EXHIBIT A

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

GREGORY GREENE, JOSEPH LACK, and ANTHONY MOTTO, individually and on behalf of all others similarly situated,	)	
Plaintiffs,	)	
-vs-	)	Case No. 14 C 1437
MIZUHO BANK, LTD., a Japanese financial institution, and MARK KARPELES, an individual,	)	Chicago, Illinois April 27, 2016 10:30 a.m.
Defendants.	)	

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE GARY FEINERMAN

APPEARANCES:

For the Plaintiffs: EDELSON P.C.
BY: MR. ARI J. SCHARG
MR. JOHN AARON LAWSON
350 North LaSalle Street
Suite 1300
Chicago, Illinois 60654
(312) 239-3362

Court Reporter:

CHARLES R. ZANDI, CSR, RPR, FCRR
Official Court Reporter
United States District Court
219 South Dearborn Street, Room 2128
Chicago, Illinois 60604
Telephone: (312) 435-5387
email: Charles_zandi@ilnd.uscourts.gov

APPEARANCES: (Continued)

For Defendant Mizuho Bank, Ltd.:

SHEARMAN & STERLING, LLP
BY: MR. JEROME S. FORTINSKY
MR. JEFFREY RESETARITS (via telephone conference call)
599 Lexington Avenue
New York, New York 10022
(212) 848-4900

NEAL, GERBER & EISENBERG
BY: MR. JONATHAN S. QUINN
Two North LaSalle Street
Suite 1700
Chicago, Illinois 60602
(312) 269-8093

(Proceedings heard in open court:)

THE CLERK: 14 C 1437, Greene versus Mt. Gox.

THE COURT: Do we have anybody on the phone?

MR. RESETARITS: Yes. Jeff Resetarits with Shearman & Sterling for Mizuho is on the line.

MR. SCHARG: Good morning --

THE COURT: And could you say your name one more time, please.

MR. RESETARITS: Sure. It's Jeff, last name is Resetarits.

THE COURT: Got it. Thank you.

MR. SCHARG: Good morning. Ari Scharg on behalf of the plaintiffs.

MR. LAWSON: Good morning. Aaron Lawson on behalf of the plaintiffs.

MR. FORTINSKY: Good morning, your Honor. Jerry Fortinsky with Shearman & Sterling for Mizuho.

MR. QUINN: Good morning, your Honor. Jonathan Quinn on behalf of defendant Mizuho.

THE COURT: Good morning. So, if the lawyers want to stand at the podium, you can. If you want to sit down and talk into the microphones, you can, whatever you feel most comfortable doing. I'm indifferent to that.

So, we have a couple of motions. One is fully briefed. One isn't. Let me do the 1292 motion first, which

asks for an interlocutory appeal on the personal jurisdiction ruling. I'm going to deny that motion, and I'm going to state my reasons on the record.

Under 1292, the district court can certify legal questions to the Court of Appeals under particular circumstances. It has to be a controlling question of law, and it has to be -- there has to be a substantial ground for a difference of opinion. And then it has to materially advance the ultimate termination of the litigation.

And I agree that for both questions presented -- well, actually, I'm not sure about that. So, I'm going to put aside the third prong of the test. The two questions that Mizuho has proposed for immediate interlocutory review fall short on the first prong and the second prong.

So, the first question is: May a foreign defendant's alleged silence or inaction, in this case when accepting funds for a deposit, constitute intentional contact with the forum state sufficient by itself to support personal jurisdiction consistent with due process?

That's not a controlling question of law in this case because it doesn't fit this case. It doesn't describe what happened or what is alleged to have happened in this case. And just to make things easier, whenever I say that something happened or that Mizuho did X or Y or the plaintiff did X or Y, I'm not actually saying that Mizuho did X or Y or

plaintiff did X or Y. I'm saying that it's been alleged, that those things have been alleged, and because we're at the pleadings stage, that's my factual predicate.

It can't fairly be described as silence or inaction for a bank to take custody of, accept, and profit from bank deposits that are sent to an account in the bank. That's not inaction. That is putting out a net, taking what comes in the net, and not giving it back, and profiting from it.

It's that conduct that was the basis for my personal jurisdiction ruling, and from where I sit, I don't think that that conduct can fairly be described as silence or inaction.

So, the first question is a perfectly good question, and I think it's probably a contestable question; but it's not a controlling question of law in this case because it doesn't fit this case.

The second proposed question is: May a foreign defendant's adoption of a policy that equally affects thousands of individuals around the world or its failure to disclose such a policy to those individuals subject it to personal jurisdiction in each forum state where any of those individuals may be located consistent with due process?

That question is a contestable -- no, that question is a controlling question in this case because that describes this case, but it's not a contestable question of law. And on that point, I'll just say the following:

I mean, let's assume that a bank did something that it knew was engaged in -- said, "You know, we're only going to engage in transactions, we're only going to accept deposits from" -- and I know the bank says that they weren't able to accept or not accept, and that's something that's going to come up in the motion to dismiss. Right now, I'm just talking about the motion -- the personal jurisdiction motion.

"We're going to accept deposits only from Texas, Oklahoma, Arkansas, Mississippi, and Alabama," as opposed to a bank that says, "We're going to accept deposits from everywhere." It can't possibly be that the bank that limits its alleged tortious conduct to those five states are suable in those five states, are subject to personal jurisdiction in those five states, but that banks who are indiscriminate with respect to the states in which they're knowingly doing things and accepting money from can't be sued anywhere other than where that bank is located.

In other words, you don't get extra credit, from a personal jurisdiction perspective, by treating people in all 50 states in a tortious way, as opposed to limiting your tortious conduct to certain states.

And this goes back to a passage in the opinion where I said that I have no doubt that Mizuho didn't care that Lack was from California or Greene and Motto were from Illinois. And I remember having a discussion -- I think I remember

having a discussion with Mr. Fortinsky when we argued this motion where I heard him saying, perhaps incorrectly, that after *Walden versus Fiore*, personal jurisdiction requires that the defendant actually care which state the defendant is from and which state they're affecting.

And I don't read *Walden versus Fiore* that way, and I think that notion is what underlies the question, the second question that's been presented for a 1292(b) interlocutory appeal.

So, let's say I'm a meat -- a hamburger manufacturer in Canada and I know that my hamburgers are tainted, and I just send out my trucks to deliver -- my trucks are delivering those hamburgers in the United States to all 50 states. I have adopted a policy that equally affects thousands of individuals around the world, or at least in the country; and it really doesn't matter to me whether the trucks are going to North Dakota or Wisconsin or California or Alabama or Mississippi or whatever, but I know that they are, and I know that I'm affecting people in those 50 states.

Mizuho's preferred answer to the second question would be, under those circumstances, the Canadian hamburger manufacturer isn't subject to personal jurisdiction in any of those states because it just acted with a shotgun as opposed to with a rifle. And that -- that's not a contestable question, I don't think. I don't think it's a close question.

