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UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF TEXAS  
HOUSTON DIVISION

HI-CRUSH INC., )  
) CASE NO: 20-33495  
Debtors. )  
) ADV. CASE NO: 20-03471  
-----)  
HI-CRUSH PERMIAN SAND LLC, ) Houston, Texas  
) )  
Plaintiffs ) Thursday, March 30, 2021  
Vs. )  
) 1:58 p.m. to 4:18 p.m.  
EOG RESOURCES, INC., )  
) )  
Defendants. )  
-----)

HEARING

BEFORE THE HONORABLE DAVID JONES  
UNITED STATES BANKRUPTCY JUDGE

APPEARANCES:

For Plaintiffs: JOSEPH WILLIAM BUONI  
Hunton Andrews Kurth LLP  
600 Travis, Suite 4200  
Houston, TX 77002

For Defendant: SARAH A. SCHULTZ  
Akin Gump et al  
2300 N. Field Street, Suite 1800  
Dallas, TX 75201-2481

Court Reporter: UNKNOWN

Courtroom Deputy: UNKNOWN

Transcribed by: Veritext Legal Solutions  
330 Old Country Road, Suite 300  
Mineola, NY 11501  
Tel: 800-727-6396

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**GOVERNMENT'S EXHIBITS      RECEIVED**

1 HOUSTON, TEXAS; Thursday, March 30, 2021; 1:58 PM

2 (Call to Order)

3 THE COURT: Good afternoon everyone. This is  
4 Judge Jones. The time is two o'clock. Today is March 30,  
5 2021. This is the docket for Houston, Texas. Next on this  
6 afternoon's docket, we have Adversary Number 20-3471 Hi-  
7 Crush Permian Sand, LLC versus EOG Resources. Let me go  
8 ahead and take appearances, starting with those folks who  
9 are ongoing. Mr. Buoni good afternoon, do you wish to make  
10 an appearance?

11 MR. BUONI: Yes, Your Honor. Good afternoon.  
12 This is Joe Buoni with Hunton Andrews Kurth, appearing for  
13 Hi-Crush Permian Sand, LLC.

14 THE COURT: Thank you. Ms. Schultz, good  
15 afternoon to you. Do you wish to make an appearance?

16 MS. SCHULTZ: Yes, Your Honor. Good afternoon.  
17 Sarah Schultz, Akin Gump Strass Hauer & Feld, appearing on  
18 behalf of EOG Resources, Inc., along with my colleague,  
19 Laura Warrick, who will be argument for us today. Erin Peek  
20 will be handling -- she will be the master of our PowerPoint  
21 presentation and the (indiscernible).

22 THE COURT: All right, thank you. Ms. Warrick do  
23 you want to go ahead and make your appearance so we get a  
24 good voice print?

25 MS. WARRICK: Yes. This is Laura Warrick with

1 Akin Gump Strass Hauer & Feld here today on behalf of EOG  
2 Resources, Inc.

3 THE COURT: All right, thank you. And Ms. Lewis,  
4 did you want to make an appearance?

5 MS. LEWIS: Yes, Your Honor. Good afternoon.  
6 Ashley Lewis, with Hunton Andrews Kurth, on behalf of Hi-  
7 Crush Permian Sand, LLC.

8 THE COURT: All right, thank you. That's everyone  
9 that I have on GoToMeeting that's turned their camera on.  
10 Is there anyone else that wishes to make an appearance? All  
11 right. Ms. Warrick, before we get started -- and Ms.  
12 Schultz told me, and quite frankly, it just didn't register.  
13 Who do I need to transfer control to?

14 MS. WARRICK: Erin Peek.

15 THE COURT: Erin Peek. There she is. All right,  
16 she should have control and you have the podium whenever  
17 you're ready.

18 MS. WARRICK: Thank you, Your Honor. Erin, if you  
19 could go ahead and put up the deck, when you're ready.

20 Your Honor, we're here today on EOG Resources,  
21 Inc. motion to dismiss, which is filed at docket number 18  
22 in this adversary proceeding.

23 EOG is moving to dismiss all counts of Hi-Crush  
24 Permian Sand, LLC amended complaint, which is filed at  
25 docket number 14, for failing to stay a claim upon which

1 release may be granted. We're moving pursuant to Federal  
2 Rule of Civil Procedure 12(b)(6), which is made applicable  
3 in this proceeding by Federal Rule of Bankruptcy Procedure  
4 7012.

5 I want to acknowledge at the outset that the  
6 amended complaint is to be viewed in the light that's most  
7 favorable to the Plaintiff, to Hi-Crush, and that the well-  
8 seated facts and complaints would be taken as true. As that  
9 said, where a Plaintiff attaches evidence to its complaint,  
10 the Court may consider that and (indiscernible) considered,  
11 the evidence that's attached to the complaint in this case.  
12 And we suggest that the Court should also consider matters  
13 of public record. We have a couple that we will talk about  
14 over the course of this presentation today.

15 Going to the next slide, before we get into the  
16 argument, I just wanted to give you a quick (indiscernible)  
17 of where we're going.

18 First, we're going to talk about some of the  
19 relevant facts that are at issue here, and that are  
20 reflected in the timeline that you see on your screen.  
21 We'll talk about the 2017 sand purchase agreement that was  
22 executed between EOG Resources and Hi-Crush's predecessor,  
23 Permian Basin Sand Company, LLC. That sand purchase  
24 agreement was amended in 2018 and Hi-Crush, the Plaintiff in  
25 this action, replaced Permian Basin Sand Company LLC with

1 EOG as counterparty to that agreement.

2 We'll also look at the June 25, 2020 10-Q that Hi-  
3 Crush Inc., which is a parent company of the Plaintiff in  
4 this action, filed on behalf of itself and on behalf of its  
5 subsidiaries, including Hi-Crush, which describe a default  
6 under the credit facility and expectation to file for  
7 bankruptcy, among other things.

8 Two days after that, on June 27, 2020, EOG  
9 notified Hi-Crush of an immediate termination of the sand  
10 purchase agreement, pursuant to Section 7(b) of that  
11 agreement. Hi-Crush responded, acknowledging receipt that  
12 the (indiscernible) had been terminated.

13 Then, 15 days after EOG's termination of the  
14 agreement, Hi-Crush filed for bankruptcy. And Hi-Crush is  
15 scheduled for the bankruptcy, so that there were -- that had  
16 had liabilities exceeding (indiscernible) nearly \$20 million  
17 as of this date.

18 So, after that -- if you turn to the next slide --  
19 we'll look at the claims in Hi-Crush's amended complaint,  
20 none of which can survive this (indiscernible) motion.

21 I noted at the outset, it was a very favorable  
22 view with which the Court to look at the complaint, as it  
23 relates to the Plaintiff. But the Court, as I noted, can  
24 consider documents that are attached to the complaint, and  
25 can consider matters of public record.

1           So, dismissal is warranted under Federal Rule of  
2 Civil Procedure 12(b)(6). And we'll go through each of the  
3 counts (indiscernible), in a few minutes. Taking them out  
4 of order, in terms of how they're pled in the amended  
5 complaint, but we'll address them in a way in which they're  
6 addressed in the briefing. We're talking about the breach  
7 of contract action, which is count two; then, the  
8 declaratory judgment claim, count one; then look at the  
9 attorneys' fees request. And finally, constructive  
10 fraudulent transfer claim (indiscernible).

11           Next slide, please.

12           So, as I mentioned, we'll start with the relevant  
13 facts. The facts that are contained on the following slides  
14 are based on either the allegations and complaints, the  
15 documents that are attached to the complaint, and matters of  
16 public record about which the Court may take judicial  
17 notice. Next slide, please.

18           I'll start at the beginning. I'm sure -- I know  
19 that the Judge reads everything and this is a refresher, but  
20 the Plaintiff in this case here is the Debtor, Hi-Crush.  
21 And Hi-Crush is in the business of supplying frac sand. The  
22 Defendant is EOG, my client. It is an E&T company that  
23 utilizes frac sand during the process of drilling and  
24 completing wells. Next slide, please.

25           Hi-Crush and EOG were parties to the sand purchase

1 agreement. And that agreement provided for Hi-Crush to  
2 sell, and for EGO to purchase frac sand. The sand purchase  
3 agreement included an annual minimum purchase requirement,  
4 and provided for shortfall payments, annual shortfall  
5 payments, in the event that the annual minimum was not met.  
6 Those terms are confidential and the sand purchase agreement  
7 has been filed under (indiscernible) in this case. But it  
8 is described in the complaint, and (indiscernible) on track,  
9 and if (indiscernible) a minimum volume commitment in the  
10 current (indiscernible) agreement.

11 The term is also a confidential provision of the  
12 contract, but it -- we can't say that there was a set  
13 initial term, for a certain period of time, that's  
14 identified at paragraph 18 of the unredacted amended  
15 complaint. And it was subject to potential (indiscernible).

16 Next slide, please.

17 So, with respect to that term, the sand purchase  
18 agreement did contain an early termination provision.  
19 That's contained at Section 7(b) of the agreement, and is  
20 really going to be our focus here today.

21 As you see on your screens, Section 7(b) provided  
22 that, in the event that either party -- not just EOG, but  
23 either of the two parties -- should satisfy one of the five  
24 categories identified in Section 7(b), then the other  
25 parties shall have the right to immediately terminate the

1 agreement.

2 And it's the two termination provisions that we're  
3 focused on, are Number 3, which is when one party becomes  
4 bankrupt or insolvent, however evident, or unable to pay its  
5 debts as they fall due. And again, upon the occurrence of  
6 either of those conditions, then the counterparties to the  
7 agreement will have the right to immediately terminate the  
8 agreement. And that will be important when we look  
9 constructive fraudulent transfer claim.

10 THE COURT: Sure. Is there a definition, or do  
11 you have a definition, for purposes of this agreement, of  
12 the term 'bankrupt'?

13 MS. WARRICK: I don't believe it's a defined term  
14 in the agreement. And I mean, it's different than filing a  
15 petition for bankruptcy, but that is --

16 THE COURT: And it has to be different than  
17 insolvent, right, because it says 'or'? So, what does it  
18 mean?

19 MS. WARRICK: Correct. I mean, I think it would  
20 probably mean, like a state of bankruptcy. I think it would  
21 be, honestly, fairly similar to insolvency, but inability to  
22 pay debts as they fall due, you know, liabilities  
23 (indiscernible).

24 THE COURT: Wouldn't be that, because that that's  
25 (iv), right?

1 MS. WARRICK: That is (indiscernible) four,  
2 correct.

3 THE COURT: So, I mean -- in evaluating this,  
4 aren't I supposed to try and give meaning to every single  
5 term? And if that's true, what does that mean?

6 MS. WARRICK: Your Honor, we're happy to examine  
7 that more. But I would -- how I have been thinking about  
8 it, and I think this is consistent with the rest of the  
9 contract, and it's particularly 7(b)(ii), which talks about  
10 filing a petition for bankruptcy. But it is (indiscernible)  
11 in a condition to -- in which you could file for bankruptcy.  
12 You know, that might not have happened yet, or wouldn't have  
13 happened yet; or number two would be satisfied. But kind of  
14 being in that state where you're insolvent or, you know,  
15 (indiscernible) and you would otherwise have the ability to  
16 file for bankruptcy.

17 THE COURT: Well, I mean, can't anybody file for  
18 bankruptcy? I mean, all it takes is a check and a petition,  
19 right?

20 MS. WARRICK: That's correct, but the bankruptcy  
21 could be dismissed if it was improperly filed and there is  
22 no basis for the Debtor to be --

23 THE COURT: Sure. Lots of things could happen.  
24 But I was just going off of your comment, 'could file.'  
25 Anybody can file, right? Whether or not they should file is

1 an entirely different discussion.

2 MS. WARRICK: That is right. I think that this  
3 question really highlights the broadness of 7(b)(iii). And  
4 that's something we focus in our reply, mostly with respect  
5 to insolvency. But you know, this is just demonstrating the  
6 -- if one party succumbs as a state of financial distress,  
7 to where, you know, it might be considered bankrupt or  
8 insolvent, there's evidence of that, then the contract  
9 provides for an immediate termination.

10 THE COURT: Got it. And with your -- is there a  
11 definition of insolvent in the agreement?

12 MS. WARRICK: Insolvent is not a defined term in  
13 the agreement.

14 THE COURT: And so, with respect to your argument  
15 today, how are you using the term 'insolvent'?

16 MS. WARRICK: We're not -- have used insolvent in  
17 the reply briefing. We do not think that the Court needs to  
18 consider the definition of insolvent to be as strict as that  
19 provides for in Section 101 of the Bankruptcy Code.

20 THE COURT: No, I read that, which is why I'm  
21 asking the question. What does it mean to you, for purposes  
22 of today's argument?

23 MS. WARRICK: Right, well, in *In re Buffalo Coal*,  
24 a case in the Northern District of West Virginia, the Court  
25 considered a similar provision and looked it at Black's Law

1 Dictionary, at whether liabilities exceeded assets, and an  
2 inability to pay debts as they fall due, also is (iv).

3 THE COURT: And so, when we get into just the pure  
4 balance sheet test, doesn't valuation then become really  
5 important?

