SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK - CIVIL TERM - PART 48

- -X

CHARIF SOUKI, Individually, AVR AH LLC, KARIM SOUKI, CHRISTOPHER SOUKI, and LINA SOUKI RIZZUTO, as Trustees of the SOUKI FAMILY 2016 TRUST, and STRUDEL HOLDINGS LLC,

Plaintiffs,

- against -

NINETEEN77 CAPITAL SOLUTIONS A LP, BERMUDEZ MUTUARI, LTD, WILMINGTON TRUST NATIONAL ASSOCIATION, and UBS O'CONNOR LLC,

Defendants.

INDEX NUMBER: 651164/2023

- -X

Proceedings

Via Microsoft Teams
New York, New York
May 1, 2023

B E F O R E :

HONORABLE ANDREA MASLEY,

JUSTICE OF THE SUPREME COURT

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ANNE BROWN, RPR
SENIOR COURT REPORTER

THE COURT: At 2:33, in the matter of Souki against Nineteen77 Capital Solutions A LP.

Who is speaking for plaintiff?

MS. DUBATOWKA: Good afternoon, Your Honor.

This is Megan Dubatowka with Harris, St. Laurent & Wechsler. My co-counsel, Tim McConn of Yetter Coleman --

(Reporter clarification.)

THE COURT: Yeah. Thank you, Ms. Brown.

I'll ask everyone to turn off their microphones, unless you are speaking.

MS. DUBATOWKA: And, Your Honor, Tim McConn will be speaking on behalf of the plaintiffs.

THE COURT: Okay. Mr. McConn, can we just test your microphone, because it's hard to hear Ms. Dubatowka.

MR. McCONN: Yes, Your Honor. Can you hear me okay?

THE COURT: Oh, yeah. You're fine.

Okay. And who is speaking on behalf of some of the defendants, the Nineteen77 defendants?

MR. CAFASSO: Good afternoon, Your Honor.

This is Darrell Cafasso from Orrick, Herrington & Sutcliffe. I will be speaking on behalf of all defendants this afternoon.

THE COURT: Where are you? Are you in the conference room?

MR. CAFASSO: Correct. I'm waving. Do you see me?

THE COURT: Oh, okay. Got it. All right. Everyone else needs to have their microphones off. And yeah, now I have you. Thank you.

So this is Plaintiffs' motion for a Preliminary Injunction. Mr. Cafasso, who else is with you?

MR. CAFASSO: With me, Your Honor, I have my partner, Laura Metzger, who has also filed an appearance in this action, and other colleagues at Orrick, Harry Murphy, Zach Kuster, and Meredith Dawson.

THE COURT: Okay. Everyone who is on should email when we're done, Ms. Brown with their names and their addresses. And their affiliations and who you represent and what law firm you work for. Okay?

MR. CAFASSO: Okay.

THE COURT: So everyone who's on. Although, I understand we also have -- members of the public are observing today as well.

Okay. So, Mr. McConn, you want to get us started.

MR. McCONN: Your Honor, I'd be happy to. Can you still hear me okay?

THE COURT: Yes.

MR. McCONN: If it's okay with the Court, I'd like to use a PowerPoint to help guide us through the discussion.

THE COURT: Did you share it with your adversary?

MR. McCONN: I did not, Your Honor. I didn't know that I was supposed to. I'm happy to do so right now.

THE COURT: Well, welcome to my courtroom. And please read my rules in the future before you ever come in my courtroom again --

MR. CAFASSO: I missed that one, Your Honor. I apologize.

THE COURT: -- number one. Number two, courtesy, to me and to your adversary. So the answer is no.

MR. McCONN: Okay. Your Honor, I apologize. I was not trying to hide anything. That is my fault for not knowing the rules.

With that, Your Honor, if I may, may I proceed?

THE COURT: Please.

MR. McCONN: Thank you, Your Honor.

So, Your Honor, as you said, we are here today on the plaintiffs' motion for a Preliminary Injunction. I represent all of the plaintiffs, including Mr. Souki, and then the remainder of the plaintiffs are entities that are affiliated with Mr. Souki.

What we're asking today, Your Honor, is for the Court to simply maintain the status quo with respect to the condition of the assets and the collateral that will be the subject of the discussion and that are the subject of the briefing that's been filed with the Court.

We are talking about three elements here, as Your Honor well knows. We are talking about likelihood of success on the merits. We think we can show likelihood of success on the merits with respect to various claims, including our claim that the defendants breached their duty to use good faith and commercial reasonableness, as well as our declaratory judgment claim and our fraud claim.

And as Your Honor well knows, the law in New York -- with respect to the element, the first element, likelihood of success -- a prima facie showing of a reasonable probability of success is sufficient. And so that's number one.

Number two, the irreparable harm element. And of course, we're talking about three pieces of collateral. A family residential ranch, a family-owned --

THE COURT: Anything about the conflict in the record between whether it is the family home? I have your client saying many different things. So what am I to believe?

MR. McCONN: Thank you, Your Honor, for the question. And, yes, ma'am. I understand that when we filed our original Complaint, we identified him as a Texas resident. And as you'll see in his supplemental affidavit that we filed on Friday, we clarified that he was a Texas resident up until last year. And because of how much time

he's now spending back in Colorado, he is now a Colorado resident. But at all times relevant to the discussion, Your Honor, his only home in the United States was the ranch and is the ranch in Colorado.

So even when he was a Texas resident and spending time here in Houston -- he'd live in a hotel or spend time in a hotel -- his only home is the ranch. And that is the record in the case. And we've clarified that now in Mr. Souki's supplemental affidavit.

THE COURT: Mm-hmm. Okay. Did you want to proceed?

MR. McCONN: I would, Your Honor. I just wasn't sure if you had another question.

THE COURT: Oh, believe me. When I have a question, you'll know.

MR. McCONN: Thank you, Your Honor.

THE COURT: Yeah. It's my courtroom. I'm not afraid to ask questions in my courtroom, but thank you so much for the invitation.

MR. McCONN: Thank you, Your Honor. I'll keep going. I want to make good use of the Court's time.

So the second element is the irreparable harm. We're talking about the ranch. We're talking about the family-owned company, Ajax Holdings. And we're talking about the sailboat that is a rare and unique piece of

personal property. Those are the three elements, Your Honor. I'll just get right to it.

So a quick background to help guide the Court. 2017, Mr. Souki enters into the first loan with the defendants. That loan was worth $50 million.

THE COURT: I mean, the bottom line is we're talking about $138 million loan, correct?

MR. McCONN: We are talking -- when you add up all the interest that they say has accrued, that is correct, Your Honor.

THE COURT: Okay.

MR. McCONN: That was never the balance at any given point in time, but that is the total.

THE COURT: I don't really care. But that's the amount I have to deal with.

MR. McCONN: Okay. So we're dealing with that very sizable loan. It came in two tranches in 2017 and 2018. All these pieces of property that we're talking about were pledged as collateral. Given the value of that collateral, the defendants were certainly more than over-collateralized.

The final thing I'll say about that first agreement in 2017 is that when we signed the loan agreement, the defendants also required Mr. Souki to sign an account control agreement, which gave them the right to exercise control over the Tellurian stock, if they so chose. So that

was 2017.