So, while it describes this case, it doesn't satisfy the requirements of 1292(b).

So, for those reasons, I'm going to deny the motion for an interlocutory appeal, which is docket No. 208.

Let's move on to the -- let's move on to the motion to dismiss, which presents meatier issues than the 1292(b) motion. So, Mizuho had the last word in writing, so let me ask the plaintiffs whether they would feel that there's anything in the reply to which they'd like to respond in a way that they haven't already responded in their opposition brief.

MR. LAWSON: I don't believe so, your Honor.

THE COURT: Okay. Is there any -- are there any points that you would like to emphasize that you've already put forth in writing?

MR. LAWSON: I don't think so. I imagine you'll have questions about the choice of law issues that come up. If not, I think we'd like to talk about them now, but I think that's perhaps the only issue in which we might have anything we'd want to really put forward.

THE COURT: Okay. Well, tell me what you -- give me your pitch on choice of law.

MR. LAWSON: Okay. Excuse me. It seems to us that if Japanese law is going to apply, then a request that you dismiss the case under Illinois law is essentially a request for an advisory ruling; and we're not sure that Rule 44.1

allows Mizuho to move to dismiss under one body of law while at the same time reserving their right to contest the allegations under a separate body of law later in the litigation.

THE COURT: Why not?

MR. LAWSON: Well, their argument --

THE COURT: All I have to say is, "Well, I'm not going to dismiss the case because it fails to state a claim under Japanese law," but what stops them later on on summary judgment or in a trial saying, "You know what, Japanese law applies, and here's what Japanese law says on these causes of action"?

MR. LAWSON: Well, I agree that they can do that. I just don't know that they can ask for your ruling on Illinois law at this point in time.

THE COURT: Why can't they -- why not?

MR. LAWSON: Well, their premise seems to be that the claims are so weak under Illinois law that we can dismiss them and not worry about Japanese law, but --

THE COURT: But you think that Illinois law applies.

MR. LAWSON: We do.

THE COURT: So, they're agreeing with your premise.

MR. LAWSON: Say that again?

THE COURT: You guys are sharing a common premise, which is for purposes of 12(b)(6), what law applies.

MR. LAWSON: I think we think it applies for the entire litigation, but yes.

THE COURT: For purpose of 12(b)(6) --

MR. LAWSON: Yes.

THE COURT: So, you ought to be happy with their assumption for present purposes that Illinois law applies.

MR. LAWSON: Well, inasmuch as -- yes, we do agree that -- we are happy to apply Illinois law at this point. I just don't think that it makes sense to ask us to litigate under Illinois law now with the assumption that it won't apply later. But if you disagree, we're not -- I mean, this is not a hill --

THE COURT: It's not that I disagree. I don't even understand your point. Why are you even pressing this point? They're agreeing with you with your premise on the 12(b)(6), and you ought to say, "Great, we're fighting it under Illinois law. That's exactly what we want."

MR. LAWSON: It is what we want.

THE COURT: Later on, you can say -- well, we have to talk about Japanese law versus Illinois law for *forum non* purposes; but assuming we get over that hump, you live to fight -- they live to fight another day, and you don't give anything up.

MR. LAWSON: Sure. All right.

THE COURT: But what am I missing?

MR. LAWSON: I suppose nothing. Maybe we're just thinking about this in different ways, and in that case, your way gets to carry the day.

THE COURT: No, but I'm -- I mean, that -- I appreciate that, but if I'm looking at it the wrong way, I want to know that. And I'm just one person, and sometimes I think of things in a certain way, and I come to believe, either from my own devices or from hearing from counsel, that I ought to be looking at something from a different way.

So, I ask in all sincerity. When I say, "What am I missing," I'm not like Kim Jong Un saying, "What am I missing," and there's only one answer to that. I'm being sincere. What am I missing?

MR. LAWSON: I'm not sure you're missing anything.

THE COURT: Okay. All right. So -- but what about -- since we're on choice of law, for the *forum non*, why don't you address choice of law for purposes of the *forum non* motion.

MR. LAWSON: Okay. Our point is that given that this -- we apply Illinois's choice of law rules, the presumption is that Illinois law applies. And absent, you know, a material conflict -- but even if there were a material conflict, in tort cases, where the injury is felt, where it occurs is generally the jurisdiction that has the greatest -- the most significant relationship to a dispute; and in that

case, for plaintiff Motto, for plaintiff Greene, that's -- those are both Illinois. So, we think even if there was a material conflict, Illinois law would apply.

THE COURT: I understand that that's true for Greene and -- that may be true for Greene and Motto, but you're seeking to certify a nationwide class. So, given that we're going to have class members possibly from all 50 states, which does not make this a universal jurisdiction case for purposes of personal jurisdiction; it makes it the case that I described, why -- wouldn't it make more sense to just have a single source of law?

MR. LAWSON: I don't think a nationwide class action -- it might need subclasses to account for minor variations in different states' common law -- would be unmanageable. And that's a question we can get to at certification.

But I can tell you that I've seen nationwide tortious interference class actions, nationwide fraudulent inducement class actions, and they generally do require some finessing; but by and large, the law of most of the common law jurisdictions, it essentially tracks. They essentially track each other, and I don't think it would present manageability concerns at all.

THE COURT: Okay. But what -- I mean, what -- what do you have to say about Mizuho's argument that this is one of

those situations where the presumption that the forum state's law applies has been overcome, given that this Japanese bank was operating under Japanese banking laws and was dealing with a Japanese account holder? What are your thoughts on that?

MR. LAWSON: You know, it's still -- it would still at some point be their burden to show that the presumption needs to be rebutted or should be rebutted, is rebutted. But the --

THE COURT: Well, didn't they make that argument in the *forum non* part of their brief?

MR. LAWSON: Well, I mean, that particular argument still requires a showing of a material conflict. It isn't rebutted simply because there's conduct in this litigation that is outside the State of Illinois.

If Illinois had literally no connection to the dispute, I think that might be one thing; but then I believe the way to address that would be, you know, a venue motion, as actually happened in the Maryland case they cite in their reply.

It still -- but they -- you know, there is a connection between Illinois and this dispute, so they'll have to show the material conflict. It isn't simply rebutted because Mizuho's in Japan.

THE COURT: I see. I see. So, what you're saying is that in order for choice of law to even be put on the table,

there has to be a showing of a conflict between Illinois law and Japanese law, and because Mizuho has not gotten into the substance of Japanese law, it hasn't established that there's a conflict; and, therefore, at this point, there's no choice of law problem?

MR. LAWSON: Right.

THE COURT: Could you address that point, please?

MR. FORTINSKY: Yes, your Honor. The case law we cite says that one reason that -- one reason why you should, at least in appropriate circumstances, send the case back to, in this case Japan, is that neither the Court nor in some cases the lawyers are well-equipped to get into the details of the foreign law.