6 MS. WARRICK: It could. I don't think we're  
7 limited to that.

8 THE COURT: To what?

9 MS. WARRICK: To a pure balance sheet test and --

10 THE COURT: Well, wait a minute, so you said  
11 assets and liabilities. Isn't that the balance sheet test?

12 MS. WARRICK: Yes, Your Honor. And so, I mean --  
13 but as you can see, there's also the provision about  
14 inability to pay debts as they fall due.

15 THE COURT: I got that.

16 MS. WARRICK: And also --

17 THE COURT: But I'm going to get there,  
18 eventually, as soon as I try and get -- I'm trying to rope  
19 you in now. So, are we just talking, in your mind, about  
20 just pure -- with that definition of insolvent, are we just  
21 talking pure balance sheet assets are less than the  
22 liabilities? Is that what that means to you?

23 MS. WARRICK: I don't want to limit us in that  
24 way, because I don't think that's actually proper. We also  
25 cited in our --

1 THE COURT: Okay, then what else? What else could  
2 it be?

3 MS. WARRICK: We cited in your motion the  
4 definition of insolvency under the Uniform Commercial Code,  
5 which would apply in this case, which encompasses the  
6 Bankruptcy Code's definition, that's Part C of the Texas  
7 Business and Commerce Code, Section 1.201.3. But it defines  
8 insolvent more broadly than that, and also, A, having  
9 generally ceased to pay debts in the ordinary course of  
10 business, other than as a result of a bona fide dispute; B,  
11 being unable to pay debts as they become due; or C, being  
12 insolvent with the meaning of Federal Bankruptcy Law.

13 THE COURT: Okay. So, as it's used in the  
14 agreement, do you believe that insolvent means all three of  
15 those?

16 MS. WARRICK: Yes, Your Honor.

17 THE COURT: Okay.

18 MS. WARRICK: This is an agreement regarding the  
19 sale of goods and would be governed by (indiscernible).

20 THE COURT: In that case, is (iv) just simply --  
21 just duplicative?

22 MS. WARRICK: Again, as it (indiscernible). I do  
23 think they related. And again --

24 THE COURT: And so, how would I know that? How  
25 would I know that (iv) is just intended to be belt and

1 suspenders?

2 MS. WARRICK: Well, I think that it's -- I don't  
3 know how you can just determine its intended to be belt and  
4 suspenders, but it is there as an express condition for  
5 termination, separate from this other condition that we  
6 looked at, that allows for termination. If a  
7 (indiscernible) insolvent, however evident -- which I would  
8 that is the key, the however-evident clause, which has --  
9 makes it so that this termination provision should be  
10 interpreted very broadly, not (indiscernible).

11 THE COURT: So, the however evidence, is that --  
12 what does that mean to you? Is that regardless of how you  
13 learn about it? Regardless of you find out about it? What  
14 does that mean to you?

15 MS. WARRICK: Yes, Your Honor. I think it can  
16 mean either of those things, regardless of how you learn  
17 about it, how you find out about it. I think regardless of  
18 how it looks, you know, particularly with the bankrupt  
19 provision, you know, it doesn't have to be a filing for  
20 bankruptcy that would be covered under Section 7(b)(2). You  
21 know, if there's other evidence that the party has become  
22 bankrupt, then that satisfies a (iii) here.

23 THE COURT: Okay, so you just used the term, 'a  
24 party has otherwise become bankrupt.' What did you mean  
25 when you said that?

1 MS. WARRICK: Well, I'm kind of going back to what  
2 we talked about a little bit earlier, which is -- and I  
3 recognize you say anyone can file for bankruptcy, but kind  
4 of becoming -- getting to be in such a state where, you  
5 know, there's pressure from creditors, there's you know, the  
6 types of things that are described into (indiscernible) at  
7 pages 11 and 12 -- (indiscernible) credit facility, you  
8 know, a potential acceleration of debt, that sort of thing,  
9 where, you know, a company like Hi-Crush looked at the  
10 situation and said, regardless of whether or not we can  
11 negotiate the terms of a prepackaged bankruptcy filing with  
12 our lenders, we are going to file for protection from our  
13 creditors under the United States Bankruptcy Code.

14 So, I mean, I think that's like a state in which  
15 the parties, I think, could be said to become bankrupt or  
16 insolvent.

17 THE COURT: Okay.

18 MS. WARRICK: So, looking just below that section  
19 that we've been focusing on, is also important that after  
20 termination of the agreement, the party terminating the sand  
21 purchase agreement had no obligation to make any shortfall  
22 payment. Again, this will come into play a little bit more  
23 with the constructive fraudulent transfer claim. But the  
24 agreement expressly provides for what happens to that  
25 shortfall payment that would otherwise be due upon an early

1 termination of the agreement. If the agreement, though, is  
2 terminated pursuant to Section 7(b) of the sand purchase  
3 agreement, then that shortfall payment is not due.

4 Next slide please.

5 We've already talked a little bit about the 10-Q.  
6 And you see excerpts of it here on the screen. Hi-Crush,  
7 Inc. filed a 10-Q on June 25, 2020. And our position is  
8 that it does evidence the insolvency, inability to pay debts  
9 as due in anticipated bankruptcy filing of the company. As  
10 you saw in the briefing, the 'Company' is a defined term,  
11 capital C, Company, and it's defined on page 10 of the 10-Q,  
12 to include Hi-Crush Inc., together with the subsidiary. And  
13 it's also noteworthy that the subsidiaries are guarantors of  
14 all the obligations under the relevant (indiscernible)  
15 credit agreement, and has granted the lender security  
16 interest and substantially all of their respective assets.  
17 The 10-Q talks about that on page 37.

18 This page is a little difficult to see with the  
19 callout boxes on top of it, but it's page 11. But the top  
20 of the page talks about recent developments, and it  
21 describes the climate in March 2020 that Your Honor is  
22 certainly very, very well aware of. It talks about the  
23 COVID-19 pandemic, the significant decline in commodity  
24 prices, OPEC disputes that causing disruption already to the  
25 company's business operations, financial position and

1 liquidity.

2 So, after talking about these kind of, really  
3 terrible factors that were at play in the macroeconomic  
4 world, and that were impacting Hi-Crush and all of its  
5 subsidiaries, the 10-Q goes onto explain the severe  
6 financial distress of the Company, capital C; which had  
7 resulted in the Company's borrowing base.

8 So, kind of going through these callout boxes,  
9 it's noted that effective June 22, 2020, the Company was in  
10 an immediate event of default under the credit facility,  
11 that could result in the acceleration of all obligations and  
12 termination of all commitments thereunder at the option of  
13 the lenders of that facility.

14 This default was because of the failure to comply  
15 with the springing fixed-charge coverage ratio, financial  
16 covenant under the ADL credit facility.

17 The 10-Q goes onto note that if the obligations  
18 under the credit facility are accelerated, the specified  
19 default would also constitute a default under the company's  
20 senior notes, and that could result in the indebtedness  
21 under such senior notes becoming immediately due and payable  
22 at the auction of the holders of the senior note.

23 The 10-Q then went onto explain that the Company  
24 had entered into a forbearance agreement for a period of ten  
25 days. Pursuant to that agreement, the lenders had agreed to

1       forbear from exercising default-related rights and remedies  
2       with respect to the specified default, until July 5, 2020.

3               The 10-Q notes that that forbearance period may be  
4       extended with the consent of the lender, but otherwise did  
5       not (indiscernible) any indication that this extension would  
6       occur.

7               So, the 10-Q goes onto say, in the third callout  
8       box there, that occurrence or continuation of another event  
9       of default, under the ADL credit facility, a breach of any  
10       representation or warranty in the forbearance agreement, or  
11       the failure to comply with any term or agreement in the  
12       forbearance agreement, will result in the early termination  
13       of the forbearance period. And the 10-Q states, at page 21,  
14       that events of default would include, among other things,  
15       bankruptcy or insolvency.

16               The 10-Q goes onto say that absent an extension of  
17       the forbearance agreement, the Company will be in default  
18       under senior notes, and currently does not, and currently  
19       does not have sufficient liquidity to repay the \$450 million  
20       principal amount in the senior notes, should they be  
21       accelerated.

22               (indiscernible) this current forecast, quote,  
23       "Gives doubt to the Company's available liquidity to meet  
24       other obligations," and indicates, quote, "Substantial doubt  
25       about the Company's ability to continue as a going concern

1 within a year, one year from the issuance date of the  
2 financial statement."

3 The 10-Q also goes onto say, on the next slide,  
4 that the Company was in discussions with advisers to try to  
5 work out a deal with lenders on the terms of a prearranged  
6 bankruptcy filing. But importantly, it notes that  
7 regardless of whether the terms and conditions of a  
8 prearranged filing can be agreed upon with the debtholders,  
9 the Company expects to file for protection from its  
10 creditors under the United States Bankruptcy Code.

11 So, next slide please.

12 Two days after that 10-Q was released, EOG  
13 terminated the sand purchase agreement. You see the first  
14 page of the two-page order here on your screen. This says  
15 the termination was expressly pursuant to Section 7(b)(iii)  
16 and 7(b)(iv) of the SPA that we talked about a few minutes  
17 ago. Otherwise, the (indiscernible) were insolvent,  
18 however, evidenced in being unable to pay debts as they fall  
19 due. And in this letter, EOG cites the provisions of the  
20 10-Q that provide evidence for these grounds of termination.

21 Next slide, please.

22 So, 15 days later, what was forecast in the 10-Q  
23 came to be. Hi-Crush did, in fact, file a chapter 11  
24 petition on July 12, 2020. And Hi-Crush's schedule in the  
25 bankruptcy case, which was filed under penalty of perjury,

1 showed that the liabilities exceeded assets by nearly \$20  
2 million as of petition date. We'll talk about this a bit  
3 ore later, acknowledging that, we acknowledge that there are  
4 disclaimers and that sort of thing, in the schedule. But  
5 the line items here do show this (indiscernible) all  
6 property exceeds the total liabilities by nearly \$20  
7 million, as of the petition date. Next slide, and onto the  
8 next one too.

9 So, as we said at the outset, we believe that  
10 (indiscernible) entire complaint is proper here. It's Hi-  
11 Crush's (indiscernible) claim upon which relief may be  
12 granted.

13 A bargained for provision of sand-purchase  
14 agreement was that either parties had the right to  
15 immediately terminate (indiscernible) certain  
16 (indiscernible) conditions. And EOG actually  
17 (indiscernible) that right, and it terminated the sand  
18 purchase agreement according to its terms.

19 EOG could not have been in breach when it acted in  
20 compliance with the agreement's termination provisions. And  
21 so, we respectfully suggest that Hi-Crush has failed to  
22 state a claim for breach of contract and that that count  
23 should be dismissed.

24 Relatedly, Hi-Crush's duplicative and redundant  
25 claim for declaratory judgment, count one, cannot survive.

1 Because Hi-Crush cannot, will not be a prevailing party  
2 under either its breach of contract or declaratory judgment  
3 claims; it's not entitled to attorneys' fees, the request  
4 for fees should be dismissed along with the underlying  
5 claim.

6 THE COURT: Can we go back to -- I'm sorry -- can  
7 we go back to the declaratory judgment issue for just a  
8 second? The debt request is actually, at least in my mind,  
9 a series of five different declarations. Is it your view  
10 that they should all be dismissed, or certain ones of them?  
11 It wasn't clear to me. And so, I just want to understand?

12 MS. WARRICK: Yes, Your Honor. We will put that  
13 up on the screen (indiscernible) -- throw my presenter off.  
14 But our position is that all five of the requests should be  
15 (indiscernible).

16 THE COURT: All five of them, okay. We'll get  
17 there when we get there.

18 MS. WARRICK: Okay, sounds good. So, yeah, we'll  
19 start, if it is -- oh, and construct (indiscernible). We  
20 will address that, but there are a few reasons why we think  
21 that claim should fail, but most importantly, because  
22 there's no transfer of property, or interest in property, of  
23 the Debtors, when a contract is terminated according to its  
24 terms, as the Fifth Circuit held in the (indiscernible)  
25 opinion.

1           Going to the next substantive slide -- with the  
2 cover sheet there, yeah. So, first, we -- the Court could  
3 dismiss the breach of contract claim (indiscernible) claim.  
4 The elements are up on your screen. I'm sure the Court  
5 doesn't need a reminder of those. We did want to just  
6 highlight the third element, that there must be a breach b  
7 the defendant.

8           And in this case, EOG had a contractual right to  
9 immediately terminate the sand purchase agreement when Hi-  
10 Crush became bankrupt or insolvent, however evident, or  
11 unable to pay debts as they fall due. And the Texas Supreme  
12 Court in (indiscernible) Homes, that we have cited at the  
13 bottom of your screen, and had since cited to that again, in  
14 2017 in Community Health Systems Professional Services  
15 Corporation; we site the (indiscernible) reply briefing.  
16 When parties properly terminate the contract pursuant to its  
17 (indiscernible), a breach of contract claim must fail.

18           So, let's look at the next slide. As we discussed  
19 just a few minutes ago, this would be the bulk of the call  
20 to the Court. Section 7(b) provides for the -- either party  
21 to terminate the sand purchase agreement I the other becomes  
22 bankrupt or insolvent, however evident. And our position is  
23 that there is no requirement in this contract for a  
24 complicated, expert-driven determination of fair evaluation  
25 with respect to this insolvency analysis. We, however,

1 evidenced there in the contract, suggest that it be  
2 interpreted broadly and, you know, if it looks like  
3 insolvency and there's the -- the benefit of the doubt  
4 should be given to the terminating party.

