs, those are the entities -- they're not leaving it -- so if you think about the way this schedule works, the top part are the APA WACs, and the credit bidding WACs, and the trusts, and the SPCs that are being left behind. If you look at that, 9 and 12 aren't leaving anything behind.
However, you're rightfully to point out, there's other wind down costs below. And if you can see those other wind down costs, which are 4796, those are being allocated

back to both APA WACs and credit-bidding WACs by NBV, word that we've used a lot today, net book value. And 24 percent of that, the credit-bidding WACs are being allocated. 76 percent, the APA WACs, because that's the split. So they are paying for their fair share of this allocated cost.

Q They're being charged 24 percent. Period, full stop, the end.

A That's correct.

Q Okay, and if the number proves to be higher, is it the Debtor's intent to allocate more expenses to WACs 7 and 8, notwithstanding the agreement, to fund solely our allocable share?

A I'm not going to give you a legal opinion, but what I've been told by counsel --

THE COURT: I was going to say, how he answer what the Debtor's intent is?

MR. WENDER: Well, because he helped put together the numbers. And so if they're talking about wind down budgets and allocation --

THE COURT: But that's litigation strategy.

Q In coming up with your four times cushion, and that's 40 million on top of the allocated 10.3, correct? So a total of 50 million left behind from the wind down, that's' what you're asking to hold back, correct?

A I have a wind down budget of 10, basically 10, and then

40 million on top of that, that's what I described.

THE COURT: 40 million, or 40 percent?

MR. DEL GENIO: No, no what I said what it's four times. So again, I looked at four times the amount of WACs, I had 10 million --

THE COURT: You're saying it's 10 million plus the 40, or is it just the 40?

MR. DEL GENIO: NO, it's the 10 million plus the 40, right. The wind down is the budget, the 40 is effectively the holdback. So it's four time what the --

THE COURT: Okay.

MR. DEL GENIO: Because they have four times more entity. That was, I mean, look. This is the way I prepared the number.

THE COURT: I understand.

Q So it's a 400 percent in addition to cushion, correct?

A No, that's not a cushion. We're going to have to spend the wind down amounts. I have four times -- the holdback is the cushion.

Q But if you spend less than even the 10.32, we get those monies, right?

A Look, based on everything in this case, I'd love to spend less, but you can see how long we've been in here today.

THE COURT: This is all costing more money here.

Q I know, and more money, we've seen in cases, where somehow when there's money, it gets spent, and that's our concern.

And two additional aspects, one is the reasonableness. But let me ask you, did you run a sensitivity analysis testing the reasonableness of leaving two times the holdback? Did you run any sensitivity analysis.

A Yeah, I went from 70 -- I basically went from 30 percent down to this $40 million number, which is about 12 to 13 percent of distributable proceeds down from 30. So there was obviously some thinking and logic. And if you think this discussion is tough, you should have seen the discussion I had with the boards around the world.

Q No, but it's -- I have not seen anything about, in support of the thinking and logic. I've asked for calculations, I haven't seen any of those.

THE COURT: Just add -- look, don't argue, just ask him questions.

Q Okay, well it's -- what is it, did you run sensitivity analysis with two times to show that was a reasonable holdback?

A No, what I did is, is I told you, and I think I was pretty clear, and I don't think it was that complicated, that I thought that there was four times the amount of

entities, 104, 98, and 6. That's 104, divided by 25, that's a little bit more than four times. That's how I came up with it.

Q And your budget includes amounts for WACs 2, 10, and 11, correct?

A 2, 10, and 11, in that 40 million, that's correct. Again, I need to have, make sure I have proceeds, so I'm not administratively insolvent. That's my major concern here.

MR. WENDER: That's it for now, Your Honor.

THE COURT: Thank you, any other -- anyone else want to examine this witness?

MS. DAILEY: Yes, Your Honor.

CROSS-EXAMINATION OF ROBERT DEL GENIO

BY MS. DAILEY:

Q For the record, Your Honor, Renée Dailey from Akin Gump on behalf of WAC 8. Mr. Del Genio, I think you refer to the exhibit that was attached to your supplemental declaration. I think Ms. DiBlasi said you'd have that in front of you?

A Exhibit B?

Q Yes, I just didn't have an extra copy to give you, so I wanted to make sure.

A Yes, I have that in front of me, thank you.

Q Great, thank you.

A You're welcome.

Q I will try not to repeat Mr. Wender's questions. I'd

like to ask a few questions about how we get to the WAC 8 reserve amount. Because again, the 40 million is across all of the, we'll call them the APA WACs, is that correct?

A Yes.

Q Okay. And so I'm going to try to talk through some math. So if we look at the top of the exhibit, Mr. Del Genio, if I find WAC 8 and scroll across on the top, I get to the 1.125 number, are you following me?

A I am following you.

Q Okay. And my understanding of that is, that our 15 trusts, times 5000, plus the seven SPCs, times 150,000.

A That's correct.

Q Okay, so then if I was to keep a tally on the side for WAC 8, I would start with my top number, is 1.125.

A I agree with that.

Q Okay, and I'm not going to do any multiples, we're going to go through the straight numbers.

A That's fine.

Q Then if I go to the bottom, there were a couple of numbers here that we discussed, probably in the hallway and on the call, that should be part of a multiple, in your view, but others that are not. Is that a fair statement?

A That is a fair statement.

Q Okay, and if I read my circles correctly, we had the 20,000, which is on the bottom line there, plus the 3.15

million as numbers you would propose to multiply by four, is that correct?

A Right, because those were --

THE COURT: I'm sorry, you say at the bottom, what are --

MS. DAILEY: Apologies, Your Honor. If we're on the right-hand side, and these are numbers that are totaling to the 4.796 million number in the far-right corner, if I'm on the bottom line of numbers, I'm just sliding a little bit over to the left. And I'm parsing through that a bit, because based on prior conversations, Mr. Del Genio made a distinction between estimates for winding up trusts and SPCs, which he would multiply by four, and what I think I can fairly call static costs, which are -- let's see, 304 and 10, which are some storage costs.

MR. DEL GENIO: Yes, what I said is on those estimates, I wouldn't say they're static, but on those estimates, I think they're fair estimates.

THE COURT: Which ones, 303?

MR. DEL GENIO: 304 and the 10, that you see in other --

THE COURT: Which other ones?

MR. DEL GENIO: And the other ones, Your Honor, are statutory severance for non-U.S. employees, the 808,000, and health insurance, 504,000, because those are as were

just described, more static numbers.
Q Fairly estimated is probably a better description there.
A I would agree with fairly estimated.
Q Okay, okay. And so if we take those two category costs that are a little sort of squished together here at the bottom, if I parse out the more known costs, the 304, the 10, the 808, and the 504, I come up with 1.235 million. Does that sound about right?
A I'm doing it in my head, but yeah, that's in the ballpark, yes.
Q Okay, I did it on my phone calculator, so we're -- you're probably ahead of me. And then if I take the other costs there, which basically, I think, foot to the left of all of the SPC and the trusts, multiplied by their respective 150 and 5, I come up with 9.669.
A Okay, so you lost me.
THE COURT: I'm not following the numbers you're talking about.
MS. DAILEY: Okay.
THE COURT: I understand the 1.235. What point are you making?
MS. DAILEY: I'm trying to get to, Your Honor, what the costs would be for WAC 8 before a four times multiple is applied to them. And unfortunately, Your Honor,

we don't have anything that is filed that states those costs, nor was anything filed to the data room, which I think correctly allocated those costs.

MR. SOTO: Your Honor, it may help the Court, we have a demonstrative --

MS. DAILEY: That may --

MR. SOTO: That help you do that --

THE COURT: Well, it's not your turn yet.

MR. SOTO: Yeah, I'm perfectly willing to allow her to use administrative that might give the Court --

THE COURT: Well, what is the point of all this?

MR. SOTO: That is a different issue.

MS. DAILEY: The point, Your Honor --

THE COURT: You agreed to try and come up with a reasonable number. I haven't heard that about the negotiations, I haven't heard about what anybody said to anybody. And it may be reasonable to withhold $40 million extra dollars, it may be reasonable to only withhold $10 million extra. I don't know, but none of this -- I'm not hearing any of this.

MS. DAILEY: Well, Your Honor --

THE COURT: His estimate, as I understand it, is it going to quote, be 11.8, 11.9 to wind down these cases. That's the estimate at least in the budget, right?

MR. DEL GENIO: Yes.

THE COURT: Okay. And maybe less. You're concerned it may be more, or a lot more, and you want to make sure the estates are not administratively insolvent.

MR. DEL GENIO: That's correct.

THE COURT: Did anybody discuss this issue when you were negotiating the plan support agreement or anything else as to what would be a reasonable additional holdback?

MS. DAILEY: No, Your Honor, at the time we were advised, and Mr. Glueckstein can chime in, that this budget had not yet been prepared, and so there was nothing to look at to base our reasonableness assessment off of.

THE COURT: So you want to go forward with the Macquarie sale, and put this off for another day?

MS. DAILEY: I do not, Your Honor, because --

THE COURT: Okay, then today's the day. He's testified, this is his estimate. Did you -- were there any discussions at all about what the wind down costs might be, or what a reasonable cushion might be when you didn't have this document?

MS. DAILEY: No. Well, only in passing of a hypothetical, of what it might look like. We were thinking, from the WAC 8 perspective, that it was a percentage of the existing wind down budget, which for WAC 8 was approximately 1.8. So we were thinking in buffer terms, buffers are usually 10 to 15 percent. And so our view of what it would

end up to be is far different than what's on this page, Your Honor.

THE COURT: All right, sounds like nobody talked about it. So what more evidence do I need on this? I have his budget, and I just have to make my best guess about what's reasonable, right? Because I haven't heard a single thing on terms of what the parties agreed to, notwithstanding that you have an agreement that says you're supposed to agree.

MS. DAILEY: Exactly, Your Honor. And so in the proposed sale order, the bracket for the percentage was blank for quite a while.

THE COURT: Right, so how do you propose I decide it?

MS. DAILEY: Well, Your Honor, I propose that you do not agree and approve a four times multiple.

THE COURT: What do you say is reasonable?

MS. DAILEY: Well, we had offered a settlement -- sorry, counter-proposal, I guess, to the Debtors, of a far lower number. I'm not sure I'm permitted to say what that was.

THE COURT: Is there anything I can do other than select a number?

MS. DAILEY: I don't think there's --

THE COURT: I mean, we're going through this

evidentiary hearing --

MS. DAILEY: I don't think there's enough information in front of Your Honor to do anything except either apply and approve the actual budget.

THE COURT: Right.

MS. DAILEY: Or to provide a small buffer, but certainly not four items the amount of (indiscernible) --

THE COURT: Or not approve the sale, because you're not willing to put this issue (indiscernible).

MS. DAILEY: Well, Your Honor, otherwise, and I think I said this earlier, WAC 8, we are supportive of the sale.

THE COURT: I understand that.

MS. DAILEY: Other than this, of course. I just wanted to be clear on that.

THE COURT: Okay. Go ahead, I didn't mean to interrupt your examination.

MS. DAILEY: No, that's fine, Your Honor, and I will try to cut to the chase.

Is it fair, Mr. Del Genio, and admittedly it's doing some rough lawyer math here, that I have an approximately 1.821 million that would be attributable to WAC 8 under the Exhibit B, this revised and updated wind down budget?

A I don't remember the number exactly, but let's say it's

in the ballpark.
Q Okay, that's fine. And so if I however were to apply your proposed four times multiples, I believe the number goes, because I'm only multiplying some of them, to approximately 6.580 million, is that fair?
A Yes, I do remember that number.
Q Okay, thank you.
A You're welcome.
Q Going into the 1.82 ballpark, or the 6.580, are there any WAC -- are there any expenses attributable to a WAC other than WAC 8?
THE COURT: I don't understand that question.
Q Meaning is WAC 8 picking up anyone else's expenses or estimates?
A Well, you're picking up your share of the other wind down costs, which is in the bottom part of this schedule.
Q Okay, so I'm picking up a share of WAC 10 wind down costs?
A Well, all the Whole Co, Service Co, WAC 10 and 11 --
THE COURT: Well, aren't you picking up a percentage of costs that I previously determined you agreed to pick up?
MS. DAILEY: We agreed to pick up, Your Honor, our share.
THE COURT: Isn't this really making that argument

that we're paying more than we should, or we're not getting a benefit? And I've already decided that that's what you agreed to do.

MS. DAILEY: But that's not what we agreed to do, Your Honor. We agreed to pay our share of the, I'll call them the Whole Co costs, the costs that were supposed to be allocated. And we agreed to pay WAC 8 direct costs. We did not agree -- and our net book value is approximately 15 percent, for WAC 8. We never agreed to have our net book value, 15 percent, increased to either 19 or 20, that's the range, to pick up for WACs that are dropping out. And I wanted to make sure in this budget, it did not do that.

THE COURT: This budget is not an estimate. I'm not deciding what wind down costs are. I'm not even deciding what your share of the wind down costs are. It's just the security for future wind down costs, that's all we're deciding today.

MS. DAILEY: Which in our view, Your Honor, the four times multiple applied to it is not reasonable.

THE COURT: So what is the reasonable multiple? You, just sit down.

MS. DAILEY: Thank you, Your Honor.

THE COURT: No, no, not you. The lender was standing up. You have the floor.

MS. DAILEY: Well, that makes me feel better then,

Your Honor.

THE COURT: I'm not deciding anything other than a holdback today, so tell me what you think a reasonable holdback is.

MS. DAILEY: Your Honor, we only on behalf of WAC 8 --

THE COURT: I understand you're only speaking for WAC --

MS. DAILEY: Okay, we offered, that we could agree and resolve our objection on this if it was a 2.5 times, rather than a four.

THE COURT: Okay.