So, it's not really -- we should not be having a debate about what Japanese law says. That's what the case says. Even beyond that, though, the --

THE COURT: But I think what he's saying is that what difference does it -- if there's no difference, material difference between Japanese law and Illinois law, then we don't need the superior expertise of the Japanese courts, because if they're the same, then I could handle it just as easily as a Japanese court could.

MR. FORTINSKY: Well, in any event, that is not the standard. The standard is delineated in our briefs, and it turns on, among other things, the convenience to the

witnesses, the availability of the evidence, the interests of the respective jurisdictions, and the disposition of the -- of the matter. Those are the criteria. And on those criteria, clearly, the -- all of the factors here tilt in favor of Japan.

One telling sign is what the plaintiffs resort to, their first point virtually is the presumption. When you're relying on the bare presumption rather than the facts of the case, that sort of tells you that the facts, the details, the guts of the issue is on the other side.

And here, what we have is the evidence and the witnesses are in Japan. Even the plaintiffs' own initial disclosures reflect that. The plaintiffs, in listing the witnesses for this case, say that in addition to their individual clients, the witnesses will all be agents and employees of Mt. Gox, which is a Japanese institution, a Japanese bitcoin exchange, and the agents and employees of Mizuho Bank, which is also a Japanese institution. That's who this case will turn on.

Yes, there are three individuals who've brought the claim, but once they get done showing us their -- their records reflecting sending the money to Mt. Gox, which is likely to be just a relatively modest number of pages, all of the documents and all of the witnesses are in Japan.

Of the sort of three -- in any tortious interference

action, in a sense, you have three different locuses of activity. There is the plaintiff, there is the defendant, and then there is the third party whose contract is allegedly interfered with.

And in this case, that's the plaintiff, Mt. Gox, and Mizuho. Two out of the three, the two of the three that are likely to have the most witnesses and the most documents in this case are in Japan.

And the institutional interests of Japan turns on various things, but I think is crystallized in this: One of the key questions here will be how you balance -- we've presented this before as an argument, but I'm just presenting it here as a question. What this case will turn on is: How do you balance the Japanese bank's interest and the Japanese system's interest in preserving the confidentiality between a bank and its customers on the one hand, which standing alone would tell you that Mizuho not only didn't have a right to, but had a duty not to make disclosures to the plaintiffs, how do you balance that against on the other hand the plaintiffs' assertion that there's a duty of disclosure?

And the duty of disclosure versus duty of confidentiality is at least in the first instance a question of Japanese -- Japanese law. It's not a question that really the plaintiffs have even briefed or made any allegations on. It's a question of how do you -- how do you wrestle with those

competing considerations?

Now, we would tell you that, in fact, there's been no allegation here that Japanese law requires -- has any duty of disclosure. The plaintiffs have not even shown any duty of disclosure under Illinois law or California law, let alone Japanese law. So, I don't think when you get to balancing that question it's even a close call.

But that whole set of issues turns on what Japanese law says about what banks are required to do.

THE COURT: But doesn't Federal Rule of Evidence 44.1 acknowledge a United States federal court's ability to make that determination based on all of the sources that are listed in Rule 44.1?

MR. FORTINSKY: Yes. When -- yes, that's true. But the case law also acknowledges in many, many cases, some of which are reflected in our papers, that U.S. judges, with all due respect to the esteemed judges of this court, are less competent to make decisions on foreign law than foreign judges are. And where there is -- and that is one factor, not the only one, but one of the factors to be considered by the Court in addressing a *forum non conveniens* argument.

THE COURT: You're talking past each other, and all I'm interested in is the part of the *forum non* analysis that turns on the difficulty that a United States court would have applying Japanese law.

What the plaintiffs are arguing is that tortious interference law, fraudulent concealment law, unjust enrichment law, there's been no showing by Mizuho that Japanese law is any different from Illinois law regarding the elements of those claims or even whether there are such claims under Japanese or Illinois law. And I don't hear any push-back from you on this.

MR. FORTINSKY: Let me --

THE COURT: What you're saying is one component of tortious interference law is justification and, you know, having a valid business purpose. And in order to address that factor of tortious interference law, we'd have to get into the Japanese law of bank disclosure and confidentiality and all of that.

So, it seems that you're talking past one another, and so I take it you're not -- you don't take issue, at least at this point, with the plaintiffs' argument that Mizuho has not shown that there's any difference between Japanese law and Illinois law as to the elements of the causes of action.

MR. FORTINSKY: Let me address that in two ways, your Honor.

First, the -- showing that there's a conflict of law between Japan and Illinois is not one of the standards, not one of the criteria that we look to in deciding a *forum non* motion. So, there was no burden on us to brief that law.

That's it in a nutshell, your Honor.

THE COURT: You're walking away from your brief, though, on this point, pages 36 -- pages 28 to 29.

MR. FORTINSKY: I'm happy to take a look at that, your Honor, but --

THE COURT: Because you've said that that's one of the elements. And if you want to walk away from that, that's fine, but I want to make sure that you're -- you actually mean to do that.

MR. FORTINSKY: If you'll show me, your Honor, what passage you're referring to, we can -- I'm glad to address it.

THE COURT: Subsection B on pages 28 to 29, where you talk about the choice of law for tort claims. And you seem to be arguing that Japanese law would govern the elements of a tortious interference or a fraud claim, and now you're saying that you don't have to show that.

MR. FORTINSKY: You're talking about Point B?

THE COURT: Yes.

MR. FORTINSKY: The point here, your Honor, is that applying Japanese law would create difficulty. That's the point I just made, that U.S. courts are less competent to address questions of Japanese law.

THE COURT: I get that.

MR. FORTINSKY: It's not about a conflict.

THE COURT: No, I get that. But is it applying

Japanese law in terms of determining the elements of the cause of action, or is it applying Japanese law in determining with respect to one element of the tortious interference claim what Japanese law has to say about depositor confidentiality and the like?

MR. FORTINSKY: I think Japanese law would apply regarding both, your Honor.

THE COURT: Okay.

MR. FORTINSKY: So --

THE COURT: So, in order to make the first argument, which is, there's a difference between Japanese law and Illinois law as to the elements and/or existence of the causes of action, don't you have to tell me about what Japanese law says on those particular subjects?

MR. FORTINSKY: No, your Honor. This is essentially a dispute that arises in Japan. Japanese law governs.

THE COURT: I know. But why is --

MR. FORTINSKY: I don't have in front of me the Japanese law on tortious interference, so if that's the question, I don't have that.

THE COURT: Okay.

MR. FORTINSKY: And I'm not telling you that Japanese tortious interference law -- I'm not describing it to you in its particulars.

The point, though, is that the Japanese -- this is an

issue that arises in Japan. If it were sent to Japan, the plaintiffs would have the right to reformulate their complaint under Japanese law. My understanding is that Japanese law does not necessarily have all the same -- the same causes of action. They're not on all fours, generally the same concepts, but it's not how you trace this particular element in this cause of action and match it up with that one.

So, undoubtedly, if this were repositioned in Japan, if this were refiled in Japan, the -- both the plaintiffs and defendants would have the right and the need to restate their positions a little bit to align with what Japanese law establishes.

