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COURT OF APPEALS
STATE OF NEW YORK

CORTLANDT STREET,

Appellant,

-against-

BONDERMAN,

Respondent.

NO. 104

20 Eagle Street
Albany, New York
November 18, 2025

Before:

CHIEF JUDGE ROWAN D. WILSON
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE MADELINE SINGAS
ASSOCIATE JUDGE ANTHONY CANNATARO
ASSOCIATE JUDGE SHIRLEY TROUTMAN
ASSOCIATE JUDGE CAITLIN J. HALLIGAN

Appearances:

MARK C. ZAUDERER, ESQ.
DORF NELSON & ZAUDERER, LLP
Attorney for Appellant
475 Fifth Avenue
17th Floor
New York, NY 10017

PAUL M. O'CONNOR, III, ESQ.
Loeb & Loeb, LLP
Attorney for Respondent
345 Park Avenue
New York, NY 10154

Brandon Deshawn
Official Court Transcriber

1 CHIEF JUDGE WILSON: Last case on today's
2 calendar is Cortlandt Street v. Bonderman.

3 MR. ZAUDERER: May it please the court. Mark
4 Zauderer, for the appellants. Respectfully, I would like
5 to reserve three minutes for rebuttal.

6 CHIEF JUDGE WILSON: Yeah.

7 MR. ZAUDERER: Thank you. We were here almost
8 eight years ago. And in the, what I'll call the Cortlandt
9 1 opinion, this court set down the template for this case
10 at the pleading stage. And I don't want to be presumptuous
11 to tell the court what it said and read it to you, but I
12 would say, because it sets the stage - - - I'd like to
13 remind us what the court said was that it is sufficient at
14 the pleading stage that the alleged facts and the
15 inferences drawn from them establish the basic elements of
16 the doctrine of piercing the corporate veil.

17 JUDGE TROUTMAN: You emphasize the pleading stage
18 - - -

19 MR. ZAUDERER: Correct.

20 JUDGE TROUTMAN: - - - that that case did. Was
21 that pleading pre-discovery? So it's not - - -

22 MR. ZAUDERER: Correct.

23 JUDGE TROUTMAN: - - - necessarily - - - the
24 court is not bound on this stage?

25 MR. ZAUDERER: Absolutely. I agree a hundred

1 percent. But we're at the summary judgment stage. And as
2 we know, we have to show the facts back this up. But the
3 legal template does not change. And we followed that
4 roadmap. You know, before I came here, someone said, do
5 you want to take the eighteen volumes of the record here?
6 I said, no. I would like to use my time to lay out for the
7 court, and I think I can do it in six minutes. I can cut
8 through eighteen volumes and explain the fraud here. And
9 not only the fraud, but to meet the standard that was
10 established here that, you know, piercing the corporate
11 veil or alter ego case, we have to do two things,
12 otherwise, I would just be applauding with one hand. We
13 have to show the complete domination and control of the
14 judgment debtor here, which we did, and I'm going to get
15 into that, married to the concept of a misuse of that
16 control.

17 JUDGE TROUTMAN: And so you say married, meaning
18 they both have to go together?

19 MR. ZAUDERER: Absolutely. And we took the
20 template and you know, five or six years of discovery in
21 fourteen volumes. I would like to say now what the two
22 basic errors were of the Appellate Division. First of all,
23 it rejected the group theory that this, as a matter of
24 pleading, laid out. All you have to do is juxtapose what
25 you said in Cortlandt 1 and what the Appellate Division

1 said. They said, we don't accept the group plea. I don't
2 - - - can't explain that. I did watch the oral argument.
3 I think I understand they - - - how they missed it, but
4 they missed it. And that's in our briefs, and we discussed
5 it.

6 JUDGE HALLIGAN: Can I ask you what the - - -

7 MR. ZAUDERER: Yes.

8 JUDGE HALLIGAN: - - - collective entity is that
9 you're proposing here? Is it just the TPG defendants or
10 the TPG plus the Apax?

11 MR. ZAUDERER: Right. It's - - - the theory is
12 TPG plus Apax. And I'm going to describe it. I'll answer
13 your question in full. But we're not going to focus on
14 Apex because they were out on - - - on jurisdictional
15 grounds.

16 JUDGE HALLIGAN: Right. So if they're out - - -

17 MR. ZAUDERER: Yes.

18 JUDGE HALLIGAN: - - - but your theory is the two
19 together form a collective, then what does that do to your
20 theory?

21 MR. ZAUDERER: Because there was no finding on
22 the merits that Apax and TPG did not engage improperly in
23 this joint effort. It was just - - - it does not - - - the
24 fact that they're out on jurisdiction subject - - - not
25 subject matter, personal jurisdiction grounds doesn't

1 impact the analysis of what happened at the time when they
2 acted together.

3 JUDGE HALLIGAN: So you're suggesting that we
4 would analyze the question of collective liability as
5 against both acting jointly even though one is no longer in
6 the case?

7 MR. ZAUDERER: Yes. Yes. Even though the - - -
8 there can't be liability on the other because there are no
9 - - - no precedent - - -

10 JUDGE RIVERA: So what's the collective conduct?

11 MR. ZAUDERER: Okay.

12 JUDGE RIVERA: Over here.

13 MR. ZAUDERER: Okay. So - - -

14 JUDGE RIVERA: What's the collective conduct?

15 MR. ZAUDERER: Yes. I'm going to explain - - -

16 JUDGE RIVERA: Yeah.

17 MR. ZAUDERER: - - - the whole thing eventually.

18 I think the easiest way to explain this - - - I'm going to
19 ask you to, if you would, picture in your mind's eye a
20 horizontal line. Above the line we have the nine
21 defendants here, all the TPG-created entities. Below the
22 line, we have the Hellas - - - the - - - the Hellas
23 entities, right? And now I'm going to lay out the whole
24 case for you.

25 Okay. So above the line, the nine entities, and

1 I'm going to call them one, two, three - - - one through
2 nine. I can give you the names, but I won't to take your
3 time with it. So one, two, and three are the investment
4 solves - - - investment funds. These are the shareholders
5 of the Hellas entities, okay? Four, five, six, and seven
6 are the general partners of one, two, and three. And eight
7 and nine, I'll come back to you when I explain to you the
8 fraud here and how these were married together with their
9 control.

10 So here is what - - - this is record page 4374 to
11 75. When - - - after they acquired Hellas, they wrote to
12 the SEC, and they explained how these entities were shell
13 companies, which included the debtor and the guarantor.
14 This is what they said on September 27, 2005. They said
15 the Luxe - - - this is the counsel, Cleary Gottlieb,
16 writing to the SEC. The Luxembourg holding companies are
17 merely - - - now the - - - those are referring to the
18 Hellas companies and their holding companies because
19 there's an operating company below. But these holding
20 companies, the debtor and guarantor, had no operation at
21 all. They were only created to funnel the money in, which
22 I'm going to come to and how they took the money out.