5 THE COURT: So, let me ask you this, because this  
6 is coming back to my valuation question, which you didn't  
7 answer, but it was okay. So, if you -- let's say that I've  
8 got a very simple balance sheet; I owe \$1 and I've got  
9 something that I think is worth \$1. So, in that example,  
10 there wouldn't be insolvency, right, because assets are  
11 exactly equal to liabilities -- in the example that I just  
12 gave you, right?

13 MS. WARRICK: Right.

14 THE COURT: So, you said however evidenced. What  
15 if you said, "Well, that can't be worth \$1. I would only  
16 pay 75 cents for it." Do you get to -- I mean, however  
17 evidenced would see to suggest that you could substitute  
18 your judgment for that of someone else; either the owner or  
19 a third-party appraiser or whatever it might be. Is that  
20 what you're telling me?

21 MS. WARRICK: Yeah, I understand where you're  
22 going with that hypothetical. And I do think there would  
23 have to be like logical checks on this. And so, like for  
24 example, in the hypothetical that you gave, we're not saying  
25 a valuation, doing a fair valuation and determining

1 insolventy, as you would in a fraudulent transfer case, for  
2 example, cannot happen here. It can. And like, perhaps  
3 that would be the appropriate approach in this scenario that  
4 you highlighted. But what we're saying is that it's not so  
5 limited. So --

6 THE COURT: I got it. I'm trying to figure out  
7 where you think the limits are.

8 MS. WARRICK: Right. I mean, I don't think the  
9 counterpart could just come out and say, "Well, I don't  
10 think you're solvent," which I think is kind of where you  
11 were going in that hypothetical. There would need to be  
12 checks on that.

13 But that really isn't what happened in this case.  
14 Here, the counterparty provided evidence of insolventy.

15 THE COURT: Did they?

16 MS. WARRICK: Publicly stated. Our position is  
17 yes, that they did.

18 THE COURT: I just asked you if they did. I mean,  
19 I've -- all of those things are subject to multiple  
20 interpretations and are done for a variety of reasons,  
21 right?

22 MS. WARRICK: With respect to the SEC filing?

23 THE COURT: Sure, because it's all driven by  
24 people like, us that they're afraid of.

25 MS. WARRICK: I don't argue with that. But at the

1 same time, there are legal -- you know, there are legal  
2 disclosure requirements. And often, the people like us are  
3 afraid of, you know, failing to disclose something that  
4 should be otherwise closed and --

5 THE COURT: Right. So, if it says, if it's got  
6 something and we can focus on the exact language, but if it  
7 says if this happens -- I mean, of course, if someone  
8 accelerated a \$400 million note, we don't have \$400 million  
9 to pay them. The assumption there is, you know, we get a  
10 forbearance, we avoid having that \$400 million come to you  
11 right now, and you know, we're going to restructure that  
12 debt and pay it over time.

13 In that example that I just gave you, is the  
14 possibility that a debt could be accelerated, and the  
15 acknowledgement that says if it's accelerated, no way I can  
16 pay it. Does that -- where does that fit into your 7(b)  
17 analysis?

18 MS. WARRICK: I think that fits in with that  
19 analysis because --

20 THE COURT: I'm sorry, which one, Ms. Warrick? Is  
21 it four? Or is it three? And if so, why?

22 MS. WARRICK: I think it could, honestly, be on  
23 either of them. And I understand kind of wanting to keep  
24 those separate. But if you looked at the definition of  
25 insolvency under the Uniform Commercial Code, as we talked

1 about earlier, that includes four. So, I think it could  
2 kind of check the box in both of those categories.

3 THE COURT: But what if the acceleration never  
4 comes?

5 MS. WARRICK: Well, there's still a default under  
6 the credit facility and --

7 THE COURT: Sure, but there are defaults all the  
8 time, right? You forget to send a report on the first  
9 Monday of every month, you know, you don't sign a report,  
10 you don't meet some financial ratio that you've agreed to  
11 make. I mean, those happen all the time. If you stub your  
12 toe on one of those, does that really trigger three or four?  
13 And if so, which one?

14 MS. WARRICK: I wouldn't think that something, you  
15 know, like -- I haven't examined that or really thought  
16 about it, but I don't want to be too hasty to reply. But I  
17 don't think, you know, kind of a technical (indiscernible)  
18 is what we're talking about here. And the 10-Q, it talks  
19 about events that will result in the early termination of  
20 forbearance agreement, and that includes the occurrence or  
21 continuation of another event of default under the ADL  
22 credit facility --

23 THE COURT: All right.

24 MS. WARRICK: -- but there is another covenant  
25 default. A breach of any (indiscernible) or warranty is

1 forbearance agreement, or a failure to comply with any term  
2 of the forbearance agreement. And that includes -- a breach  
3 of forbearance agreement would include filing for bankruptcy  
4 as (indiscernible) page 15 of 21.

5 THE COURT: All right. Well, you have to kind of  
6 take that one out of it, because the triggering on a  
7 bankruptcy filing is problematic for you, isn't it?

8 MS. WARRICK: Yes. And we're not arguing,  
9 obviously, that --

10 THE COURT: So, come back to your example. So, if  
11 -- I mean, they say that if I do A, B or C, that that will  
12 result in a default under the forbearance agreement. But  
13 aren't we missing sort of, we've got to have the other party  
14 to the forbearance agreement say, "Okay, forbearance  
15 agreement is over and we're accelerating the debt," right?

16 MS. WARRICK: That is right. There does need to  
17 be a (indiscernible) decision by the lenders to accelerate  
18 the debt. But again, you know, the 10-Q showed that that  
19 will result upon, you know, this is kind of a stumble, I  
20 would say, breach of a (indiscernible) warranty or failure  
21 to comply with provision of the agreement.

22 So, I think, taken as a whole, the 50-ish pages in  
23 this 10-Q do reflect that (indiscernible) in a really  
24 tenuous financial state, that -- I think that's where we're  
25 -- and that's where we're really going with this however

1 evidenced point.

2 THE COURT: That's exactly where I wanted to get  
3 you to. Is a tenuous financial state a trigger under  
4 (b)(iii) or (b)(iv)? There are an awful lot of companies  
5 out there that are in a tenuous financial state. Are they  
6 all -- if they have this provision in all of their  
7 contracts, are they in trouble, even if they --

8 MS. WARRICK: I think they might be.

9 THE COURT: Well, they might. But, see, you're  
10 trying to convince me today that it's not a might be. I  
11 agree with you, it might be. What you're trying to convince  
12 me is that it's a fait accompli, right?

13 MS. WARRICK: Right. And I guess I said that, you  
14 know, kind of a waffling type answer, so it might be just  
15 because I don't know what their agreements say or what not.  
16 But --

17 THE COURT: I told you, if it had the same  
18 provision.

19 MS. WARRICK: No, I think that it's -- I think  
20 it's bad news for them. I think that this is a contract  
21 that was negotiated by sophisticated parties and that it  
22 should be enforced according to its terms. And so,  
23 7(b)(iii) and 7(b)(iv) are broad. But that is what the  
24 parties agreed to and, you know, in this situation, it was  
25 EOG terminating. But it could have just as easily been Hi-

1 Crush terminating --

2 THE COURT: Okay, so I need to ask you one more  
3 question. So, with respect to (iv), so, if an event  
4 happens, and all of a sudden I have to pay \$400 million,  
5 which I obviously can't do, and I've told you I can't do,  
6 but if there is no acceleration, I can, at least for the  
7 foreseeable future, pay the \$400 million in accordance with  
8 the original loan documents. Does that trigger (iv), just  
9 because it could happen? Or does it have to happen?

10 MS. WARRICK: I think it has to happen, but I do  
11 think that it has happened in this situation.

12 THE COURT: How so?

13 MS. WARRICK: And that is because the ... sorry, I'm  
14 just collecting my thoughts.

15 THE COURT: That's quite all right.

16 MS. WARRICK: So, the Company had defaulted  
17 already under its credit facility. And so, that had already  
18 occurred. And so, as a result, it entered this forbearance  
19 agreement. And that, under that agreement, the lenders  
20 agreed to forbear from exercising its default related rights  
21 or remedies with respect to the (indiscernible) by default.  
22 But it doesn't take away the ability to exercise those  
23 rights or remedies.

24 THE COURT: Totally agree. So, let's come back to  
25 the language. So, it's to be unable to pay its debts as

1 they fall due. Does a forbearance agreement change when a  
2 debt comes due?

3 MS. WARRICK: I think the debt is still due, but  
4 there is an agreement to forbear or delay on collecting the  
5 debt.

6 THE COURT: So, it's your view -- and I just want  
7 to understand -- so, it's your view that -- and I'm asking  
8 you really hard questions that I already know the answers  
9 to, so it's kind of fun -- so, is it your view that a  
10 forbearance agreement is irrelevant to this analysis?  
11 Because that's what you just told me.

12 MS. WARRICK: Yeah, well, it's forbearance on  
13 enforcement of rights.

14 THE COURT: Right. So, can we get -- whoever is  
15 running the PowerPoint, can we go back to that slide that  
16 has been up for a while? Thank you.

17 So, let's just focus on (iv). So, is a  
18 forbearance agreement, under your theory, is a forbearance  
19 agreement relevant to whether or not (iv) gets triggered?  
20 Because that's a really important issue, right? No really  
21 argued in the papers. But it's kind of, it's an underlying  
22 theme. And I'm just curious as to what you think, because  
23 this could become important later on, so you've got to make  
24 -- you've got to be careful about the argument that you  
25 make.

1 MS. WARRICK: Right. I think that the forbearance  
2 agreement -- I mean, I don't want to speak universally --  
3 I'll find --

4 THE COURT: No, just in this case. Does the --

5 MS. WARRICK: In the context here.

6 THE COURT: This is our world, right here, 7(b).

7 MS. WARRICK: Right.

8 THE COURT: Does a forbearance agreement have any  
9 effect on whether or not the event gets triggered under  
10 (b)(iv)?

11 MS. WARRICK: I think, in this specific case, I  
12 don't think it's a forbearance agreement impact, 7(b) will -  
13 -

14 THE COURT: Okay.

15 MS. WARRICK: The debt was due and it was unable  
16 to -- and Hi-Crush was unable to pay the debt as it fell  
17 due.

18 THE COURT: Okay. So, then in the papers that  
19 were filed, why did you care about the forbearance  
20 agreement?

21 MS. WARRICK: Well, I guess we hadn't had the  
22 benefit of your helpful pushback on it. I'll just state the  
23 obvious, but I think it's just relevant in terms of, you  
24 know, it's something that is discussed here in the going  
25 concern analysis in the 10-Q. And you know, even if you

1 kind of took a contrary view on, with respect to the  
2 inability to pay debts as they fall due, this situation,  
3 even taking the forbearance agreement as delaying the  
4 deadline to repay and what not -- it still reflects the  
5 insolvency of --

6 THE COURT: Let me go one step further. I want to  
7 see -- I'm testing your conviction. So, let's assume that  
8 there was a payment that was due on the 1st. And let's --  
9 of each month -- and let's say that I didn't make the  
10 payment in February, I didn't make the payment in March.  
11 But because of the moratorium -- I'm making this up -- but  
12 because of a government moratorium on debt collection, no  
13 default was declared; (iv) been triggered or not?

14 MS. WARRICK: And to clarify the hypothetical, was  
15 the moratorium before or after the first two payments were  
16 due?

17 THE COURT: Why would it matter, under your  
18 theory? You're applying an absolute. Did they or didn't  
19 they? Not whether or not they should have, could have, had  
20 an excuse for not doing -- your view of the world, I think,  
21 that you're -- I'm not telling you that you're wrong. I'm  
22 not telling you that you're right. I'm just trying to  
23 understand where you are. The way that you're reading (iv)  
24 is, if they've got a contractual obligation, doesn't matter  
25 if they have an excuse, doesn't matter if a default has been

1 sent, doesn't matter if a lender has agreed to do something  
2 different; it's your view that we look at the original  
3 document establishing the relationship, and if they don't  
4 need it, (iv) gets triggered. Is that the argument?

5 MS. WARRICK: I would want to put a final point on  
6 it. I think (iv) says, "Be unable to pay debts as they fall  
7 due."

8 THE COURT: Okay.

9 MS. WARRICK: So, your situation with the  
10 government moratorium is different. The party, in that  
11 case, wouldn't be paying its debts as they fall due, but it  
12 may still be able to, in which case -- but there's not  
13 because of the relief from the government.

14 THE COURT: So, this is all -- so, your view, or  
15 the critical thing to (iv), from your point of view, is  
16 whether or not you have the capability of doing it. Right?

17 MS. WARRICK: I think that is critical. And I  
18 think that in this case, the 10-Q says we cannot make that  
19 payment. But I think that's, you know --

20 THE COURT: It says we can't make the payment if  
21 \$400 million comes due, right?

22 MS. WARRICK: Right. If the lenders stop  
23 forbearing from collecting the amounts due.

24 THE COURT: But you told me the forbearance  
25 doesn't matter.

1 MS. WARRICK: Right. It's still due. Sorry, just  
2 to clarify: I think this issue, in this case, is that in  
3 the 10-Q, they're essentially admitting that they are unable  
4 to pay that debt, as it falls due.