THE COURT: But we don't know what the differences are.

MR. FORTINSKY: Yes, that's true, but that's not one of the criteria -- that's not one of the criteria --

THE COURT: And now again you're walking away from the argument that you made --

MR. FORTINSKY: I don't understand that, your Honor.

THE COURT: -- which is that Japanese tortious interference law and fraud law are different; and, therefore, it has to go to a Japanese court rather than an American court.

You don't know what Japanese law says about tortious interference or fraud, and because you don't know that -- and

I don't blame you for not knowing that. I don't know that. I don't know if anybody in this room knows it. Maybe Mr. Quinn knows it. But no one in this room knows it, perhaps. Then I can't say that this case needs to go to Japan because a Japanese court has to -- is in a better position to apply Japanese tortious interference law and Japanese fraud law, because if it's the same as Illinois law, then I could do it just as easily, and that falls out as a factor.

Whereas, if Japanese law is very different from Illinois law and I would have a hard time grasping, for some reason, what Japanese law says about those elements, then that would weigh in -- and Japanese law should apply, then that would weigh in favor of a transfer on *forum non conveniens*.

But without the essential predicate of knowing whether there's a distinction between Japanese law and Illinois law as to the elements of the various torts being alleged, then that's not really a consideration for *forum non conveniens*.

MR. FORTINSKY: Well, let me throw another consideration into the discussion, your Honor, on that very point. When we say that courts in the United States are less competent to apply Japanese law, it's not just that the causes of action are different. Even if we were to assume, in other words, that Japanese law was the same as Illinois law on tortious interference, for example, except that it was in

Japanese, that would not completely answer the point because when a court applies the law, it is not simply reading the statute. It has to apply the case law. It has to understand the procedural elements of it. Applying the law isn't just a matter of reading a statute, in other words.

And, therefore, to me, I take it as a given or at least I find it persuasive that a Japanese court would be superior to a U.S. court in applying Japanese law to all the circumstances of this case, even if it were to turn out that the fraudulent concealment law and unjust enrichment law and tortious interference law were all precisely the same.

The second point I want to make in response, your Honor, is that to me, it would defy belief if it turned out that the law on all those three elements -- there are essentially three causes of action here against Mizuho, the accounting being just a remedy -- but the three causes of action, if it were to turn out that those were all the same, that would be astonishing, especially here where just a few moments ago, the plaintiffs conceded in response to the Court's questions that the laws of the 50 states, they said, were, for the most part, I think was the word that counsel used, the same.

Well, the same concern that -- ironically we're now talking here about the same kind of concern we were a few minutes ago, the variety of different state -- different laws

in the various jurisdictions. There's a multiplicity of laws, we know from our general legal experience, across the 50 states on all of these causes of action. There may be a sort of family resemblance between all the different tortious interference claims, but I've litigated in enough jurisdictions to know that there are some differences, I gather everybody in this courtroom has, same kind of thing with fraudulent concealment.

That was the consideration we were discussing a few moments ago when the Court correctly pointed out that if the case stays here, we will be dealing with an abundance of different law across 50 jurisdictions.

Now, if even within the United States we see that there's this multiplicity of differences -- multiplicity of different causes of action, which the plaintiffs effectively conceded when they said they were, for the most part, the same, which is to say they're not really all the same, then the same thing is undoubtedly true when you cross the ocean and you have -- you have to look at Japanese law.

To me, maybe this is unfair to say this, but it feels sort of obvious or instinctive to say that if our laws within the United States are so different, they can't possibly be precisely the same in Japan.

But still, my third point is, if the Court would welcome a further submission on Japanese law on this point,

we would, of course, be glad to provide it.

THE COURT: All right. Anything else on choice of law?

MR. LAWSON: No, no.

THE COURT: Okay. Let's talk about -- you kind of threw it to me, which is fine. What am I interested in? I'm interested in causation. And the question is: Did Mizuho's conduct cause a loss to either of the depositors here, Lack or Motto, given --

MR. LAWSON: So you're talking about the fraudulent concealment?

THE COURT: And also tortious interference. Is there causation, given the timing of who did what when and when the deposits were made?

MR. LAWSON: I believe that Mizuho's argument is that the -- that Mt. Gox's problems were out there sort of in the ether. There had been reporting on them, so that both of these individuals should have known that they weren't getting their money back.

You know, I believe a lot of the reporting noted that Mt. Gox was processing withdrawals and deposits slowly, not that they'd shut down completely.

But I would also note that in both cases, you know, we allege that neither of the plaintiffs would have deposited -- and this is for the fraudulent concealment

specifically, would have deposited had they known that the money was not coming out. And this sort of -- the black hole character of the Mt. Gox account at the time that they deposited wasn't widely known, if it was known at all. So I think that shows causation, at least at this stage on that claim.

THE COURT: But given the undisputed timeline established by the pleadings, isn't there an independent, a wholly independent reason why the deposit was not allowed -- I'm sorry, the withdrawal was not allowed on February 20th, 2014, which is that Karpeles cut off the spigot on February 7th?

MR. LAWSON: Well, I -- his -- I mean, his actions were also taken, I believe, in response to what Mizuho was doing behind the scenes. That's -- yeah.

MR. SCHARG: Yeah.

MR. LAWSON: So, I don't think that necessarily -- also -- I don't think that is a fully superseding cause or anything of that nature. I think it's still the case that both Mizuho and Mt. Gox were responsible for the understanding of both the plaintiffs that if they put their money into the exchange, they'd be able to trade bitcoin. They'd be able to withdraw their money at some point.

So, I don't think that gives us a complete causation problem.

MR. SCHARG: And I'd like to add something to that also. The big issue is that Mizuho was the exclusive banking partner for all of the users in the United States. The big reason why that was so important is because Mizuho knew that given all the heat on Mt. Gox and all of the issues with the press and the regulatory authorities, that there's no way that any other bank would come in and fill their shoes. There would effectively be no other bank that could ever provide a withdrawal opportunity for users in the United States. And that's the reason why they are, in particular, responsible for the claims and why there is causation.

THE COURT: But even if -- even if Mizuho didn't have the black hole or the *Hotel California* policy, whatever you want to call it, with respect to deposits and withdrawals, Lack couldn't have withdrawn his money on February 20th for reasons having nothing to do with that policy.

MR. SCHARG: But he also could never have withdrawn his money regardless. Once it was in, it was gone. There was no way he would ever be able to withdraw it again.

THE COURT: But there seems to be -- tell me why there isn't a wholly independent cause of his inability to withdraw, that cause being Karpeles saying, "No more withdrawals."

MR. SCHARG: Because those were both issues that led to the ultimate event of Mt. Gox going dark, but the reason

Karpeles had to ultimately say, "No more withdrawals," and that the whole thing was going dark to begin with was because their entire business was frustrated by the banking policies imposed by Mizuho.

THE COURT: But is that really the theory of your complaint?