MS. DAILEY: There's no magic to that, Your Honor.

THE COURT: There's no magic to any of this.

MS. DAILEY: Nope, there is not.

THE COURT: Okay, so you say 2.5 times.

MS. DAILEY: Thank you.

MAN: 2.5 on top of, or 2.5 total?

MS. DAILEY: I'm sorry, give me one moment, Your Honor.

MAN: Is it 2.5 (indiscernible) original 10.

MS. DAILEY: That's all I have, Your Honor, and thank you, Mr. Del Genio.

THE COURT: Okay, does anybody else want to cross-examine this witness? Any redirect?

MR. SOTO: None at this time, Your Honor.

THE COURT: This is the time. You can step down, thank you.

MR. DEL GENIO: Thank you, Your Honor.

THE COURT: Do you have any other evidence on this issue? You can step down.

MS. DIBLASI: No, Your Honor.

THE COURT: Anybody have any witnesses? All right, look. This was supposed to be a negotiated number, as I understand the document. And there have been no negotiations, and what you're really asking me to do is pick a ballpark figure for what's reasonable. Frankly, 40 percent seems a little high. I realize it's out of an abundance of caution, and you're concerned that the estates may be administratively insolvent, but I'm not sure that's what reasonable means within the language of the plan and support agreement.

So I will accept the proposal, 2.5 times, plus the wind down budget, okay? Does that resolve your issues, so I can get to the WAC 9 issue?

MS. DIBLASI: Well, I think technically we need to put declarations in support of the Macquarie sale, and get that order entered. That was the only objection to the Macquarie sale order.

THE COURT: What declarations do you want to put

in?

MS. DIBLASI: Your Honor, we had the supplemental declaration of Matthew Niemann, filed at Docket Number 404. He's present in the courtroom today and available for questioning.

THE COURT: Hold it down, please. Go on.

MS. DIBLASI: And Macquarie submitted the declaration of Stephen Wesley Cook, at Docket Number 414.

MR. EDELMAN: Your Honor, Mr. Cook is not in the room today, but we have a chief executive office from Macquarie Watercraft, and he is prepared --

THE COURT: It's not a problem yet, Mr. Edelman.

MS. DIBLASI: And then Mr. Del Genio's declaration, which was just entered into evidence, prior to his taking the stand.

THE COURT: Okay, and what number was that? 418? Is there anyone who objects to the receipt of the Niemann Supplemental Declaration, Document Number 404, the Cook, is it?

MS. DIBLASI: Yes.

THE COURT: Cook Declaration, Number 414, or Mr. Del Genio's declaration is already in, or wants to cross-examine any of these witnesses. Hearing no response, I'll receive the declaration.

(Niemann Supplemental Declaration and Cook Declaration

Admitted into Evidence)

THE COURT: Do you want to call another witness, Mr. Edelstein? Edelman?

MR. EDELMAN: No, thank you.

THE COURT: Okay, see, it's not a problem. Okay, is there anybody who wants to be heard in connection with the sale to Macquarie? Hearing no response, the sale is approved. We've gone through the marketing, we've gone through the sale process, the bid procedures order. I'm satisfied, particularly in light of the auction, where Macquarie was outbid on three or four of these, that the price is fair and reasonable, I think the order's a little long. I'll go through it, till be shorter when I'm done. all right, thank you.

MS. DIBLASI: Thank you, Your Honor.

THE COURT: I haven't reviewed the revised order either, it just came in this morning.

MS. DIBLASI: You'll see, Your Honor, in that revised order there were some modifications that resolved the objections, for example, filed by Milestone, as well as the WAC 8 noteholders' objections to the DIP payoff provisions. So those were some of the modifications in there.

THE COURT: Okay.

MS. DIBLASI: Before we turn to WAC 9 --

THE COURT: I see Mr. Edelman jumping up.

MR. EDELMAN: There was one party who objected to a (indiscernible) objection, and we --

THE COURT: Well, I asked if anybody objected, and nobody spoke.

MR. EDELMAN: Well, they had us agree that we would say something in the record.

THE COURT: Oh, okay. Go ahead.

MR. EDELMAN: And so with that, both Debtors --

THE COURT: Who's the party that --

MR. EDELMAN: It's OMNI. They're a lessee. And OMNI is a lessee for a Sikorsky S92A, Serial Number 920119, and two Leonardo Helicopters with Serial Numbers 89007 and 41511. And it's, counsel's asked that we confirm the following upon the record at this hearing: that the security deposits and the future obligations, to the extent that these leases are assumed by the Macquarie, as the stalking horse purchaser, and the purchaser here, that those security deposits and future obligations are governed by the contracts themselves, including without limitation the governing law, and the form selection provisions of those contrast.

THE COURT: Do you want that in the sale order? Is it there already? Or is it just sufficient on the record?

MR. EDELMAN: We think actually the sale order among the verbiage that's there, covers this, so we don't need that --

THE COURT: It covers a lot of stuff, repeatedly --

MR. EDELMAN: And it does cover the security deposit--

THE COURT: I think it has free and clear in there 20 times, but --

MR. EDELMAN: So we think it's covered.

THE COURT: Okay.

MR. EDELMAN: But we agreed that we would read that in the record.

THE COURT: Fine, thank you.

MS. DIBLASI: Just one follow-up, Your Honor. My colleague, Bryan Podzius, will just give a brief update on the cure objections which are not going forward today, but just so the record is clear.

THE COURT: Okay.

MR. PODZIUS: Good afternoon, Your Honor, Bryan Podzius, Weil, Gotshal & Manges. I just wanted to put on the record the cure objections that were resolved in connection with the hearing. These are 19 OKH, LLC, the Debtor's landlord, was resolved. Augusta Westland Malaysia was resolved. NHV was resolved. Airbus Helicopters was

resolved. Finally, the Debtors received an informal cure objection from Pratt & Whitney Canada, and a formal objection from CHC Leasing. Your Honor, Your Honor's chambers indicated that you were available to adjourn these objections to the March 14th omnibus hearing.

THE COURT: That's what they said, I guess.

MR. PODZIUS: If it's acceptable to Your Honor, we would like to see if you have a date in late February to hear these objections, to the extent the Debtors can't resolve them.

THE COURT: What happened to March 14th?

MR. PODZIUS: March 14th is available. The Debtors are hoping to close the Macquarie sale by the end of February.

THE COURT: Why don't you speak to my courtroom deputy tomorrow? Just give her a list of the objections so we can put them separately on the calendar, so we don't lose track of them as some get saddled, and maybe some have to be litigated, okay?

MR. PODZIUS: Very well, Your Honor. We'll reach out, thank you.

THE COURT: Thank you. All right, WAC 9.

MS. DIBLASI: All righty, so, Kelly DiBlasi on behalf of the Debtors. We now have the WAC 9 sale transaction, this is a streamlined credit bid for the equity

of WAC 9. I think I went through this previously, but the sole objection is the one raised by Macquarie.

In support of the WAC 9 sale transaction, the Debtors have filed the supplemental declaration of Matthew Niemann at Docket Number 405, and the WAC 9 facility agent filed the declaration of Jacqueline McDermott at Docket Number 403. Both Mr. Niemann and Ms. McDermott are in the courtroom today, and available for questioning. We'd like to submit tehri declarations as their direct testimony.

THE COURT: 403 is Mr. Monk. Ms. McDermott is 410.

MS. DIBLASI: (indiscernible) McDermott.

THE COURT: Is that the one you want?

MS. DIBLASI: Yes.

THE COURT: Okay. Is there any objection to the receipt of those declarations? And/or does anybody want to cross-examine the witnesses?

MR. EDELMAN: Your Honor, just to make things go quickler -- quicker, can't speak anymore. We'll accept the direct, but we would like to cross.

THE COURT: Okay, who do you want to cross-examine first.

MR. EDELMAN: Jacqueline McDermott, please.

THE COURT: Okay, is Ms. McDermott here?

MR. GLUECKSTEIN: Yes, Your Honor, if I may be heard. Brian Glueckstein, Sullivan & Cromwell, for Lombard.

Ms. McDermott is representative of Lombard. Your Honor, we have no objection to cross within the scope of direct. We obviously have not been noticed that they're looking to call her as a witness. The scope of her direct is limited. We would expect cross to be limited to that scope, in accordance with F.R.E. 611(b).

We also, Your Honor, had interposed in our reply to the Macquarie objection, standing objection. We have concerns, and not really sure they've established they have the ability to object to our sale. But obviously subject to that objection, if Your Honor wants to take testimony --

THE COURT: I mean, his objection essentially, I guess is that the sale provisions, or certain of the sale provisions are unfair to him, and he had rights, or he has rights which would be prejudiced by those sale provisions, so.

MR. GLUECKSTEIN: And to that point, Your Honor, I mean, to go further, we actually think that this whole question that's been raised, and was subject to this discussion earlier today, with respect to break fee and related issues, is actually resolved on the face of the documents. Mr. Dietderich is prepared to argue that.

But if cross is going to go forward on a factual record, we don't think there are any factual issues here for this objector. And again, we don't believe as a purchaser

of other assets, and effectively as an unsuccessful bidder with respect to WAC 9, that they even have standing to object to our sale or (indiscernible).

THE COURT: Well, what if your agreement with the Debtor prejudices them? They're not a party, but it prejudices them.

MR. GLUECKSTEIN: Well --

THE COURT: Releases a claim that they have. Even though they're not a party, you think they could object to that?

MR. GLUECKSTEIN: Certainly, if it was actually purporting to release a direct claim that they had as against us. But I think that's part of the legal --

THE COURT: I don't quite understand what the objection is. And you can educate me on that. I know you started, but --

MR. GLUECKSTEIN: We're fine to offer the testimony, Your Honor, and address the details of the documents.

THE COURT: When I first read your objection, I thought that to the extent you have a right to a breakup fee, it's under the bid procedures order, or under your APA, and I just didn't get how that that WAC 9 Debtors would agree to would affect that right. The NDA is a different issue, I guess. And that's what I'm not getting, and I

heard you before, but I still don't get it.

MR. EDELMAN: Your Honor, we actually think there's several effects of the current proposal. But with respect to your question about how our breakup fee, which is one disagreement, I think we have many, at least three, the facts that they're trying to impose upon us, is our right to a breakup fee is against the Debtors.

But we have agreed by contract that it would solely be paid from the transaction proceeds, from any transactions that they've completed, and under the bidding procedures that were approved by this Court, any transaction that gave rise to a breakup fee had to include in their cash component of that transaction, they had to pay such amounts to the Debtors.

So it was the bidding procedures, and our contract created a flow, that went through the Debtors, but what they're seeking to do is eliminate the breakup fee. And we're saying if we're entitled to a breakup fee, that's not fair to us. Because everyone -- these bidding procedures were heavily negotiated, and everyone agreed to that.

THE COURT: But why wouldn't you continue to be entitled to a breakup fee if you're right?

MR. EDELMAN: Why would we continue to be?

THE COURT: Why wouldn't you be entitled -- in other words, if they were -- if you're concerned that

there's not going to be a source to pay your breakup fee, or you're not going to be entitled to a breakup fee?

MR. EDELMAN: Well, both. Because we've agreed to limit the source from the proceeds of any transaction, and under their transaction, there is no cash sufficient to pay the $19 million of breakup fees. So, unless --

THE COURT: But they're making an exit payment, right?

MR. EDELMAN: It's not enough to -- it doesn't include the $19 million of breakup fee.

THE COURT: Well, but they wouldn't have a full share -- they wouldn't be fully liable for $19 million, would they?

MR. EDELMAN: Actually, under the terms of the bidding procedures, that they would be. So if you want, I can tell you --

THE COURT: Okay, all right.

MR. EDELMAN: -- all the impacts. We also agreed to definitive timing, where third parties were supposed to submit bids by a certain date, before Macquarie gave their allocation, because we thought that that would actually affect how people bid. And this was heavily negotiated between the parties.

And we think that their conduct, in reaching out to a third party for a buying transaction, one, is violative

of numerous contracts that they've entered into, but it also violates the bidding -- the orchestrated bidding procedures that we entered into. So we think that that was a right that's being violated. We agreed to only give a vacation from a breakup fee is there is a credit bid. And what we meant by credit bid, and we said at the last hearing, that this was a lender-specific right. So if they truly do have either in process, or a definitive joint venture arrangement or other joint arrangement, we think that we're entitled to that.

As I said, this was a very limited exception in the bidding procedures, for -- the bidding procedures themselves allowed for parties to have negotiations with servicers for normal servicing arrangements. What was disclosed yesterday in their affidavit was something much more, that they've already negotiated with third parties beyond just servicing arrangements.

And this also affects our NDAs, because the NDAs were one of the specific assets that we negotiated to purchase. And if they're in violation of the NDAs, they're seeking to get releases from that, and those are assets that we're purchasing. And to the extent that we've been damaged, because they violated the bidding procedures, the Debtors agreed to maintain the assets, that includes the NDAs, and they should not get any release form violations of

the contracts that we're purchasing.

THE COURT: Where -- which is the provision of the bidding procedures that relates to this combination with another entity that triggers the right to a breakup fee?

MR. EDELMAN: There's a couple of provisions. And it's really just a vacation from a breakup fee, just says there shall be no breakup fee for a credit bid.

THE COURT: Where does it say it in the bidding procedures, though? In other words, you're saying that because they combined, or they structured their transaction a certain way, they're liable for the breakup fee?

MR. EDELMAN: That's correct.

THE COURT: What makes -- where is it?

MR. EDELMAN: I've marked all the other provisions except for that one.

THE COURT: That was the one I was obviously going to ask about.

MR. EDELMAN: I believe it's in the credit bidding, there's a separate section about credit bidding, which --

MAN: Your Honor, I think it's in Paragraph 10 of the order.