2018, there's a supplemental loan agreement. We get to the amount that the Court described.

In 2019, the defendants entered into another loan agreement with the company that Mr. Souki co-founded, Tellurian. That was for $75 million. And so by the time you get to the end of 2019, the defendants are very heavily exposed to Tellurian under the two loans of Mr. Souki and the loan with Tellurian itself.

In early 2020, this becomes a problem. And the reason it becomes a problem is because two very significant things happen in the market and it severely impacted the Tellurian stock cost.

The first is they ran into an issue with a potential customer, a company called Petronet out of India. The way these LNG facilities work, Your Honor, is they can't be billed until they get the financing in place. You can't get the financing note for these multi-billion-dollar facilities until customer contracts are signed. Petronet was going to be one of the primary customers of Tellurian, and in February of 2020, they announced that they were backing away from the table. That sent the stock price down very significantly.

The second thing that happened was in March of 2020, COVID occurred, and that just blew up the oil and gas

markets around the world. That also strained very heavily -- strained the Tellurian stock price.

So it's with that context, Your Honor, that in the spring of 2020 when this was happening, the defendants approached Mr. Souki. At that time, Mr. Souki was the chairman of the board of Tellurian, but he was not an officer. He was not actively involved in the day-to-day business of the company. But given their exposure to the company at that point and the problems that were going on, the defendants asked -- really, pleaded with Mr. Souki to come back, re-engage with the company, and take over so that he could ensure that the company -- that he could right the ship at Tellurian. And in doing so, help get these loans paid off to the defendants, including the loan that Tellurian had.

And what they did is they asked him -- and this is in his affidavit. They asked him to come back, get back in charge, re-engage. And if he did so, they would be very flexible in their approach to his -- the repayment of his loan. They told him to focus on getting the Tellurian loan paid, and if he did so, they would not touch his stock, his Tellurian stock that was pledged as collateral under his own --

THE COURT: And where is that written agreement?

MR. McCONN: It's not, Your Honor. I fully confess

that that is -- it's all oral. There are emails that talk about it, but there's no written agreement that says that. We don't dispute that.

But what we do say, Your Honor, is that that assurance, that promise -- what we call an agreement or commitment by the defendants. It spelled out what the parties understood would be the reasonable time to sell his stock if it ever had to be sold to pay off his debt -- it would be after Tellurian achieved certain milestones in the future. That's what they understood would be the commercially reasonable thing to do. So that was 2020.

And as a result of that, Mr. Souki re-engaged. He came back in as the executive chairman of the company. Devoted all of his time and resources to righting the ship at Tellurian. Getting the Tellurian loans paid off. And in doing so, he did enter into a written agreement -- actually two -- with the defendants. Both called bridge agreements.

The bridge agreements essentially were forbearance agreements that lasted for about a year, and during that period, they would not touch his stock. But it also said that at the end of that year when the agreements expire, they would have the right to sell his stock if certain things happened. It said that we couldn't provide the material nonpublic information so that it wouldn't impact their ability to sell the stock. But it also said that if

they, the defendants, decided to move forward with selling the stock at any point after that, they would have to take commercially reasonable steps not to disrupt the stock price. That was the agreement they made in writing.

On that same day, May 5th of 2020, when we entered into those bridge agreements, the defendants also exercised their right to take exclusive control of Mr. Souki's stock. This is a letter attached as Exhibit 2 to Mr. Souki's supplemental affidavit.

THE COURT: What's the NYSCEF number?

MR. McCONN: Pardon me?

THE COURT: What's the NYSCEF number?

MR. McCONN: I don't -- I don't know, Your Honor. I'll have to find that for you.

THE COURT: Again, please read my rules. Please be prepared with NYSCEF numbers. I have 400 cases. Would you like to know how many Exhibit 2s I looked at today?

MR. McCONN: I'm sure it was a lot. I apologize.

THE COURT: Would you like to see how many Exhibit 2s are in this file? "Exhibit 2" -- useless. Completely useless. Thank you.

MR. McCONN: I apologize. Your Honor, I'll get you that number.

THE COURT: Thanks so much.

MR. McCONN: I apologize.

So Exhibit 2 to Mr. Souki's supplemental affidavit is Index Number 651164/2023.

THE COURT: That's the Index number of the case. Thank you so much. The NYSCEF number is the document number in the docket.

MR. McCONN: I apologize. It's 104, Your Honor.

THE COURT: Got it. Thank you.

MR. McCONN: You're very welcome. Apologies.

So the NYSCEF -- sorry, NYSCEF Number 104 is Exhibit 2 to this supplemental affidavit. This supplemental affidavit is 102. And that document clearly shows, Your Honor, that on May 5, 2020, the defendants exercised their right under that account control agreement that we talked about earlier, and they sent a letter to Mr. Souki saying, "We now have exclusive control over your stock," and under the plain language of the agreement, the account control agreement.

At that point, Mr. Souki ceased having any control over his stock. He could not do anything about it, including selling it. Only Defendants had the right at that point, or the ability to sell the stock. They were the only ones who could do so. So that's in May of 2020.

For the rest of 2020 and early 2021, things seemed to be going okay. That was -- Mr. Souki was running Tellurian. He was raising money for the company. He

eventually helped the company pay off both the loan to the defendants as well as another loan. It really helped the company. The stock price stabilized and it started to recover. That gets us into the spring of 2021.

Around the spring of 2021, in March or so of 2021, the bridge agreements expire. The loans have now been paid off. The Tellurian loan has been paid off. So the only loan that's left outstanding are Mr. Souki's personal loans, which he was told they would be very flexible in how they would deal with it. And they wouldn't touch his Tellurian stock until after Tellurian achieved these milestones. Well, that promise went out the window.

And again, we understand. It's not -- it was a promise. It was made. It went out the window. And in March of -- sorry, May of 2021, the defendant started insisting that Mr. Souki sell his stock, his Tellurian stock; the 25 million shares that he pledged as collateral under the loan.

At that point and at all points going forward, Your Honor, why they were asking him or insisting that he sell the stock is beyond us. Because at that point, not only did he have other kind of SEC-type restrictions on him from selling, he didn't have the ability to sell. The Account Control Agreement gave the defendants the exclusive right to do that. Yet, during that time, they were asking Mr. Souki

to sell his stock.

They were also insisting that he sell his ranch. And so at that point, even though it's his residence, his home, his children live there, he made the decision. He knew that he had obligations to the defendants. And so he made the decision to ask his children to move off the ranch. He would put it on the market and try to sell it so he could pay off the loans, which he couldn't do using the stock because they had exclusive control. So that -- that is 2021, spring, moving forward.

But once we get into the next 15 to 18 months, Your Honor, there are repeated windows of time -- days, weeks of time -- wherein the value of the stock, the Tellurian stock, exceeded his debt. We know from what they filed in the papers that they believe his debt was $119 million in April of 2022.

What we know, Your Honor, this is all public information and it's included in Mr. Souki's affidavits. That the value of his shares in June of '21, November of '21, all throughout April and into May of '22 -- in March, sorry -- further in May of 2022 and then again in August of '22. At all of those points in time, the value of his shares that they controlled were more than his debt.