MR. SCHARG: It's not really. We're kind of going down this road, but the --

THE COURT: I mean, the theory of your complaint is that Karpeles was the principal bad actor because he was stealing.

MR. SCHARG: In a sense, yes.

MR. LAWSON: Right.

THE COURT: But now you're saying that Mizuho made him do it.

MR. SCHARG: No, I'm just saying that the -- that the policies that were implemented by Mizuho -- so, Mizuho recognized that Karpeles was a bad actor and recognized that Mt. Gox, there was a ton of scrutiny. They didn't want anything to do with Mt. Gox.

At the same time, though, they were the only ones that users in the United States could withdraw money through. They were the sole -- they were the portal into Mt. Gox for United States users. There was never going to be any other portal aside from Mizuho.

MR. LAWSON: Right. So, our theory isn't that Mizuho's actions caused Karpeles to steal or caused someone else to steal, right, because of course the negligence and the conversion are pleaded in the alternative, but that it's what they were doing behind the scenes that caused him to take the site dark, which is --

MR. SCHARG: Or accelerated the shutdown --

THE COURT: So, what you're saying is Mizuho's banking decisions is what caused Karpeles to halt the withdrawals on February 7th of 2014?

MR. SCHARG: Karpeles -- there were -- I know that he might have announced to the public that he was halting withdrawals, but those withdrawals have already been halted by Mizuho for months and months and months.

THE COURT: So, what is it that Karpeles did on February 7th?

MR. SCHARG: He finally started to, I believe -- yeah, he finally announced something on his website that informed the public about what was already going on for the past six or eight months, and explained why they couldn't -- explained why, for whatever -- you know, he put it in a certain way; but what he was responding to was outrage over the fact that nobody could withdraw money, and there was increased regulatory scrutiny, and he made a public statement.

THE COURT: But Mizuho didn't have the ability to

stop withdrawals of bitcoin --

MR. SCHARG: No.

THE COURT: -- from Mt. Gox.

MR. SCHARG: That's right.

THE COURT: And that's what Karpeles halted on the 7th, is that right?

MR. SCHARG: No, I think -- no, he announced that he was halting the ability to withdraw any form of currency. Go ahead.

MR. LAWSON: You're right, yes.

THE COURT: Including --

MR. LAWSON: Money was already stopped, and he stopped the withdrawal from the wallets, yes, because he said he was investigating -- I mean, I think that when you represent you're investigating a bug, the idea is that you'll finish investigating at some point and you'll go back live. And it was between that point and the time when he actually took the exchange completely dark that both individuals put their money in.

And, you know, if -- if you're relying on a -- on the exchange's promise of security, I suppose the fact that there is a bug might spook you; but the fact that it's being investigated probably is an assurance that they're actually looking out for what's going on, whether that happened to be true. But the fact that they couldn't withdraw their money

was never Karpeles's doing.

MR. SCHARG: No. And to be clear, he only halted the withdrawal at that point. He didn't announce that it was being shut off completely.

THE COURT: Right. I mean paragraph 37 -- I'm on the second amended complaint, but I imagine the third amended complaint says the same thing.

MR. LAWSON: It's 38, yeah.

THE COURT: "On February 7, 2014, Karpeles halted his customers' ability to withdraw any form of currency from the Mt. Gox website." So, that means bitcoin, and it also means real money.

MR. SCHARG: Yeah. It's perhaps inartfully drafted, just in a sense that these are the manifestations and the representations that he was making to the public. He made it appear that he was all of a sudden -- that he was all of a sudden halting these withdrawals; but in reality, as we pled, they -- Mizuho had already enacted banking policies six or eight months earlier, the previous year, that made it impossible for United States consumers to withdraw cash from Mt. Gox.

THE COURT: I see. All right. Any thoughts on that?

MR. FORTINSKY: Yes, your Honor. I think at this point, frankly, with all due respect, the plaintiffs are just kind of winging it with regard to their allegations here. Let

me make three principal responses.

Number one, the idea that Mizuho caused Mt. Gox to go dark doesn't make any sense because at its worst, what the Mizuho policies did would be to prevent people or delay people, really, from getting their money out.

If people can't get their money out, Mt. Gox has more money, not less. It's not a reason why Mt. Gox would go dark. As we argued in our briefs, common sense is one of the things that the Supreme Court requires of courts when they evaluate these allegations.

The -- the idea that Mizuho made it impossible for -- and this goes to the tortious interference claim in particular. The idea that Mizuho made it impossible for Mt. Gox to perform its obligations under the contract also doesn't make any sense, because the -- this is not like a bank where there's a run on the bank and the bank doesn't have all of the money because they lend out as well as accept money from borrowers. This is a situation where people give their bitcoins and their money to Mt. Gox, and Mt. Gox has it. When they ask for it back, they have to give it back.

When the -- in the plaintiffs' brief, they refer in surprisingly airy terms to this notion that the -- the plaintiffs were not able to enjoy the benefits of their agreement. What is the benefit in question? The benefit in question is being able to get your money back when you want

it, being able to transfer your money when you want it.

Mt. Gox could have given people's money back. There was no problem in Mt. Gox being able to do that through a variety of means, including through, whether it was other banks or in bitcoin. What Mt. Gox did was it completely went dark.

And the plaintiffs in their -- in their complaint tell you exactly what happened. They're running away from these allegations now, but it's the heart of the complaint. They tell you what happened.

"Mark Karpeles siphoned money, bitcoins and cash, out of the plaintiffs' and the other users' accounts." They say that in paragraph 91, he siphoned it out.

Elsewhere more than once, they say that the problem was Karpeles's theft or his gross negligence. In other words, it was what Karpeles did. It wasn't that, "Oh, we're having some problems. It's sort of sticky. We can't get it out." They tell you. They can't run away from these allegations. It's the heart of their complaint that that's what happened here.

And in fact, we all know that in real life that's what happened, that Karpeles took the money, or at worst there was a bug and he was grossly negligent for having a messed-up system. That's what all the articles that they incorporate in the complaint say as well. So, the notion that somehow Mizuho

was the cause of this is just a late-invented fiction.

Second point, the heart of the allegations against Mizuho is Mizuho should have told the plaintiffs. The plaintiffs had a right to know about Mizuho's policy. Well, to put -- to crystallize what we're trying to say, I could say it this way: The plaintiffs were on notice. The plaintiffs knew.

Look at the chronology, your Honor. In May 2013, Homeland Security issues a seizure warrant for one of the Mt. Gox accounts, the Dwolla account. And at that point, Mt. Gox users could no longer access that. So, that's the first -- I think the first flare that alerts people that there's an issue.

THE COURT: Well, how do I know from the pleadings that --

MR. FORTINSKY: Well, whether it's the first one or not is not important. I'm not resting anything on that.

But in any event, in June of 2013, Mt. Gox, according to the complaint, announces that it's suspending withdrawals of U.S. dollars. Mt. Gox says it's suspending it temporarily.