THE COURT: 10 of the order, okay. Thank you.

MR. EDELMAN: It's also in the Macquarie APA, which builds on that also.

THE COURT: Well, I don't know how they would be bound by the Macquarie APA, but let me just read the order.

I don't see anything in Paragraph 10 that really talks about this. All it says is no breakup fee will be due, and any transaction that is effected by a WAC facility agent or credit bid co, exercising credit bid rights or other remedies, including but not limited to foreclosure, under any or all WAC facilities and related documentation.

MR. EDELMAN: That's the provision that says they have to do a credit bid or their own remedies, it's not for a joint venture.

THE COURT: But where does it limit?

MR. EDELMAN: Well, it's in a few places.

THE COURT: All right, so it doesn't seem to be in that place.

MR. EDELMAN: Well, first of all, the bidding procedures requires that any joint bidding arrangements have to be subject to the Debtor's approval. And that's in Section -- on Page 7 of the bidding procedures, joint third-party bids. The Debtors will be authorized to approve joint third-party bids in their reasonable discretion, that's in one place. On Page 7, that's in Paragraph I.

And then also in the bidding procedures on Page 5, that, at the very bottom of the paragraph, the proviso says that the Debtors, the WAC lenders, WAC facility, and any

credit bid co. established by those parties, that prior to disclosure to any servicer, that the Debtors would have to -- they'd have to approach the Debtors to reach an agreement as to what could be provided to them. The reason for those disclosure --

THE COURT: Where is -- is there anything that says that unless just the lenders in a particular WAC make the bid, in other words, if there's some combination with a third party, that they have to pay a breakup fee?

MR. EDELMAN: You have to give some effect to our entitlement to a breakup fee. And so the credit bid has to be a true credit bid, which is just by its lenders. There's numerous provisions in the contracts that prohibit parties from reaching out to third-parties without the Debtor consent or without letting us know so we can actually monitor that situation.

Additionally, the non-disclosure agreements prevented any contact, any contact -- not negotiation, contact between the WAC 9 lenders and a competitor.

THE COURT: That doesn't affect the breakup fee, does it?

MR. EDELMAN: Well, I think that all goes to show that the breakup fee -- that we need it to be on notice and that we had need to monitor. When our bidding procedures were approved we had an extensive colloquy with the Court

and we said that our vacation from -- I guess vacation last time -- our vacation for breakup fees was limited to lenders only and it wasn't --

THE COURT: I hear you. I'm just asking where in the document that says that.

MR. EDELMAN: It just says that pri -- that we have a vacation when there's a credit bid. That's what it says.

THE COURT: I'm not -- Who made the credit bid yesterday?

MR. HOLTZER: Your Honor, Gary Holtzer for the record. I'm just going to try to help a little, to expedite to answer your question.

I believe on page five of the bidding procedures you'll see the definition of credit bid co. and that starts the conversation about entity designated and I think that's where Mr. Edelman is headed.

And then you look at the paragraph 10, it references again to credit bid co.

THE COURT: Let me -- thank you. Let me just read this.

And what's the evidence going to show? You're saying they --

MR. EDELMAN: The evidence will show that they have taken actions in violation of the bidding procedures,

that they've admitted that they have. They're close to a deal with their servicer for recapitalization and sale transaction. They said they haven't documented it yet. It's not finalized.

THE COURT: But why can't they do that? In other words, there's one lender as I understand it, Lombard, right?

MR. EDELMAN: Yes. I know that's the --

THE COURT: Did Lombard make the streamline bid?

MS. McDERMOTT: Yes.

MR. EDELMAN: I understand they did.

THE COURT: So what's the issue?

MR. EDELMAN: Well, the issue is that they violated numerous provisions --

THE COURT: You keep telling me that and I keep asking you which provision. That's the problem I'm having.

MR. EDELMAN: Okay. Well, first of all, when they speak to the servicer, anyone -- they given permission to the talk to the servicer, but only about servicing arrangements. They weren't permitted to talk to anything beyond servicing arrangements because, frankly, under the bidding procedures they weren't permitted to without getting the consent of the Debtors and in some cases us and they didn't do that.

And the reason is we were supposed to monitor them

to make sure that they weren't trying to evade -- our deal is specific and when the parties negotiated the vacation from credit bid, it's meant to be only for the lenders and --

THE COURT: But it was the lenders that bid. That's what I'm asking.

MR. EDELMAN: But if they are true -- if they are disguising a transaction as a joint transaction then we would be entitled to a breakup fee.

THE COURT: Maybe I should just hear the evidence and see where this goes because I -- it sounds to me like Lombard made the bid. Maybe they spoke to somebody they shouldn't have spoken to, I don't know how that doesn't make it a credit bid. It may make it a violation of some other provision, but maybe add some remedy, I don't know. But, it's very hard to understand this in a vacuum. Yes?

MR. EDELMAN: I'm happy to --

MR. DIETDERICH: May I just have a moment to address this because I think there's an easier way to look at this and a more fundamental. For the record it's Andy Dietderich at Sullivan & Cromwell.

Your Honor, we may not be bound by the Macquarie's purchase agreement, but Macquarie is and for there even to be a debate about whether or not a credit bid is an exemption from the break fee, there has to be a break fee in

the first place.

And there's only a break fee for a competing transaction and competing transaction is defined in the Macquarie credit agreement. I can take Your Honor there if you'd like to see it, but it's defined as a transaction or transferred assets, which is defined term -- transferred assets, assets in the WACs that Macquarie is actually purchasing.

Now the Macquarie transaction started out initially to be a transaction for everyone, but when the WAC makes a credit bid, the excluded assets come out of the Macquarie transaction. And as just approved by the Court, Macquarie isn't buying WAC 9. Macquarie is only buying the transferred assets and our assets are not transferred assets.

So, under 802 of Macquarie purchase agreement, our transaction isn't a competing transaction even if it wasn't a credit bid, which it is.

But if you look at 802, this is at 64 annex C page 55 of the Macquarie APA --

THE COURT: Do we have one? You said it was any of the looseleafs that were delivered? Hold on. I don't think I have the Macquarie APA. Oh, wait a minute. I have it. What --

MR. DIETDERICH: So, Your Honor, let's actually

start at Page 54 of this agreement, if I may. So Page 54 of the agreement, with apologies, is the breakup fee provision. And it's the circumstances in which a breakup fee is paid. Very conventionally, the breakup fee is paid in two circumstances. Clause 3A is for a topping bid, and Clause 3B is for the seller's breach.

In both circumstances, they're paid for defined term competing bid. Now if Your Honor will turn the page, and for those following along, turn the page to Section 802, there's a definition of competing bid. Again, this is the only circumstance in which a breakup fee is due. Competing bid is defined as higher or better competing bids in respect of all or any part of the transferred assets, the assets, and the transferred equity interests. Okay.

Those are things, Your Honor, Macquarie is paying for. That's the exchange in the Macquarie transaction. It's quite obvious that if Macquarie's not buying it, Macquarie doesn't have deal protection in connection with it. It's an excluded asset. So because WAC 9 and our assets are not included as transferred assets, assets or transferred equity interests as approved by the Court, our bid, credit bid or not, cannot constitute a competing bid and cannot give rise to a break fee.

THE COURT: Well, why isn't it a competing bid?

MR. DIETDERICH: What's that?

THE COURT: Why isn't it a competing bid? They made an offer to buy the WAC 9 assets, and you've made a bid to buy the equity.

MR. DIETDERICH: Where was no auction respect to this. Remember, they've not made a bid to buy the WAC 9 assets.

THE COURT: Well, they made a bid to buy everything.

MR. DIETDERICH: As part of the original auction procedures --

THE COURT: But then --

MR. DIETDERICH: We said in the beginning, as you know the bidding procedure agreement, we said we have no interest in selling to Macquarie. We negotiated in the bidding procedures a special protection for us that said if we made a credit bid in full, Macquarie couldn't make a topping bid.

THE COURT: Right.

MR. DIETDERICH: Okay. Now this transaction is designed to start off with an expansive concept of transferred assets that then shrinks down. But a transferred asset is only what is actually transferred to Macquarie what Macquarie pays for it. And as approved by the Court, the Macquarie purchase agreement does not include our assets.

THE COURT: What's the definition of transferred assets under the agreement?

MR. DIETDERICH: The definition is the asset being sold to Macquarie. So it's the WACs that are participating in those assets.

THE COURT: But originally, they were going to buy all the WACs. I don't understand.

MR. DIETDERICH: Yes. The definition of transferred assets is the definition that changes based upon what happens next. So the point is Macquarie has not entered into a transaction with the Court, okay. It's an approved transaction. If that transaction is terminated for a topping bid or for seller default, then in that circumstance, there's a breakup fee due. But, of course, Macquarie doesn't have a breakup fee now that the transaction's approved by the Court with respect to things it's not buying. And this was --

THE COURT: But that's the whole point of a breakup fee. You've outbid them.

MR. DIETDERICH: No, the breakup fee, that's the point of the breakup fee.

THE COURT: Right.

MR. DIETDERICH: Whereas, this transaction is structured, the breakup fee relates only to the defined term transferred assets that are actually being transferred.

THE COURT: What's the definition of --

MR. EDELMAN: That makes the breakup fee never due and payable.

THE COURT: You're right.

MR. EDELMAN: You're (indiscernible) breakup fee. So it does make sense. I mean we asked -- we gave the lenders a specific (indiscernible) from breakups and now you'd like to say we can never a breakup fee because by definition, if any assets aren't purchased by us, we don't get a breakup fee.

MR. DIETDERICH: I'm saying you can't earn a breakup fee with respect to the WAC 9 assets because you're not in competition with the WAC 9 assets.

THE COURT: But they were willing to buy the WAC 9 assets, and you came in and your outbid them. That's what the auction was about.

MR. DIETDERICH: We didn't outbid them, Your Honor. We expressed from the beginning that we were -- that if we made a credit bid in full -- yeah, we -- we outbid the bid in that respect.

THE COURT: Okay. You made a bid -- you made a streamlined credit bid --

MR. DIETDERICH: Right.

THE COURT: -- in accordance with the bid procedures.

MR. DIETDERICH: Correct. That's correct.

MR. EDELMAN: No. I'd like to object to that. I think they colluded with --

THE COURT: All right. Yeah, I understand the dispute regarding whether it was a streamlined -- but you made a bid and you're purchasing the assets which is the conversation we had, you know, eight hours ago about how you made the bid in accordance with the bid procedures which limited your exit payment.

MR. DIETDERICH: That's correct. But it doesn't change the definition of transferred assets in the contract.

THE COURT: Yeah, but Mr. Edelman is right. You would never earn a breakup fee because there would never be assets that are transferred.

MR. DIETDERICH: Well, we should never earn a breakup fee to the extent we made a bid in full for the assets.

THE COURT: But that's what the breakup fee is for. They have the stocking horse. I'm missing -- I got to tell you I'm missing something.

MR. DIETDERICH: Your Honor, we will rest. We will rest on the fact that we've made a streamlined credit bid. It's not looking very streamlined today, but it is a streamlined credit bid.

THE COURT: Okay. I thought the argument was that

if you made a credit bid, you didn't have to -- and you got the assets, you didn't have to pay breakup fees.

MR. DIETDERICH: Correct. Correct.

THE COURT: Where does it say that?

MR. DIETDERICH: It says that in the -- everywhere the breakup fee is mentioned. In the bidding procedures order and in the Macquarie APA, there's a definition of exempt transaction.

THE COURT: Okay. Where is that?

MR. DIETDERICH: And it's defined -- that is defined in the Macquarie APA at -- in the annex for definitions at A-6.

THE COURT: What page is that in the APA?

MR. DIETDERICH: It's A-6, and that's the first annex for the defined terms on Page A-6 is an exempt transaction.

THE COURT: If you look at the top of ECF numbers, what number is that?

MR. DIETDERICH: It is Docket 64.

THE COURT: Yeah. But there are 282 pages. What number is it?

MR. DIETDERICH: Page 238 of 282.

THE COURT: 238, okay.

(Pause)

THE COURT: You're saying an exempt transaction is

one in which no breakup is earned?

MR. DIETDERICH: Correct. Correct. I think that's undisputed.

MR. EDELMAN: And that is undisputed, but the real argument here is that this is a disguised third part bid, and that was not meant to exclude --

THE COURT: Okay. You know what, let me give you (indiscernible) on this because --

MR. DIETDERICH: Okay.

THE COURT: -- they're just not making a lot of sense. Okay. Now let me just -- let me find the affidavit -- the declarations that you're offering, that the Debtor is offering. That was in yesterday's docket?

(Pause)

THE COURT: We're just trying to find the declaration.

Let me just see what you say.

(Pause)

THE COURT: Okay. And you wanted Ms. McDermott to testify? You want to examine her first?

MR. EDELMAN: Correct.

THE COURT: Examine her first?

MR. EDELMAN: Yes, please.

THE COURT: All right. Is Ms. McDermott here?

Would you raise your right hand, please? Do you

solemnly swear that the testimony you're about to give will be the truth?

MS. McDERMOTT: Yes.

THE COURT: Okay. Please take a seat and speak into the microphone so we can hear you.

MR. EDELMAN: I was just checking the time to see if -- good afternoon.

MS. McDERMOTT: Good afternoon.

THE COURT: It's not evening yet. Go ahead.

MR. EDELMAN: That's what I was checking.

DIRECT EXAMINATION

BY MR. EDELMAN:

Q Could you state your name and what's your position at which company?

A Yes. Jacqueline McDermott. I'm a director at --

THE COURT: Okay. Please keep your voice up and -- you can pull the microphone closer to you so you don't have to lean over it.

MR. EDELMAN: I'm a director with the World Bank of Scotland.

BY MR. EDELMAN:

Q Okay. And what is your connection with Lombard North Central, PLC?