5 THE COURT: If it got accelerated, right? Because  
6 was there ever an acceleration?

7 MS. WARRICK: I don't believe so. I think that it  
8 could result in acceleration.

9 THE COURT: Right. So, if a note says you'll pay,  
10 you know, you'll pay interest every month, and everything is  
11 then due at the end of the first year, but if you default  
12 and we accelerate, then it's all due three days after we  
13 send you notice. Those are different due dates. Would you  
14 agree with that?

15 THE COURT: I would agree with that.

16 MS. WARRICK: Okay. So, don't we have to have, in  
17 the example that we've been talking about, don't we actually  
18 have to have the acceleration so that the \$400 million comes  
19 due before you get to apply that test?

20 THE COURT: I don't know that -- I don't think  
21 that's actually the case, because I think (iv) here says  
22 unable to pay debts as they fall due. And here, the -- I  
23 agree that the acceleration had not yet occurred, but the  
24 10-Q describes how, you know, all these different events  
25 will result in the early termination of the forbearance

1 period. So, the 10-Q is showing that, you know, any day the  
2 forbearance period could go away and the debts would be  
3 immediately due and payable, and that Hi-Crush was unable,  
4 would be unable to meet that obligation, should it be come  
5 due.

6 THE COURT: I got it. Okay. Keep going.

7 MS. WARRICK: Okay. So, I think we've hit the  
8 last bullet there. Our position is that we don't need to  
9 have a, you know, a complicated, expert-driven determination  
10 of insolvency.

11 THE COURT: Let me ask you that. You say that in  
12 passing, and then you flick the slide back. That's actually  
13 one of the most complicated things in this. So, who's -- I  
14 mean, I have to take somebody's valuation, right? And in  
15 the context of a 12(b)(6), whose valuation do I take? And  
16 do I consider the purpose for which the valuation was made?

17 MS. WARRICK: I guess what I would say in response  
18 to that, Your Honor, is that I don't know that you need to  
19 have the valuation. I recognize that --

20 THE COURT: How so?

21 MS. WARRICK: Well --

22 THE COURT: Because insolvency, at the end of the  
23 day, is math, right?

24 MS. WARRICK: That's -- yes, Your Honor, that's  
25 right. And especially under Bankruptcy Code.

1 THE COURT: Well, no. Bankruptcy Code just makes  
2 it more complicated. If we just -- insolvency, at the end  
3 of the day, is just a mathematical equation, right? It's  
4 one number subtracted from another, and then we figure out  
5 whether it's a plus or a minus, a green or a red. And so,  
6 we have to have some valuation, right? I mean, maybe I take  
7 the Debtor's valuation, maybe I take your valuation. That  
8 was the reason for poking at you earlier. But whose numbers  
9 do I use when I do the math?

10 MS. WARRICK: I guess what I would say, is that  
11 our position is that you don't have to do the math here.  
12 And that is different --

13 THE COURT: So, if I don't have to do the math,  
14 then how do I know that insolvency exists?

15 MS. WARRICK: I think by looking at the 10-Q and  
16 looking at the --

17 THE COURT: So, you're focused on (iv); that if  
18 all of these bad things happen, we can't pay everything at  
19 once. Because that's what that really says, right?

20 MS. WARRICK: It does say that. But it also talks  
21 about, you know, the -- again, the kind of financial climate  
22 and situation in 2020 and how that's casting substantial  
23 doubt on the company's ability to continue as a going  
24 concern. It talks about the efforts to work out pre-  
25 arranged bankruptcy filing, and says that regardless of

1 whether or not, that terms and conditions can be agreed  
2 upon, the company is still going to file.

3 THE COURT: Right.

4 MS. WARRICK: And so, I think that those are just  
5 -- I think that those are evidence of severe financial  
6 distress and (indiscernible).

7 THE COURT: No question. I don't think anybody  
8 who is around energy would say that suppliers and service  
9 companies in, really from 2018 through 2020, didn't have  
10 severe financial distress. But financial distress isn't in  
11 7(b), is it?

12 MS. WARRICK: No, that's not specifically listed  
13 there. I would argue, though, that it is encompassed by  
14 7(b)(iii), otherwise (indiscernible).

15 THE COURT: Okay. So, I'm going to get you to  
16 tell me what bankrupt means before we're done. But keep  
17 going.

18 MS. WARRICK: All right. I'm glad on my computer  
19 and I can (indiscernible). Oka, let's go to the next slide,  
20 please.

21 So, two days before termination, the purchase  
22 agreement, as we've just spent some time discussing, our  
23 position is that Hi-Crush publicly provided evidence of  
24 insolvency. Again, that's on behalf of the Company defined  
25 term, with a capital C, which included (indiscernible) Hi-

1 Crush. And it announced its default under the credit  
2 facility that had insufficient liquidity to pay the  
3 principal amount of the senior note should they be  
4 accelerated; concerns about ability to continue as a going  
5 concern, and anticipated bankruptcy.

6 Please go to the next slide.

7 Our position is that the 10-Q gave EOG enough  
8 evidence, adequate evidence, of insolvency of Hi-Crush, and  
9 that EOG was justified in terminating the sand purchase  
10 agreement as a result of the disclosures made in the 10-Q.

11 We also point the Court to items that are part of  
12 the public record and that we suggest that the Court can  
13 take judicial notice of. First is that, barely two weeks  
14 after termination, Hi-Crush filed for bankruptcy. Your  
15 Honor noted at the beginning, there's not an insolvency  
16 requirement to call for chapter 11. But it's still --

17 THE COURT: I didn't say that. What I said was --

18 MS. WARRICK: Or just that anyone can file for  
19 bankruptcy, I think.

20 THE COURT: Right.

21 MS. WARRICK: We don't dispute that anyone can  
22 file those papers and file a chapter 11 position. But, you  
23 know, hopefully, it's filed in good faith and for the  
24 appropriate reasons and what not. And we think that it  
25 tends to support this argument that at an (indiscernible)

1 level, Hi-Crush, the Plaintiff, was insolvent at the day of  
2 the bankruptcy filing and was just very close in time to the  
3 date in which EOG terminated the agreement.

4 And then also, Hi-Crush filed schedules under  
5 penalty of perjury, which showed that its liabilities  
6 exceeded its assets. And again, here, Hi-Crush noted in its  
7 response the (indiscernible) book value. And there are  
8 quite a few disclaimers and reservations right throughout  
9 the (indiscernible) notes at the beginning of those  
10 schedules.

11 We're not really trying to argue about that.  
12 Again, we're just pointing to these as probative evidence  
13 that supports the conclusion that we already drew from the  
14 10-Q, in which the Court, you know, no doubt, can consider  
15 at this stage, because it was attached to the complaint.

16 THE COURT: Sure.

17 MS. WARRICK: So, EOG, our position is our motion  
18 doesn't rise or fall on these two things, but they do  
19 support the specific conclusions that we drew, and that the  
20 Court can properly consider them at this state. Next slide.

21 EOG also terminated the agreement for inability to  
22 pay debts as they fell due under 7(b)(iv). And we just  
23 spoke about this at some length, but again, Hi-Crush  
24 (indiscernible) default under its credit facilities, would  
25 soon be in default under its senior note, and does not have

1 sufficient liquidity to repay the full amount. While, you  
2 know, the 10-Q did say that the forbearance period may be  
3 extended. That had not yet happened. And so, and has been  
4 discussed earlier, I think that the debts were still due,  
5 even absent -- even with the forbearance agreement in place.

6 THE COURT: I just want to see if you were  
7 committed to what you'd said.

8 MS. WARRICK: And we've cited a couple of cases  
9 here that support this argument that a debt is no less due  
10 just because a creditor has (indiscernible) for a time, who  
11 is preparing, selecting it, and that the willingness to work  
12 out payment plans, so that is immaterial to determining  
13 insolvency.

14 So, I was going to turn next to the declaratory  
15 judgment claim, unless you had further questions on the  
16 breach of contract?

17 THE COURT: I'm with you.

18 MS. WARRICK: Okay. We could turn two slides,  
19 please, to the substance of declaratory judgment slide.  
20 There we go.

21 We've proposed that Hi-Crush's request for a  
22 declaratory judgment is improperly redundant, of the  
23 underlying breach of contract claim. You see it here on  
24 your screen --

25 THE COURT: Can I focus you a little bit? With

1 respect to 46.1 and .5, I'm inclined to agree with you. But  
2 .2, .3 and .4, is that not a substitute for the fact that  
3 the two parties, effectively, pushed the issue of assumption  
4 and cure to a period post-confirmation? How else would you  
5 figure that out, given the agreement that was put in the  
6 confirmation order?

7 MS. WARRICK: I guess I would respond to that  
8 with, just saying that if the sand purchase agreement was  
9 terminated, according to the terms and --

10 THE COURT: But let's go the other direction.  
11 Let's assume that after a trial, I said nope, the agreement  
12 wasn't terminated. So, now -- again, because I have to look  
13 at that agreement that's in the confirmation order -- I  
14 think it's in the confirmation order, not the plan. But I  
15 have to now look at that, and how else would I make a  
16 determination of, effectively, assumption and cure without  
17 .2, .3 and .4?

18 MS. WARRICK: Frankly, Your Honor, I'm not sure on  
19 that. And so, if I could just think on it for a second and  
20 get back to you, that would be appreciated. But I think the  
21 bottom -- what we're really hitting at in this motion to  
22 dismiss the declaratory judgment claim, is what you talked  
23 about, you know, the duplicative request that the Court  
24 declared that the sand purchase agreement termination was  
25 invalid. That was what our --

1 THE COURT: I got it with .1 and .5. And let me  
2 tell you how I look at it, and maybe it will help focus your  
3 argument. With respect to .1 and .5, is -- that is a  
4 determination of who's right or wrong with respect to the  
5 underlying claims. That's how I get to the point that it's  
6 duplicative. With respect to .2, .3 and .4, either party  
7 could be right or wrong, and that still drive an answer  
8 under .2, .3 and .4, sort of. Right?

9 MS. WARRICK: I would suggest that if EOG is  
10 right, then .2, .3 and .4 are --

11 THE COURT: Right. What if they're wrong? They  
12 could still be wrong, but maybe the sand purchase agreement  
13 isn't in full force and effect on the day that I render  
14 judgment for the remainder primary term. Maybe something,  
15 maybe there had been an intervening action and we, you know,  
16 we haven't seen the emails between the business people. And  
17 I'm not suggesting this exists, but we hadn't seen the  
18 emails that said, you know, "Hey, we're doing this, we have  
19 to do this. But if it turns out that we're wrong, here's  
20 how we're going to go forward. Here's our new agreement."  
21 And you get an email back that says, "Yeah, you're probably  
22 right. That's good." So, there's a situation where you  
23 have a -- again, looking at our example, you have a  
24 contract, but the terms is different than -- the remaining  
25 term is different than the remainder of the primary term,

1 defined term.

2 And let's assume that -- and let me just keep  
3 going -- let's assume that I find that, again, the agreement  
4 wasn't terminated, but in the interim, something else had  
5 happened so that Hi-Crush lost the right to assume the  
6 agreement. Or perhaps they missed a deadline that had been  
7 set, you know, to assume, or to assume executory contracts  
8 and leases. Again, I'm not suggesting any of that happened.  
9 All I'm trying to point out is, is that you could be wrong,  
10 Mr. Buoni could be right, and it still doesn't dictate the  
11 answer of .2, .3 and .4. With respect to .1 and .5, the  
12 underlying claims determine the answer; that was kind of my  
13 point. And I'm trying to understand -- sorry, go ahead. I  
14 talked over you.

15 MS. WARRICK: Oh no, I think I was talking over  
16 you. I hear your point on .2, .3 and .4, if the breach of  
17 contract claim is not (indiscernible) --

18 THE COURT: I agree, that if the breach of  
19 contract claim is gone, .2., .3 and .4 become irrelevant.

20 MS. WARRICK: Right. And I think they would be  
21 taken up with that, the dismissal of those claims. Yeah.

22 If we could just turn to the next slide, I think  
23 that this (indiscernible) what the Court was just saying  
24 with respect to .1 and .5, but you know, where claims,  
25 declaratory judgment claims are duplicative of breach of

1 contract or relevant claims in a lawsuit, Courts in this  
2 (indiscernible) will routinely reject (indiscernible).

3 THE COURT: Yeah. And when I press Buoni a little  
4 bit, he's going to agree that .1 and .5 are duplicative, and  
5 he's going to focus on .2, .3 and .4.

6 MS. WARRICK: Yeah. Okay. Let's go to the next  
7 slide, please.

8 This is kind of similar to the, to what we just  
9 talked about with the declaratory judgment action. But Hi-  
10 Crush has withdrawn its claims of fees under the Texas  
11 Declaratory Judgment Act, under Section 37.009 of the Texas  
12 Civil Practice and Remedies Code.

13 So, the only claims for attorneys' fees that  
14 remain in this case are dependent on the prevailing parties'  
15 provision to recover fees for the breach of contract claim,  
16 under Chapter 38 of the Texas Civil Practice and Remedies  
17 Code. There are, I think, eight different ways that you  
18 could get fees under that chapter. But the only one that  
19 would be applicable here would be for breach of contract.  
20 And then, likewise, the prevailing parties' provision in the  
21 sand purchase agreement -- or, excuse me, the attorney's  
22 fees provision in the sand purchase agreement, only relates  
23 to the prevailing party.