At that point, a, quote, person close to Mt. Gox is quoted in the *Wall Street Journal* as saying that it took that step after Mizuho declined to process withdrawals in dollars.

THE COURT: And where in the pleadings does it say that Greene and Lack and Motto read that edition of the *Wall*

Street Journal?

MR. FORTINSKY: It doesn't say that, your Honor, but it puts them on notice. And let me put the answer slightly differently.

THE COURT: Where does it say in the complaint that people are presumed to know what's published in the *Wall Street Journal*?

MR. FORTINSKY: The complaint doesn't say that, your Honor, but the plaintiffs' grievance is that there was no announcement. If you posit that Mizuho had done precisely what the plaintiffs now say in retrospect for their convenience Mizuho should have done, what is it that they say now they should have done? They perhaps should have made an announcement.

If they made an announcement, what would they do? They'd put out a press release. Where would the announcement be covered? It would be in the *Wall Street Journal*. It would be in things like the *Bitcoin News* and *Tech Crunch* and *Bitcoin Talk*, all of which had, as I could describe for your Honor, detailed descriptions of the delays that Mt. Gox users in the United States were experiencing in trying to get their money out.

So, in short, there was -- anybody who's interested in bitcoins who's paying attention would have seen in any of the sources I just mentioned that there were problems in

withdrawing -- in withdrawing, starting in June and running straight through.

For example, quote, "People have expressed discomfort that they cannot get their money from Mt. Gox despite issuing withdrawal requests." That's from *Coin Desk*. "Unfortunately, as of today, withdrawals of U.S. dollars via wire transfers are still substantially delayed." That's from *Bitcoin Magazine*. "Mt. Gox has refused to provide estimates of when these withdrawals might occur. There is a serious problem with U.S. withdrawals."

These are all form articles that are incorporated by reference in the complaints and made part of the plaintiffs' allegations. In other words, they acknowledge the Court is entitled to look at this as it evaluates the motion to dismiss.

In fact, the Seventh Circuit opinion on this, I believe, was authored by your Honor. The Court is entitled to take into account these kinds of press releases, articles that are incorporated in the motion to dismiss.

As a result, the information that in effect they say should have been out on the market was out on the market, and especially in the bitcoin world by the time Lack and Motto invested. That was my second point. The third -- all going to causation.

And the third point, which picks up on your Honor's

questions, is that the Seventh Circuit case law says that in order to establish causation, in order to establish the elements of the respective causes of action, you have to show that if the conduct of the defendant had not occurred, then the plaintiffs wouldn't have been harmed. That's how you measure whether there is causation. In fact, one of the cases refers to that as hornbook law.

Here, the harm allegedly comes from the failure of the -- of the inability, rather, of the plaintiffs to withdraw their funds. The plaintiffs, however, do not allege that Mr. Motto ever, ever tried to withdraw his funds; and they only allege, as the Court pointed out, that Mr. Lack tried to withdraw his funds on February 20th, four days before it goes completely dark and after withdrawals were not possible because across the board, Karpeles had said no to withdrawals.

In fact, as to Motto, excuse me -- in fact, as to Motto, not only was he on notice by virtue of all of the articles in the press, but he did not even send his money in until February 15th, which is more than a week after Karpeles had announced that he was halting withdrawals. So, from his point of view, it was okay that withdrawals were halted, and in fact, the same thing is true of Lack. They invested their money knowing that there were problems in withdrawals; and, in fact -- in fact, as I said, Motto, invested only after Karpeles himself had halted it.

And indeed Motto, as the Court is aware, is the only Illinois resident that's a plaintiff that allegedly sent cash to Mt. Gox through Mizuho.

THE COURT: Okay. So, what I think you're arguing, and correct me if I'm wrong, is that -- and let's just focus on the deposit subclass -- that the deposit subclass's losses, or at least Motto and Lack's losses, let's focus on them, can't have been caused by anything Mizuho did or did not say because information was out there at all relevant times that withdrawals were not going to be allowed of fiat currency if you make those deposits with Mt. Gox?

MR. SCHARG: Can I make one clarification?

THE COURT: Well, I'm --

MR. SCHARG: Okay.

THE COURT: I just want to know what he's arguing, and then I'm going to give you a chance to address it.

MR. FORTINSKY: That's pretty close to what I said, but it's only one element of it. One part of it is that there's no causation because the information was already out there. Another part of it is that there's no causation because there was no attempt to withdraw until after Karpeles himself --

THE COURT: And that was my first question. I understand.

MR. FORTINSKY: That was an independent basis for the

argument.

THE COURT: And I gave the plaintiffs a hard time on that, and what I'm saying is that's kind of a second -- an additional argument.

MR. FORTINSKY: Yeah. And when you say out there, it's not only that it was out there. It was in precisely the sources that you would have wanted these kinds of disclosures to be out there in, the *Wall Street Journal*, *Bitcoin News*, *Tech Crunch*, et cetera. These are the sources where you would want the coverage to be, and that's where it was.

MR. SCHARG: I was just going to say that his position isn't that they were aware that the withdrawals had stopped or that Mark Karpeles had indicated that nobody could thereafter withdraw things. It was just that the withdrawals were halted or were experiencing delays.

To take that and say that that means that people could no longer ever withdraw money from Mizuho is -- is a big stretch. And that's not what Karpeles said. That's not what any of those publications that Mr. Fortinsky just mentioned said.

And as your Honor alluded to, even if they did say that, what's the relevance? It's not like our -- we don't allege that the plaintiffs ever read or saw those types of things. And those types of publications, the *Coin Desk*, et cetera, are more relevant for people that deposited

bitcoin, perhaps, but this was a deposit of money.

MR. FORTINSKY: But it was deposited into a bitcoin exchange. These were people who were investing in bitcoin.

THE COURT: Well, what would -- let's say Mizuho announced -- and I'm assuming that the public announcements are what Mr. Fortinsky says they are rather than what you say they are, and that may be wrong.

But on that assumption that it had already been announced that withdrawals were being hindered and/or halted by Mizuho of fiat currency, what would have been added to the informational mix and how if Mizuho itself had announced, "Oh, by the way, that's all true"? How would that have helped, and by what mechanism -- what plausible mechanism would that have helped Lack and Motto?

MR. LAWSON: Well, I think -- I mean, what I'm hearing is sort of a species of kind of a fraud on the market, sort of the converse of a fraud on the market theory.

THE COURT: Yes, I agree. And what I'm saying is, in order for there to be causation, it has to be plausible that if only Mizuho had announced somehow, and I'm asking you how, that all of this was true, then Lack and Motto wouldn't have deposited their money.

MR. LAWSON: Right.

THE COURT: So, why would an announcement from Mizuho have made a difference?

MR. LAWSON: You know, I think it would have probably piqued the interest of many of these reporters, right? A number of the reporters who wrote the stories that Mr. Fortinsky's alluding to are bitcoin traders themselves. One of them actually talks about his ability to get his bitcoin out of Mt. Gox.