A Lombard North Central, PLC is a subsidiary of the World Bank of Scotland, and I work in the restructuring group

which was responsible for the Waypoint position once it was, you know, when we got contacted about the forbearance and the (indiscernible) issues.

Q So you worked for World Bank of Scotland, but you're responsible for the restructuring area of Lombard that's responsible for Waypoint?

A Yeah. Not -- I'm not the head of it. I'm just an employee.

Q Okay. When did you get involved with Waypoint?

A Initially, when CHC filed for bankruptcy, I was asked to have a look at it and then about two weeks before the initial forbearance.

Q Do you remember when that was?

A Middle of June.

Q June of last year?

A Yeah.

Q June 2018. Were you the primary person involved with the WAC 9 negotiations about the bidding procedures?

A Well, our lawyers were, but yes, we were involved in the --

Q But you were the primary business person?

A Yeah.

Q Okay. Now when did you decide to -- that you would pursue a credit bid for the WAC 9 transactions?

A Well, we initially had four positions across the

Waypoint group, so we had borrowing in full WACs. When it became apparent that there was a blocking vote in WAC 3 and they wouldn't agree to the DIP, we took a decision to exit three of our positions where we were obviously part of a larger lender group and retain our WAC 9 assets because we believed that the WAC 9 position was, you know, a par value (indiscernible).

Q And when was that?

A We've always maintained that position.

Q No, when did you focus on just WAC 9?

A We sold our debt, I think, it was on the 20th of November.

Q I didn't hear that.

A We sold our debt on the 20th of November.

Q November 20th of 2018?

A Yes.

Q Okay. And was that the time that you decided that you were going to pursue a credit bid?

A We would -- at that point in time, we would obviously still have the allocations. We didn't have -- well, if my memory serves me correctly, then Macquarie had obviously put I think it starts to negotiate the M&A, and we didn't know what the allocation was, but we made it very clear that we required close par for us to exit.

Q Did you say close to par?

A Well, we -- if we -- if my memory serves me correctly, I think we would have accepted close to par had we retained all of the positions. Once we sold those positions, we focused on it being a par --

Q When did you --

A -- recovery.

Q When did you start negotiating -- so when did you definitively decide that you were going to put in a credit bid?

A I can't tell you the exact date, but it will have been close to the 20th of November.

Q Do you know if it was after Macquarie signed up the stock and asset purchase agreement?

A Well, in those negotiations when we were at I think it was Milbank's offices and they wanted to put Macquarie in as a stocking horse at 650 million, we said at that point in time we want par. And I even sat down with somebody from Macquarie in December and told them at that point as well that if they require -- if they wanted to acquire the assets, they needed to pay par plus accrued interest.

Q When did you start negotiating with a potential servicer?

A December time. It was -- we talked to a number of services about our 17 aircraft.

Q And that was in December?

A Yeah.
Q Of 2018?
A Yeah.
Q Have you now reached a definitive agreement with your servicer?
A Not a definitive agreement, no. We have a service -- a draft service agreement at the moment, but it's not definitive.
Q What are the current terms of that -- of the form of agreement that's in existence right now?
A I don't know.
Q You don't know the compensation arrangements?
A No.
Q Do you know how long the servicing arrangement is?
A No.
Q Is it ready to be signed?
A No.
Q What are the open issues?
A It's -- I think it's still about the -- the costs to be paid to the servicer. They haven't been agreed.
Q I'm sorry. Could you be a little bit more specific what you mean by costs?
A The cos per aircraft to manage the aircraft. I -- I -- it's not my area of expertise, the service agreement, because I don't -- I look after restructurings of debt.

This is about a asset management and that's not my forte. So I won't be able to tell you whether the current rates that are in that agreement are market facing or whether they are, you know, acceptable because I -- I don't look after asset finance specifically of managing the aircraft.

THE COURT: What's the relevance or the significance of this service agreement?

MR. EDELMAN: The servicing agreement, I believe, is with a competitor who -- and to the extent that it's --

MS. McDERMOTT: Can I just say that the service --

THE COURT: There's no question pending.

Go ahead.

MR. EDELMAN: So to the extent that we believe that there could be potential violations of the nondisclosure agreements and also could weigh on whether or not there's a joint venture arrangement that's in existence. So that's why I'm exploring whether or not the servicing with the competitor is in fact a plain vanilla servicing arrangement or something more.

THE COURT: Okay.

BY MR. EDELMAN:

Q Do you know if there's any agreement as to whether any portion of the ownership or equity interest of the assets of this WAC or the equity interest of the WAC will be transferred to the servicer?

A No, they won't.
Q Did the servicer originally request a purchase option for these assets?
A We've never -- the way that the -- the credit bid is set up is that we've done it through an orphan trust, charitable trust. We don't intend to hold onto the assets permanently. The risk remains with Lombard at this present time. And at some point in the future, we will sell those perhaps, but at this moment in time, we are focused on the servicing arrangement with the servicer and it's the same servicer as WAC 12.
Q Have any discussions been held with the servicer about the potential transfer of ownership of the assets?
A We will do that at some point in the future, but at this moment in time, there's no intention to. We don't have any -- any agreement to sell to the servicer.
Q Have you had negotiations regarding such a sale?
A No.
Q So you had no negotiations regarding a sale of assets?
A We've talked to them about the possibility of them doing it and what it might look like, but we haven't -- there's no documentation relating to that that has been signed or agreed to.
THE COURT: Talked to who about the possibility?
MS. McDERMOTT: The servicer.

THE COURT: Okay.

MS. McDERMOTT: But we've also spoken to other people, and other people have approached us about acquiring the assets.

BY MR. EDELMAN:

Q Have there been any terms about what the purchase arrangement might look like in email correspondence?

A No, I don't think so. I can't -- I don't recall.

Q Would you be the person who's negotiating with the servicer about that?

A I'm -- no. No, I'm not negotiating with the servicer about it.

Q No, would you be the person responsible for negotiating that?

A Possibly as part of a team.

Q Do you know if other members of your team have been negotiating with --

A Not within the restructuring group, no.

Q So there was no -- there has been no negotiations about a stock sale with the servicer?

A There was -- we've talked about the possibility in the future that there might be, but nothing has been agreed. And, again, as I've -- we've also had approaches and, you know, would speak to all the parties as well.

Q Have there been discussions about the transaction with

the servicer including warrants?
A No.
Q Profit participations?
A No.
Q Transfer of control rights?
A No.
Q Distribution rights?
A Distribution of what?
Q I guess profit distributions.
A Profit from what the revenue of the --
Q Yes.
A No. I'm not -- as I've said, I've not negotiated the service agreement. I don't know exactly what was in the service agreement. But, no, I don't -- there isn't any -- it's just a standard service agreement.
Q Okay. Have you reviewed the service agreement?
A No.
Q Okay. Have you been a party to those negotiations?
A Of the service agreement? No.
Q Do you know if there's any derivative or synthetic transaction with the servicer to transfer the benefits of ownership to the servicer without directly transferring those?
A No.
Q You don't know or it doesn't --

A My -- my understanding is that it doesn't, but I don't --

Q But you haven't reviewed it, so you don't know for sure?

A No.

THE COURT: Well, you've been asking her questions about the service agreement now for a half an hour. Maybe you should establish a foundation first.

MR. EDELMAN: Right.

BY MR. EDELMAN:

Q In paragraph 6 of your declaration, you state that the proposed credit bid ownership structure is intended to be temporary. What does that mean? That means short-term; doesn't it?

A Well, that's what I just said that earlier. Our -- our intention is not to hold these assets long term. We're not -- we're not asset managers. We don't want to hold the aircraft long term. Our intention will be to sell the assets at some future point.

Q Okay. In your declaration, you say that Lombard is discussing with its servicer a subsequent transaction pursuant to which the designated transferee and/or the underlying business would be recapitalized and sold to the servicer. Did you declare that in your declaration?

A I don't have the declaration in front of me, but if

it's written down, then yes, I did.

Q So, well, that is what it says. Do you -- can you give more information about that Lombard has discussed how Lombard is discussing with its servicer a subsequent transaction pursuant to which the designated transferee and/or the underlying business would be decapitalized and sold to the servicer?

A We don't have any information. The servicer doesn't have any information in relation to the leases at this point in time. I think it was only (indiscernible) servicer last Friday. So we haven't disclosed any information about the aircraft or inspected the aircraft or anything like that. So it's very difficult. As I repeated -- I'll repeat myself again, we -- our intention is to sell the aircraft eventually. We have had -- sorry, I'm getting a bit of a dried mouth here. And we have spoken with the servicer -- thank you so much.

THE COURT: Do you want a cough -- I don't know where it's been.

(Pause)

MS. McDERMOTT: And as I said, we haven't disclosed any information to the servicer about the aircraft so we can't have any meaningful discussions because they don't know the aircraft and they haven't inspected the aircraft and they haven't seen the leases. So they would be

having blind negotiations on, you know, the purchase of the -- the assets. And, therefore, at this moment in time, it is purely that we have said that we don't want to hold onto the assets permanently and that we will sell them in the future. And they, you know, as a possible purchaser, they being the servicer of the aircraft, you know, possibly will be the natural owner.

BY MR. EDELMAN:

Q I'm confused because your declaration says Lombard is discussing with its servicer a subsequent transaction.

A But we can't --

Q Are you having those discussions currently or is there a declaration (indiscernible) that fact?

A No, no. As I've said to you, we have had initial -- like very loose discussions because our intention is not to hold the assets for a long period of time for it -- we can't get into any definitive discussions because they don't know the assets and they don't have any information on the assets. So they -- you can't -- you know, they've been negotiating blind. And it may well be that they came back and said, you know what, we don't believe the assets are worth the 98 million or whatever, 94 million dollars. So we might go and speak to somebody else.

THE COURT: What was the business of Lombard before the credit bid?

MS. McDERMOTT: So Lombard is the subsidiary of the Royal Bank of Scotland. And Lombard provided asset finance and --

THE COURT: So it's a lender essentially?

MS. McDERMOTT: Yeah.

THE COURT: All right.

BY MR. EDELMAN:

Q So your declaration says that you are currently discussing subsequent transactions. Is that correct or not?

A I've answered that question.

MR. GLUECKSTEIN: Objection, Your Honor. This has been asked and answered and this is becoming argumentative.

THE COURT: Well, you know what I don't understand about you -- what appears to be your theory of the case, and that's why I asked the question. They're lenders. They don't want to own helicopters. Then why get their money out of the case and get rid of the helicopter? That's not their business. Why is it surprising that when they foreclose or any other secured party forecloses, their interest is to sell the assets and get their money out.

MR. EDELMAN: They haven't foreclosed yet, so I've had no problem if they were going down this path which they appear to be going down this path either if they didn't violate NDAs which we think they have.

THE COURT: Well, then ask her about it. But the

fact that a lender after foreclosure wants to unload the assets is hardly surprising.

MR. EDELMAN: That's right. But they haven't foreclosed yet. And so they currently are -- and I'll go through the evidence. I just want to get to some of the --

THE COURT: Yeah. Why don't you go ahead.

BY MR. EDELMAN:

Q And in your next sentence, you say that neither Lombard or the designated transferee or the servicer have reached an agreement or arrangement with respect to this, but discussions continues. And a subsequent sale could occur soon after consummation of Lombard's credit bid. Is that correct?

A Yeah.

Q So --

A But I reiterate that they don't have any information on the aircraft, so we can't -- we don't --

Q How can you make this statement in your declaration that you could soon close after the consummation if no one's talked about anything? You're --

A Well, they know that there's 17 aircraft that -- that we owe. They know the total revenue of the leases, and they've had access now to the data room. So we're hoping that once they get access to the data room and get the information from the leases that we should be able to move

forward quite quickly thereafter to consummate a transaction.

Q So you've started having discussions about a subsequent transaction?

A I reiterate what I've said now I don't know how many times, but I reiterate that we can't talk specific numbers because they don't know the aircraft and they haven't inspected the aircraft and they don't have the details of the leases, nor did they have the details of the lessees and nor did they have details of the PBH.

Q So you're saying that you put a submission to Court where you say you could soon close when you have no idea whether they could soon close. Is that what you're --

A They -- they are --

Q Are you saying there's a --

THE COURT: Wait, wait, wait.

MS. McDERMOTT: No, I'm --

MR. GLUECKSTEIN: Objection, Your Honor.

THE COURT: Yeah, it's getting a bit --

MR. GLUECKSTEIN: Multiple objections.

THE COURT: She testified she's not even involved in the -- she's not even involved in the negotiations, but putting that aside, she did put it in the affidavit. She said they're talking. They want to get rid of this asset.

MR. EDELMAN: Okay.

THE COURT: I mean, you know, why -- I assume that the credit big procedures didn't prevent a party that credit bid and got the assets to sell them.

MR. EDELMAN: After they completed the --

THE COURT: But maybe that goes into the decision of whether or not you want to credit bid in the first place.

MR. EDELMAN: Okay.

BY MR. EDELMAN:

Q In your next sentence, you said that you complied with the provisions of the bidding procedures order. Do you know which provisions of the bidding procedure order you complied with?

A Sorry, I haven't got the bidding procedures in front of me so, you know, yes, my understanding is we have -- we have abided by all the provisions within the bidding procedures.

Q Well, I mean you -- in your declaration, you said that you complied with the provisions of the bidding procedures order. So I'm asking which provisions have you complied with?

A All of them, I believe.

MR. GLUECKSTEIN: Objection, Your Honor. This is -- I mean we're asking a memory test of a legal document here.

THE COURT: Yeah.

MR. GLUECKSTEIN: I mean this is --

THE COURT: Well, but you put it in the declaration.

MR. GLUECKSTEIN: She put it in the declaration that she complied with the documents.

THE COURT: What did she mean? What were you referring to when you put that in the declaration is the question.