24 THE COURT: So, talk to me a little bit about that  
25 -- about the withdrawal.

1 MS. WARRICK: I believe that was in Footnote 101  
2 of the response.

3 THE COURT: Mr. Buoni, have you withdrawn? I just  
4 didn't see that, if that's the case. Have you withdrawn  
5 your request for attorneys' fees under the declaratory  
6 judgment action?

7 MR. BUONI: Only under the Texas Civil Practice  
8 and Remedies Code, Section 37.009; not the request for  
9 attorneys' fees under the contract. So, we have -- we're  
10 withdrawing one of the grounds. So, that's correct.

11 THE COURT: Right. So, the request for attorneys'  
12 fees under the dec action, has been withdrawn.

13 MR. BUONI: Correct, Your Honor.

14 THE COURT: All right, so Ms. Warwick, see, you  
15 won .1. You scared him into withdrawal.

16 MR. BUONI: To clarify, Your Honor, the statutory  
17 grounds for attorneys' fees are withdrawn, not the  
18 contractual grounds.

19 THE COURT: No, I got it.

20 MS. WARRICK: And we're not (indiscernible) the  
21 point with the contractual grounds is that they only relate  
22 to the prevailing party, and we're not --

23 THE COURT: No, if you win, they don't get  
24 attorneys' fees for losing. That's not going to be novel.

25 MS. WARRICK: Right. And we don't concede that,

1 even if they win. Like, if counts two, three and four the  
2 declaratory judgment claim stand, and they win on those,  
3 that they would necessarily be entitled to fees. But we  
4 could argue that at the later date

5 THE COURT: I think that he's said, "Pursuant to  
6 the statute, I'm withdrawing." The only way he gets  
7 attorneys fees, is if he prevails on the breach of contract  
8 claim. Right, Mr. Buoni.

9 MR. BUONI: Or the prevailing party in the dec  
10 action, because the dec action relates to the contract, and  
11 the contractual attorneys' fees provision covers the  
12 declaratory judgment request.

13 THE COURT: Right. But you can't ever get to two,  
14 three or four if you don't win on the breach of contract  
15 claim.

16 MR. BUONI: That's correct, Your Honor. If we  
17 lose on count two, breach of contract, we don't get  
18 attorneys' fees.

19 THE COURT: Right. Ms. Warrick, are we  
20 comfortable there?

21 MS. WARRICK: I'm comfortable with that. Yes,  
22 Your Honor.

23 THE COURT: All right.

24 MS. WARRICK: So, I think that takes us to the  
25 final count, count three, in the complaint, in the amended

1 complaint.

2 THE COURT: This is the most interesting.

3 MS. WARRICK: I think it's very interesting too,  
4 Your Honor. But yeah, so our position is that Hi-Crush has  
5 failed to state a claim (indiscernible) fraudulent transfer.  
6 As you know, they assert this claim in the alternative. And  
7 they have to do that, because, for the breach of contract  
8 claim to survive, they have to argue that they're solvent.  
9 And for the (indiscernible) fraudulent transfer claim, they  
10 have to argue that they're insolvent.

11 And putting aside the issue that -- our position  
12 is that Hi-Crush must allege this account with specificity.  
13 I think it fails, just more cleanly, on the point that no  
14 transfer of property or interest in property of Hi-Crush  
15 occurred, because EOG terminated -- or when, if and when,  
16 EOG terminated the sand purchase agreement pursuant to  
17 (indiscernible).

18 If we could go, please, to the next slide.

19 The Hometown decision by the Fifth Circuit in  
20 2017, agreed with two opinions from the Seventh Circuit  
21 that, quote, "When a termination is pursuant to the terms of  
22 a contract, there is no transfer." So, here, the sand  
23 purchase agreement, as we talked about, had the immediate  
24 termination provision, and it also provided that after  
25 termination, EOG was under no obligation to continue

1 performance or to make any shortfall payment.

2 So, once the contract was terminated, if that was  
3 immediate, there's no kind of notice period or waiting  
4 period. And the contract expressly provides for what  
5 happens to other contractual rights. And notably, the  
6 shortfall payment that Hi-Crush highlights in its papers,  
7 after termination.

8 So, this is different from the fact of Hometown.  
9 In that case -- we relied expressly on Hometown in our  
10 papers. The first bullet there on the screen is really just  
11 our main point here. But in that case, there was a  
12 transfer, because the situation was different than the one  
13 here. There, the contract contained a 60-day notice period  
14 for the termination that was applicable in that case. And  
15 the parties terminated the agreement immediately, instead of  
16 adhering to that 60-day written notice period.

17 So, the Fifth Circuit there determined that income  
18 that would have otherwise been paid during the 60-day notice  
19 period, was property of the State, and that if there was a  
20 claim for constructive fraudulent transfer there.

21 But again, that's different from our case. Here,  
22 the sand purchase agreement provided for immediate  
23 termination, there was no notice period during which  
24 (indiscernible). And it also expressly provided for what  
25 happened to the shortfall payment on termination of the sand

1 purchase agreement.

2 So, in its amended complaint -- this relates to  
3 the assertion in the amended complaint that a transfer can  
4 include the prepetition termination of valuable contract  
5 rights. EOG sites to In re (indiscernible)-one from the  
6 Bankruptcy Court in the District of Delaware, Judge Walrath,  
7 for that point. And there have come two responses to that:  
8 First of all, (indiscernible)-one distinguishes the Seventh  
9 Circuit cases that the Fifth Circuit expressly agreed with,  
10 with respect to a termination pursuant to the terms of the  
11 contract being no transfer.

12 But even, putting that aside, that case is also  
13 distinguishable from the facts of this case. In that case,  
14 the Debtor had prepaid -- it was a prepaid contract and the  
15 Debtor had prepaid for millions of dollars in advertising  
16 services, but had not gotten the benefits of those services  
17 before the counterparty terminated the contract. And there,  
18 the Court noted that a contract whose termination would  
19 result in the loss of valuable property rights of the  
20 Debtor, such as an entitlement services for which -- paid in  
21 advance -- only that type of contract was potentially  
22 recoverable under Section 548.

23 So, in our case, there was no prepayment  
24 arrangement, and some of the items that Hi-Krush points to  
25 in its response, like building the facility, that sort of

1 thing, they're not expressly provided for in the agreement.  
2 Our contract, (indiscernible) of the contrary, expressly  
3 provides for what's happened post-termination. And so, this  
4 case is very much distinguishable from the facts of  
5 (indiscernible)-1, as well as the facts from the Hometown.

6 THE COURT: Do you believe that the claim that's  
7 pled in count three, is just a 548 claim, or is it a 548  
8 claim and a TUFTA claim? It was unclear to me, because they  
9 are slightly different.

10 MS. WARRICK: I think it's pled at both. But I  
11 think that the same analysis would apply. And in fact,  
12 Hometown is like the TUFTA.

13 THE COURT: I'm just talking about for purposes of  
14 the pleading itself. Do you think that there have been  
15 adequate claims pled, both under 548, as well as under  
16 TUFTA?

17 MS. WARRICK: I think that there are issues with  
18 respect to not being pled with (indiscernible). The  
19 (indiscernible) alternative pleadings.

20 THE COURT: Well, that's a Rule 9 argument, right?

21 MS. WARRICK: Right.

22 THE COURT: So, this is --

23 MS. WARRICK: They do plead under -- for TUFTA, in  
24 paragraphs 6 and 7 of the (indiscernible) claim.

25 THE COURT: Sort of, right? I mean it --

1 MS. WARRICK: I think we focus more on the 548  
2 element.

3 THE COURT: It says the transfer should be avoided  
4 as a fraudulent transfer, see 548, see TUFTA.

5 MS. WARRICK: Right.

6 THE COURT: All right.

7 MS. WARRICK: So, yeah, even just putting that  
8 aside, under these, the cases that we examine in our  
9 briefing, and including the ones here on the screen, some of  
10 them relate to 548, some of them relate to TUFTA or the  
11 other relevant statutes in whatever state is at issue. And  
12 so, I think our position is that the Fifth Circuit has made  
13 it clear that when a termination is pursuant to the terms of  
14 the contract, there's no transfer and there can be no claim,  
15 either 548 or in TUFTA.

16 THE COURT: Okay.

17 MS. WARRICK: Next slide, please. On this slide,  
18 we just have a couple of other supporting rationales for why  
19 there's no transfer. These are examples of some of the  
20 cases that we take a look at in more detail on the briefing.  
21 But often, there's an argument made that the Debtor -- the  
22 contract right is a valuable property right because the  
23 Debtor could assign its interest, or sell its interest in  
24 the contract to another party. But courts have found that  
25 restrictions on the alienability and the contract support

1 the conclusion that a termination of the agreement is not a  
2 transfer (indiscernible) property of the Debtor. And here,  
3 in the sand purchase agreement, at Section 11(b), there is  
4 such a striction on alienability, that provides that Hi-  
5 Crush has to have EOG's written consent to assign its right  
6 for obligations under the contract.

7 And then, we also suggest that finding otherwise,  
8 finding in contrary, in contrast to the decision in  
9 Hometown, the Fifth Circuit would be, would violate the  
10 meaning and the policy reasons behind the bankruptcy code,  
11 because it could render virtually every validly-terminated  
12 contract -- executory contract, it could make it revivable  
13 by the Debtor simply initiating bankruptcy proceedings. We  
14 don't think that's proper here.

15 And finally, if we can turn to the next slide;  
16 this is the last substantive slide in this presentation. I  
17 mentioned at the outside of this claim, the kind of  
18 conundrum of insolvency allegations with respect to the  
19 breach of contract claim, and the fraudulent transfer claim.  
20 But there's also, just within the fraudulent transfer claim,  
21 the conundrum of insolvency allegation.

22 Because even just looking at this claim, if Hi-  
23 Crush alleges that (indiscernible) insolvent on the date of  
24 termination, as it must do to succeed on one of its  
25 fraudulent transfer claims, then there could be no transfer

1 because the contract was terminated according to its term,  
2 as we saw in the Hometown decision. But if Hi-Crush alleges  
3 that it was solvent, then obviously -- and that's the very  
4 element of the fraudulent transfer claim -- cannot be  
5 alleged. So, this simply notes the fact that  
6 (indiscernible).

7 So, in conclusion, Your Honor, our position is  
8 that Hi-Crush failed to state the claim on which relief may  
9 be granted, and the Court should dismiss this lawsuit. We  
10 don't think that there's any need to engage in burdensome or  
11 extensive discovery effort, when it's evident from the base  
12 of the complaint, and evident from the sand purchase  
13 agreement attached to the claim, from the 10-Q that's  
14 attached to the complaint and termination letter attached to  
15 the complaint, that EOG had a contractual right to terminate  
16 and exercise that contractual right, in accordance with the  
17 terms of the contract.

18 We suggest that this conclusion is bolstered by  
19 evidence that's in the public record, and that the Court may  
20 consider at this stage concluding the bankruptcy filing on  
21 July 12, 2020, and the Plaintiff's schedule filed in the  
22 bankruptcy case, which show liabilities exceeding assets as  
23 of the day of the bankruptcy filing.

24 So, our position is the breach of contract claims  
25 and the redundant declaratory judgment claim, which we've

1 talked about a little bit today, that those should all be  
2 dismissed about their accompanying claims for attorneys'  
3 fees.

4 And furthermore, it's our position that the Fifth  
5 Circuit has spoken on the issue, and that when a contract is  
6 terminated according to its own terms, that there's no  
7 transfer for purposes of a fraudulent transfer analysis.  
8 So, Hi-Crush's alternative claim does not provide a  
9 possibility for relief for Hi-Crush, and it should also be  
10 dismissed.

11 With that, I'll wrap up, unless the Court has any  
12 further questions.

13 THE COURT: No, thank you. Very nice job.

14 MS. WARRICK: Thank you.

15 THE COURT: All right, Mr. Buoni?

16 MR. BUONI: Good afternoon, Your Honor.

17 THE COURT: Good afternoon.

18 MR. BUONI: Your Honor, may I ask for a five-  
19 minute break before we get started?

20 THE COURT: Of course. I have 3:16. Shall we  
21 come back at 3:25?

22 MR. BUONI: That works for me. Thank you, Judge.

23 THE COURT: All right. I'll see everybody back at  
24 3:25.

25 (Recess)

1 THE COURT: All right. The time is 3:25. We are  
2 back on the record in adversary number 20-3471, Hi-Crush  
3 versus EOG and Mr. Buoni, are you ready?

4 MR. BUONI: Ready, Your Honor. And, Your Honor,  
5 may I please have the presenter role?

6 THE COURT: Sure. There you go.

7 MR. BUONI: Thank you. All right. Did I share my  
8 screen okay?

9 THE COURT: You did. We have a mountain of sand.

10 MR. BUONI: Thank you, Judge. Judge, I know you  
11 like pictures so I thought I'd --

12 THE COURT: I do.

13 MR. BUONI: -- show you what our sand looks like.

14 THE COURT: Thank you.

15 MR. BUONI: Your Honor, today I'd like to handle  
16 the argument on the breach of contract claim and the  
17 fraudulent transfer claim. And Ms. Ashley Lewis is an  
18 associate at my firm. If you permit her to argue the  
19 declaration judgment and the attorney's fees, I'd like to  
20 allow her to do that.