They had exclusive control of his shares. They had the right to sell his shares. For whatever reason, they

were insisting that he do it, but they wouldn't do it. But they knew that that was the right time to sell it because they were asking him to do it. Maybe they forgot they had the right to do it or they sole right to do it, I don't know. But for whatever reason, over that many months of time when they had reasonable opportunities to sell, they did not do so.

And at one point, Your Honor -- and this is in Mr. Souki's supplemental affidavit as well, which again is NYSCEF Doc Number 102. At some point in late 2021 and early '22, as the defendants continued, repeatedly insisting that Mr. Souki sell during these windows when the stock price was -- the value was more than the debt, he finally said -- his representative finally said, "Look, guys. We can't do it. And if you don't believe me, you got to sell. You do it." And they still didn't do it. And so this is going on repeatedly throughout 2021 and 2022.

And during that same time frame -- it's somewhat relevant to what we're talking about here -- they're also insisting that he sell his ranch. And he tried. And he made several good faith efforts to do so. In 2021, he was able to sell two of the properties -- actually, three of the properties on the ranch. And it took a lot of bidding and negotiating and working with the defendants, who were being nonresponsive to him, to get them to finally agree to

release the lien that they had over those particular properties under these loans. But they did. No dispute that they finally did. But at that point in time, as of late 2021, they then were the only lien holder on his ranch. They had cleared out the other lien holder, the other mortgagor.

And at that point they had a first lien position, and at that point, throughout the rest of '21 and into '22 -- all of '22, they refused multiple proposals by Mr. Souki to either sell off parts of the ranch to other bidders, including his family trust. They rejected refinancing proposals that he had made on parts of the loan using the ranch. And so this continues repeatedly. And they're still not selling his share. None of this would have been necessary on the ranch if they would've just taken their own advice and used the exclusive right they had to sell the shares.

They wouldn't even have had to sell all the shares, Your Honor. They could have sold a large portion of them and wiped out the entire debt. And for whatever reason, they continued not to do so.

And so, Your Honor, we get to the end of 2022. And I appreciate you indulging me. I know I'm going through a lot of the background here, but I think it's important context.

In late 2022, after this two years of inaction and interference, the defendants began to foreclose on some of the collateral.

The first piece of collateral they foreclosed on was the sailboat, the Tango sailboat. We got notice of this three days before Christmas in 2022. And we had never received any further information from the defendants, or the receiver they appointed as to what is going on with the Tango. We have asked. We've asked repeatedly. And the receiver that they appointed for selling that boat has repeatedly refused to give us any information.

But what Mr. Souki has learned through acquaintances out in the market cause he knows a lot of people who deal with these sailboats, is that the boat has been listed for sale for a fire-sale price, using a marketing process that doesn't come close to complying with the way it's done in the industry.

And the defendants, notably, do not dispute any of this. If you look at their briefing, their response, or the opposition and the affirmation that was attached to it, there's no dispute about Mr. Souki's testimony with respect to how the Tango that's being marketed -- or the fact that he is not being provided any information whatsoever. So that's the Tango. That's at the end of '22.

At the beginning of this year, in February of '23,

they then seized the Tellurian shares. They already had exclusive control over the shares. They took a step in seizing the shares -- actually moving, directing the broker to physically -- not physically, but electronically move the shares of Mr. Souki's account to the defendants' account.

Now this is just a ministerial act because, as I've said a few times now, at that point they controlled the shares. But that was the first time, in February of '23, that they actually took their own advice and used the exclusive right that they had and went ahead and started selling the stock. But they did so when the stock -- instead of when it was at 5 and $6 during those repeated windows that I was telling you about earlier, at this point it was trading below $2. It had been trading right around $2 going back to November or so, maybe October. But by the time they seized the shares on February 6th and 7th, the stock is trading below $2.

And yet that next day, February 8th, I believe, they started selling the stock. And they didn't just start selling it, Your Honor. They dumped it on the market.

At that point in time, the average volume of Tellurian stock being sold every day was roughly 10 to $12 million -- or 10 to 12 million shares, I'm sorry. Whereas back in 2021 and early 2022, during those windows of time that I mentioned to, Your Honor, back during those

periods, the shares were trading sometimes 80 to 90 million per day. In April of '22, it got up to 230 million shares being traded in one day. Those were the times to sell.

Yet, for whatever reason, they dumped his shares on the market when it was at a two-year low, and the trading volume was such that if the executive chairman's gets dumped into the mix, it's going to move the price dramatically. And yet they did it anyways. And the very first day, they dumped almost 2 million of his shares on the market, roughly 15 percent or so of the total volume for that day. It drove the price down by 10 percent, not surprisingly.

We then asked them -- we pleaded with them -- to not sell any more, but if they were going to, to use an industry-compliant methodology, which would be essentially using these algorithms that traders use to make sure that they're only putting 3 to 4, maybe 5 percent into the market each day and as the market moves, the algorithm will adjust. They clearly didn't do that at least in the first week cause they kept dumping large, humongous volumes on to the market to the point where at the end of the first six business days, they had driven the price down by, I want to say nearly 25 to 30 percent.

So they ignored our advice. They ignored our pleas. They finished out selling all 25 million shares over the next six weeks or so. For the 25 million shares that

they could've received $158 million for back in April of 2022, they received 37 million.

And that's also at a time when his debt -- because of their interference and their inaction, Mr. Souki's debt had increased to, according to them, $135 million. So they sold his shares a time when the volume of those shares was almost a hundred million dollars less than the total debt. So that gets us to this lawsuit.

March 6th we filed a lawsuit. A week later, March 13th, they react by initiating foreclosure on the ranch, which they've now scheduled for July of this year. Two days later, they react by initiating foreclosure on the family company, Ajax Holdings. They scheduled that for June 13th. So only six weeks from today. And it was because of that that we then moved for a Preliminary Injunction on April 3rd.

Your Honor, as I mentioned earlier, the primary claim that we are focused on today with respect to likelihood of success on the merits is the duty that they breached with regards to commercial reasonableness. Commercial reasonableness is required in the disposition of every piece of collateral under the New York UCC, which is part of this contract. The contract is made subject to New York law. No dispute about that. Sections 9-6.1 -- sorry, 9-610 of the New York UCC, Sub B, requires commercial

reasonableness in every aspect of a disposition of collateral, including the method, manner, place and time.

The Courts have defined commercial reasonableness in this context to mean things like a good faith attempt to dispose of the collateral to the parties' mutual best advantage, or what a reasonable business would have done to maximize the return on a collateral. Those are the *Central Budget v. Garrett* case and the *matter of Excello Press* cases that we've cited in our briefing. And this is a duty -- it's a requirement, Your Honor -- that can not be waived. Section 9-602 Sub G of the New York UCC says that expressly. It can not be waived.

So whatever discretion the loan agreements provide the defendants, whatever rights they have vis-a-vis Mr. Souki and the plaintiffs under these loan agreements, it's all subject to this duty to use commercial reasonableness under the UCC that can not be waived. And they don't dispute that in their papers.