MS. McDERMOTT: That we have abided by the bidding procedures, the provisions within the bidding procedures.

BY MR. EDELMAN:

Q So were you aware that there was a requirement in the bidding procedures for you to ascertain the scope of what you can talk about to the servicer with the Debtors?

A I haven't -- I know we had a conversation with the Debtor at Milbank's offices sometime in December where I think Macquarie were present. And there was a discussion with the Debtor about an amendment or an ability for the people that wanted to credit bid, and that was at the time most of the WACs, to be able to divulge certain information to a potential servicer, which was obviously just the -- some headline numbers about the aircraft and --

Q I think that actually results in the very paragraph that we're talking about of the bidding procedures. But you don't recall?

A We had that conversation at Milbank's offices.

Q But do you remember the corresponding provision that was added to the bidding procedures that related to that?
A No.
Q Under the bidding procedures, the Debtors are required to approve the submission of joint bids. Do you know if the Debtors ever approved WAC 9 to submit a joint bid with any other person or entity?
A No.
Q I'd like to hand --
MR. EDELMAN: If I may approach the witness and the Court?
THE COURT: Yes.
MR. EDELMAN: I'm going to hand up a nondisclosure agreement.
(Pause)
BY MR. EDELMAN:
Q I just handed you a document entitled "Nondisclosure Agreement." Are you familiar with this document?
A I don't know -- well, I remember it from at the time that it was entered into. I don't know -- I can't remember the full content of it.
Q Is this the nondisclosure agreement that Lombard entered into at the time that the June 2018 nondisclosure agreement that was referred to earlier in your testimony?
A I don't know. Yes, it was 'cause I apparently signed

it.

Q Okay. So it is. Do you know if the Debtors ever consented to Lombard or WAC 9 speaking to anyone else about an alternative transaction?

A We haven't -- we haven't spoken to anybody about an alternative transaction. What is an alternative transaction? We've spoken to Waypoint and the Debtors about a -- a credit bid and we did speak to them at -- it was in end of October, I think November, and we asked to be released from -- to -- to have an ability to speak to a third party which was a fund. And because at that point in time, there wasn't any deal with Macquarie on the table, and the only bid that was on the table was from Fortress. And we asked to be released so that we were able to discuss a possible alternative transaction which would see a fund which was somebody who had already been in the M&A process that World Bank of Scotland and Lombard would join as a new venture with to acquire all of the assets of the group. But we couldn't get to a price that was -- would have been acceptable to the lenders.

THE COURT: Mr. Edelman, I'm going to -- WAC 9 and none of the other WACs needed your consent to provide -- to discuss any information or provide any information to anybody else. If the parties whose consent is not required -- is required, is not raising this issue, what's your --

what's your standing to raise this issue?

MR. EDELMAN: Well, actually, this NDA is an --

THE COURT: But you don't own it now.

MR. EDELMAN: We don't own it now, but --

THE COURT: And what you're saying is the time when you didn't own it, they may have violated it.

MR. EDELMAN: Well, I'm referring to a declaration that they just put in yesterday for the first time.

THE COURT: Well, provide the evidence that they violated it.

MR. EDELMAN: Okay.

THE COURT: Or adduce it.

BY MR. EDELMAN:

Q Doesn't Paragraph 3 of this NDA prohibit --

THE COURT: Let's just -- by the way, let's just mark this as Macquarie Exhibit 1.

MR. EDELMAN: Okay. Macquarie Exhibit 1.

THE COURT: Yeah.

(Macquarie Exhibit 1 Marked For Identification)

By MR. EDELMAN:

Q Doesn't Paragraph 3 of this NDA prohibit any contact with any party about any proposed transaction?

A As I said, we -- we spoke to the Debtor and we -- and on the phone at the time was Houlihan, and it went to the board and we asked first to have the ability to go and speak

to one of the M&A bidders for an alternative transaction.

Q And that was with Fortress?

A No, no. It was with another bidder that was in the --

THE COURT: Let me ask you a different -- you said you were acquiring this NDA. Macquarie is acquiring the NDA?

MR. EDELMAN: That's right.

THE COURT: Is Macquarie also acquiring claims arising from the breach of the NDA?

MR. EDELMAN: Yes. Yes, we're acquiring all rights under the NDA.

THE COURT: So isn't the answer that if there's been a violation, you have rights?

MR. EDELMAN: Well, the problem is that they're getting a mutual release under the document and they're asking for a good faith finding. And we've asked for a carveout.

THE COURT: Well, the good faith relates to the transaction. It's a 363(m) finding. Are you contending that they didn't proceed in good faith?

MR. EDELMAN: Well, if they were talking to a servicer as they said in their contract in violation of an NDA, you know, the law is basically that we purchase a set of assets and, you know, the law is that if they're not treating other bidders fairly, that is a factor in -- and

the courts have said that that bars a good faith finding. And under this NDA, which they have entered into, it bars any contact. It says will contact any potential lender, intentional investor or competitor" about any alternative transaction.

And so, you know, prior to them becoming owners, you know, and once they become the owners, you know, they can do what they want. But during this period prior to that, you know, the NDA prohibits them without getting express consent. And we heard -- sorry, I'll --

THE COURT: Okay.

MR. EDELMAN: -- make arguments later.

BY MR. EDELMAN:

Q And is this the --

MR. EDELMAN: Can I approach?

THE COURT: Sure. Do you want to mark that for identification?

It's Macquarie 2 for ID.

(Exhibit Macquarie 2 Marked for Identification)

BY MR. EDELMAN:

Q Is this -- have you seen this letter before?

A Yes.

Q Can you describe what this letter is?

A It was a letter that was sent to LCI, as you said, about their NDA that they'd executed with the Debtor.

Q And is this letter a concern raised by the Debtors that LSI was violating their NDA based upon the apparent discussions that LCI was having with other members of the Waypoint Community?

THE COURT: Wait, let me read this.

MR. EDELMAN: Okay.

(Pause)

THE COURT: Okay.

BY MR. EDELMAN:

Q When did you see a copy of the order?

A I don't know. I can't recall the date.

Q Was it around the time it was sent?

A I believe so.

Q So since the end of December approximately, you acknowledge that LCI was -- the Debtors were concerns about LCI's compliance with their NDA?

A Yes.

Q Do you know if the Debtors ever consented to allowing you to speak to LCI specifically?

A Not specifically. Well, I don't recall.

Q Okay.

THE COURT: Pardon?

MS. McDERMOTT: I don't recall.

BY MR. EDELMAN:

Q Do you know if Houlihan Lokey ever consented to LCI

speaking to you about a transaction for anything other than a servicing arrangement?

A Not that I recall.

MR. EDELMAN: Okay. Can I have a thirty-second break? I just want to check with --

THE COURT: Sure.

(Pause)

MR. EDELMAN: I think those are all my questions, Your Honor.

THE COURT: Okay. Anybody else -- before we hear any cross-examination or redirect, does anybody else want to question this witness?

Any redirect?

MR. GLUECKSTEIN: Yes, Your Honor. Briefly.

THE COURT: Go ahead.

MR. GLUECKSTEIN: And for the record, Your Honor, Brian Glueckstein, Sullivan & Cromwell, for (indiscernible).

REDIRECT EXAMINATION

BY MR. GLUECKSTEIN:

Q Ms. McDermott, in connection with the questions that you were asked this afternoon, you testified that you spoke to potential servicer with respect to servicing of the assets following the closing, correct?

A Correct.

Q And you did that pursuant to both your rights under the documents and permission from (indiscernible). Is that correct?

A Correct.

Q In connection with disclosure of information to potential servicers, is it your understanding -- strike that. In connection with your discussions with potential servicers, to your knowledge did Lombard disclose information to the potential servicer beyond what was permitted in the permission granted by the Debtor?

A No.

MR. GLUECKSTEIN: Your Honor, if I -- can I approach the witness to hand her a copy of the bidding procedures?

THE COURT: Yes. Do you want to mark that as an exhibit?

MR. GLUECKSTEIN: Sure. I think it's in the record today. I'm just --

THE COURT: Is it?

MR. GLUECKSTEIN: -- I wasn't sure exactly where --

THE COURT: Oh, I get -- is it -- no, it's not. It's one of those documents I had to ask for separately --

MR. GLUECKSTEIN: For purposes of --

THE COURT: -- which was not attached to anybody's declaration.

MR. GLUECKSTEIN: We can mark it for clarity as Lombard Exhibit 1.

THE COURT: Okay. Lombard 1 is the bidding procedures?

MR. GLUECKSTEIN: Bidding procedures, Your Honor. It's Docket No. 159.

THE COURT: The order and the procedures?

MR. GLUECKSTEIN: It is the order and the procedures, yes.

THE COURT: Okay.

(Lombard's Exhibit 1 Marked For Identification)

BY MR. GLUECKSTEIN:

Q Ms. McDermott, if you could turn to -- well, before we turn to the document, do you still have your declaration in front of you?

A Yes.

Q And there's some questions earlier from counsel with respect to Paragraph 6 of your declaration. Do you see that?

A Yes.

Q I'm sorry, Paragraph 7. Do you see Paragraph 7 there --

A Yeah.

Q -- of your declaration states, "Lombard's complied with the provisions of the bidding procedures order including

compliance with confidentiality obligations." And it goes on from there. Do you see that paragraph?

A Yeah. Yes.

Q And counsel asked you some questions about your recollection of the specifics of the bidding procedures and you didn't recall off the top of your head.

A Correct.

Q If you could turn to at the top of the pages, there's some numbers. It's probably easiest to refer to Page 32 of 48 of what was marked as Exhibit 1.

THE COURT: Well, I don't have those ECF numbers so what --

MR. GLUECKSTEIN: Page 12 of --

THE COURT: Of the bidding procedures?

MR. GLUECKSTEIN: Page 12 of the procedures themselves.

THE COURT: Okay, the credit bidding?

MR. GLUECKSTEIN: Correct.

BY MR. GLUECKSTEIN:

Q Have you previously reviewed this document, Ms. McDermott?

A Yes.

Q And are you generally familiar with the terms of this document as reviewed in connection with making your credit bids?

A Yes.
Q And if we look at Page 12, about halfway down, there's a number of things that starts, "A credit bid must include the following." Do you see that language?
A Yes.
Q It first lists that there's an unconditional offer. Is it your understanding that Lombard's bid contained an unconditional offer?
A Yes.
Q Did your bid contain a form of consideration?
A Yes.
Q Did your bid as submitted to the Debtor contain proof of financial ability to perform?
A Yes.
Q With respect to the remaining pages -- sections on Page 33 -- I'm sorry, Page 13 of the bidding procedures --
A Yeah.
Q -- is it your understanding that your as applicable complied with the provisions on Page 13 there?
A Correct.
Q Okay. If we move over to Page 14, there's a separate section in the bidding procedures entitled "Streamline Credit Bid Requirements." Do you see that?
A Yes.
Q Have you reviewed this section prior to today?

A Yes.
Q And to your knowledge, did the bid that Lombard submitted comply with the terms of the section entitled "Streamline Credit Bid Requirements"?
A Yes.
Q Specifically just to call out a couple of (indiscernible) provisions here, in Section C(b), it discusses payment of the exit payment. We discussed the exit payment earlier today, correct?
A Correct.
Q And did your bid include payment of the exit payment as required by the Streamline Credit Bid Requirements?
A It did.
Q And (c), the commitment to purchase all the equity of the relevant WAC facility and series WAC 9, does your bid include that provision?
A It did.
Q And does your bid include the mutual releases required in Section (d)?
A Yes.
Q And you were informed subsequent to submitting your bid and informed by the Debtors that they believed that the Lombard bid satisfies the terms to be qualified as a Streamline Credit Bid, correct?
A Correct.

MR. GLUECKSTEIN: No further questions, Your Honor.

THE COURT: Okay. You can step down. Thank you.

MS. McDERMOTT: Thank you.

THE COURT: Do you want to cross-examine Mr. Neiman?

MR. EDELMAN: I do.

THE COURT: Mr. Neiman? You know, why don't we take five minutes. We've been a long time. We'll take a five-minute break.

CLERK: All rise.

(Recess)

CLERK: All rise.

THE COURT: Please be seated. Mr. Niemann?

MR. NIEMANN: Yes, sir.

THE COURT: Raise your right hand, please. Do you solemnly swear that the testimony you're about to give will be the truth?

MR. NIEMANN: I do.

THE COURT: Okay. Please take a seat. Speak into the microphone. Let me just find Mr. Niemann's declaration. Which number is it?

MR. EDELMAN: Is it 404?

CLERK: 406?

THE COURT: 404 is the Macquarie sale.

CLERK: 406.

THE COURT: 406? Okay. All right, go ahead.

DIRECT EXAMINATION OF MATTHEW NIEMANN

BY MR. EDELMAN:

Q Good evening.

A Good evening.

THE COURT: Close.

Q Did Houlihan run the sale on an M&A auction process for the Waypoint entities?

A We were the lead investment banker with the company in running the process, yes.

Q And you were the person who lead Houlihan's engagement with the Debtor?

A I'm the senior-most officer at Houlihan involved in Waypoint engagement.

Q When did you become involved with --

A April. I think our engagement letter is May 1st, if I'm not mistaken, but sometime in April of 2018.

Q And as part of your responsibilities, you were familiar with the nondisclosure arrangements made by Waypoint with its lenders and potential bidders?

A Yes.

Q Are you familiar with an NDA, a nondisclosure agreement that the company executed with LCI Helicopters Ireland, Limited?

A I am aware that we -- the company executed one, yes, with LCI.

MR. EDELMAN: Okay. I'd like to present --

THE COURT: Macquarie 3?

MR. EDELMAN: Yes, Macquarie 3.

THE COURT: Okay.

Q Thank you.

A Thanks.