21 THE COURT: I encourage it. That's terrific.

22 MR. BUONI: Sure thing. Thank you. Okay. So this  
23 is Joe Buoni on behalf of Hi-Crush Permian Sand, LLC, which  
24 today I'll refer to simply as Hi-Crush. And I'll go quickly  
25 through the background because I do think EOG did a nice job

1 of running through a lot of background allegations.

2 Hi-Crush is a seller under the stand purchase  
3 agreement with EOG as the buyer. Hi-Crush views this  
4 agreement as an extremely valuable asset which provides  
5 effectively with guaranteed revenue through the take-or-pay  
6 provision of millions of dollars guaranteed annually and  
7 potentially tens of millions depending on the amount of  
8 stand order by EOG. Hi-Crush spent \$50 million to build  
9 this mine facility on the left side on the screen in order  
10 to be able to perform its obligations under this agreement  
11 and in reliance on EOG's commitments under this agreement.  
12 And there's a closer look.

13 Now Hi-Crush has always performed its obligations  
14 under the agreement satisfying all of EOG's frac sand orders  
15 and Hi-Crush never materially breached the agreement at any  
16 point in time.

17 EOG had a nice timeline so I'll go through mine  
18 quickly. But essentially, the key facts here are, on June  
19 22nd, 2020, there was a covenant default -- not a financial  
20 -- or not a payment default but a financial covenant default  
21 -- under the ABL credit facility, not under the senior notes  
22 -- (indiscernible) senior notes, just under the ABL facility  
23 -- and following the default there was a forbearance  
24 agreement agreed to by the ABL lenders and Hi-Crush -- Hi-  
25 Crush, Inc., which is the parent company.

1           Three days later, the covenant default and  
2 forbearance agreement were disclosed along with Hi-Crush,  
3 Inc., disclosing liquidity constraints facing the company.  
4 To be clear, Your Honor, there was no disclosure of any  
5 insolvency either on the part of Hi-Crush itself on the --  
6 at the entity level or the Hi-Crush enterprise or of any of  
7 its affiliates. The word insolvency simply doesn't appear  
8 in the 10-Q. Likewise, there was no disclosure that Hi-  
9 Crush, the entity -- the plaintiff in this case -- was  
10 unable to pay its debts or it failed to pay debts or was  
11 unable to pay its debts as they fell due. At the time of  
12 the disclosure, Hi-Crush was solvent and current on its  
13 debts as alleged in the complaint.

14           Two days after the 10-Q was issued, EOG purported  
15 to terminate the parties' stand purchase agreement citing,  
16 as we've discussed already, the Section 7(b), romanette iii  
17 and iv of the stand purchase agreement. Hi-Crush promptly  
18 responded and disputed that the termination was effective  
19 and demanded that EOG perform under the agreement. As Your  
20 Honor's well aware, the bankruptcy filing happened on July  
21 12th.

22           EOG stopped ordering frac sand at the time it sent  
23 the termination notice and over the course of 2020, it  
24 incurred over \$5 million worth of take-or-pay shortfall  
25 payments or deficiency fees that became due at the end of

1 2020. And Hi-Crush commenced this action to recover that  
2 amount and also to either recover its damages or compel  
3 specific performance of the agreement going forward because,  
4 as I mentioned, this is an extremely valuable asset to the  
5 reorganized debtor.

6 I'm going to turn now to the parties' disputed  
7 interpretations of the key contract language that's -- you  
8 all have already been focused on today. Now EOG argues that  
9 Hi-Crush is seeking to rewrite the terms of the agreement by  
10 demanding a fair value analysis, and that is not correct.  
11 While we do think a fair value analysis is one way the Court  
12 could go, we are not demanding -- or we are not rewriting  
13 the contract. If Hi-Crush is proven to be insolvent under  
14 an applicable standard, and I'll get to the standard  
15 shortly, but if they are actually proven to be insolvent  
16 then EOG would not be in breach by terminating. But the  
17 proper insolvency inquiry must take place first before the  
18 question can -- before the Court can answer the question of  
19 whether a breach has occurred.

20 EOG seeks to cut this inquiry short. It argues --  
21 and I believe I have this quote right from today -- EOG  
22 argued that it doesn't need to consider the definition of  
23 insolvency is the quote I wrote down. And this is -- that  
24 was consistent with what I read in the brief where EOG says  
25 that they just need evidence tending to show insolvency to

1 be able to terminate. So the language here from -- the way  
2 EOG interprets Section 7(b), they argue on reply that a  
3 party's entitled to terminate if there is evidence --  
4 however that evidence may look -- of the counterparty's  
5 insolvency.

6 Hi-Crush submits that this is a overly subjective  
7 view. Under this view, a party could take the position that  
8 only a tenuous financial state, as EOG argued today -- only  
9 a tenuous financial state or an unsatisfactory financial  
10 position is all that's required to satisfy Section 7(b) and  
11 to cancel a seven-year, long-term agreement that EOG  
12 invested \$50 million to be able to perform.

13 I want to mention the Commodity Merchants' case  
14 that we might be talking more about later on the fraudulent  
15 transfer piece but in Commodity Merchants, the contract  
16 actually allowed termination if the counterparty's financial  
17 position became unsatisfactory to the terminating party.  
18 And so that language was clear in that contract. There's no  
19 such language here in Section 7(b). Likewise, there's no  
20 language that says EOG can terminate if Hi-Crush appears to  
21 be in a tenuous financial state or if Hi-Crush appears to be  
22 in financial distress.

23 THE COURT: So, Mr. Buoni, let me ask you the same  
24 question I asked Ms. Warrick. With respect to 7(b) little  
25 iii, what do the terms bankrupt and insolvent mean in your

1 view?

2 MR. BUONI: So, Judge, with regard to bankrupt, I  
3 see -- I read it with otherwise the (indiscernible) bankrupt  
4 and reading the provision along with romanette i and ii, I  
5 really see that as a catch-all where, if were for some way -  
6 - laws can change -- if somehow you're already bankruptcy  
7 proceeding and you did not fit within i and ii, that is a  
8 catch-all that any form of bankruptcy or bankruptcy  
9 proceeding would satisfy, you know, termination under that  
10 situation.

11 THE COURT: So again, I'm not sure what that means  
12 because obviously if this were a right to terminate to upon  
13 a filing of a bankruptcy that's become problematic and we  
14 wouldn't be here. At least one definition of bankrupt is  
15 that one -- that there has to be a judicial adjudication of  
16 a person of entity status in a proceeding. That's at least  
17 one definition. But I'm -- the fact is, is that little iii  
18 stands alone and it says, "otherwise become bankrupt of  
19 insolvent." I mean, is it a fair statement that you really  
20 don't have any more of an idea of what bankrupt means than  
21 Ms. Warrick does?

22 MR. BUONI: I think that's probably fair, Your  
23 Honor. I will say that EOG didn't terminate based on Hi-  
24 Crush being, quote/unquote, otherwise bankrupt. But I think  
25 that that's a fair assessment.

1 THE COURT: Well, so you're saying otherwise --  
2 the "otherwise" become applies only to bankrupt and not  
3 insolvent?

4 MR. BUONI: I'm not saying that, Your Honor, but I  
5 was just trying to take it piece by piece with bankrupt. I  
6 think otherwise become bankrupt is a catch-all, and  
7 otherwise be insolvent even if somehow you don't satisfy the  
8 other -- the proceeding parts of that section.

9 THE COURT: Okay. So what's insolvent mean to you  
10 under this provision?

11 MR. BUONI: Insolvent -- I want to make sure -- I  
12 don't want to be wedded to my outline, Judge, but I want to  
13 make sure I'm not missing anything. Insolvent means --  
14 insolvent under Texas law, the contract selects Texas law as  
15 the governing law and it states that the contract shall be  
16 interpreted in accordance with Texas law.

17 THE COURT: Okay.

18 MR. BUONI: So, Your Honor, I submit that the  
19 Court must look to the definition of insolvency under Texas  
20 law to determine whether or not Hi-Crush was actually  
21 insolvent.

22 THE COURT: Okay. Do you know what that is?

23 MR. BUONI: Yes, Judge. We agree with -- excuse  
24 me -- we agree with EOG that Texas law would apply the  
25 uniform commercial code to this agreement and so there is

1 three different options that would be available under the  
2 UCC.

3 THE COURT: All right.

4 MR. BUONI: And I'll circle back to that point in  
5 a moment, Judge. I think the problem with EOG's  
6 interpretation is that they're overly focused on the phrase  
7 "however evidenced," and EOG doesn't cite one case where a  
8 court interprets the meaning of "however evidenced" at all  
9 and certainly not in the way that EOG interprets it. In  
10 their way, all you need is evidence of insolvency to be  
11 insolvent.

12 The main case that EOG relies on is Buffalo Cole,  
13 and that court was confronted with a similar -- the same  
14 phrase of "however evidenced" but the Court did not construe  
15 what "however evidenced" meant -- means. Instead, the Court  
16 looked to the meaning of insolvency and is what I believe is  
17 a -- perfect here as well, Your Honor. It's the meaning of  
18 insolvency under Texas law.

19 I also want to add with regard to Buffalo Cole,  
20 that was a summary judgment case where both the trustee and  
21 an officer of the debtor admitted that the debtor was unable  
22 to pay his debts as they fell due. And the trustee also  
23 admitted balance sheet insolvency and there, the Court made  
24 a finding of insolvency. But we are very far away from that  
25 situation here as the motion to dismiss stage.

1 I think the proper way to look at the meaning of  
2 "however evidenced" is to focus on what the word "evidenced"  
3 means. Evidence, as the Court knows, is documents or  
4 testimony or objects that tend to prove or disprove the  
5 existence of disputed facts. So "however evidenced" goes to  
6 the breadth of the evidence that EOG may rely upon in  
7 asserting insolvency.

8 "However evidenced" does not change the meaning of  
9 the term insolvency. And so I think the flaw in EOG's  
10 argument is it conflates these two issues. EOG argues that  
11 Section 7(b) reflects the party's intent that each party  
12 should have wide latitude in determining whether the other  
13 party has become insolvent. So it's wide latitude in the  
14 actual meaning of whether the other party is insolvent.

15 We (indiscernible) this language with the  
16 insertion of the language in blue because we think the  
17 better reading is, Section 7(b) reflects the intent that  
18 each party should wide latitude in the evidence it may rely  
19 upon in determining whether the other has been insolvent.  
20 And this, Judge, makes perfect sense when you consider the  
21 Texas standard of insolvency. As we just walked through,  
22 there's three different meanings of insolvency under Texas  
23 law.

24 THE COURT: So -- let me ask, Mr. Buoni --

25 MR. BUONI: Sorry.

1 THE COURT: -- because I'm going to quibble with  
2 this just a little bit. So you've said this is what Texas  
3 law says. No, this is what the Texas Uniform Commercial  
4 Code says. There are many other definitions of insolvency  
5 under Texas law. But are you stipulating that the UCC  
6 definition applies to this particular contract?

7 MR. BUONI: That's correct, Judge.

8 THE COURT: Okay.

9 MR. BUONI: And --

10 THE COURT: Am I bound by that stipulation?

11 MR. BUONI: Not necessarily.

12 THE COURT: No. I'm -- it's actually a very  
13 serious question because -- I mean, I got it that you all  
14 went to the UCC and you (indiscernible), okay, well, here's  
15 a definition of insolvency. And I got it that Texas law  
16 applies, but, you know -- I'll read you a selection out of a  
17 fairly well-known Texas case. It's says, "the meaning of  
18 insolvency is definitely not fixed and is not always used in  
19 the same sense but its definition depends rather on the  
20 business or fact situation to which the term applies." That  
21 a quote.

22 So I'm just trying to figure out how you all got  
23 to the UCC. I didn't see in anything I read that it says,  
24 this is the definition that we will use. Was it just a,  
25 this contract is covered by the UCC therefore we're going to

1 use the UCC definition? Is that how we got there?

2 MR. BUONI: Yeah, Judge. Let me back up for a  
3 second. I'm responding to EOG's motion and EOG's motion  
4 took the position that the UCC applies.

5 THE COURT: Okay.

6 MR. BUONI: And so --

7 THE COURT: Just want to understand how we got  
8 there.

9 MR. BUONI: Right. And today I think EOG did  
10 confirm that is the definition they're relying on. I think  
11 there was still some wavering on whether you just need  
12 evidence as opposed to satisfy one of these standards, but  
13 I'm responding to EOG and I think that this definition does  
14 provide a good understanding -- a good explanation -- for  
15 how to interpret "however evidenced."

16 THE COURT: Okay.

17 MR. BUONI: And the explanation is, each of these  
18 standards has a -- has different evidentiary requirements,  
19 and "however evidenced" allows them -- makes clear that they  
20 don't need to prove insolvency under one particular  
21 standard. They can submit evidence under any standard of  
22 their choosing under the UCC, but they still need to satisfy  
23 what one of these standards actually requires to be  
24 insolvent.

25 THE COURT: So you're saying the "however

1 evidenced" -- it's -- doesn't change the fact that when I  
2 look at it in order to determine whether or not they acted  
3 in accordance with their contractual rights, that there is a  
4 legal standard out there that I have to find that they met.  
5 Is that your position?

6 MR. BUONI: Yes. They need to satisfy an actual  
7 insolvency standard or test. They cannot simply contend, it  
8 looks like you're insolvent so we're going to terminate  
9 based insolvency. They need to be right from a -- from an  
10 actual standard.