23 They said, these are merely - - - and this is the
24 lawyer for the entity - - - for the whole complex here.
25 They're merely intermediate shell companies that have no

1 business activity or purpose beyond affecting the
2 transactions described. That's this whole transaction
3 we're talking about.

4 CHIEF JUDGE WILSON: And so does that allow you
5 to pierce the corporate veil - - -

6 MR. ZAUDERER: It will, Your Honor, when I - - -

7 CHIEF JUDGE WILSON: - - - by - - - by itself?

8 MR. ZAUDERER: Yes. It happens because - - -

9 CHIEF JUDGE WILSON: By itself? So any time
10 somebody represents to the SEC that in a course of a
11 transaction, some company is a shell company for the
12 purpose of holding something and has no business
13 operations, its veil should be disregarded?

14 MR. ZAUDERER: Not by itself. I would agree with
15 you.

16 CHIEF JUDGE WILSON: Okay.

17 MR. ZAUDERER: They say the - - -

18 CHIEF JUDGE WILSON: And would you agree that
19 that's a common structure?

20 MR. ZAUDERER: Absolutely. And I - - -

21 CHIEF JUDGE WILSON: Right.

22 MR. ZAUDERER: - - - think that's what, frankly,
23 confused the Appellate Division. The Appellate Division
24 saw this from the ground level. They didn't look at it
25 from 1,000 feet, which I'm going to describe. And that was

1 the error here. And they go on to say, these entities,
2 that is the shell companies, are controlled by the Apax
3 entities and the TPG entities and are not independent from
4 these controlling entities. That's not - - - not
5 independent. That's - - - the second statement, they said
6 the TPG shareholders, that's respondents one, two, and
7 three right above the line that I've - - - that I've
8 hypothesized, they're not acting independently or directly
9 - - - directly in these transactions. They are private
10 equity investment funds organized as limited partnerships
11 with no officers or directors. They act through and are
12 controlled by the TPG entities, that's four, five, and six.

13 Now, what I'm going to describe to you, which I'm
14 sure the court wants to hear, is how is this structure used
15 to commit a fraud? So at this point, I would say enter
16 stage left a Mr. Matthias - - - I'd spelled Calice. I'm
17 told it's pronounced [kuh-leesh-e]. And he had a
18 counterpart on the Apax side. By the way, these entities
19 below the line I've created, these Apax and TPG are joined
20 at the hip like - - - like Siamese twins. And they each
21 acted in relation to these entities as their counterpart
22 did.

23 So here's what happened. Calice was the - - -
24 the so-called leader of the TPG deal team. He had a
25 counterpart. He was the leader. He was responsible for

1 overseeing these investment funds. He advised a review
2 committee. He performed the business modeling. He liaised
3 with the underwriting banks. He devised evaluations. And
4 he was appointed - - - now this is where he goes below the
5 line - - - he was appointed by the three investment funds,
6 that's respondents one, two, and three, to the boards below
7 the line of Hellas. And this is where it's going to get
8 interesting.

9 So he becomes a board member in the Topco entity.
10 He's a director and secretary of Hellas one, director of
11 Hellas two. He's - - - and then he includes the issuer of
12 the bonds, and manager and secretary of Hellas finance.
13 That's the guarantor of the bonds. And here's where it
14 gets more interesting. He signed the documents relating to
15 the CPECs that are going to be redeemed in a moment. And
16 I'm going to tell you how the fraud occurred. And he
17 signed the PIK notes, the notes that are at issue here, and
18 the indenture for those. And he signed the documents for
19 the resolutions adopted by Hellas and then by the CPEC
20 redemption agreements.

21 So here's the way it works. So the money comes
22 in in the bonds. And what does he do? He ships it back
23 over the line to the various entities. And this is how
24 they acted collectively. So - - -

25 CHIEF JUDGE WILSON: Well, those entities held -

1 - - held debt, no?

2 MR. ZAUDERER: The - - - who - - - I'm sorry.

3 What?

4 CHIEF JUDGE WILSON: The entities above the - - -

5 well, when - - - when the original purchase - - -

6 MR. ZAUDERER: Yeah.

7 CHIEF JUDGE WILSON: - - - of Hellas was done,

8 various of these entities held obligations, right? So that

9 is, they financed it partly with debt.

10 MR. ZAUDERER: Yeah. They financed it.

11 CHIEF JUDGE WILSON: Right.

12 MR. ZAUDERER: Exactly.

13 CHIEF JUDGE WILSON: Right.

14 MR. ZAUDERER: So - - - so the money goes through

15 Hellas - - -

16 CHIEF JUDGE WILSON: And this debt is held by

17 some of these over the line companies whether they're - - -

18 MR. ZAUDERER: Yeah. It goes up the line.

19 CHIEF JUDGE WILSON: Right. Yeah.

20 MR. ZAUDERER: This is what happened. And so - - -

21 - and here's what happened. So entity one that's one of

22 three investment funds, it gets distributions - - - they

23 divided up the money. That's why these - - - we're here

24 because they had different people behind them. 380.5

25 million and another 82 million to entity number one. 8.6

1 million to entity number two. 47.3 million and 6.(sic)
2 million to entity number three. Entity four, which is the
3 general partner of number one gets \$78.6 million. Entity
4 six gets 11.1. Seven didn't get distributions. It was - -
5 - I'll come back to that. Seven got - - - it was a general
6 partner. But it - - - number eight was a consultant and
7 received consulting fees. And nine provide - - - provided
8 advisory services to the funds. And that's at pages 7348
9 to 53.

10 JUDGE TROUTMAN: But didn't the offering
11 memorandum state that payouts were going to take place?

12 MR. ZAUDERER: Yes. They were deceptive in two
13 respects, the offering memorandum. First, it talked in the
14 hundreds of pages. It says about money being used to repay
15 deeply subordinated debt. That's the CPECs. Now, our
16 expert opined - - - the - - - these are - - - represents -
17 - - represented your equity investments. That's not debt.
18 That's misleading. They dispute that. You're going to
19 hear that. But that's a factual issue for summary judgment
20 and the experts. But here's where the real fraud came in.