Q Do you recognize this document? Sorry, I'll give you a chance to look at the document.

A I recognize this nondisclosure agreement. Whether I've actually seen this particular one, there were I don't remember exactly, but 50-plus, I want to say, nondisclosure agreements signed with potential bidders.

THE COURT: This one is much longer than the one with Lombard.

MR. EDELMAN: I had nothing to do with the drafting of this --

THE COURT: I'm just saying --

MR. NIEMANN: Your Honor, I think there were different forms for the lenders which would be Lombard versus the bidders which would be LCI at least at this time. This was August.

Q Isn't it true that the nondisclosure agreements with competitors were significantly more stringent than the ones

with the lenders?

A Believe it's true that the nondisclosure agreements with bidders, potential bidders who were involved in the M&A process were longer. The forms were longer than the lenders. I don't recall that there was a separate form of nondisclosure agreement for potential competitors. We handled the information sharing differently, but I'm not sure that -- I don't know that there was a separate form of NDA for competitors versus noncompetitors in the bidding process. I just don't know, is the short answer.

Q Okay. Do you know if LCI has requested any permission from Houlihan to use confidential information under this document for any purpose --

THE COURT: Before you answer, that what does LCI have to do with this?

MR. EDELMAN: They're the servicer who Lombard has --

THE COURT: But are you saying that Lombard is liable if LCI disclosed confidential information?

MR. EDELMAN: I'm saying that they're contracting or about to contract with a party who's violated some NDAs and if they violated also, you have two parties who are violating NDAs.

THE COURT: I don't understand what LCI has to do with the transaction with WAC 9.

MR. EDELMAN: LCI is the party who is the servicer and who's been identified as the entity with whom they're negotiating a potential recapitalization and sale to a servicer. So that's the entity that is subject to Paragraph 6 of the McDermott declaration. So if -- that's why they're relevant, because if both parties -- and Lombard knew of the existence of the LCI nondisclosure agreement, as evidenced by them being copied on the letter which the Debtor sent to LCI saying please act cautiously because we think you're potentially violating your nondisclosure agreement. And that put LCI on notice, and then they continued to deal with them and both parties are violating their NDAs which are contracts that are subject to the Macquarie sale --

THE COURT: But how do you connect WAC 9 with LCI's violation of its own (indiscernible) letter?

MR. EDELMAN: I think we -- I think they're both potentially liable under their own individual confidentiality agreements, but if they're both acting in a way -- that starts to sound like a delusion.

THE COURT: But the only evidence I have -- well, okay. Why don't you go ahead?

MR. EDELMAN: Okay.

Q Have you seen the -- Jacqueline McDermott's declaration in support of the WAC 9 credit bid transaction?

A I saw a paragraph or two. I haven't read the whole

thing, but paragraph or two was shown to me today.

MR. EDELMAN: Your Honor, I only have a highlighted portion, highlighted to the extent -- and I know we gave one to Ms. McDermott.

THE COURT: Is it still there?

MR. EDELMAN: No, it's over there.

THE COURT: I don't think it's in any (indiscernible).

MR. NIEMANN: That's Mr. Del Genio's.

CLERK: We have extra.

MR. EDELMAN: We'll get one over.

THE COURT: But I'm looking at Ms. McDermott's declaration in Paragraph 7 and it just says Lombard has complied with the confidentiality --

MR. EDELMAN: No, no. It's the sentences above that. It's like the, Lombard is discussing with its servicer a subsequent transaction pursuant to which a designated transferee of the underlying business would be recapitalized and sold to the servicer.

THE COURT: Right. Who's the designated transferee?

MR. EDELMAN: That's their (indiscernible). That's Lombard.

THE COURT: What does that have to do with LCI?

MR. EDELMAN: They're the servicer that they're

talking to.

THE COURT: They said they're their present servicer, but I thought they were talking to somebody else.

MR. EDELMAN: There is no present servicer.

THE COURT: I thought they said LCI was the present servicer.

MR. EDELMAN: They're about to enter the contract with LCI.

THE COURT: Okay.

MR. EDELMAN: There is no present servicer because they don't --

THE COURT: Right. They don't own the helicopters. Okay.

Q So, Mr. Niemann, I'd like to point you to the -- seven lines from the bottom of Paragraph 6 on Page 3. A sentence that says, "Lombard is discussing --

A I'm there.

Q -- with its servicer." We heard the testimony of Ms. McDermott before that LCI is a servicer. Would Lombard discussing with LCI a subsequent transaction pursuant to which the assets with WAC 9 be sold to the servicer, would that be violative of the LCI NDA?

MR. SOTO: Objection to the question --

THE COURT: Sustained. Calls for a legal conclusion.

MR. EDELMAN: Okay.

Q Okay. Has Houlihan permitted LCI under its NDA to discuss with Lombard a potential recapitalization and purchase of the WAC 9 assets?

A No.

Q Has Houlihan authorized Lombard to have those discussions with LCI?

A No.

Q Do you know if Lombard approached -- did Lombard approach Houlihan with respect to the scope of servicing arrangements that it could talk to LCI about?

A There's a specific provision in the bidding procedures. I think it's actually the attachment to the bidding procedures order that speaks to the sharing of information regarding potential new servicers. Waypoint's the existing servicer, so the credit bidders were either going to have to leave the assets with Waypoint or move them to a new servicer, in this case LCI, as I understand. So there's a specific provision that speaks to the information sharing around that. I don't know if that answers your question, but that's my understanding of the arrangement.

Q Okay. I'm going to hand to you what I think has been marked as Lombard 1 (indiscernible) another copy because I don't know what happened to --

MR. EDELMAN: May I approach the witness?

THE COURT: Yes.

Q -- which is the bidding procedures order and the bidding procedures. And on Page 5 of the bidding procedures, there is a provision that talks about authorizing WAC agents and bid cos.? to deal with this servicer. Is that the provision that you were referring to?

A No, it's not. It's actually an attachment. I don't see what you're talking about on Page 5. If you could direct me.

THE COURT: First full -- the full paragraph, the last clause. (Indiscernible).

MR. EDELMAN: He's looking for --

MR. NIEMANN: I'm sorry, could you --

MR. EDELMAN: (Indiscernible).

MR. NIEMANN: I'm sorry, I was in the order.

Q It's the page with the --

A I'm getting there. Yes. That is -- the top of that page above auction qualification. That's exactly the provision I'm referring to.

Q And there's a proviso at the end of that sentence which, if you could read that, I think it provides that the WAC and the credit bid cos. can ask for permission as to what the scope of what they can talk to the servicer is. Do you know if that conversation was ever held by WAC 9?

A I think it was, because we put information in the data

room initially that we -- the company was comfortable sharing with a potential competitor or competing servicer. Sorry. My understanding is as of last week, I think Ms. McDermott said it was Friday -- I have no reason to doubt that -- we put more information in that was more sensitive information, so we would go in different levels of information sharing with potential competitors.

Q Do you know if the company ever authorized the provision of information that related to matters beyond servicing?

A As I answered earlier, no. We never authorized -- the authorization would come through Houlihan and Houlihan never authorized the sharing of information for any purpose other than servicing, alternative servicing.

MR. EDELMAN: I'd like to approach and show the witness what's been designated as Macquarie 2.

THE COURT: I just want to ask a question. Were you involved in all the preparation of bid procedure orders -- bid procedures?

MR. NIEMANN: Regrettably, yes. A lot.

THE COURT: This proviso we've been talking about that deals with the consent or permission of the Debtors, the WAC lenders, WAC facility agents, the credit bid co. putting aside the Debtors, was that on a WAC by WAC basis or did all the WAC lenders have to agree that any WAC lender

could disclose confidential communications?

MR. NIEMANN: If I understand your question, Your Honor, the concept was on a WAC by WAC because the WAC lenders didn't have each other's information. They didn't even have holdings, so we had to go silo by silo and so we had to deal with each individual WAC lender as to their ability to share information with potential servicer.

THE COURT: I guess the question is, we're talking about WAC 9.

MR. NIEMANN: Yes, sir.

THE COURT: And the argument is that WAC 9 shared confidential information improperly with, let's say, LCI. Putting aside the Debtor, did they require the permission of the WAC 3 facility to share that information or was the consent of the WAC lenders, the WAC facility and the credit bid co. on a WAC by WAC basis. Do you understand --

MR. NIEMANN: I think I understand your question. I'd answer it this way. No, other WAC lenders did not have to consent. It was solely, to my understanding, the consent right of the company. So the company had, I guess discretion, if you will, on level of information sharing. But it was as between the company and the individual WAC agent, essentially.

THE COURT: All right, thank you. Go ahead.

MR. EDELMAN: Can I approach the witness?

THE COURT: Yeah.

Q This has been marked as Macquarie 2.

THE COURT: Which one is that?

Q That is the (indiscernible) letter to LCI about --

THE COURT: Okay.

Q -- requiring LCI to comply with the terms of its nondisclosure agreement. Have you seen this letter before?

A Yes. I'm familiar with it.

Q Do you know what was a derivation why that was -- letter was sent?

A Generally, yes.

Q Could you describe that?

A The letter's dated two days after Christmas, December 27th. As I recall, mid-December or so we were concerned about information sharing with potential competitors who were being considered as alternative servicers. And so as a result of that -- I believe Mr. Soto is the author of this letter who's a partner at Weil Gotshal -- sent a letter. In my recollection of this letter, it was a very direct reminder of the responsibilities of LCI under their existing NDA and I believe this letter doesn't show CC, but ultimately was shared with one or more of the WAC lenders that might've been in dialog with LCI as an alternative servicer.

Q Didn't Houlihan learn that LCI was seeking to become

more than a servicer and wasn't that the genesis of the letter?

A I -- that does not sound correct.

Q Okay.

THE COURT: Why did LCI sign a confidentiality agreement? What was their role in all this in December -- or in August, I guess?

MR. NIEMANN: So we went out to nearly 200 potential buyers, if you will. So we went to all competitors, LCI being one of them. That's when they signed the initial, the August NDA, as did other competitors and we shared information on a more limited basis with competitors than we would with a straight financial buyer and then later LCI did not make a bid so they just kind of went by the wayside. And then the resurfaced, if you will, later as a potential alternative servicer and we had these information sharing arrangements around alternative servicing.

THE COURT: Because the NDA was entered in as part of the sale process?

MR. NIEMANN: Yes, sir.

THE COURT: Thank you.

MR. EDELMAN: May I approach the witness? I'd like to --

THE COURT: Yes.

MR. EDELMAN: -- designate Macquarie 3 or 4.

THE COURT: Four.

MR. EDELMAN: Macquarie 4.

Q Mr. Niemann, if I tell you this is a portion of the WAC 9 credit agreement that contains the confidentiality provision, would you be able to confirm that?

A Yes, this is the WAC 9 credit agreement and within that, on Page 131 at Section 12.16 is the confidentiality provision of that credit agreement.

Q Do you know whether the WAC 9 lenders or agents were permitted to talk to purchasers of the WAC 9 assets pursuant to this confidentiality provision?

A I'd have to go back and read it word for word. I seem to recall there being some restriction around speaking to competitors.

Q Okay. And do you know if Houlihan or the Debtors ever gave permission for the WAC 9 lenders or the WAC 9 agent to be excused from any of those confidentiality provisions?

A Again, I'd have to read the entirety of this confidentiality provision. I recall there being something in here regarding competitors. I do not recall Houlihan or the company ever releasing Lombard, the WAC 9 agent, to share information regarding anything other than servicing. That's all. That was the scope of it.

Q Thank you. I think that's -- no further questions.

THE COURT: Anyone else want to question the

witness? Redirect?

MR. EDELMAN: No, Your Honor.

THE COURT: You don't get to redirect.

MR. EDELMAN: Sorry.

THE COURT: Is there any redirect from Lombard? Okay, you can step down.

MR. NIEMANN: Thank you, and good evening.

THE COURT: Do the Debtors have any more witnesses?

MS. DIBLASI: No, Your Honor.

THE COURT: Lombard have any more witnesses?

MR. DIETDERICH: No, Your Honor.

THE COURT: Does Macquarie have any witnesses?

MR. EDELMAN: No, Your Honor.

THE COURT: So everybody rests?

MR. EDELMAN: Yes.

THE COURT: Okay. So I'll hear argument.

MS. DIBLASI: Kelly DiBlasi, Weil, Gotshal, and Manges on behalf of the Debtors. Your Honor, we -- as you heard during the testimony today, in particular from Mr. Niemann, the bidding procedures did release the restrictions in the NDA and permit lenders to speak with alternative service providers. And as Mr. Niemann testified, the Debtors did provide certain information, specifically for the WAC 9 agent and lender to share with the alternative

service provider with whom they were negotiating.

THE COURT: How did the Debtor do that?

MS. DIBLASI: It was posted in a data room.

THE COURT: And I thought Ms. McDermott testified to some meeting, I guess with the Steering Committee and others at (indiscernible) where the scope of permissible disclosure was discussed?

MS. DIBLASI: Yes, Your Honor. My recollection is that was discussed and was the reason why we have this provision on Page 5 of the bidding procedures. The credit bidders indicated they wanted to talk to potential credit bidders, wanted to talk to alternative service providers. We negotiated that provision that's how in the Court ordered procedures and it was important to the Debtors to ensure that we had control over the scope of the information that was shared and that was sort of the genesis of that provision.

We have negotiated and entered into an equity purchase agreement with RBS Lombard. It's the Debtors' determination that that complies with the bidding procedures and complies with Lombard's obligations under the bidding procedures. We are not aware of any violations of either those procedures or confidentiality obligations. We're certainly not aware of any evidence of that and, Your Honor, it is our determination that the streamlined credit bid

submitted by WAC 9 followed by -- is an exempt transaction and would not impose a breakup fee on this estate. Certainly if it did, we don't have the funds with which to pay that.