So, it isn't as though all the information that was out there is pointing in the same direction. What we might have seen was steadier coverage of what was going on. We've got a few articles over a long period of time, which is generally sufficient in a fraud on the market context; but there, you're assuming really sophisticated investors, and I don't think that's the standard here. So, you'd want to see much more, I would think, at the very least.

I mean, I think the next step is sort of constructive notice, and I'm not sure that six or so articles over the course of three-quarters of a year is necessarily enough to say that our unsophisticated bitcoin investors are going to be on constructive notice.

THE COURT: I agree with you, and I disagree with Mr. Fortinsky on that point. My question goes beyond that.

MR. LAWSON: Okay.

THE COURT: Which is you have to show that Mizuho's failure to say, "Oh, yeah, that's right," caused Lack and Motto to make their deposits. And my question to you is:

How? If Lack and Motto weren't reading the *Wall Street Journal*, they weren't taking the Metro North Line, where everybody seems to have *Wall Street Journal*, they weren't reading *Bitcoin News*, how plausibly would Mizuho's announcement have reached Lack and Motto to cause them to make a different decision from the decision that they actually made? And what did the law obligate Mizuho to do?

MR. SCHARG: Can I -- sorry.

THE COURT: Go ahead.

MR. SCHARG: I was -- to just refocus the argument a little bit, I think that the question is: What was Mizuho obligated to tell individuals in the U.S. that were depositing money through them into Mt. Gox about the transaction?

Because Mizuho had very confidential and one-sided information. It knew a couple of things. It knew that it was the only portal into or out of Mt. Gox. Other people did not know that at the time. It knew that it had shut off the ability of users in the U.S. to withdraw money. People didn't know that. And then, of course, it also took a transaction fee on money that came in.

So, it is -- it was incumbent, certainly, on Mizuho to tell people that were depositing money through its portal that they would never be able to -- or at least they presently would not be able to ever withdraw this money. And it knew that nobody else would step in to become the new banking

partner because -- I think the discovery's going to show that, and we have individuals that can speak on that issue.

But it knew that it was the only game in town. There was nobody else. And they were upset with themselves that they got into that -- they got into the situation. They wished that they had never done business with Mt. Gox in the first place.

But the fact of the matter is that they did, and that they never distanced themselves from Mt. Gox and did not inform people that were depositing money, the probably biggest issue to those people, especially people that are depositing $40,000, "You'll never -- you cannot withdraw this money through us, and there's no end in sight of this -- of the inability to withdraw," that type of policy.

THE COURT: Whether by accident or design, you're avoiding my question.

MR. SCHARG: Oh.

THE COURT: And I'm sure it was by accident.

MR. SCHARG: Then it was, I'm sorry.

THE COURT: What was Mizuho supposed to do, via what medium, to convey the message that you say the prospective depositors deserved?

MR. SCHARG: Well, I think first, they were supposed to stop accepting deposits. Number two, they should have come out and said what was going on. They should have been

forthcoming with people.

THE COURT: Where?

MR. LAWSON: You could have done it in the same publications, and I don't think -- many of these talk about delays, talk about frustration. They don't talk about the fact that your money's not coming back. So, they could have corrected the record in that way.

MR. SCHARG: And let me just make the point, too, and we allege this in the complaint, is that the whole purpose that Mizuho did this behind the scenes, right, is because they wanted Mt. Gox to be the ones that terminated the banking relationship with it. It did not want to be viewed as the one that terminated or had anything to do with the termination of the banking relationship with Mt. Gox.

So, this was part of an intentionally designed strategy to get Mt. Gox to dissolve the partnership.

THE COURT: So, you're saying that Mt. Gox should have done -- I'm sorry, Mizuho should have done two things. One is cut off all deposits all together, and two is make a clarifying announcement that would be broadcast in all the publications that we don't know if Lack or Motto actually read.

MR. SCHARG: And not accept the $30 fee for the deposits, but --

THE COURT: Well, that doesn't matter, because

whether they accepted the fee or not, you'd still be mad at them.

MR. SCHARG: Yeah. I mean, I think what they should have done is not accepted deposits.

THE COURT: Okay. Let's go there. What do you make of Mizuho's argument that it was legally prohibited by Japanese law from cutting off the input, the deposits?

MR. SCHARG: I don't make anything of it because there's no evidence to suggest that that's the case.

THE COURT: Okay. What do you make of their argument that California and Illinois law prohibits -- prohibit a bank from cutting off deposits to one of its current account holders?

MR. LAWSON: I'm not sure we make much of it. At the last hearing --

THE COURT: Well, because the reason I ask is if you're saying Mizuho should have done X, and they say, "We were legally prohibited from doing X" --

MR. LAWSON: Right. I understand your concern. I would note that at the last hearing, Mizuho's lawyers didn't dispute that they could put a freeze on the account, and I'm -- I didn't come -- I haven't come across anything that would suggest that they're unable to.

THE COURT: Okay. All right. Any thoughts on any of that?

MR. FORTINSKY: Yes, your Honor. A few different things. The -- on the last point, a big part of the concern is that -- for any bank, when you've got a customer who has -- a customer that has widely publicized its -- how to go about sending in money by wire transfers, you know, a bank doesn't want to be in a position where it has interfered with its customer's business, just speaking generally, by refusing to accept incoming wire transfers.

And as we've outlined in the brief, there are state laws in the U.S. that restrict a bank's ability to reject incoming transfers.

THE COURT: Was Mizuho subject to those state laws?

MR. FORTINSKY: Your Honor, frankly, we think the answer is no because Japanese law applies, and that reinforces the point we've made before about why Japanese law here is dispositive.

THE COURT: So, those California and Illinois statutes didn't govern Mizuho's ability to prohibit deposits into the Mt. Gox account?

MR. FORTINSKY: Right. We put those in for illustrative purposes on the assumption that the plaintiffs asked us to entertain, in effect, that this case was -- I mean, their position is that this case was governed by the U.S. statutes.

But the --

THE COURT: No, see, you're falling into the same mistake that I believe you were falling into earlier, which is it's possible for Japanese law to govern -- to be pertinent to a particular element of a domestic cause of action, an Illinois or a California cause of action. So, it's not all or nothing.

MR. FORTINSKY: I agree with that, your Honor, yeah, yeah.

THE COURT: Okay.

MR. FORTINSKY: But to address some of the other points, the -- the plaintiffs' response was in part that the -- what Mizuho should have done was to say something, and they acknowledge, it would have been in the same publications, which is to say, it would have been more of the same. It would not have been fundamentally different.

What the plaintiffs do say in response to a series of your Honor's questions is that Mizuho should have disclosed because it knew, variations of this, Mizuho knew that these plaintiffs were never going to be able to get their money out again. Mizuho knew that Mt. Gox was going to go dark. Mizuho knew that it was the only portal into or out of Mt. Gox.