THE COURT: All right. So why are we talking about waiving? Are they even trying to -- they're not even asking to waive it.

MR. McCONN: Your Honor, you're right. They're not asking to waive it. But they're making several arguments about how provisions in the agreement show that they have all kinds of discretion and they can essentially do whatever

the heck they want with respect to collateral. And that's simply not true.

So I know they're not saying "waiver," but they're making an argument that implies that there is no duty to use commercial reasonableness under this contract, and by New York law there clearly is. And for that matter, Your Honor, they also expressly agreed to use commercial reasonableness under the bridge agreements in May of 2020.

Remember we talked about the provision that says that if they're going to sell the Tellurian stock, which they had the right to do, exclusively, as of that date, they had to use commercially reasonable efforts to avoid material disruption?

THE COURT: Basically, you want me to take a leap from the fact -- or your argument that it is a fact that they did not use commercially reasonable methods to sell the stock, and, therefore, they will not use commercially reasonable methods to sell the ranch and to sell the boat, correct?

MR. McCONN: No, Your Honor. Respectfully, it's a little different than that. And I'm sorry I haven't articulated it better. What we're asking Your Honor to do is to find that we have a likelihood of success on our commercially reasonableness claims.

THE COURT: Hold on. There's a feedback for some

reason. Try again, please.

MR. McCONN: Sure. Thank you, Your Honor.

So what we are asking is that you find that we have a likelihood of success on the merits of our claim, that they breached their duty of commercially reasonableness as to how they disposed of the Tellurian stock. And had they done it commercially reasonably -- what we think we have previewed to the Court and the evidence that we put before you is that had they done it commercially reasonably, they would have used the stock to dispose of the entire debt.

And so -- and once they do that, once we use commercially reasonable efforts to sell the stock and dispose of the entire debt, they have no further right to foreclose on the ranch or the company or the sailboat. And we have a declaratory judgment claim to that effect, or action to that effect, Your Honor, in our first Amended Complaint.

And so that is what we're asking the Court today to find. That there is a likelihood of success on the merits of those claims such that there is no further right to foreclose on this collateral, and, therefore, they should be enjoined from doing so until we get to a trial on the merits.

THE COURT: Got it. Thank you.

MR. McCONN: Sure. And so, Your Honor, just back

to the commercial reasonableness claim. As I mentioned, the UCC Section 9-610 mentions time as one of the key elements of the commercial reasonableness inquiry. And if you go to comment 3 of that section, it says, you know, quoting here -- it's not the entire comment, but in relevant part. It says "that if a secured party holds collateral for a long period of time without disposing of it" -- excuse me -- "and if there is no good reason for not making a prompt disposition, the secured party may be determined not to have acted in a commercially reasonable manner." And that's exactly what we're saying here, Your Honor, based on the facts as I've laid them out to you.

But the Courts in New York have also construed this to mean that, as part of this inquiry the Court must consider the, quote, "reasonableness of choosing the date that was chosen." This is the *Highland CDO Opportunity Master Fund v. Citibank* case that we cite in our briefing. In fact, both sides cite that case.

THE COURT: Mm-hmm.

MR. McCONN: So it's clearly a requirement of this inquiry and it's clearly something that if they're going to get over the hurdle of commercial reasonableness, they have to show that the date that they chose or the time that they chose was commercially reasonable.

And just to kind of take you back to what we said a

minute ago about how the Courts define "commercially reasonable," it has to be to the parties' mutual best advantage and has to be what a reasonable business would have done to maximize a return on the collateral.

So that means that they are required -- the defendants, when they are selling our stock -- Mr. Souki's Tellurian shares, when they're selling that, they have to sell it at a time when a reasonable business would have sold it to maximize the return on the collateral. And they just simply failed in that regard -- miserably failed in our view, Your Honor, for all of the reasons I've already stated. And I won't belabor the point.

THE COURT: And why isn't this -- I understand that the ranch is unique. I understand the boat is unique. But as to the stock, you know, why -- how could there be irreparable harm when, according to your own expert, all he has to do is a calculation. And can only be assessed -- I'm reading from his page 7. "Can only be assessed by performing statistical analysis of the daily order flow." But the bottom line with the report is that it can be calculated.

MR. McCONN: Your Honor, so we are -- we are not claiming irreparable harm as to the sale of the stock. We understand that -- the stock has already been sold. The horse is out of the barn, as we might say in Texas. We will

have a claim for money damages, or at least as to why there's no deficiency left on the loan based on the sale of the stock. But the irreparable harm is going to come if they sell off this unique property; the ranch, the family business, and the sailboat. That's where the irreparable harm will come in. And that's why we are now moving, respectfully, for Your Honor to stop them from selling those things.

We didn't seek an Injunction to stop the sale of the shares, but we are now moving to enjoin the sale of three very, very unique pieces of property. And that's -- that's where the irreparable harm would come in.

THE COURT: Okay. Thanks.

And who's speaking for the defendants? Mr. Cafasso, where are you?

MR. CAFASSO: Right here, Your Honor. Can you hear me?

THE COURT: It's a little muffled.

MR. CAFASSO: How about now?

THE COURT: And all other microphones should be off, please.

Go ahead.

MR. CAFASSO: And let me know, Your Honor, if you can not hear me.

THE COURT: We will.

Won't we, Ms. Brown?

THE REPORTER: Yes.

MR. CAFASSO: So this motion, Your Honor, can and should be resolved on the plain language of binding loan agreements to which the sophisticated parties agreed and controlling New York law from both the Court of Appeals and the First Department. And respectfully, Your Honor, they can not establish any of the three requirements for the drastic remedy of a Preliminary Injunction.

And as you heard my adversaries just go through and you see it in their papers, they claim -- they try to claim that this motion raises a bunch of fact-intensive questions. That's just not true, Your Honor. The undisputed facts, which are all the Court needs to consider today, are as follows:

Mr. Souki, a sophisticated business person, borrowed approximately $138 million pursuant to binding loan agreements in 2017 and 2018. Mr. Souki, and the other plaintiffs, pledged specific collateral to secure those loans and granted Defendants perfected security interests in that collateral.

Under the plain language of the loan agreements, Your Honor, Defendants are permitted to foreclose on that collateral at any time after a default, in their sole and absolute discretion.

The contracts, as Mr. McConn admits, say nothing about waiting for certain milestones at Tellurian before they could sell the stock. Mr. Souki acknowledged in May 2020 that he was in default, and he has been in default ever since.

Defendants nonetheless agreed, Your Honor, to forebear through the outside date of March 30, 2021 -- and that's in so-called bridge agreements, which I would like to walk Your Honor through in a moment.

Within those agreements the parties agreed, among other things, that those written agreements could not be contradicted by any evidence of prior or contemporaneous oral promises and that there would not be any subsequent oral modifications to the agreements.

When those agreements expired, Your Honor, in March of 2021, even after that point, Defendants agreed to forebear for another two years before they exercised their contractual remedies.

On February 6th of this year, in 2023, Defendants exercised their rights to take possession of the Tellurian shares and began trading on February 8th. Later that same day, Mr. Souki's own lawyer, I believe it was Mr. McConn, sent an email where he estimated and agreed that Mr. Souki's outstanding debt obligation was $124 million.