One other issue which has not been given much attention here but is within Macquarie's objection --

THE COURT: Let me ask a question. One of the arguments is that on the one hand, you're assigning certain rights or claims to Macquarie and on the other hand you're releasing them to some extent, to the extent you're exchanging mutual release with Lombard.

MS. DIBLASI: Correct.

THE COURT: What's your response to that?

MS. DIBLASI: The releases are broad but not unlimited. There are carveouts specifically for willful misconduct. I would argue if someone intentionally breached an NDA, that may constitute willful misconduct and would not be released. And on that note, Your Honor, Macquarie's objection does seek to carve back the scope of the releases being granted to the Debtors and its seller affiliates under the equity purchase agreement and this is another point on which the Debtors must object because if these releases are carved back in the way that Macquarie proposed, it potentially exposes the estates to liabilities.

THE COURT: Which number is the Macquarie

objection? It just takes a while to find some of these documents.

MS. DIBLASI: I understand, Your Honor. Macquarie objection to the WAC 9 sale is ECF Number 339.

THE COURT: I have that. Okay. And which provisions are they trying to cut back or limit?

MS. DIBLASI: In the mutual releases, Your Honor, they argue that it's overly broad and they propose changes that would carve back no only the release that the buyer, RBS Lombard, is receiving but also the release that the Debtors would be receiving and we do not consent to that and have concerns that any change to that release would expose the estate to potential liability.

MR. EDELMAN: Your Honor, we only meant to carve out the release for the Lombard side. That was an overzealous editing.

THE COURT: Is the release that Lombard is getting inconsistent with the release referred to in the DIP procedures?

MR. EDELMAN: We believe that they are because the release in the bidding procedures did not talk about anything that would be releasing an asset that was being transferred to Macquarie.

THE COURT: Because it could've just said general release. That was my recollection.

MR. EDELMAN: It did, but if the Debtors have, under these bidding procedures, agreed to transfer assets to Macquarie, they shouldn't be entitled to diminish that. One of the provisions of the APA is that the Debtor shall maintain the current status of the assets, so that would be a violation of the APA because releasing rights under the NDAs would be undercutting the current status of the assets.

MS. DIBLASI: For the record, Your Honor, the Debtors believe that the release in the equity purchase agreement as we signed it are consistent with the release provision in the bidding procedures.

THE COURT: I'm looking for the release in the bidding procedures.

MS. DIBLASI: It is on Page 15, Your Honor, of the bidding procedures. It's at the top of the page --

THE COURT: Okay.

MS. DIBLASI: -- in Paragraph D.

THE COURT: It seems like a very broad release, Mr. Edelman, in the bidding procedures.

MR. EDELMAN: Well, it just says a mutual release. But --

THE COURT: Well, it's a mutual release of all -- "The release shall include any claim that could be brought by or on behalf of such releasing party." That's pretty broad. That sounds like a general release.

MR. EDELMAN: Well, the same bidding procedures contains provisions that are -- that the transferred assets are being transferred to Macquarie.

THE COURT: Okay.

MR. EDELMAN: So, you know, this is just very generalized language here. It doesn't talk about what happens with assets. It's only supposed to deal with assets that relate to their particular WACs. If they're damaging other Debtors, which that would be the basis of our NDAs, we don't really care what happens to their particular WAC. But if they have damaged Macquarie for other WACs and/or our rights under the general bidding procedures, that's --

THE COURT: What's the evidence that anything they did damaged another WAC?

MR. EDELMAN: Well, we have the evidence of -- from Lombard themselves that said that they have contacted the servicer about alternate arrangements which we had no right to do under both their nondisclosure agreement and also the LCI nondisclosure agreement.

THE COURT: But there's a continuum here and you enter into credit bidding provisions. And I've said this before, but these are lenders. They don't manage helicopters and they don't want to own helicopters, so there's a provision in the credit bidding procedures or in the bid procedures which say that with the permission of the

Debtor and the relevant WAC, information can be exchanged with a servicer, right?

MR. EDELMAN: That's correct.

THE COURT: And is there any evidence that any information that was exchanged with LCI was not within the scope of the consents that were granted by the Debtor, either explicitly or implicitly by putting the information in the data room?

MR. EDELMAN: Your Honor, there is evidence because we have the express admission here which violated our bidding rules.

THE COURT: Where?

MR. EDELMAN: In their affidavit, their declaration. They violated their NDA.

THE COURT: How did they -- let's put the NDA aside. This started out with a concern that they were not credit bidders because they entered into some business combination or some agreement which deprived them of that status. I don't see anything that you showed me in the bidding procedures or any other document which says they're not a credit bidder, but the evidence is that Lombard made the bid and it's been talking to entities about potentially selling the assets which, as I said, they're not in this business.

MR. EDELMAN: That might be true, but they don't

own the assets and until they own the assets, they're subject to the nondisclosure agreements and they're subject to the bidding procedures. So what you have here is two entities that are going out and they probably got comfort from LCI to put a credit bid that effectively deprived Macquarie of the benefit of the bargain.

THE COURT: That's speculation. What's the evidence of what they told LCI?

MR. EDELMAN: We just found out about their admission --

THE COURT: What's the evidence of what they told LCI and how it violated any confidential information?

MR. EDELMAN: They've admitted that they will soon enter into agreement.

THE COURT: Okay, but that doesn't tell me what they told LCI. You're saying that you have a claim for breach of the NDA or breach of the credit, but I don't know what they said. That's what I'm saying.

MR. EDELMAN: Well, we know what they said but they talked about the selling the business. Recapitalizing and selling.

THE COURT: Okay, but the limitation is not on the subject matter so much as what information (indiscernible).

MR. EDELMAN: That's actually not correct, Your Honor. The Lombard credit -- the Lombard NDA specifically

said that they were barred from contacting anyone beyond -- in Paragraph 3. It's not just the information, it's that the recipient of the company agreed that -- sorry. "Neither recipient or its representatives will contact any potential lender or potential investor, competitor, customer, supplier." And that's exactly what they did. They contacted --

THE COURT: Well, but they were subsequently authorized to do that, right?

MR. EDELMAN: Only about servicing, not about a wholesale sale of their assets or --

THE COURT: But how does it make them not a bidder? Let's get back to the, what I'll call the big money item, the breakup fee. How does that entitle you to a breakup fee from them? Maybe you have a claim for breach of the NDA, but how does that entitle you to a breakup fee from them?

MR. EDELMAN: Well, if they acted in concert, say, we'll enter into an agreement with you to sell this two days after --

THE COURT: But that's not the evidence.

MR. EDELMAN: Your Honor, we just got the admission yesterday.

THE COURT: But today's the sale hearing.

MR. EDELMAN: Your Honor, they've admitted that

they're violating the nondisclosure agreements.

THE COURT: No. No, no, that's -- no. They're admitting that they are discussing the possibility --

MR. EDELMAN: No --

THE COURT: Let me finish. They're admitting that they are discussing the possibility of a transaction of some sort --

MR. EDELMAN: And that's a violation of the NDA.

THE COURT: -- with the servicer.

MR. EDELMAN: That's a violation of the NDA because that's not a servicing --

THE COURT: So let's assume that you're right. How does that not make them a credit bidder, though?

MR. EDELMAN: If -- we've stated from the very beginning, we gave an express limited carveout solely to the lenders and if they're acting to expand or vacation from a breakup fee so that any other -- they're entering into any other party transaction, that's not the vacation.

THE COURT: But that doesn't follow. I mean, they bid. The testimony was Lombard alone bid. They don't have an agreement with anybody. Yeah, they've been talking about it because they don't want to own these assets and they're not in the business, but I don't understand how that affects their status as a credit bidder. The NDA is a different issue, but -- because I know you've alleged it with respect

to good faith and also with respect to maybe there's a violation. I don't know what the remedy would be, but I don't understand how it would make them something other than a streamlined credit bidder.

MR. EDELMAN: We think -- well, you're correct. We haven't done discovery yet, but we only found out about this yesterday and brought this to this Court's attention today.

THE COURT: All right, and I've heard the evidence. I've heard two witnesses and the evidence is they don't -- yes, they've discussed a possible agreement. I don't know what they discussed. They were authorized to release information to the servicer about the income and the actual helicopters that were owned. In the course of servicing, they get that information. What are they supposed to do, shut it out if they want to enter into a transaction?

MR. EDELMAN: Your Honor, the case law about being in good faith is clear.

THE COURT: Okay, so we're talking about good faith now, we're not talking about credit bidding anymore?

MR. EDELMAN: Well, they're using good faith as -- to insulate under 353 --

THE COURT: So what's the bad faith?

MR. EDELMAN: The bad faith is that they are

treating Macquarie grossly unfairly.

THE COURT: How?

MR. EDELMAN: By breaching the NDA that is expressly being transferred to Macquarie.

THE COURT: So you're saying --

MR. EDELMAN: They plotted --

THE COURT: -- breach of the NDA so simply discuss --

MR. EDELMAN: (Indiscernible).

THE COURT: Let me finish. It's a breach of the NDA to discuss with anybody that after we acquire these assets, we'd kind of like to sell them?

MR. EDELMAN: Any contact with any party other than servicing would be a breach of the NDA. That's correct. They should wait until after they become the owners. They flouted the bidding procedures which set up strict requirements for how you could get third parties involved. Third parties were supposed to submit this by January 4.

THE COURT: Right.

MR. EDELMAN: Then we gave the allocation. Then there were credit bids. And what they've done is they've done this hybrid approach which allows them to talk to LCI to damage Macquarie. They were willing -- this is not a not a --

THE COURT: How is Macquarie damaged?

MR. EDELMAN: Well, we are not getting out breakup fee.

THE COURT: But you're not -- okay, how else are they damaged?

MR. EDELMAN: Well, they violated the bidding rule because, frankly, without them talking about such matters as a potential offloading, they probably wouldn't have given the credit bid and Macquarie would've had a more valuable entire entity.

THE COURT: That's speculation. That's not evidence.

MR. EDELMAN: It's speculation that is preserved by the bidding procedures that everyone expressly agreed to and it's also preserved by the NDAs.

THE COURT: So you're saying that, hypothetically, they couldn't go to somebody and say if we buy these assets, would like to buy them from us, before the sale closes?

MR. EDELMAN: That's correct. That would be a violation of the NDA.

THE COURT: Okay.

MR. EDELMAN: Under their express terms. Their actions are so night and day different than the other WAC which we dealt with which was WAC 12 who completely opened up and showed us all the transactions and made us feel

comfortable. We've approached them and they shut down the discussion, said no, unless you withdraw your objection we're not talking to you.

THE COURT: Okay. All right.

MR. EDELMAN: So we think that we've been treated unjustly.

THE COURT: So basically -- well, I don't know about (indiscernible) showing that, but basically the argument is that you're not entitled to a good faith binding because you discussed a potential transaction with another entity post-confirmation and that violated the NDA. So what's your response to that?

MR. DIETDERICH: For the record, Andy Dietderich. We didn't violate the NDA. The NDA itself has been mischaracterized. The NDA has a proviso to it that says the lender can share pursuant to the confidentiality provisions in the credit agreement. The credit agreement was not put up. We have testimony from Ms. McDermott that says the conversation she had with a servicer were known to the Debtor. We have conversations with Mr. Niemann saying that the sharing of this information was put into the data room.

Ms. McDermott testified specifically that she couldn't give them the information that they needed to buy the company because it was qualitatively different than the information she needed as the servicer, right, when she said

they didn't have underlying information about the assets. And as to this idea that it's a violation of the NDA somehow in a material way, for us to have a conversation with somebody we're already in the deal with about servicing, about ownership, we don't see a basis for that in the contract.

Your Honor also raised an issue with Page 5 of the bidding procedures border about the authorization to share information with the alternative asset manager. And just to point Your Honor to that provision at the top of Page 5, it starts by talking about such WAC facility agent. So the provision is as Mr. Niemann testified also on its face, that it can be waived with respect to a WAC facility by the Debtor and the agent and the credit bid co. for that thing. In addition, the definition of credit bid co. is very interesting.

Credit bid co. is not just the lender, Your Honor. It's an entity designated by the agent, right? So this already contemplates a proposition where the agent doesn't actually take the asset itself, of course, because it's a credit bid and banks don't often want to have the entity -- have the asset themselves. The definitions of streamlined credit bid and credit bid are fully negotiated. Nowhere in the definition of streamlined credit bid does it say that Lombard has to hold the asset for a period of time.

Nowhere does it say -- and Lombard has no back-to-back arrangements, Your Honor -- but nowhere does it say that a back-to-back arrangement would even be prohibited, as long as Lombard stands with the Debtor, is tendering its debt in exchange for assets, which it is, and is following the requirement for credit bid. We don't need to invent in this case what a requirement for credit bid is. We can look in the bidding procedures as approved by the Court that has enumerated requirements for credit bids.

And Ms. McDermott has testified that the bid has satisfied very single one of those requirements. In addition, Mr. Niemann testified that it satisfied the requirements for a streamlined credit bid and the Debtors have certified our credit bid as a streamlined credit bid.

THE COURT: I don't have an issue with that. It's this question about a good faith finding. You go out before the consummation of your transaction and you discuss -- regardless of what you discuss, you discuss with someone else once we get it, we'll sell it to you or we'll talk to you about selling it.

MR. DIETDERICH: Again, from our perspective, our bidding procedures say that the agent can designate somebody to take the asset. So they expressly contemplated that, right? In addition, it's not a requirement anywhere that we couldn't do that. We didn't negotiate with Macquarie. We

negotiated with the Debtors, right? And so from our perspective, there is nothing that stops us from arranging a transaction or beginning to arrange in transaction behind the scenes.