21 So the question is, how do they get their money
22 out in relation to the CPECs they hold? Well, here's where
23 they committed the fraud. These were valued, these
24 instruments, at €1. In fact, just before this, they sold
25 over \$40 million at the value of €1. And later on, they

1 did it again, which I'll come to. But for this, they
2 unilaterally said, how do we value these to get the money
3 out? And they were - - - they valued them at €35 a piece
4 with no support. They just made it up totally. And I will
5 tell you that the operative instrument - - - I'll find it
6 here - - - says that - - - which they created says that
7 these have to be valued - - - if the value is going to be
8 established other than what it is at €1, it has to be done
9 at arm's length. That is in the document itself. I can
10 give you the record cite. And in the offering memorandum,
11 while they may have said the subordinated debt, they never
12 said that they could do what they do here, which is
13 unilaterally determine the value of what they're trading it
14 in in order to get their money out. And that is precisely
15 what they did. And the - - -

16 CHIEF JUDGE WILSON: Well, they based it on a
17 valuation of 3.2, right?

18 MR. ZAUDERER: They - - -

19 CHIEF JUDGE WILSON: €3.2 billion.

20 MR. ZAUDERER: The - - - whatever they valued it
21 sufficient at a number that the - - - if you took the - - -
22 3.5 times the valuation or €3.5 times the number of CPECs
23 and whatever else they were putting in, they were able to
24 get all the money out. That's what - - - that's what they
25 - - -

1 CHIEF JUDGE WILSON: You know, my question is a
2 little different. So the - - -

3 MR. ZAUDERER: I'm sorry.

4 CHIEF JUDGE WILSON: This is all related to their
5 attempt - - - there was a suggestion, I think, by their
6 lawyers that they get an outside valuation of the company,
7 right? And that wasn't done.

8 MR. ZAUDERER: It was not done.

9 CHIEF JUDGE WILSON: And they made an internal
10 one instead for something like €3.2 billion.

11 MR. ZAUDERER: Yeah.

12 CHIEF JUDGE WILSON: And then a year or so later,
13 a completely unaffiliated third party came in and bought
14 the company for more than that?

15 MR. ZAUDERER: Incorrect.

16 CHIEF JUDGE WILSON: Okay.

17 MR. ZAUDERER: Incorrect. And they'll tell you
18 that because the company that bought it - - -

19 CHIEF JUDGE WILSON: Yeah.

20 MR. ZAUDERER: - - - did not acquire the debt.

21 They paid €500 - - - they paid €500 for the assets, 500,
22 not 3.2. That - - - that's a fiction. And you can ask
23 them, I'm sure, if you will. Now, coming back to the - - -

24 JUDGE HALLIGAN: Counsel, could I ask you to - -

25 -

1 MR. ZAUDERER: Yeah.

2 JUDGE HALLIGAN: - - - just step back for a
3 minute? And - - - and here's what I'm struggling with.

4 MR. ZAUDERER: Yeah.

5 JUDGE HALLIGAN: I understand you to be arguing
6 that Cortlandt 1 says that collective liability is
7 possible. And I think you also cite Passalacqua and maybe
8 - - - what is it?

9 MR. ZAUDERER: Yes.

10 JUDGE HALLIGAN: Morris. But I - - - am not sure
11 I see a lot of discussion of why collective liability is
12 appropriate on the facts we have here. Can you tell us why
13 it's a good idea - - -

14 MR. ZAUDERER: Well, I'll give you a - - -

15 JUDGE HALLIGAN: - - - based on our case law - -
16 -

17 MR. ZAUDERER: Sure.

18 JUDGE HALLIGAN: - - - and the purposes of - - -
19 of a collective liability theory?

20 MR. ZAUDERER: Well, let's say you had ten people
21 who were acting together, and they buy a company, and
22 somebody is trying to hold them responsible as controlling
23 the company. Each one would say, I only own ten percent of
24 this company.

25 JUDGE HALLIGAN: Yeah, but what would the

1 parameters of the collective liability theory be under - -
2 - under your view?

3 MR. ZAUDERER: For - - - if - - -

4 JUDGE HALLIGAN: So for example, one percent,
5 would that be enough?

6 MR. ZAUDERER: I think you have to - - - here,
7 you have well over eighty percent between the two, okay? I
8 don't know - - - well, would one percent be? I don't know.
9 That would - - - probably a novel question, but here's the
10 - - - if I may, the theory. It's really not new. It's, by
11 analogy, like a conspiracy. This is not a criminal or
12 civil - - -

13 JUDGE HALLIGAN: Well, when you say it's not new,
14 I think you're pointing us to Cortlandt 1 and Passalacqua.
15 Are there other cases from this court that adopt that
16 theory or apply it?

17 MR. ZAUDERER: I rely on Cortlandt. There have
18 been some subsequent - - -

19 JUDGE HALLIGAN: Okay.

20 MR. ZAUDERER: - - - cases which have used that
21 theory.

22 JUDGE HALLIGAN: And that - - - and that - - -

23 MR. ZAUDERER: Passalacqua does.

24 JUDGE HALLIGAN: - - - simply, I think says it's
25 - - - well, I see your light's on, but says that it's

1 possible.

2 MR. ZAUDERER: I'm sorry. Say what?

3 JUDGE CANNATARO: Those cases say it's possible.
4 They don't - - -

5 MR. ZAUDERER: Yes.

6 JUDGE CANNATARO: - - - require it. So what are
7 the telltale signs that would invoke this collective
8 liability that exists out there, but may not be appropriate
9 in every situation?

10 MR. ZAUDERER: What would - - - if people get
11 together with a common plan and act in some way or receive
12 the benefit of it, they constitute what they call
13 themselves here, a consortium or a group. And so what
14 we're saying is that the people who join this group, they -
15 - - you can't say we're acting as a consortium and then the
16 - - - and then not accept the responsibility of being a
17 consortium.

18 JUDGE CANNATARO: That sounds a little bit like
19 you're saying every time these entities are acting in
20 concert, they're subject to collective - - -

21 MR. ZAUDERER: They - - -

22 JUDGE CANNATARO: - - - piercing.

23 MR. ZAUDERER: They are if they do what I just
24 suggest to you - - - I just demonstrated that each played a
25 role in part - - - either participating as an investment

1 entity, as a general partner, or receiving the benefits so
2 they could pass them on. And that's exactly what happened
3 here.

4 JUDGE TROUTMAN: Don't you also have to show that
5 they abuse the corporate form somehow?

6 MR. ZAUDERER: Yes. They abused the - - - well,
7 they have the - - -

8 JUDGE TROUTMAN: Just by acting together?

9 MR. ZAUDERER: They set up entities and created
10 obligations. They issued bonds. But these were just
11 shells.

12 JUDGE HALLIGAN: The - - - each one - - - I mean,
13 what I think I hear you saying is, essentially, we should
14 import the overt act concept from - - -

15 MR. ZAUDERER: Yes.

16 JUDGE HALLIGAN: That - - - that's very broad.
17 Does - - -

18 MR. ZAUDERER: But I - - -

19 JUDGE HALLIGAN: So if I take one overt act - - -

20 MR. ZAUDERER: No, not just one.

21 JUDGE HALLIGAN: Okay. So how is it distinct - -
22 -

23 MR. ZAUDERER: Not - - - not tentative, all
24 right.

25 JUDGE HALLIGAN: - - - from - - - you said you

1 have to play a role. So what does that mean exactly?