Now, there's some debate over the price amounts,

Your Honor, but the point is that even after we took possession of the shares, Mr. Souki was still acknowledging that he owed us in excess of a hundred million dollars.

So what has happened since February 8th to bring us before Your Honor today? Mr. Souki still has not paid back anything. We sold the shares, as Mr. McConn alluded to, over a two-month period on the New York Stock Exchange. And by the time Defendant started selling the shares, Tellurian's stock price was in the midst of a precipitous 60 percent decline. The stock was plummeting. As a result --

THE COURT: Well, they're saying that was your fault. They're saying you prompted that.

MR. CAFASSO: That was not our fault, Your Honor.

THE COURT: Okay.

MR. CAFASSO: Yes. I'll get to that. As a result of those sales, we recovered approximately $35 million. We have not recovered anything else since, and sitting here today, Mr. Souki still owes almost a hundred million dollars on these loans. Those, Your Honor, are the undisputed and controlling facts, and everything else Plaintiffs say in their affidavits about supposed oral promises, negotiations, expectations, is legally of no moment.

And so while we very much disagree and dispute what they're saying -- we don't agree that that extra contractual evidence has anything to do with this motion. We're happy

to engage on it at the appropriate time, but it's simply of no consequence here in light of governing agreements and New York law.

And to grant a Preliminary Injunction here, Your Honor, you need to find merit to Plaintiffs' claim, which is a rather remarkable claim. That his entire outstanding debt of a hundred million dollars should be deemed wiped out because, in hindsight, Defendants mistimed the selling of the Tellurian shares, either because they sold too early or they sold too late.

Now, if Your Honor agrees with us that that claim has no basis in either of the contracts or the law, then there's simply no basis to stop the foreclosures efforts as to the other pieces of the collateral.

So, Your Honor, I think that's sort of the kernel of what's going on here. All of his other arguments, at most would go to reduce the amount of debt owed, not come close to extinguishing it. And in all events, would be compensable by monetary damages.

And, Your Honor, Plaintiffs' position -- and to be charitable, is a little bit incoherent to me. On the one hand they say that we sold too early because of some supposed extra contractual promise not to sell the Tellurian shares until certain milestones were met. As Your Honor observed, that's nowhere in the contracts. The contracts

say nothing about that.

But then they say, well, you also sold too late because you should have sold when the stock was trading at a brief three-year high in April 2022, even though the contracts say we can sell at any time. And as I'll get to, the law does not place the risk of a declining market on the defendants.

And telling, though, Your Honor, plaintiffs do not cite a single case where a Court has upheld a commercial reasonableness challenge, either to the timing or to the manner of the sale of pledged securities on a public stock exchange. And that's perhaps not surprising because the UCC establishes a safe harbor for sales of collateral on a recognized market.

In fact, Your Honor, the cases they do cite -- the *Highland CDO* case, your case in *D2 Mark*, the *Grace* case. They're so different from this case. None involve the disposition of securities on the New York Stock Exchange, or anything even remotely close to that. That they only serve to illustrate why Plaintiffs' claims here fail as a matter of law.

And, Your Honor, let's be clear about what happened here. And to use Your Honor's own decision in *D2 Mark*, we're not talking about the sale of a historic hotel in the middle of the COVID pandemic where I believe they gave

36 days to make a market, 27 of which you couldn't access the property because of the lockdowns. That's not what's happening here, Your Honor. This case could not be more different. We're talking about sale of the common stock on the New York Stock Exchange over a period of two months.

And as an aside, although we could have, we did not try to foreclosure on any of the collateral during the pandemic. And I would submit to Your Honor, that a ruling in favor of Plaintiffs here would set bad precedent because it would penalize us for forbearing, and it would disincentivize lenders from working with their borrowers to avoid foreclosure. And I don't think that's the policy that New York should be adopting or promoting here.

At the end of the day, Your Honor, Plaintiffs are just using hindsight to cherrypick a few dates and argue that we could've timed the market better, but that's not the law, Your Honor.

The mere fact that a greater amount could've been obtained if we sold at a different time, that's not enough to establish commercial unreasonableness. That's straight from the UCC, Section 9-627A. And the case law makes clear that the investment and market risk of pledged securities rests with the borrower, not the lender.

And nothing in the law, Your Honor, puts that risk on us with the lenders. And I would point Your Honor to the

Bankers Trust decision from the Court of Appeals, which is very analogous and makes clear that the sale of pledged collateral on a recognized market is immune from attack on the grounds of commercial reasonableness. And that as secured lenders, we were entitled to act according to our self-interest and discretion in disposing of the shares, and we were not required to follow Mr. Souki's recommendations as the borrower. That's straight from the Court of Appeals in the *Bankers Trust* decision.

THE COURT: They use the word "immune"? I don't think they use the word "immune." I'll do a search, but I don't think they used the word "immune."

MR. CAFASSO: Certainly, the First Department did, Your Honor, in *Citibank v. Solow*. They say you're immunized from attack on the grounds of commercial reasonableness if you sell pledged collateral through regular market channels. And the *Solow* decision from the First Department cites to *Bankers Trust* for that proposition.

And finally, Your Honor, the *Lane v. Bank One* decision, I would admit and tell you it addresses Kentucky law. It's from the Sixth Circuit. But it's perhaps the most factually analogous here because it involved a challenge both to the timing and sale -- timing and manner, rather, of pledged securities on the New York Stock Exchange. And the Court made several apposite holdings

rejecting those challenges. And it's really on all fours here, Your Honor. So I would point Your Honor to that decision as well.

At the end of the day, Your Honor, there's simply no basis in the contracts or the law for the Court to second guess the timing of our sales. And again, Plaintiffs do not point to a single case where a Court has done so.

Your Honor, if you would indulge me, I'd like to walk you through just a few provisions of the bridge agreement because I think they're very important and they tend to foreclose Plaintiffs' arguments. And this would be in NYSCEF 89.

THE COURT: Sure.

MR. CAFASSO: It's the 2018 bridge agreement.

THE COURT: Okay.

MR. CAFASSO: Just by way of background, as Mr. McConn rightly said there were series of agreements that pertained to these loans. They're all described in the Metzger affidavit we submitted with our opposition.

THE COURT: You didn't -- I don't have anything about the commercial reasonableness of the sales of the other properties, the ranch and the boat. But anyway -- you know, all I have is an attorney affidavit, which is a little odd, but go ahead.

MR. CAFASSO: Well, part of the reason, yeah, Your

Honor, is they didn't challenge that. Again, their whole argument before you today is that if we sold the shares at a different time, his entire debt would be extinguished and, therefore, we cannot foreclosure on those additional properties.

The bridge agreements, one was 2017, one was 2018 -- they're identical, or at least they're identical in all relevant respects. So let me just focus Your Honor on the 2018 bridge agreement. I also point out that in Mr. Souki's -- in Plaintiffs' first Amended Complaint, they say this was heavily negotiated. They concede this was heavily negotiated. And let's look to see what those heavily negotiated terms were.