Again, we believe any conversation we've had would've been consistent with the NDA architecture, but it's certainly not bad faith of any sort. In fact, Your Honor, the reason why that sentence is in Ms. McDermott's affidavit is we wanted to be completely up front with everybody which is exactly the opposite of bad faith. Thank you.

THE COURT: Anyone else want to be heard on this? I'll give you the last word, Mr. Edelman.

MR. EDELMAN: Okay. First of all, if you look at all the references to the credit bid co., that's an entity formed by the WAC agent. So them saying that that's a third party does not conform with the terms of the bidding procedures. Second, the prepetition credit agreement they said we didn't submit, we actually did submit the confidentiality provision and we heard the testimony from Mr. Niemann that there was no waiver of those requirements by the Debtor. The credit bidding requirements under --

THE COURT: So which provision -- it's a long provision, 12.16. What is it that they violated? Which section?

MR. EDELMAN: It's at the end of B, which -- I'm

sorry... It says that -- at the very beginning, it says, "Subject to the provisions of Clause B, it will not disclose" -- this is the second line, I think -- "it will not disclose without the prior consent of the manager any information with respect to any permitted holder, holdings, or subsidiaries or any other leases, lessees, sublessees, which is now or in the future furnished pursuant to this agreement or any other agreement."

And then it goes down two lines that basically solely -- "the information shall solely be used for purposes of valuating its investment in the term loans hereunder in connection with administering and enforcing any of its rights and remedies." Selling its assets pre-ownership doesn't fit within what's permitted under that credit agreement.

THE COURT: That's a limitation on the information that can be used, right?

MR. EDELMAN: That's correct.

THE COURT: But you haven't told me what information they used which violated the confidentiality agreement.

MR. EDELMAN: Actually this provision states -- is referenced in the Lombard nondisclosure agreement and says that unless permitted under this provision, it's a violation of that NDA.

THE COURT: But the provision is still content -- it's focused on content, not that they talked to somebody.

MR. EDELMAN: That's right. That's --

THE COURT: And I come back to the question, what is the evidence that they disclosed information that they couldn't disclose under this provision?

MR. EDELMAN: Well, that's why we focused mostly on their nondisclosure agreement which focused on contact, not just the scope of the information. And the nondisclosure agreement in Paragraph 3 talks about any contact with anyone, basically. And it's as broad a provision as you could possibly draft, that it prevents them from doing that without getting some consent from the Debtors with they didn't have. Paragraph 3.

THE COURT: Yeah, I'm looking for it.

MR. EDELMAN: Your Honor, if you want another copy --

THE COURT: I have (indiscernible).

MR. EDELMAN: Your Honor, you know, good faith and receiving the benefits of the releases, it's really a burden that is on the proponent of the party who's trying to get the good faith finding and we've shown that they violated the NDA. We believe that they violated the intent of our agreement for vacation from breakup fee which was extraordinary unto itself.

They've acted in complete difference with the WAC 12 lenders that they've basically hidden from us what they've done and we just found out one day ago, so maybe the answer here is to allow us a brief period for discovery before allowing them to have the benefits of the releases and the good faith finding because we think that the -- there's evidence or at least some indicia they definitely violated the NDA by the very terms because they contacted a party beyond the scope.

It doesn't deal with the content. They talked about a transaction and that's beyond the scope. We know that their counterparty, LCI, was also -- there's risk about and --

THE COURT: Well, but you know, I heard that evidence and I don't know that anything LCI did had anything to do with WAC 9.

MR. EDELMAN: Okay. But --

THE COURT: What I'm saying is if LCI violated --

MR. EDELMAN: We think that --

THE COURT: -- some confidentiality agreement, you haven't tied WAC 9 into that.

MR. EDELMAN: We think there's enough at risk here and at the very least we should get a carveout for our nondisclosure agreement so it's not covered by their releases because, frankly, those are supposed to be our

assets and we think actually their good faith finding should be not -- or at least carved out from the bidding -- you know, our rights under the bidding procedures and the nondisclosure agreement should be carved out.

THE COURT: So the argument is that you violated the no contact provision of the nondisclosure agreement and therefore you didn't act in good faith? Forget about what you told them or didn't tell them, you contacted them, and that's a matter of record.

MR. DIETDERICH: Your Honor, why don't we parse it this way? The no contact provision of the NDA, right, seems completely immaterial. We do not need a specific finding on whether or not we violated or didn't violate the no contact provision --

THE COURT: You want a good faith finding?

MR. DIETDERICH: -- of the NDA. Right. We very much want a good faith finding.

THE COURT: The argument is that you can't get a good faith finding if you violated the NDA.

MR. DIETDERICH: We disagree with that.

THE COURT: You want to brief the issue?

MR. EDELMAN: We welcome that op, Your Honor.

MR. DIETDERICH: Your Honor, Your Honor. I think the question is the following. The first and most important thing are the mutual releases. The releases are a question

of the Debtor's business judgment. This claim, right, of any past violation of the NDA, is a question that's purely historical. It doesn't go forward, right? It's a claim by the Debtor when the Debtor had the NDA and it's within the power of the Debtor to release and the Debtor's business judgement to release.

Macquarie going forward might be acquiring contractual rights, but it's not acquiring historical claims under those contractual rights.

THE COURT: (Indiscernible) the transfer of claims, but they're arguing more. They're saying you're not entitled to a good faith finding under 363(m). Forget about the claims. Probably they're going to be hard pressed to prove they were damaged, I think. But they're saying you're not entitled to a good faith finding because you violated the no contact provision of the NDA.

MR. DIETDERICH: Again, Your Honor, we did not violate -- if we violated the no contact provision of the NDA, right, that was done in a way and manner that we think was straightforward and understood. The facts of our discussions are fully disclosed on the record in the affidavit. Right? Those discussion are completely immaterial to Macquarie because they relate to an asset that Macquarie had already, at the time of these discussions decided it was not purchasing.

Remember that Macquarie has no ability to match our bid when we put in a credit bid. There's been no allegation that any of this happened.

THE COURT: So you're saying if it's a violation, it's an immaterial violation that doesn't bear on the good faith?

MR. DIETDERICH: By definition, it didn't go to the bidding contest such as it was between us and Macquarie because as soon as we put in our credit bid at the full amount as anticipated, Macquarie had no ability to match our bid. So anything that happened after that with respect to this contact provision in the NDA, by definition, cannot affect Macquarie's bidding behavior or our bidding behavior. So it can't go to the good faith about our bid which was made and accepted by the Debtor before this was relevant.

MR. EDELMAN: Your Honor, we disagree with that, obviously. We think actually that a party violating the NDA could've gotten comfort and that's why they actually decided to go -- not sell the assets and they took a significant -- a value of assets away from us and only a party who if they think that we need more discovery about this --

THE COURT: Well, look. Today's the hearing under the local rules. First of all, their response was generated by your objection. So I assume you had a basis to make that objection. But today is the hearing under Local Rule 9014-

2. It's the evidentiary hearing and this is, by nature, an expedited process.

MR. EDELMAN: We understand that, but it's still --

THE COURT: But is there evidence as to when this contact with LCI or whoever the servicer is occurred vis-à-vis possibly taking these assets off their hands? In other words, he's saying you tainted the bidding process and Mr. Dietderich has said well, it didn't affect the bidding process. But one of the questions I have is when did the contact take place?

MR. EDELMAN: Well, they presented a witness who wasn't -- who said that she was not directly involved --

THE COURT: All right, so --

MR. EDELMAN: -- with the contact with the servicer.

THE COURT: So how does that prove that it tainted the bidding process.

MR. EDELMAN: You're putting -- the burden is on the party who's getting the benefit of a good faith finding to prove that and we've shown that they have acted in violation of their NDA.

THE COURT: What's the evidence that it affected the bidding?

MR. EDELMAN: Since we don't know the timing, we

don't know exactly the effect of the bidding, but we believe it did.

THE COURT: Yeah.

MR. EDELMAN: And --

THE COURT: With respect, beliefs are not evidence.

MR. EDELMAN: No, obviously. I mean --

THE COURT: All right. I've heard enough. Let me deal first with the breakup fee because I think that is the easiest issue to deal with. I see nothing in the evidence or in the documents that I've seen that changes WAC 9 status from a streamlined bidder -- streamlined credit bidder to a third-party bidder. The evidence is, through Ms. McDermott, that it was Lombard that made the bid. It didn't make the bid on behalf of itself and anybody else. It wasn't in a business combination with anybody else. It made the bid.

The evidence is that in the course of making the bid as a lender, didn't want to own the assets so it started to talk about the possibility of unloading these assets which, putting aside the NDA, is hardly a surprising point. Since they're a lender, they're not an owner or manager of helicopters. They don't want to own the collateral. They want to liquidate the collateral and get paid back.

With respect to this NDA issue, in terms of content there's absolutely no evidence about what

information was given to LCI or whoever the servicer is and was referred to in Ms. McDermott's declaration. The testimony from Ms. McDermott was that they were given permission, Lombard was given permission to share with the servicer the helicopters and, I guess, the gross revenue or the net revenue (indiscernible) without identifying who the lessees were.

There's no evidence that they shared any information beyond that, so this brings us to the no contact issue in the NDA. It looks like it's a technical violation of the NDA, but it doesn't seem to have affected the bidding at all or the transaction at all. And I don't know how you can say they acted in bad faith based on contacting somebody about the possibility that once they get these assets they want to sell them because they don't want to hold onto them because they got to pay a servicer and they have to do all these other things and pay insurance that an owner has to pay when all they want to do, because they're lenders, is liquidate their collateral and get paid back.

I just don't see how that affects the good faith of the process. Moreover, in terms of the mutual -- the releases, the releases that's being given is consistent with the releases identified in the bidding procedures order except that there is now a carveout for willful and malicious injury, and I'm not (indiscernible), willful

misconduct and gross negligence.

And you can make the argument, Mr. Edelman, that if you've gotten that claim and somebody knowing violated, I guess, a provision restricting the use of confidential information, they engaged in willful misconduct but that's for another day.

Seems to me that the Debtor, consistent with the bidding procedures order, is giving the general release of all claims the Debtor could've brought and that there were no -- you were a participant in this process and nobody said, hey, wait a minute, there should be a carveout for claims that are being assigned to me or rights that are being assigned to me. So the release to that extent is consistent with what everybody agreed to including Macquarie in the bid procedure orders.

So I'm overruling the objections. You have to provide me, though, with a form of an agreement which includes that cushion that we talked about several hours ago at this point. A form of order. I'll review it. My impression is that the order is too long. I mean, there's only so many times you can buy free and clear and that it's not a fraudulent conveyance and that you're not subject to successor liability and it's not a continuation of the prior business.

You only have to say it once and it should be on

the findings of fact, not the conclusions of law. So I have -- so I need the sale orders in Word form for 9 and 12; 3 is not on -- who is it, 2? Two is not on for today.

MS. DIBLASI: Correct.

THE COURT: I'll need an order in Macquarie which includes that cushion that we talked about.

MS. DIBLASI: Yes, Your Honor.

THE COURT: Anything else?

MS. DIBLASI: And the order on the emergency motion on the allocation dispute.

THE COURT: Right. Which I've approved in the course of this discussion but the emergency allocation, the only dispute with respect to that, nobody disputed the amounts in the budget, it was just the allocation.

MS. DIBLASI: Just the allocation (indiscernible).

THE COURT: And that's been resolved earlier today.

MS. DIBLASI: Yes, Your Honor.

THE COURT: Okay, while we were all still young, I guess.

MS. DIBLASI: We will --

THE COURT: I say that so the record will reflect it's almost 7:00 at this point.

MS. DIBLASI: Yes, and on that note, we thank the Court --

THE COURT: Sure.

MS. DIBLASI: -- and your staff for their time and extended time this evening. We will submit those orders as quickly as possible, probably you'll get them sometime tomorrow because it'll take us some time to --

THE COURT: Now, what about their emergency motion, WAC 9's emergency motion to dismiss the case?

MS. DIBLASI: Yes, Your Honor.

THE COURT: The one question I have about your motion is you kind of want an order now, that way you consummate the transaction the case is dismissed. But we have to know when the case is dismissed, the U.S. Trustee has to know when the case is dismissed. It's got to be a very clear point. So what you can do is I'll grant the motion. I didn't hear any objection to it. But you have to -- I'm not signing that order and dismissing the case until I get a certification from you that the transaction has closed. And at that point, I'll sign the order so everybody knows that's when the case is dismissed.

MR. DIETDERICH: That makes sense, Your Honor, and we have one more. We've spoken about the Debtor with this. We have one more very technical point. We also would like to put in another condition to the entry of that order which is a certificate of no objection from the Debtor and here's why. Because there's a technical argument that they can't

cooperate with a dismissal of the case until after we close our transaction. So we've told the Debtor that they could object for now --

THE COURT: Okay.

MR. DIETDERICH: -- on the expectation that once we're closed, they'll cooperate and we'll sign under --

THE COURT: Yeah, the order should also provide for the deconsolidation of the WAC 9 Debtors -- I guess the same is true of -- well, WAC 12 doesn't have a motion to dismiss at this point.

MS. DIBLASI: Yes, the sale order actually provides that upon closing, those Chapter 11 cases are severed from the joint action.

THE COURT: The clerk has to know so that the clerk can close those cases and deconsolidate them.

MS. DIBLASI: Understood, Your Honor.

THE COURT: All right. Otherwise, the clerk will never close them.

MS. DIBLASI: Okay.

THE COURT: All right, anything else? All right, thank you very much.

MR. DIETDERICH: Thank you, Your Honor.

MS. DIBLASI: Thank you very much.

MR. EDELMAN: Thank you, Your Honor.

THE COURT: If you want, you can leave your stuff

here. We'll lock the room and then you can send someone to pick it up tomorrow, if that's easier.

(Whereupon these proceedings were concluded at 6:56 PM)

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

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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