2 MR. ZAUDERER: I'm not suggesting as you may be
3 alluding to in a criminal case, perhaps one overt act by
4 one conspirator binds everybody. We're not - - -

5 JUDGE HALLIGAN: So everybody has to take one
6 overt act?

7 MR. ZAUDERER: I'm saying we have demonstrated -
8 - - yes. I think that's - - - that's correct.

9 JUDGE TROUTMAN: What would your rule be?

10 MR. ZAUDERER: What?

11 JUDGE TROUTMAN: If we did the alter ego in the
12 collective sense, what would your rule be?

13 MR. ZAUDERER: The rule would be that if you have
14 what's demonstrated to be a common plan and you use a shell
15 entity as here, a corporate entity or other kind of entity
16 to perpetrate a wrong, that the members of that group who
17 play a role in it are liable because, otherwise, nobody is
18 liable except, you know, there'd - - - there'd be no
19 liability for the actions of particular participants.

20 JUDGE TROUTMAN: But you acknowledge you would
21 have to identify that a wrong occurred - - -

22 MR. ZAUDERER: Yes.

23 JUDGE TROUTMAN: - - - by that - - - those
24 actions?

25 MR. ZAUDERER: We - - - we would and we have, and

1 to say - - -

2 JUDGE RIVERA: And knowing - - - knowing - - -

3 MR. ZAUDERER: Yes.

4 JUDGE RIVERA: - - - that the participation is
5 knowing in furtherance - - -

6 MR. ZAUDERER: Yes.

7 JUDGE RIVERA: - - - of that wrong?

8 MR. ZAUDERER: Yes. And we've demonstrated here
9 - - -

10 JUDGE RIVERA: Can't be I'm in the dark. I
11 happen to be a part of this company, but I'm in the dark
12 that indeed - - -

13 MR. ZAUDERER: No. I'm not suggesting that - - -
14 that they - - -

15 JUDGE RIVERA: - - - there's a fraud that's being
16 committed.

17 MR. ZAUDERER: - - - they extended that fraud.
18 There has to be an abuse, as here, which had an effect of
19 leaving the debtor insolvent and causing injury. And
20 that's what you said in Cort - - - when laying out the
21 theory in Cortlandt 1. Every element that was in Cortlandt
22 1 we've established. And I suggest to you, it's certainly
23 not on sum - - - it's not a summary judgment case against
24 us. And this should go to trial that - - - that the - - -
25 there was enough evidence here to create triable issues on

1 all of these things.

2 CHIEF JUDGE WILSON: Thank you.

3 MR. ZAUDERER: Thank you.

4 MR. O'CONNOR: Good afternoon. Paul O'Connor,
5 from Loeb & Loeb, on behalf of the TPG, respondents, the
6 only respondents in the case at this point. What I'd like
7 to do, actually, before I get into my argument, is address
8 a couple of things that Mr. Zauderer said.

9 First of all, he was correct. We were here in
10 2018. So it was a long time ago when we were here on the
11 motion to dismiss. And I think that's important. It was a
12 motion to dismiss decision. The court was very clear that
13 what was laying out was that the pleadings were adequate at
14 that point in time. As a matter of fact, the opinion
15 itself says point blank that it is adequate, and they
16 shouldn't require more at this pre-answer, pre-discovery
17 stage. That's directly from the Cortlandt 1 opinion. And
18 as Mr. Zauderer said, you know your work better than we do,
19 but to just show us on the record there that's what was
20 stated.

21 There was a reference to the SEC statement.
22 First of all, it was a statement to the SEC in 2005, not in
23 connection with the 2006 transaction. It was - - - it used
24 the word control. But again, we cited a case for the
25 proposition that using the word control to the SEC has

1 explicitly been held by courts in the state not to be the
2 same as control for purposes of alter ego. And the
3 entities that were shell entities were not the Hellas
4 entities. They were Troy entities. And again, they're not
5 the same entities that are being talked about here. It
6 wouldn't matter anyway whether you were describing them as
7 nonoperating entities. There are lots of nonoperating
8 entities out there that are not being pierced.

9 There was a mention to Mr. Calice - - - Matthias
10 Calice, who is a former partner of TPG. He was dismissed
11 from this case because there was no alter ego evidence. It
12 wasn't personal jurisdiction. There was no evidence that
13 he - - - that he had committed alter ego type liability
14 actions. So the idea that what they're going to do is try
15 to ride in on the back of Mr. Calice, who's not even in
16 this case, makes absolutely no sense.

17 I'm going to get to the fact that there's no
18 evidence as to any of these TPG respondents, but they've
19 now made it even harder. They now are not talking about
20 them by name. They were talking about them as the
21 respondents generally. They never used their names. They
22 never talk about what any entity did. They've now taken to
23 calling them entity one, two, and three; four, five, and
24 six; seven, eight, and nine. I really have absolutely no
25 idea what those entities are.

1 And then, again, there was a discussion of each
2 playing a role, which I will get into here. The fact of
3 the matter is, the evidence is crystal clear. None of them
4 played any role whatsoever. There is no evidence in this
5 record. And this record is voluminous as was already
6 referenced by Mr. Zauderer. It's nineteen volumes. That
7 was all in front of the Appellate Division. What - - - if
8 it was in there, I'm sure they would have brought it to
9 your attention.

10 CHIEF JUDGE WILSON: Does it matter if they're
11 CPECs or debt or equity?

12 MR. O'CONNOR: Pardon?

13 CHIEF JUDGE WILSON: Does it matter if they're
14 CPECs or debt or equity?

15 MR. O'CONNOR: It does not matter. CPECs are
16 actually our hybrid entity. They - - -

17 CHIEF JUDGE WILSON: Yeah.

18 MR. O'CONNOR: They are both debt and equity.
19 They're actually Luxembourg securities. And they're
20 treated under Luxembourg as one thing and treated here in
21 the U.S. as a different thing. And it doesn't matter. All
22 this - - - everything - - - almost everything that Mr.
23 Zauderer talked about, the valuation of the CPECs, fraud,
24 et cetera, has nothing to do with the alter ego matter you
25 have in front of you. What you have in front of you is

1 something that's very precise, which is - - - is that, has
2 alter ego been pled as against these six entities?

3 As this court is well aware, when we were last
4 here, this case was much bigger. There were many more
5 defendants. There were many more parties. There's hardly
6 anything left of it that they had - - - they amended their
7 complaint so there were ten or eleven - - -

8 JUDGE TROUTMAN: Do they need to establish it as
9 to each individual?

10 MR. O'CONNOR: Yes.

11 JUDGE TROUTMAN: Or can they collectively act?

12 MR. O'CONNOR: So I don't - - - I'll get to that.
13 I don't think that they can collectively act. I think that
14 this court's jurisprudence has made it very clear that what
15 you need to do in alter ego is analyze two factors that you
16 set forth in Morris, which I'll get to now into my
17 argument.