First of all, Mr. Souki admits that he's in default. If you go to page 1, Your Honor --

THE COURT: No, I do see that. I don't need to go anywhere. I get it. He's admitted it.

MR. CAFASSO: He's admitted it. He also waived any defense to the debt, at least as of May of 2022. And that's in Section 5.1 of the bridge agreement. And again, as recently as February of this year, they conceded that he still owed approximately $128 million.

Section 4.3, Your Honor, is an important one. That's the enforcement protocol. And the enforcement protocol provides that at any time -- at any time, the

administrative agent may exercise remedies against -- foreclose upon or dispose of any of the collateral, including the shares, at the time and in such manner that the administrative agent determines, in its sole and absolute discretion, provided that they used commercially reasonable efforts not to materially disrupt the stock price.

So with respect to timing, Your Honor, all the contract says is that they could sell at any time. It makes clear that they could foreclose on these shares at any time. And notice, Your Honor, it says nothing about waiting until Tellurian reached certain milestones. You may think that's a pretty material term that these sophisticated parties in a heavily negotiated agreement would add. It's not in there, because that's not something the parties agreed so.

I'd also point out, Your Honor, that the commercially reasonable clause -- we agreed to use commercially reasonable efforts to avoid a material disruption. We did not agree never to cause a material disruption and I think that's an important distinction.

I would then direct Your Honor to Section 5.3, which says that each party agrees that in no event --

THE COURT: Wait. Hold on. So, really? That's such an interesting argument. So you agree to avoid a material disruption. You did not agree that you would not

cause a material disruption. Is that your argument?

MR. CAFASSO: We agreed to use commercially reasonable efforts. Yes, Your Honor. I am not disputing that.

THE COURT: Okay. Wow.

MR. CAFASSO: Yes.

THE COURT: Interesting argument.

MR. CAFASSO: It's neither here nor there, as I'll get to.

THE COURT: Yeah. It's not a great argument, frankly.

MR. CAFASSO: I can tell.

Section 5.3, Your Honor. No course of dealings can cause a modification of the loan agreements; establish a custom or course of dealing; operate as a waiver, as so on.

Section 5.7, and I think this is particularly devastating to their claims, Your Honor. This is --

THE COURT: Okay. Go ahead.

MR. CAFASSO: -- oral agreement. It says that this agreement, the loan agreement and the other documents executed herewith are the final agreement between the parties and may not be contradicted by evidence of prior contemporaneous or unwritten oral agreements of the parties. There are no subsequent oral agreement between the parties. This is in both this bridge agreement and the 2017 bridge

agreement, which are the final agreements between the parties.

And finally, Your Honor, Section 5.13, which has a release of all claims, at least as of the date of the bridge agreements. But what I want to point Your Honor to is the representation that the borrower -- and this is on the last page, page 9. Each guarantor consulted with and has been represented by legal counsel and disclaimed any reliance on representations, acts, or admissions.

THE COURT: Okay.

MR. CAFASSO: So with those governing contracts in mind, let me now walk you through what happened with the sale of the Tellurian shares. And to your point, Your Honor, we did not cause a material disruption in the stock price and let me show you. And again, their entire motion rises and falls on the argument that his entire debt should be deemed extinguished because we breached some duty of commercially reasonableness here.

First of all, Your Honor, let's be clear. Defendants would prefer not to have foreclosed on his collateral and that Mr. Souki would voluntarily pay his loans back. I think that would be in everybody's interest. But we are where we are.

And Defendants had every incentive to sell this stock at a high price and recover the full amount that they

owed. It would be commercially economically irrational for them to take steps to impair their own collateral. It just doesn't make sense. And in retrospect with perfect hindsight, yes, I think Defendants would concede, we wish sold at a different time.

But the fact that we waited from foreclosing is actually a sign of Defendants' good faith, Your Honor, and not bad faith. And that's straight from the First Department's decision in the *Gramercy Twins* case, which we cite in our papers. That the length of time here -- more than three years of forbearance should not be used against Defendants. If anything, that tends to show Defendants' good faith.

But with respect to the Tellurian shares, Your Honor, here are the undisputed facts. We sold the shares. We didn't dump them on a single day. We sold them over the course of two months, from February 8th to April 5, 2023, on the New York Stock Exchange.

And if I could direct Your Honor to our opposition brief, which is NYSCEF 98, I believe there are three annexes attached to the back of the brief, which I'd like to walk Your Honor through, if I could.

THE COURT: Mm-hmm.

MR. CAFASSO: So, annex 1, Your Honor. This shows Tellurian's stock price over an approximately five-year

period. And I think the takeaways from this, Your Honor -- and this is all public information. This is not disputed. This stock was highly volatile, and it was mostly in a downward trajectory from when the loan agreements were entered into in 2017 and 2018. And if you look towards the right, it shows the time that we finally foreclosed on the shares. And that -- that is sort of blown up in annex 2.

So if you look to annex 2, we're showing the stock price movement from September of 2022 through April of 2023. And as you can see -- and I think this is a very important point, Your Honor, especially when you go back and look at *Bankers Trust* and the *Solow* decision from the First Department. This stock was plummeting. It had dropped 60 percent by the time Defendants started to sell the shares on the New York Stock Exchange. And it was for that reason that Defendants decided that they had to sell. They were not clairvoyant. There was no way to know whether the stock was going to continue to fall or what was going to happen. And they did so, again, Your Honor, over a two-month period.

And finally, on annex 3, Your Honor, it shows the daily trading volume. Our sales were relatively small compared to the overall volume. One day it was about 50 percent, but most days it was less than around 5 percent. And as of today, Your Honor, last time I checked at about 12:00, the stock was trading at about 1.36, which is around

the exact weighted average price when Defendants were selling it. So I don't think there's any reasonable argument that Defendants materially depressed the stock price here. This stock was in the midst of a precipitous decline and Defendants exercised their rights to sell the collateral.

Now, again, Your Honor, let me focus on the disposition of the Tellurian shares. And I'm happy to take any questions.

THE COURT: Do you think part of -- I understand the little yellow part of the annex 2, or annex 3 is your -- the shares that you were selling. But isn't there --

MR. CAFASSO: Right.

THE COURT: -- added significance to the sale of those shares because they are the principal shares?

MR. CAFASSO: I think it is significant, Your Honor. And Mr. Souki, in an April 2019 proxy statement from Tellurian, it was disclosed to the market that he had pledged 25 million shares to secure a private loan. So the notion -- I know they say that we never disclosed at Tellurian that we made this loan. That was in their own proxy statement. I'm happy to send to this Court. The market knew that he had pledged these shares as collateral.

THE COURT: Mm-hmm.

MR. CAFASSO: Let me, Your Honor, focus first on

the timing, and then I'll talk a little bit about the manner of these sales.

As to the timing -- and again, this is really -- this is really the thrust of their argument, because if you disagree with them on the timing, the request for Preliminary Injunctive relief goes out the window because everything else goes to quantum of damages and can't -- and can be compensated by monetary damages.

Now on the one hand they say that we should have sold in April of 2022, but they also claim in the next breath, Your Honor, that we had some agreement never to sell until Tellurian reached some milestones, which hasn't happened, and to my knowledge may never happen.