11 THE COURT: And so let me ask, what if the debtor  
12 said, I'm insolvent or the company said, I'm insolvent?  
13 That isn't -- but yet they were still paying their bills,  
14 and you couldn't figure out or they couldn't figure out that  
15 they wouldn't be able to pay their bills for the foreseeable  
16 future and their balance sheet was at least in the positive,  
17 so neither A, B, or C would apply in this example. Are they  
18 insolvent?

19 MR. BUONI: I think it may depend on who says it  
20 as to how strongly you got to take that admission, but I do  
21 think --

22 THE COURT: Your corporate --

23 MR. BUONI: -- I think that the --

24 THE COURT: -- your corporate president. Your  
25 corporate president said, I think we're insolvent.

1 MR. BUONI: I think that's a more challenging  
2 case, Judge, but I still think the party that terminates  
3 needs to be right on insolvency, and if that statement  
4 constitutes an admission -- a legally binding admission --  
5 of insolvency then maybe -- then maybe you don't need to  
6 actually satisfy a test. But I think the company may --  
7 after a contract gets terminated, the company may say, well,  
8 we're weren't actually insolvent under any particular  
9 standard. It was loose language from the president and we're  
10 going to contest the termination.

11 THE COURT: Okay.

12 MR. BUONI: One other point on being -- on the  
13 third prong here, being insolvent within the meaning of  
14 federal bankruptcy law. In its reply, EOG argues that the  
15 fair value standard doesn't necessarily apply. And we  
16 focused on the fair value standard because EOG brought that  
17 balance sheet into the equation -- into the discussion -- in  
18 its motion by pointing to the schedules. And if the Court  
19 is going to conduct a balance sheet test, then fair value is  
20 the only test. There's not a balance sheet test where you  
21 just look at the book value and determine whether or not  
22 insolvency exists.

23 Wrapping up this section, Judge, Hi-Crush's  
24 position is that the Court should reject EOG's  
25 interpretation that only evidence is required -- only some

1 evidence. There must be sufficient evidence to satisfy an  
2 articulated standard which has not occurred here. All that  
3 we've seen is that EOG argues that the 10-Q should be  
4 enough.

5 THE COURT: So let me ask you this. Does it  
6 matter the subjective intent of the person making the  
7 decision under this agreement? So let me give you an  
8 example. Let's assume that the day before the press  
9 release, there'd been a discussion that says, hey, we need  
10 to find a way to get out of this contract and some brilliant  
11 young associate in the in-house legal department came up  
12 with this argument -- hey, look at this. Let's take  
13 advantage of it, or if there was a genuine surprise and a  
14 reaction to the 10-Q was that filed. Does that have any  
15 bearing on this in your mind?

16 MR. BUONI: The underlying motive, is that what  
17 you're -- the point you're --

18 THE COURT: Maybe it's motive. Maybe it's point  
19 of reference. Because that gets back to your evidence  
20 issue, doesn't it?

21 MR. BUONI: I think that the point is they have to  
22 be right. They -- whether or not they -- their basis for  
23 calling the insolvency, they still need to be right that we  
24 were insolvent.

25 THE COURT: Well, they still have -- they do have

1 to be right in what they did. I don't know that it's right  
2 -- does it have to right with respect to insolvency, but  
3 they have to right in exercising their rights. Right? I  
4 mean, the -- whatever the agreement means, they just have to  
5 comply with the agreement, right? You can't add anything to  
6 it. The agreement is what the agreement is. Agreed?

7 MR. BUONI: Yes, Your Honor.

8 THE COURT: Okay. I'm with you.

9 MR. BUONI: Okay. Turning to the balance sheet  
10 issues, Hi-Crush in its complaint adequately pleaded that  
11 its assets exceeded its liabilities. And EOG does not  
12 directly challenge the allegations in the complaint. EOG  
13 instead simply points to the 10-Q and says that the 10-Q is  
14 conclusive on insolvency, but nothing in the 10-Q addressed  
15 Hi-Crush's solvency or insolvency at the entity level. And  
16 the pleadings -- you know, viewed in the light most  
17 favorable, show that Hi-Crush was solvent from a balance  
18 sheet perspective.

19 EOG attempts to get around this issue by pointing  
20 to the schedules filed after the petition date asking the  
21 Court to take judicial notice of the schedule. It's Hi-  
22 Crush's position that judicial notice is not proper here  
23 because judicial notice only applies to facts whose accuracy  
24 cannot be reasonably questioned.

25 THE COURT: Well, I'm assuming that a bankruptcy

1 schedule signed under oath -- it's kind of a reach to say  
2 that you aren't bound by that. Right? People have relied,  
3 I relied, U.S. Trustee's relied, creditors have relied.

4 MR. BUONI: I think -- the point is, they are  
5 offering the schedules to show the fact of insolvency.

6 THE COURT: Well, I mean --

7 MR. BUONI: And --

8 THE COURT: -- the fact is you did file schedules  
9 that, if I -- if it's just simple math, it ends up in the  
10 red. It's as of a different date. It may very well not be  
11 at fair value and that gets back to the whole issue of, how  
12 do you do the math. You have to have a valuation. You  
13 know, book value as we all know means very little on a lot  
14 of these types of assets. It also, as we have seen over the  
15 past year, a entity's financial position over the course of  
16 two weeks can change by a huge amount just given the things  
17 that are going on.

18 MR. BUONI: Right.

19 THE COURT: But I don't know that I buy that's --  
20 I mean, I don't know why I can't take judicial notice of the  
21 fact that in its schedules, the debtor asserted assets of X  
22 and liabilities of Y. I think that's an entirely  
23 appropriate fact or facts -- there are actually two -- to  
24 take judicial notice of. What they mean's a different  
25 question. But I don't -- I'm not sure I buy the fact that

1 when you file a pleading in a case under oath that I can't  
2 take judicial notice of the fact that you did that.

3 MR. BUONI: I certainly agree you can take  
4 judicial notice of the fact that schedules were filed, and  
5 you can also take judicial notice of what the schedules say,  
6 and I'm not submitting that our schedules were inaccurate.  
7 The point is, it doesn't get you anywhere on the fair value  
8 inquiry. It's just not necessary at this stage because the  
9 schedules in global notes say this -- the global notes of  
10 the schedule say this -- that these are book values unless  
11 otherwise stated and the book value may differ from the fair  
12 value.

13 THE COURT: Sure.

14 MR. BUONI: And I think we need a test before we  
15 can make a decision on whether or not there's a balance  
16 sheet insolvency.

17 THE COURT: So do you think it would have been  
18 unreasonable for EOG -- now granted, they'd already made the  
19 decision by the time they saw this -- but would it have  
20 reasonable to have relied on information that the debtor  
21 filed under oath?

22 MR. BUONI: If they had terminated after the  
23 schedules were filed, assuming no ipso facto issue?

24 THE COURT: Uh-huh.

25 MR. BUONI: It would be more reasonable. I don't

1 think it necessarily means they're in the right, though,  
2 because we're talking -- we're still talking about book  
3 values.

4 THE COURT: That's not what I asked you. Would it  
5 have been reasonable -- because you know this is only the  
6 first part to the question -- would it have been reasonable  
7 to have relied on sworn schedules if that's what they had  
8 done? They didn't do that but would it have been reasonable  
9 to do have done that? The only answer you can give is yes.

10 MR. BUONI: I was just checking my boxes to make  
11 sure I wasn't missing anything.

12 THE COURT: So if that's the case, would it also  
13 be reasonable to rely upon information filed in a 10-Q?

14 MR. BUONI: To a degree, yes, but the information  
15 in this 10-Q wasn't -- it was not reasonable in this 10-Q.  
16 It could be.

17 THE COURT: Again, not the question I asked you.  
18 Would it be reasonable to rely upon information filed by a  
19 debtor in a 10-Q?

20 MR. BUONI: I mean, generally speaking, 10-Qs  
21 should be accurate and so it's certainly for an investor to  
22 rely on them. That's what they're there for. I can't tell  
23 you, Your Honor, that it's unreasonable for a counterparty  
24 to rely on a 10-Q, although I'm not sure that they're --  
25 they're there for the counterparty.

1 THE COURT: That's public information signed under  
2 oath, right?

3 MR. BUONI: That's right.

4 THE COURT: Okay. Keep going.

5 MR. BUONI: And one last point of the schedules,  
6 and this is why we're not at a place where the schedule can  
7 be conclusive, is that, contingent obligations need to be  
8 discounted by the likelihood that the contingency will  
9 occur. And here, the schedules list \$450 million, the full-  
10 face value amount of the senior notes, which the senior at  
11 the time of the determination notice were simply a  
12 contingent debt. They were a guarantee made by Hi-Crush,  
13 and it was a guarantee not just by Hi-Crush but by a number  
14 of Hi-Crush entities.

15 The way EOG relies on the schedules, they're  
16 taking the position that Hi-Crush was a hundred percent  
17 responsible and it was a certainty at the time of  
18 termination that Hi-Crush would have to pay them in full --  
19 would be required to pay the senior notes in full.

20 THE COURT: Yeah.

21 MR. BUONI: There's some degree of discounting  
22 that should be applied in the fair value analysis and just a  
23 5 percent discount would render Hi-Crush solvent under the  
24 rest of the values in the schedules.

25 THE COURT: Right. Well, they can't really rely

1 on the schedules at all, can they? Because it has to be  
2 what was available at the time that they issued the  
3 termination letter. They're just throwing that in as to  
4 say, see, we were right. Right?

5 MR. BUONI: That's right. But I'm unsure if  
6 that's exactly what they're doing, but I'll take it and I  
7 agree that they can't be looking backwards and saying, look,  
8 we got you. We were right.

9 THE COURT: All right. Keep going.

10 MR. BUONI: Okay. Just real briefly, EOG argues  
11 that the schedules are an admission of insolvency. I think  
12 we've already beaten the horse on insolvency and -- with the  
13 schedules. But the global notes contain a express  
14 disclaimer that the schedules are not an admission of  
15 insolvency. So they cannot be -- under the standard is a  
16 judicial admission, the schedules cannot be a judicial  
17 admission.

18 Okay. Turning to the next argument that EOG  
19 makes, that Hi-Crush admitted in the 10-Q that it was unable  
20 to pay its debts as they fell due. EOG cites the town on  
21 Westlake decision for the proper standard on ability to  
22 repay debts as they fall due, and we've got no problem using  
23 that case. Town of Westlake says that the courts should  
24 look to a number of factors and that the standard on ability  
25 to repay debts is not a mechanical standard. It's one that

1 you must balance the interests of the debtor and creditors.  
2 Here, given Hi-Crush's well pleaded allegations, we're just  
3 not in a place where it's proper to dismiss the case based  
4 on this complicated standard.

5 Hi-Crush alleged it was paying its debts as they  
6 fell due and that it was able to keep paying its debts as  
7 they fell due. And the consolidated enterprise in its 10-Q  
8 disclosed \$60 million in cash on hand and it disclosed that  
9 it had repaid all outstanding borrowings under the ABL  
10 facility during the second quarter of 2020. So there were  
11 no (indiscernible) borrowings under the ABL facility. This  
12 does not look like an enterprise that is unable to pay its  
13 debts as they fall due.

14 The only debt that could -- that EOG could rely on  
15 is, we know, the senior notes debt, but that debt had not  
16 been accelerated and it could not even be accelerated until  
17 the forbearance agreement with ABL lenders had either  
18 expired or failed to be extended.

19 And, Judge, with that, if you have further  
20 questions, I'll cede the virtual podium to my colleague, Ms.  
21 Lewis.

22 THE COURT: All right. Thank you. Ms. Lewis.

23 MS. LEWIS: Thanks, Judge. I've already discussed  
24 a bit today Hi-Crush is seeking several declarations in this  
25 matter. As the Court recognized, EOG argues that the

1 entirety of Hi-Crush's adversary judgment claim is redundant  
2 of Hi-Crush's breach of contract claim, but As Your Honor  
3 has already touched on, it's not. The breach of contract  
4 claim will not resolve the assumption in (indiscernible)  
5 issues or determine the remaining terms of the stand  
6 purchase agreement. And additionally, Your Honor, it's Hi-  
7 Crush's position that that romanette v that we touched on a  
8 little bit relating to fees and costs -- neither of that  
9 will addressed by Hi-Crush's breach of contract claims. And  
10 that goes to Hi-Crush's entitlement to seize for bringing  
11 the dec action that's different as well than the breach of  
12 contract claim.

13 As Your Honor recalls, these (indiscernible)  
14 issues are carryover issues from the bankruptcy case where  
15 Hi-Crush sought to assume the stand purchase agreement that  
16 is at times (indiscernible) effected and actually instructed  
17 Hi-Crush that it needed to seek a declaratory judgment which  
18 is why we're here. The parties have tabled that issue and  
19 as you recall as well, paragraph 62 of the confirmation  
20 order where it addresses this dispute and says that the  
21 Court would (indiscernible) at a later time.

22 So this dec action is seeking to bring resolution  
23 to those outstanding issues given that it's not duplicative  
24 of the breach of contract claim. Removing it would  
25 necessarily change the scope of what the Court is being

1 asked to determine, and the Court has broad discretion here  
2 to allow it to proceed and only would submit that EOG's  
3 motion to dismiss on that point should be denied.