18 JUDGE HALLIGAN: So you think - - - you think no
19 collective liability is possible or available? Cortland is
20 - - -

21 MR. O'CONNOR: I don't think Cortlandt - - - I
22 don't think - - -

23 JUDGE HALLIGAN: What do you make of the
24 statement in Cortland 1 then?

25 MR. O'CONNOR: Well, I don't see a statement in

1 Cortlandt 1 that talks about collective liability. I think
2 that - - - I don't think Cortlandt 1 stands for collective
3 liability. And I don't think Passalacqua stands for it
4 either. And I don't think the Perez case stands for
5 either. I don't think collective liability makes sense in
6 the alter ego context, again - - -

7 JUDGE HALLIGAN: Why - - - can you explain why?

8 MR. O'CONNOR: Well, the reason it doesn't make
9 any sense is because there are other ways to get there - -
10 - easier ways to get there. If people are doing the things
11 that they're complaining about, you could bring a
12 conspiracy count. They never did. You could cons - - -
13 you could conspire to commit a fraud. This court has
14 limited conspiracy to tort claims. But you could conspire
15 to commit a fraud. They're asking you to change the law
16 and to make it such that - - - you know, that piercing the
17 corporate veil of a corporation is something that is done,
18 you know, rarely. It is done, but it's not something
19 that's done in a usual manner. There are lots of
20 corporations out there. Their veils are not being pierced.
21 And I don't think it makes sense to - - - to go ahead and
22 take a very specific doctrine.

23 And again, getting into Morris, which was
24 referenced here, and we agree that that's the standard, you
25 have to show two things. One is complete domination and

1 control of the corporation. That - - - that's the
2 Luxembourg judgment debtors here in respect of the
3 transaction attacked. Here, that's a 2006 recap. And you
4 have to do both of these things. You have to do - - - show
5 the use of such domination and control to commit a
6 wrongdoing in respect of the transaction that's being
7 attacked. That's what you need to show, and that's entity
8 by entity. It has to be. You couldn't do that as a group.
9 And again, there are ways to get - - -

10 JUDGE TROUTMAN: Do you dispute that,
11 collectively, they dominated?

12 MR. O'CONNOR: Well, again, I don't think so
13 because what you would be doing at that point is you - - -
14 there are a number of factors here. None of them are
15 determinative, but there are a number of factors for each
16 of these prongs. And what you'd be doing is saying that if
17 one entity somehow or another did - - - you know, office is
18 the same - - - had the same offices as somebody, somebody
19 else was involved in the - - - in the capitalization of the
20 company, somebody else was involved in the books and
21 records and putting that all together, you're going to
22 pierce all those veils, I don't think that that's what - -
23 - I don't think that's what your jurisprudence says. And
24 against the Morris case, which was decided thirty years
25 ago, and we're in full agreement that that's the

1 controlling - - -

2 JUDGE HALLIGAN: Yeah.

3 MR. O'CONNOR: - - - standard right now.

4 JUDGE HALLIGAN: The Appellate Div - - -

5 MR. O'CONNOR: You'd be making new law, I
6 believe. Yeah. Sorry.

7 JUDGE HALLIGAN: Okay. The Appellate Division, I
8 think, held - - - and I think it's fair to characterize it
9 as alternative grounds, that there wasn't a showing of
10 complete domination even if you were to consider it. I
11 read them as saying even if you were to consider the
12 liability as a collective whole. And so could the case be
13 resolved on that ground alone without exploring the
14 parameters of what collective liability might look like?

15 MR. O'CONNOR: Yes, it could be. Yes, it could
16 be.

17 JUDGE TROUTMAN: And even if one were to say
18 there's some collective liability, you do have to establish
19 that they use the corporate form in some violative way,
20 right?

21 MR. O'CONNOR: Yes. Yes.

22 JUDGE TROUTMAN: And so if the - - - if that's
23 not - - - if the second part is not established, it doesn't
24 matter if they acted collectively in any event?

25 MR. O'CONNOR: That's right. That's correct.

1 That's correct. And again, this is pointed out here. The
2 First Department's decision on appeal here applied the
3 Morris factors very clearly. And again, just to repeat on
4 this collective liability point, I don't believe that's the
5 jurisprudence of this court right now. You'd be making new
6 law. And we personally don't believe that it makes sense
7 to make that new law. And the reason is - - -

8 CHIEF JUDGE WILSON: Let me ask you - - - oh, go
9 ahead. Go ahead with the reason, then I'll ask my
10 question.

11 MR. O'CONNOR: Sure. I was just going to say
12 that we don't think it makes sense because, again, what
13 you'd be doing is you'd - - - you'd be making much more
14 difficult something that could be done through a conspiracy
15 claim to commit a fraud, which is what they're essentially
16 alleging occurred here.

17 CHIEF JUDGE WILSON: Well, that's what I was
18 going to ask you is, if you were - - - so we didn't, I
19 think, set out what you would need to do to establish a
20 collective veil piercing, right? I mean, we said it's
21 theoretically possible, right? It's a viable cause of
22 action. We didn't say, here's what you have to prove. So
23 were we to read into that, essentially, the crimes for
24 conspiracy, what would be the difference?

25 MR. O'CONNOR: Well, what the difference would be

1 is that you - - - you wouldn't have to go through the
2 factors that you set forth in Morris as to how to pierce
3 the veil.

4 CHIEF JUDGE WILSON: I understand that. But if
5 we - - - not we - - - if the trustee here could have held
6 all these entities liable, if - - - that's a big if - - -
7 through a conspiracy theory - - - conspiracy to commit
8 fraud, what's the difference if we import that - - - that
9 test, essentially, into communal or - - - or, you know,
10 veil piercing?

11 MR. O'CONNOR: Well, again, I think - - - I think
12 for two things. First of all, if you look at - - - if you
13 look at the situation here, what the Appellate Division
14 found is there's no evidence as to any of these respondents
15 having done anything connected to anything, veil piercing
16 or otherwise.

17 CHIEF JUDGE WILSON: Yeah. That's sort of a fail
18 - - - that's sort of a failure of proof, which - - -

19 MR. O'CONNOR: That's - - - that - - -

20 CHIEF JUDGE WILSON: Yeah.

21 MR. O'CONNOR: Right. But again, on the whole
22 idea of collective liability and pushing them all together,
23 again, you'd be now act - - - making the court go through
24 two analyzes when they could go through just one. If they
25 had - - - but if they had decided to do this and they

1 didn't do this, they could have pled conspiracy to commit a
2 fraud, and then they could have proceeded that way.

3 JUDGE CANNATARO: Counsel, I'm not sure I caught
4 into this argument. Your - - - essentially, what I hear
5 you saying is they should have gotten or could have gotten
6 a judgment against each of these entities instead of having
7 a judgment against only one of the entities, but they
8 didn't. And as the Chief was just suggesting, what's to
9 stop us legally from using the same analysis that you would
10 do to establish liability at the collective level for - - -
11 for some kind of fraudulent, you know, scheme and applying
12 it post judgment in a piercing context? Why is that not
13 allowed?