The fact is, Your Honor, we delayed -- my clients delayed so long in foreclosing to try to work with Mr. Souki and give him additional opportunities to repay these loans on his own, despite having no contractual obligation to do so.

THE COURT: So I'm just going to interrupt you just because I heard you the first time or two that you -- you're kind of repeating.

MR. CAFASSO: I'm sorry.

THE COURT: So I'm just going to jump back over to Mr. McConn and we'll come back to you.

MR. CAFASSO: Thank you, Your Honor.

THE COURT: Okay. Thanks.

Mr. McConn.

MR. McCONN: Thank you, Your Honor. Just very briefly.

Kind of taking these things in order, going back to the manner in which they sold the stock. If you go to page 17 of their opposition, NYSCEF Document 80, there's a nice little chart, a table, that shows --

THE COURT: 17?

MR. McCONN: Yes, Your Honor. Page 17 of 22.

THE COURT: Okay.

MR. McCONN: I'm sorry. This is Ms. Metzger's affirmation. I apologize.

THE COURT: Oh, okay.

MR. McCONN: But it's NYSCEF Number 80.

THE COURT: Got it. Yeah.

MR. McCONN: And what you'll see in the NYSCEF Number 80 is that, on page 17, if you look at the first few days that they were trading, overall volume was -- the first three days was 11 million; 11 million; 14 million. They sold almost 2 million; almost a million; and more than 2 million. And they continued; a million the next day. So they are dumping literally millions of shares on the market for the first few days, and that's when the stock price starts to go down.

And what you see is at that point, they do start selling -- well, a few days later, they do start selling; 300,000; 600,000; a few hundred thousand. So that's the point at which they start selling what we might say is a reasonable amount if this is a good time to sell. But by that point, the damage is done.

They have shocked the market by dumping literally millions of his shares on the market -- the executive chair; the largest shareholder of the company -- and he's having to disclose this now. He's filing form 13Ds and F-4s, whatever they are, with the SEC. And so now the market knows that Charif Souki's shares are being dumped on the market. And they know the volume that's being dumped on the market.

So, yes, maybe at some point they got wind of what they were doing, they realized what they had told them was right, and so they slowed down. And they did drag it out to April, but by that point, it's done.

And if you follow down their list here, they show you average price per day. What they don't show you is where it opened, where it closed, where the low points were. There were times during the trading where it got down below a dollar. So they destroyed 50 percent of the value of this stock by trading it. It was worth $51 million the day they grabbed it. They sold it for 35. So they absolutely damaged the stock. And they did in a commercially

unreasonable manner.

Now, Your Honor, this -- there was a recurring theme of -- from my colleague on the other side about how we're asking the Court to impose hindsight or clairvoyance. That is not the case. I mean, I could see a situation where if we came to the Court and said, "Oh, they should have sold it at a different time." You would say, "You can't require them to be clairvoyant, Mr. McConn. All they're required to do is be reasonable." We agree with that, but the facts of this case are very different.

The facts of this case show -- and again, they don't dispute this, that for months -- actually, more than a year -- they were repeatedly insisting that he sell. They were telling Mr. Souki "sell your stock."

THE COURT: That argument really doesn't work for me because, I mean, as you say, they had control of the stock at that point. You didn't. So who really cares what they're telling your client to do.

And what's really confounding about it, about your argument, is that you didn't turn around and say to them right away -- according to your argument and according to your papers, you waited for quite some time before bringing to their attention that they had a document that said they were in control of the shares. Not you. So that argument just doesn't really work.

MR. McCONN: Well, let me -- thank you, Your Honor. Let me see if I can kind of clarify things. They required us to sign that document. They required us to say that they had exclusive control of the stock. Why they then turned around and started telling us, like, "You need" -- "You need to sell the stock" is unreasonable in and of itself. Why would they insist that we sell the stock that we can't sell, that they have exclusive rights to?

And even if they forgot, when they come to us in May and July of 2021 and say, "Sell the stock" and we say, "We can't sell it," why don't they then at that point say, "Oh, yeah. That's right. We're the ones who can sell it."

THE COURT: So you didn't even tell them at that point that "You all have the power to sell it," you know. Not that "We don't have the power to sell it. You have the power to sell it."

MR. McCONN: Well, we did --

THE COURT: You don't even say that. What you say is "We can't."

MR. McCONN: You're right. And I wasn't there for --

THE COURT: So that's a little -- not entirely truthful.

MR. McCONN: Well, Your Honor, so what my client told them was -- and I confess, maybe he didn't fully

appreciate the contracts at the time -- but what he was telling them was "I can't sell and it's because I'm restricted by my board and by securities regulations," which he was. And they dispute that. But in his mind he was.

THE COURT: But now you're telling me the reason he couldn't do it wasn't because of the restriction on the stock market, but restrictions that they had on it.

MR. McCONN: It's all of that, Your Honor. It all adds up to mean he couldn't sell.

THE COURT: This is a really interesting argument that you have. I mean, this is really interesting. I love UCC cases, I really do. They're fascinating. And this is a really interesting argument. Interesting spin on it.

MR. McCONN: I've noted a lot of your UCC cases are getting ready for this so I assumed you would be interested in it.

I think the last thing I'll say about this is that, we -- a lot of the cases they cite, the defendants cite, say that, you know, "You can't really -- the Mr. Soukis of the world can't avail themselves of these kinds of claims if they never told the lender or the secured party to sell the collateral." That's a big point in their briefing.

And what Mr. Souki says in his supplemental affidavit is -- he repeatedly told them on multiple occasions that, "I can't sell. I'm restricted from selling.

I don't have the right to sell. You sell." And at that point, they absolutely had the obligation. And he said that to them in late 2021 when the stock is trading upwards of almost $5 a share.

THE COURT: The problem with that argument is that it contradicts your earlier argument that they have some sort of an agreement, an oral agreement, not to sell until certain milestones are achieved. So which is it? Because you have to choose one of these arguments. You can not have both of them.

MR. McCONN: Understood, Your Honor. And my response to that and I promise I'm trying to answer the question -- the response is they absolutely should have waited until after we achieved -- Tellurian achieved the milestones. That's what they committed to Mr. Souki repeatedly.

But they clearly don't think that they made that commitment, or they say it's not enforceable because it's not in writing. That's fine. If they are going to disregard the commitment they made, then they have to live by what New York law says and what these contracts say about commercial reasonableness.

If we're wrong about the commitment they made, shame on us. But that doesn't excuse them from the requirement to exercise commercial reasonableness as to

time. The Courts are clear about that. And they did not. They absolutely did not use a reasonable time. This isn't about hindsight. This is about them repeatedly telling us to sell when it was reasonable, and they didn't do it.

THE COURT: Okay. All right. Thanks so much.

And, Mr. Cafasso, did you want to say anything else? Because I kind of cut you off.

MR. CAFASSO: That's perfectly fine, Your Honor.

THE COURT: You need speak up, though, because I can't hear you.

MR. CAFASSO: Thank you, Your Honor. I would just make two quick points.

THE COURT: Sure.

MR. CAFASSO: And I appreciate your indulgence.