4 As to attorney's fees, Your Honor, Hi-Crush is  
5 seeking attorney's fees for both its declaratory actions as  
6 well as for its breach of contract claims. For the dec  
7 action, as Mr. Buoni acknowledged, we have withdrawn our  
8 claim on the basis of 37.009, however, we still have a claim  
9 for attorney's fees in connection with the dec action under  
10 Section 17 of the stand purchase agreement. EOG has not  
11 challenged that basis and so Hi-Crush is entitled to  
12 continue to pursue that claim. And as for attorney's fees  
13 based on the breach of contract claims, as you heard today,  
14 EOG's essentially saying, Hi-Crush can't prevail on that  
15 claim so we shouldn't be entitled to (indiscernible).

16 For reasons that have been articulated in the  
17 briefing that's been filed with the Court as well as  
18 arguments by Mr. Buoni today, Hi-Crush has stated a claim  
19 for its breach of contract case and we believe that the  
20 evidence will later show that we should prevail on it such  
21 that we should be entitled to fees. In that point as well,  
22 Your Honor, we believe that EOG's motion to dismiss should  
23 be denied.

24 THE COURT: All right. Thank you. Ms. Warrick,  
25 do you want to respond to any of the arguments that you've

1 heard?

2 MS. WARRICK: Unless Your Honor has questions, I  
3 think that we kind of addressed the counterarguments in my  
4 argument earlier, but I'm happy to answer any questions that  
5 were raised in light of what my colleagues said.

6 THE COURT: I think I'm just fine. Then with  
7 that, I'll close the argument. I've got before me the  
8 motion to dismiss filed by EOG Resources filed at docket  
9 number 18. I do find that I have jurisdiction over the  
10 matter pursuant to 28 U.S.C. Section 1334. I do find that  
11 resolution of the motion constitutes a court proceeding  
12 within the adversary under 9014. I also find that I have  
13 the requisite constitutional authority to enter a final  
14 order with respect to the request.

15 First of all, let me compliment all three of you.  
16 This is year number 10, and I haven't heard a better argued  
17 12(b) motion ever. So I appreciate the preparation. I  
18 normally get -- I normally prepare a lot harder than the  
19 lawyers do because I hear the same arguments over and over.  
20 Very clear to me that you all have been thoughtful about  
21 this. You spent a lot of time. I especially appreciate the  
22 opportunity for the youngsters in get in and develop their  
23 skill sets. It's the only way that you get better at doing  
24 this. You can't teach it in a book. But I very much  
25 appreciate the arguments and even the old guys which is odd

1 that I'm calling Buoni an old guy because he's a youngster  
2 in my book. I really appreciate all of the effort and  
3 thought that went into it.

4 I'm not going to repeat the standard. It's  
5 accurately cited, and again, the briefing was just  
6 wonderful. Based upon my reading, my review of the law, I  
7 did research outside of what you all cited. I read you a  
8 selection out of one of the cases that I looked at, and  
9 again, this is at a 12(b)(6) standard. But based on the  
10 arguments that are made, here's what I'm going to do.

11 With respect to the breach of contract claim, I'm  
12 going to deny the motion. With respect to the dec action --  
13 and again, I'm going to reference the paragraph numbers --  
14 I'm going to grant the motion as to 46 little i and 45  
15 little v. In granting the motion, I'm -- because I do find  
16 it to be duplicative. I don't think it adds anything to the  
17 lawsuit. I am going to find that there is nothing that  
18 could be done to replead in that dec action such that I am  
19 required to give the plaintiff an opportunity to replead.  
20 We already had an amended complaint, and again, it's  
21 duplicative. So I'm not -- I'm going to grant that motion,  
22 not permit any repleading.

23 With respect to the fraudulent transfer claim, I  
24 am going to grant the motion. I don't -- I know that it was  
25 done as an alternative and sort an afterthought. I think

1 Ms. Warrick's right. I don't think she went, quite frankly,  
2 hard enough that you really can't figure out what the claim  
3 is. But I cannot conclude as a matter of law that there's  
4 no a set of facts that could be pled that would establish a  
5 claim. Again, in looking at the law, I don't think it's  
6 absolute that I -- that a termination is always -- I mean,  
7 the case law proves it -- but that the termination is always  
8 a transfer or is never a transfer. I think it depends upon  
9 looking at the rights that exist under the contract. And  
10 so, Mr. Buoni, what I will do is while I'm granting the  
11 motion to dismiss as to count 3, I think the circuit  
12 requires me once I rule on a 12(b)(6) motion to give you an  
13 opportunity to replead that claim if you wish. And so I'm  
14 going to ask you in a minute if you want to attempt to  
15 replead count 3, the fraudulent transfer claim.

16 With respect to the attorney's fees, quite  
17 frankly, I don't consider that to be a separate claim.  
18 We've, I think, appropriately seen the withdrawal of the  
19 assertion under the dec action statute. The -- if there is  
20 a breach of contract claim -- I mean, that's kind of the  
21 remedy and, you know, I will -- you know, if I find that  
22 there's been a breach of contract, then I will more than  
23 likely award attorney's fees. But I think there are a whole  
24 number of considerations that will come into play. And so  
25 to the extent that you need a ruling on it, because again, I

1 don't think that it's a separate count. I mean, I think  
2 it's adequately pled and it's there as part of the remedy,  
3 if you will. I understand you have to plead for attorney's  
4 fees. I got it. But it's not asserting, I guess, separate  
5 claim for a tort or breach of contract or that sort of  
6 thing. It's an entitlement if you proceed upon or if you  
7 prevail on a particular claim and the provision for the  
8 attorney's fees exists, either by contract or by law. So to  
9 the extent that you need a ruling, you know, deny the motion  
10 with respect to the request for attorney's fees. But again,  
11 that's just -- it's somewhat of a different issue me. We've  
12 got a whole lot to do before we ever get there.

13 So Mr. Buoni, first let me ask you, do you want to  
14 attempt to replead the fraudulent transfer claim or shall we  
15 just proceed ahead with the breach of contract and the --  
16 what I'm going to call the assumption dec action?

17 MR. BUONI: I'm going to need to speak to my  
18 client, Judge. I'm inclined -- well, I'm inclined not to  
19 comment yet until I speak to the client. Could I have a  
20 window where I can replead and if I don't do it by a certain  
21 day, it's closed?

22 THE COURT: So here's -- yes, we can work through  
23 all of this because what I'm going to want you to do is, I'm  
24 going to want you to work on a form of order that -- since  
25 there is not a clear victor or a clear loser, I'm going to

1 want you both to sign off as to form only. I'll put on the  
2 record that approving this to form you're not waiving any  
3 right of review of appeal that you may have if any exist.  
4 You're just confirming that the paper is consistent with the  
5 ruling that I've made on the record pursuant to bankruptcy  
6 rule 7052.

7 What I would like for you to have that  
8 conversation and then after you've huddled with your team  
9 and you and Ms. Lewis agree as to what's going to occur, you  
10 communicate with Ms. Warrick. So let's go down that  
11 decision tree so that we know what the order looks like. If  
12 your client says, yeah, I got it. Perhaps we ought to stay  
13 just with the breach of contract claim because it gets too  
14 messy otherwise, then do we need to set a scheduling  
15 conference relatively quickly?

16 MR. BUONI: Yes, Judge.

17 THE COURT: So let's do -- so if that's your  
18 decision then start a communication with Mr. Alonzo, with  
19 you and Ms. Warrick on it, and simply get a date for a  
20 scheduling conference. Give me a rule 26 and do it -- I'll  
21 do it as quickly as you all are ready.

22 If it turns out that you want to try and amend,  
23 then work with Ms. Warrick on a deadline to replead. And I  
24 would think it probably doesn't need to be more than 30  
25 days, but just to try to give you sort of what's in my head.

1 And with that, then agree on a date. Again, I think the  
2 rules provide, you know, 30 days, but again, you know, 5 or  
3 10 days either way doesn't bother me at all. I just don't  
4 want there to be an argument over 30 days versus 6 months,  
5 if that makes sense.

6 Then if you choose to replead, then give Mr.  
7 Warrick an opportunity to file another 12(b) motion if she  
8 believes it's appropriate or an answer if she is willing to  
9 proceed ahead -- obviously, this is will be further out --  
10 but then get a date for either a hearing on the motion to  
11 dismiss or scheduling conference if she decides to file an  
12 answer. Does that all make sense? Have I given you enough  
13 guidance?

14 I'm trying to give you a lot of leeway as to how  
15 to structure this. But the long and short of it is, if  
16 you're not going to replead, then we need to get answer on  
17 file, have a scheduling conference so you all can start the  
18 process. And again, I'm going to be open. There are a  
19 number of issues that, while, you know, may be not  
20 appropriate for a 12(b)(6), may be appropriate for a test  
21 under rule 56. Again, I don't know.

22 Ordinarily, I don't like summary judgment motions  
23 until the end of discovery simply because the answer I  
24 always get is, I can't possibly respond to this motion for  
25 summary judgment because I haven't completed taking my

1 discovery. So if you look at my normal order, my normal  
2 order say, no summary judgment motions until the conclusion  
3 of discovery unless you first file a motion and set forth  
4 cause. In the few time that that has happened, I don't  
5 think I've ever said no. Actually, I've -- well, there's a  
6 real reason to have an early summary judgment.

7 If you all want to build that into the schedule --  
8 this was way -- more much long-winded than I anticipated it  
9 being -- if you all want to build that in on the front end,  
10 if you think there's some threshold issue that you want to  
11 sort of take a little bit of discovery and then test this  
12 issue, I'm all fine. And if you can't agree, then I'm  
13 perfectly happy to listen to it at a scheduling conference.

14 But I want to get a process in place where we get  
15 -- if we're going to have another rule 12, let's, you know,  
16 get a complaint, get it on file, and let's get it resolved.  
17 If we're going to proceed ahead based on what's left -- and  
18 that would be again the remaining declaratory judgment  
19 issues and the breach of contract -- then let's get a status  
20 -- let's get an answer on file, get a status conference so  
21 we can all get started working. I think, you know, debtor  
22 needs it. EOG needs an answer and we just need to move it  
23 forward.

24 Does that make sense? Is that enough guidance?

25 MR. BUONI: Yes, Judge.

1 THE COURT: Tired of listening to me? Got it.

2 Got it. Okay. Got it.

3 MS. WARRICK: I did want to clarify one thing.

4 I'm think I'm stating the obvious but our proposed deadlines

5 in the -- in our rule 26 report and the proposed schedule

6 order -- our impression is they're off the table until we

7 get this new proposal to you. (indiscernible)

8 THE COURT: I was giving you the opportunity to

9 change them. And again -- so if you all agree -- and I'll

10 just tell you because, Ms. Warrick, you've not done this

11 with me, I don't think, before -- if you all agree on

12 deadlines, I try to honor them.

13 I spent the better part of 20 years litigating

14 everything I could possibly find, and I never liked judges

15 telling me what I ought to be doing unless I was in a fight

16 and we couldn't agree. So I try to honor -- I try to treat

17 people the way that I wanted to be treated.

18 So if you all can come up with your own schedule

19 and you're happy with it, I'm going to honor that. Just

20 leave a blank for a final pre-trial date. And again, you

21 can get -- if you want my form order, if you don't have it,

22 Mr. Alonzo will send it to you if you'll just ask him.

23 It's sort of short, fairly direct. You can add to

24 it. I'm sure you could probably make it shorter but I'm not

25 quite sure how. But happy for you to do all of that. I

1 just -- I want to get the parties to the point where we can  
2 get in a position to get a resolution one way or the other.  
3 Okay?

4 MR. BUONI: Judge, one comment. I expect I'll be  
5 able to get an answer from my client either tonight or  
6 definitely by tomorrow unless my client's not available.

7 THE COURT: Sure.

8 MR. BUONI: We've got a scheduling order that we  
9 filed at docket number 20 -- and agreed scheduling order.  
10 If I get an answer within the next 24 hours or so, I know my  
11 client -- if we don't to replead, my client's going to want  
12 to keep this schedule intact that we already haven.

13 THE COURT: Fine with me. I'm perfectly happy  
14 with a joint request by you and Ms. Warrick to Mr. Alonzo  
15 that says, you know, we're not going to replead. Please  
16 enter the scheduling order at docket blank. That's  
17 perfectly fine with me. I was just giving you the option to  
18 change it if you wanted to. I wasn't trying to limit you.

19 MR. BUONI: Works for me.

20 MS. WARRICK: Thanks, Your Honor.

21 THE COURT: Okay. Ms. Warrick, you okay? All  
22 right.

23 MS. WARRICK: All set.

24 THE COURT: Anything else we need to do today? So  
25 download the CourtSpeak and listen to yourselves. And I

1 don't say that jokingly. I mean that. I learned more from  
2 listening -- of course, I had to go over and get a CD.  
3 That's how old I am. And I had to wait while they made the  
4 CD. But, you know, download the audio and listen to  
5 yourselves. You will learn more about how to be an  
6 effective presenter by listening to yourself than you will  
7 from anything else so -- and it's free.

8 And while you're driving home, don't forget to pay  
9 attention to the road. Be safe, everybody, and I'll see you  
10 soon. We'll be adjourned.

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12 (Proceedings adjourned at 4:18 p.m.)

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CERTIFICATION

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



Sonya Ledanski Hyde

Veritext Legal Solutions  
330 Old Country Road  
Suite 300  
Mineola, NY 11501

Date: April 2, 2021