14 MR. O'CONNOR: Well, first of all, I don't - - -
15 I mean, I'm not sure that they - - - that they're really
16 seeking a judgment against one entity at this point.
17 They're seeking a judgment against a large number of
18 different entities for - - -

19 JUDGE CANNATARO: No. No. They're seeking to
20 enforce a judgment against a large number of different
21 entities.

22 MR. O'CONNOR: A large number of entities.
23 That's correct.

24 JUDGE CANNATARO: They have a judgment.

25 MR. O'CONNOR: They have a judgment. And they're

1 seeking to enforce that judgment against a number of
2 different entities.

3 JUDGE CANNATARO: Because their claim is the - -
4 - you know, the judgment debtor has been emptied out by the
5 coconspirators.

6 MR. O'CONNOR: Well, they are claiming that. But
7 again, I think what's important for purposes of this - - -
8 of this appeal is that's not the relevant standard right
9 now. What we're dealing with right now is whether or not
10 the - - - the corporate form has been abused. We're
11 dealing with whether or not domination and control - - -

12 JUDGE CANNATARO: Agreed.

13 MR. O'CONNOR: - - - and whether that domination
14 and control has been used to commit a wrongdoing. We're
15 not dealing with whether or not - - - and the question here
16 - - -

17 JUDGE RIVERA: And why didn't that happen here?

18 MR. O'CONNOR: Pardon?

19 JUDGE RIVERA: Why didn't that happen here,
20 domination and control to commit a wrongdoing?

21 MR. O'CONNOR: Well, because - - - because,
22 again, if you look at the evidence here as to the six, the
23 nine TPG-related respondents that are left in the case,
24 there's absolutely no evidence of them having any contact
25 with any of the Hellas entities whatsoever, not one. And

1 I'd point the court to two places here where, again, I
2 think it's important to look at what they cited.

3 CHIEF JUDGE WILSON: When you - - - when you say
4 - - - sorry. When you say any of the Hellas entities, you
5 mean the issuer or the guarantor?

6 MR. O'CONNOR: That's right, Hellas one - - -

7 CHIEF JUDGE WILSON: Okay.

8 MR. O'CONNOR: - - - and Hellas finance.

9 CHIEF JUDGE WILSON: Yeah.

10 MR. O'CONNOR: I'd - - - I'd draw the court's
11 attention to page 13 of their opening brief, footnote 21,
12 where they say that all nonrespondents operated as part of
13 a deal team led by TPG partner, Calice. They've - - -
14 they've then got a footnote coming off of that, footnote
15 21. And if you look at that footnote, you'll see that
16 there are a lot of record cites. It's a lot of work to go
17 through them. But if you do go through them, you'll see
18 that absolutely none of them mention any of the
19 respondents. All they talk about is Mr. Calice working as
20 a director for one of the Hellas entities, which he was,
21 and signing corporate resolutions. That's not evidence of
22 - - - of domination and control. That's not evidence of
23 anything. And again in - - - and - - -

24 CHIEF JUDGE WILSON: Assume they had directors.

25 MR. O'CONNOR: They had other - - - I believe

1 there were six - - - at least six. There might have been
2 eight directors. And again, at pages 32 to 35 of their
3 opening brief, WTC goes through a long discussion of the
4 ten domination factors that are set forth in the
5 Passalacqua case. And again, if you look at that analysis,
6 it is respond - - - it is respondent-free. All that they
7 talk about there, again, are - - - are just generally
8 record cites to things that Mr. Calice did as a director.
9 Then they talk about the fact that we acted as TPG and we
10 acted as the consortium.

11 And I'd like to get to this consortium point
12 because, again, this term shows up in the OM. It's not our
13 term. The record is very clear. The OM here, the offering
14 memorandum, was drafted by the - - - by the bankers, which
15 is typical. Why they used the word consortium, I don't
16 know. But I don't know what the word consortium needs.
17 And again, they found it - - - it's an ever-changing battle
18 here with the WTC side to under - - - WTC side to
19 understand exactly what their position is. But I think
20 it's now been said quite clearly. They want this to be a
21 collective liability theory in which defendants in a case
22 are not just grouped together, but are grouped with
23 nondefendants, nonparties. The consortium includes not
24 just parties that were - - - were dismissed on
25 jurisdictional grounds, but parties who never had anything

1 to do with any of - - - with any lawsuit anywhere.

2 And again, I don't want to bore the court with
3 this especially in the - - - late in the afternoon, but you
4 know, this case has been tried twice already. It was tried
5 in London, and it was tried in Luxembourg. And both of
6 those cases - - - this is a complicated transaction - - -
7 involves two tranches of notes, PIK notes and sub notes.
8 It involves trustees, involves WTC as the indenture
9 trustee. So there's always some reason why the prior trial
10 doesn't end everything. But it's the same evidence. It's
11 the same witnesses. It's the same deposition transcripts.
12 It's the same documents that fill nineteen volumes in this
13 court.

14 In Luxembourg, the claimants lost. And in
15 Luxembourg, the court said that this transaction complied
16 with Luxembourg law, that it was done in full transparency
17 and that there was no element - - -

18 JUDGE TROUTMAN: Is that because of what the
19 offering memorandum set forth?

20 MR. O'CONNOR: It's not - - - it's both what the
21 offering memorandum set forth and what the evidence showed.
22 And again, the court had access. It's the exact same
23 evidence. I can't - - - I can't argue that the - - -
24 there's different tranches of notes. We'll get to res
25 judicata and collateral estoppel one of these days, I

1 believe. But it's taking a long time, and it's because
2 we've got so many different jurisdictions and so many
3 claims and so many parties. But the fact of the matter is
4 that - - - the last thing that the Luxembourg court said,
5 there was no element of trickery, which is an odd word here
6 in the U.S., but I think it basically stands for fraud in
7 Luxembourg as translated.

8 We then had a trial in the U.K. That trial was
9 set for six weeks. The claimants abandoned that case four
10 days into it after a couple of witnesses had gone. And
11 again, they don't have dismissals with prejudice in the
12 U.K., but they did drop the case. And the ultimate
13 prejudice is you have to pay the other side's costs for - -
14 - and here, they had to pay something called indemnity
15 costs because of the unusual nature and the weakness of the
16 claims.

17 So again, we're not letting anybody off the hook
18 here. The parties that were let out of this case for
19 jurisdictional purposes face trial in the U.K., face trial
20 in Luxembourg. This has all been done. And again, there's
21 absolutely no evidence, and you - - - you will not hear any
22 evidence.