The notion that he was restricted from selling and couldn't sell his stock, that exact argument, Your Honor, was presented to the Sixth Circuit in the *Lane* case. And I would direct Your Honor to footnote 8 where they consider and they reject that argument, saying that the particularized facts of the borrower in a situation is insufficient to alter the law and burden the lender with the responsibility of being an investor and advisor. And then they go on to make the obvious point that there are ways for insiders to sell stocks pursuant to 10b5 plans and the like.

And the last point I'd make, Your Honor, just

looking at the equities here. Mr. Souki still owes my clients a hundred million dollars, and he's been in default for several years. And it just does not serve the public interest to permit a borrower to avoid their contractual obligations.

As Your Honor knows, the New York Courts are very clear and adamant in enforcing the plain terms of contracts between sophisticated parties. And as I said at the outset, I think a ruling in Plaintiffs' favor here really sets bad precedent because it disincentivizes and punishes lenders for trying to work with their borrowers.

And the reason we didn't sell the stock earlier, Your Honor, is we were trying to work cooperatively with Mr. Souki. That's in everybody's interest. And when that just turned out to be impossible, Defendants exercised the contractual rights to foreclose on the collateral.

And finally, Your Honor, a ruling in Plaintiffs' favor here would upend and really turn on its head the whole purpose of a secured lending. The whole purpose of secured lending is to provide a lender with the promise of repayment in the event the borrower defaults through the pledged collateral, which is exactly what this transaction was.

Thank you, Your Honor.

THE COURT: Okay. Thanks.

So, Ms. Brown, if you could mark the transcript for

the Court's decision, which is that I'm going to deny the motion for the Preliminary Injunction, not because -- it's a fascinating argument. It's really a good argument, however, you have to establish likelihood of success. You have breach of contract, a DJ, breach of good faith of fair dealing which is also a breach of contract, fraud, tortious interference. And really we're all focusing on the sale of the shares on the New York Stock Exchange. And I don't know, the plaintiffs might be able to show that there was a dumping that happened on, you know, the first two or three days and they might be able to show that. But I am not satisfied that the plaintiffs have established a likelihood of success on the merits.

Their affidavit of their own expert says, "Well, you know, if am given the opportunity to write an expert report I might be able to show" -- or "I will," actually. He doesn't say "I might." I will show, he says, that, you know, they depressed the stock, they dumped it, and so forth. But it's not -- I don't have what I need to make that decision to find that it was commercially reasonable, or commercially unreasonable, as -- not as a matter of law, but as a matter of likelihood of success that the plaintiffs have pushed it over into -- not 50/50, but more, you know -- that it's likely that they will succeed on that. And quite frankly, I can't make that conclusion based on this record.

Another strong factor militating against the Preliminary Injunction is the irreparable harm, and while -- and this is where your argument is so interesting, Mr. McConn. The irreparable harm is the sale of these two precious properties, right? The ranch and the boat. And then, also, the other family stock in the family company too, I'm sure is very precious to them. But I am focusing on the sale of the shares about which you are saying was commercially unreasonable, and I just don't think that I can find that selling shares on the New York Stock Exchange over a two-month period, that it's commercially unreasonable.

Having said that, I mean, you may very well be able to prove it with a good expert and, you know, a good expert report. You might. But you just don't have it for the purposes of an injunction today.

Balance of the equities too -- I have to say that I -- you know, look, it's a commercial division, a mere Supreme Court. And, you know, we're here to, you know, enforce contracts. And I think Mr. Cafasso makes a very good argument about secured lenders needing to have some certainty that Courts are going to, you know, allow them to do what they do.

I understand Mr. McConn's argument that, you know, lenders can not just do whatever they want and sell whenever they want and sell as much as they want, but that's not the

record that I have here. And I agree that it's not unmitigated, I don't think is the right word. But they can't just do anything they want. That's true. They have to do it in a commercially reasonable way. But I just don't have before me enough facts to find that it is more likelihood -- likely than not that it was commercially unreasonable to sell the stock when they sold it.

And I will say, there is a certain amount of clairvoyance in this argument that the plaintiff is making. But there's no written -- there's no written agreement admittedly, as to the holding off on selling. So that part of the plaintiffs' argument doesn't work because, you know, you can't say that they didn't sell soon enough because you're saying that they weren't supposed to sell until certain milestones were met, number one.

Number two, we do want to encourage parties to work together not to foreclose and to, you know, give some time. And I can't punish -- which is what it would be to issue a Preliminary Injunction at this time.

And then the second half of this timing argument -- well, then they sold. You know, they sold too late -- also doesn't work, again because you don't want to punish lenders for working or trying to work with parties. But you definitely can't -- under this framework of this argument, you can not say that they should have sold sooner when your

argument is that they couldn't sell sooner because they made an agreement to wait for milestones. I mean, that just doesn't work.

Anyway, unfortunately, when the defendant lender sees the market going down -- and according to the documents I have, the market was going down. Oh, and just for the record, if you attach -- this is not in the rules, actually it might be in my rules. If you attach instead of annexes to the memos of law, it's a lot easier to use them if you file them separately. Just a thought.

Anyway, the defendants are not required to wait for a market to go down further. I mean, they can't -- it's not unreasonable to start selling when you see the market starting to go down and you're worried about it tanking and then you wouldn't have anything.

Okay. So that's the Court's decision. You can get the transcript for me, Mr. McConn, and I will so order it. You will have an appealable order. As soon I get that from you, we will issue a one-page decision that just says it was decided on the record.

Where are we with the answer or motion to -- sorry, I didn't look at that part of this.

MR. CAFASSO: I believe we have 28 days, Your Honor, to file our motion to dismiss, which we intend to do.

THE COURT: Okay. Okay. Well, then I guess I'll

see you when you argue that.

MR. McCONN: Your Honor, may I -- I know you made your ruling. I do want to make -- ask one question. We also had a motion for expedited discovery.

THE COURT: Oh, yeah. Absolutely no reason for that. Sorry.

MR. McCONN: Okay.

THE COURT: I mean, I have the record that I have.

MR. McCONN: And that's why I raised it, Your Honor. I thought, with discovery, I think we will be able to develop the record in a way that could change your mind.

THE COURT: And you will -- oh, here it is. Sorry. No expedited discovery. You haven't demonstrate that such discovery is necessary for the Preliminary Injunction and, indeed, you have all the information. That's what's so extraordinary about this argument. You know, it's all within your client's -- it's his information. So --

MR. McCONN: Respectfully --

THE COURT: -- I don't see it. Well, a) it's within his control, and, b) the other part is, you know, it's public information about when it was sold, how it was sold. And the rest of it just goes to the rest of the case. I mean, it's just regular old discovery. So I don't see how that would have helped, given your argument which is based on them tanking the price. I mean, it's all based on, you

know, your expert, and what -- and the little charts and things. So I have that. I don't really need anything else. So yeah, that's denied too.

So thanks so much. Have a nice day. And please get me the transcript.

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The foregoing is hereby certified to be a true and accurate transcript of the proceedings as transcribed from the stenographic notes.

ANNE BROWN, RPR
SENIOR COURT REPORTER

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