23 I would - - - you know, I'll finish with the - -
24 - well, I guess I have some time left, but you know, the
25 number one thing that happened in the Appellate Division, I

1 think, really, where you ended up with the decision is,
2 counsel for WTC was asked point blank why - - - what did
3 these folks do? What did the TPG respondents do? And why
4 should they be treated differently than any of the Apax
5 entities? And again, one of the Apax entities was let out
6 of this case precisely because there was no evidence in the
7 record - - - they had cited no evidence in the record. And
8 there was no evidence in the record that they had any
9 involvement in the transaction. They didn't have any
10 involvement in the transaction. Neither did the
11 respondents left in this case right now. The results
12 shouldn't be different there. And again, they cannot
13 answer the question of what these respondents did because
14 these respondents did absolutely nothing. They - - -

15 JUDGE TROUTMAN: Would you argue whether you say
16 collectively or individually, the answer is still the same?

17 MR. O'CONNOR: The answer is still the same. And
18 I think I was going to say - - - I think the - - - one of
19 the - - - another reason not to really change the regime, I
20 think, of alter ego on this case is, again, you need to - -
21 - there has to be some - - - if you're going to change from
22 what Morris said the standard is to some collective
23 liability, it ought to be in a case where you're figuring
24 out what that collective liability means. Here, there is
25 no collective liability because they didn't do anything.

1 There's nothing for you to write about as to what the
2 standard would be for courts - - -

3 JUDGE TROUTMAN: So this is not the proper
4 vehicle - - -

5 MR. O'CONNOR: It's not - - -

6 JUDGE TROUTMAN: - - - even if we were inclined
7 to change?

8 MR. O'CONNOR: Even if you were inclined to do
9 it, I don't think this is the right case to do it in. I
10 think that this is a situation where - - - where each of
11 these entities acted independently from each other and did
12 not do any of the things that this court said in Morris you
13 need to do in order to establish alter ego liability.

14 JUDGE HALLIGAN: Can I ask you how much weight
15 you put on the disclosures in the offering memorandum?

16 MR. O'CONNOR: And what's that?

17 JUDGE HALLIGAN: The disclosures in the offering
18 memorandum.

19 MR. O'CONNOR: Sure. Well, again, I think the
20 disclosures in the offering memorandum were crystal clear,
21 and I think that's why we got the result we did in U.K. - -
22 - in the U.K. and in Luxembourg. What - - -

23 JUDGE HALLIGAN: And specifically, do you mean
24 the completely dependent language or something else?

25 MR. O'CONNOR: Well, I mean, first of all,

1 everything in it was disclosed as was previously noted, how
2 - - - how the money was going to be used was clearly
3 disclosed in there. The fact that the - - - that these
4 were nonoperating companies that might not be able to
5 service the debt was clearly disclosed in there. There was
6 no wrongdoing. But again, on the OM - - - you know, again,
7 I'm just trying to fight the battle I've got, which is
8 these six respondents. There is no evidence that these six
9 respondents had anything to do with that offering
10 memorandum. That offering memorandum was clearly written
11 by the banks who were putting together the transaction for
12 the - - - for - - - for the deal. Well - - -

13 JUDGE CANNATARO: So they're just carrying out
14 their assigned roles in the transaction?

15 MR. O'CONNOR: The bankers?

16 JUDGE CANNATARO: I'm sorry?

17 MR. O'CONNOR: The bankers?

18 JUDGE CANNATARO: The sub-entities.

19 MR. O'CONNOR: Well, the six entities that - - -
20 that I'm representing here today, the respondents, had
21 absolutely nothing to do with that.

22 CHIEF JUDGE WILSON: Well, they - - -

23 MR. O'CONNOR: They had nothing to do with
24 anything.

25 CHIEF JUDGE WILSON: - - - they - - - they - - -

1 MR. O'CONNOR: There's no - - - there's no
2 evidence the did - - - they did anything.

3 CHIEF JUDGE WILSON: They benefited from the
4 transaction.

5 MR. O'CONNOR: Well, sure, they received money.

6 CHIEF JUDGE WILSON: Right. Yeah.

7 MR. O'CONNOR: And we've cite - - - we've cited
8 cases for the proposition that the - - - that - - - the
9 receipt of money, and the trial judge agreed with us, and -
10 - - and we agreed with us on nothing else. And the
11 Appellate Division agreed with us as well that the receipt
12 of money has nothing to do with anything. It's not an
13 alter ego factor at all.

14 JUDGE CANNATARO: And - - - but aren't they
15 subsequently moving money after they receive the proceeds?

16 MR. O'CONNOR: You mean the respondents?

17 JUDGE CANNATARO: Yeah. The defendants. Your
18 parties.

19 MR. O'CONNOR: Yeah. Yes.

20 JUDGE CANNATARO: Aren't they moving money
21 between themselves post - - - you know, after it initially
22 comes in? Because I feel like that's the essence of the
23 claim that there's a kind of a shell game happening with
24 the money. It's getting moved around.

25 MR. O'CONNOR: Well, some - - - some of the

1 respondents who received money - - - and again, I - - - I'm
2 not sure what the one through nine was, but some of the
3 respondents received money. Some of those respondents were
4 funds and some of those funds had investors LPs. And so
5 the money came in to the - - - to the fund and was then
6 sent out to the respondents. There's no allegation here of
7 shuttling money back and forth between Hellas - - -

8 JUDGE CANNATARO: Between the respondents?

9 MR. O'CONNOR: - - - and these entities - - - and
10 the respondents. There's no allegations like that.

11 JUDGE CANNATARO: Okay.

12 MR. O'CONNOR: That's one of the factors of
13 domination and control. But there's no allegation - - -
14 there's not even allegations of that, much less proof of
15 that, so - - -

16 JUDGE CANNATARO: No. I do think that would be a
17 telltale sign of domination and control if you were able to
18 move money in between the various entities. But you're
19 saying that didn't happen here?

20 MR. O'CONNOR: For - - - that's not - - - that's
21 not even alleged. I will say that the vast majority of
22 alter ego cases, and I've read a lot of them, obviously,
23 here today and briefing all this over the years, most of
24 them are cases where there's a single shareholder, and that
25 shareholder basically has a - - - has a company, and

1 essentially, is siphoning money back and forth between it.
2 That's usually the case - - -

3 JUDGE CANNATARO: That sounds right.

4 MR. O'CONNOR: - - - of what turns out to be
5 alter ego, not something like this. This is why I just
6 don't think that this is appropriate for a collective alter
7 ego theory like - - -

8 JUDGE CANNATARO: So this is just a case where
9 there was an offering plan to find how the transaction was
10 going to play out, and the transaction played out exactly
11 according to the offering plan.

12 MR. O'CONNOR: It played out exactly. It - - -
13 there's no allegation that anything other than what's in
14 the offering memorandum happened. What - - - exactly what
15 is set forth in there is what happened. And again, I think
16 it's important to understand that this company was acquired
17 and vested in in 2005. It was the third - - - it was the
18 third worst performing telecom company in Greece. Its
19 performance increased dramatically. And ultimately, the
20 banks came about a year later and suggested that - - -
21 that, you might want to try to sell this company. There
22 was an auction to try to sell the company. There was, in
23 fact, a bid for €3.2 billion from a company called
24 Providence, which is a U.S. private equity firm
25 specializing in telecoms. That's the valuation that was

1 used.

2 It's true that there was no independent
3 valuation, but they used the valuation that they got from a
4 bid they had just received a couple of - - - a couple of
5 weeks earlier. That's the basis of the valuation that was
6 used to - - - and again, the respondents had nothing to do
7 with any of this. It was done by others. But in any
8 event, that's the valuation that was used.

9 That was deemed not enough money, that offer. So
10 they used the 3.2 billion valuation in connection with the
11 recap. And really, just around the time that the recap
12 came - - - was - - - was being implemented, the company
13 received another offer from Weather Investments in 2007 for
14 3.5 - - - or 3.4 billion, which was €500 million in excess
15 of the debt. And the company then operated for three years
16 in the face of the global financial crisis and ultimately
17 defaulted on the debt. And again, the respondents had
18 nothing to do with that. You know, the world did that.
19 The economy did that. So with that, the light's on. And
20 if there are no other questions, I'll sit down.

21 CHIEF JUDGE WILSON: Thank you.

22 MR. O'CONNOR: Thank you.

23 MR. ZAUDERER: With respect, there's a lot of
24 intellectual misdirection here, okay? First of all, let me
25 say on the theory that the court's have been asking about -

1 - - I think it's easy to miss the forest for the trees.
2 We're looking at the individual entities. Yes, they did
3 pass money through. What I think is relevant and
4 consistent with the theory that was approved by the court
5 in Cortlandt 1 is, you have these two private equity funds
6 setting up all these entities to do this job. As I say,
7 the TPG entities above the line and the Hellas entities
8 below the line, and they use these entities to distribute
9 the money in what was a fraud here. And I'm going to come
10 to that in a moment. And nowhere in the offering
11 memorandum did it say that we could violate the provision,
12 which is basically determine our own price. The idea of
13 arm's length - - - look, if I'm saying I'm doing something
14 at arm's length, it's not at the - - - in the - - -

15 JUDGE CANNATARO: I didn't get a chance to ask
16 your adversary about the valuation, how - - -

17 MR. ZAUDERER: Yeah.

18 JUDGE CANNATARO: - - - how that could play in or
19 give him an opportunity to explain why it doesn't. But the
20 part about distributing the proceeds to the various
21 entities, he is essentially correct, though, that that was
22 - - - that was decided previously in the offering, that
23 that played out as it was promised to play out.

24 MR. ZAUDERER: With the idea that they were going
25 to do this transaction and then commit a fraud, which they

1 did. They set up these entities for the purpose of moving
2 the money, distributing the money to those who had invested
3 in this, and then yielding the thirty-five times the value.
4 You can't do that on - - - if they didn't do it at arm's
5 length - - -

6 CHIEF JUDGE WILSON: Well, the the offering
7 statement says that the whole recap is something like 1.5 -
8 - -

9 MR. ZAUDERER: Yeah.

10 CHIEF JUDGE WILSON: - - - 1.6 billion, right?
11 And it - - - and it says that something like in excess of
12 900 million is going to go to pay the CPECs.

13 MR. ZAUDERER: But they don't - - -

14 CHIEF JUDGE WILSON: And the PIK - - - and the
15 prior PIK loans.

16 MR. ZAUDERER: They don't disclose that they had
17 to change in violation of the - - - of the CPECs agreement,
18 the value, it says as follows. The redemption price shall
19 be determined by the board of managers on the basis of the
20 equity value of the company and its subsidiaries on an
21 arm's length basis. They didn't do that. They didn't
22 disclose that they weren't doing that. And the offering
23 memorandum said - - -

24 CHIEF JUDGE WILSON: You don't think that the
25 Providence offer is an arm's length basis?

1 MR. ZAUDERER: That was a preliminary offer, no
2 due diligence. It was - - - but even if - - - let's assume
3 it was, it - - - no, it cannot be an arm's length. An
4 arm's length basis is not what some offer may be. The
5 arm's length basis would be having an independent body
6 which was offered here. The accounting firm offered to do
7 it, to evaluate its value. They didn't do that. By
8 definition, arm's length is something independent, not
9 something you decide can be a basis for you to value these
10 CPECs at thirty-five times their value.

11 And I want to just, if I may, hit some of the
12 other misdirection here. They talked about the Luxembourg
13 proceedings. What they don't disclose that the - - - that
14 was brought by liquidators of Hellas two. And they said in
15 their opinion they did not represent creditors. That's the
16 bondholders. And any arguments concerning a violation of
17 creditors rights were deemed inadmissible. The court said
18 that. You didn't hear that from my colleague over here.
19 And they - - - the issue of - - - was about what Hellas two
20 knew vis-a-vis other Hellas entities and their directors
21 and officers, not the misrepresentations or wrongdoings to
22 noteholders.

23 And the London proceeding, there's nothing in the
24 record they've pointed to as to why. I know because I was
25 in London. It had - - - this had to do with finances. But

1 there's no - - - they do not argue in the brief either the
2 Luxembourg proceeding or the London proceeding is res
3 judicata, kind of talked around this. And maybe we'll get
4 to res judicata someday. So you know, some misdirection
5 there.

6 And again, I just want to close with the
7 observation that there are factual issues here for which
8 the court - - - the trial court, which spent, by the way,
9 eight hours of oral argument, it had made very specific
10 findings of the fact that go to control. And I think one
11 has to look at this idea of control by a group as looking
12 at this from 1,000 feet. It was set up by these funds to
13 accomplish a person. Mr. Calice said in a memo that we
14 cite that we - - - if we can sell this company, we're going
15 to get several times what we put in. That's what this
16 whole transaction was about. They set up the entities.
17 They used them. I could go - - - I don't have the time.
18 They know which ones they are. They're all in my - - - I
19 made this cheat sheet from page 5444. I didn't want to
20 take the time reading the entities, but that's not a fair
21 shot, but - - -

22 So with respect, I say that the decision of the
23 Appellate Division be reversed and this matter should be
24 remanded for trial.

25 CHIEF JUDGE WILSON: Thank you.

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MR. ZAUDERER: Thank you.

(Court is adjourned)

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

I, Brandon Deshawn, certify that the foregoing transcript of proceedings in the Court of Appeals of Cortlandt Street v. Bonderman, No. 104 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

Brandon Deshawn

Signature: _____

Agency Name: eScribers

Address of Agency: 7227 North 16th Street
Suite 207
Phoenix, AZ 85020

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