There's no basis in the complaint to believe that any of those things are true. Those are just *ipse dixit*. In other words, the plaintiffs just say it without support. Conclusory allegations are not sufficient to withstand a

motion to dismiss, as we've explained in our motion.

And, in fact, there's no -- I don't think it was true. I don't think there's any basis to believe it was true that anybody knew in June or before February that -- anybody other than Karpeles and Mt. Gox knew that nobody was ever going to be able to get money out of Mt. Gox again.

That's just something that in retrospect the plaintiffs find it convenient to say because, in fact, Mt. Gox went dark, but they again tell you why that happened. It happened because Karpeles siphoned money out of Mt. Gox and out of the account; and because of his, quote, "theft," Mizuho had no basis, had no knowledge of any of those things, and had no basis to believe that they might even be happening. They had no -- all of these things they said Mizuho knew, there's no basis to believe Mizuho knew.

What Mizuho allegedly knew was the change in policy that the plaintiffs describe, that the plaintiffs allege in the complaint, and that is exactly what shows up in the *Wall Street Journal* and *Bitcoin News* and the various other publications that they themselves acknowledge were where they would have put the announcements if Mizuho -- that they say Mizuho should have made the additional announcements for.

So, also as to the question --

MR. SCHARG: Wait a minute. We're not saying they should have made additional announcements. We were discussing

the particular question. What they should have done was terminated the banking relationship with Mt. Gox, instead of putting the burden on everybody in the United States just to try to squeeze Mt. Gox into breaking that relationship for them. That's what they should have done.

And this whole thing is calculated towards that end. The policies were in place because it knew that there were issues with Mt. Gox.

MR. FORTINSKY: Your Honor --

THE COURT: Go ahead.

MR. FORTINSKY: That's different from what they've alleged in the complaint. In the complaint, what they allege is fraudulent concealment. That's an allegation about a purported fraud that Mizuho committed. It can be statements or et cetera that fraudulently deprive people of information.

It's not -- it's not -- now they're saying, well, really, the grievance is that they -- that they stayed in business, but that's not what the complaint says.

And beyond that, your Honor, even apart from the issues that we've been talking about, the plaintiffs can't put together a convincing or a legally sufficient case on tortious interference because they do not plead anywhere in the complaint and do not offer in their briefs anything in -- anything to show that -- anything to satisfy the element of it being unjustified conduct.

In other words, the cause of action here is not interference with contract. It's tortious interference with contract, and a tort obviously is a wrong. It has to -- they have to plead that the tort -- the alleged tortfeasor not only did some action that interfered with their contract, but that they did it tortiously, that there was something tortious, like defamatory or wrongful or cheating.

That's what the case law says. And that case law is captured in that particular element of the cause of action in Illinois which says that it has to be unjustified conduct. The case we cite is *House of Brides*, but *House of Brides* itself cites a bunch of other cases that say the same thing. I think it's the third element says that it has to be unjustified.

And what that means is that the conduct has to be something -- it can't be a business just looking out for its own business interests. Because after all, in business, lots of other cases will tell you, there are circumstances in which defendants do things that hurt other parties, their rivals, their competitors in business, sometimes their customers when they don't choose to do business with them. That's not enough. It has to be something wrongful.

And all of the cases -- all of the cases where the court sustains tortious interference claims, there's something by the plaintiffs that shows that the -- that the -- that

there was a -- that there was a tort, an injury. They do not allege anything along those lines. And there is a right, the court cases say, to protect your own economic interests.

The plaintiffs themselves here tell us that the reason Mizuho acted as it did was to protect its reputation. It was concerned about being associated with Mt. Gox. That's not my testimony. That's not my allegation. That's what the plaintiffs tell us.

The plaintiffs in their opposition brief go on to say, "Well, you know, maybe they could have done something different," but that's really not germane to the point. The point is that the reason for Mizuho's action was in order to protect its reputation.

Even if later on somebody in retrospect says, "Well, you know, you could have done something different to protect your reputation, or that wasn't sufficient to protect your reputation, or you could have done it a different way," that doesn't matter, because the point is that what Mizuho did, its intention was not to cause anybody any harm, was not -- it's not alleged that they intended to cause anybody any harm. It's merely that they intended to protect their interests, their reputation, Mizuho's reputation in the marketplace.

That's not me. That's the plaintiffs. That's in the complaint. And that by itself is sufficient to defeat the plaintiffs' claim. It's not an affirmative defense. It's an

element of the cause of action; and as with any other element of a cause of action, if you don't plead it, you're subject to being dismissed on a motion to dismiss.

The same kind of thing applies with respect to fraudulent concealment. The additional element in fraudulent concealment that I think really is central, as this unjustified point is for tortious interference, the additional element on fraudulent concealment that's really central but that we haven't really talked about yet is the duty to disclose.

The cases are absolutely clear that there is no basis for fraudulent concealment unless the plaintiff first establishes a duty to disclose. The plaintiffs don't do that here. The -- in order for there to be a duty to disclose, there needs to be a fiduciary relationship. Here, the plaintiffs don't allege a commercial relationship between the plaintiffs and Mizuho, let alone a fiduciary relationship. They don't even allege not only a commercial relationship, they don't even allege any contact, any communications between Mizuho and these individual plaintiffs.

All they allege is that they transmitted -- they sent -- at least as to the two in the deposit subclass, that they sent wire transfers to Mt. Gox, and that it passed through Mizuho as the receiving bank, just as it passed through Chase or Wells Fargo on the other end as the sending

bank.

And perhaps to crystallize this, the plaintiffs do not cite a single case in which a bank is held to have a duty to disclose anything other than to its customer. In this case, they're saying the bank had a duty to disclose something to its customer's customers. They don't cite even one case that says that.

We cite a couple of cases that show otherwise. There have been various flavors of this argument that have shown up various places. The *Eisenberg* case which we cite has a collection of cases from, I think, nine jurisdictions, all of which come to the same conclusion, which you can't -- people are always suing banks for all kinds of things. Things are always going wrong with people's money. They're always suing, and a bank is always a convenient target because it's a deep pocket, and other reasons.

So, there have been other cases where people bring lawsuits where they said, "Oh, the bank had a duty to do something, to disclose something," and in each of those cases, the nine jurisdictions cited in the *Eisenberg* case, the courts give the answer that that's not enough. There is no duty to disclose. The same kind of thing is true in the *Tzaras* case, which we describe in our papers as well.

The cases that the plaintiffs cite on that point, there are three. The *Heider* case is different because in that

case, the defendant was explicitly told not to make a disclosure and did not make a disclosure even after the plaintiff directly inquired. It's about an asbestos case, and the facts are very different.

The JP Morgan case is different because the -- because in that case, JP Morgan moved loan balances into phony accounts in order to conceal what was going on, very different from this case, active conduct by the defendant in order -- deceptive conduct.

And the *Shrager* case, which they also cite, the ruling was different. It was not the same kind of case. The question was a factual question as to whether the conversations -- it was undisputed that there were conversations between the parties, and the question was whether those conversations sufficed to establish a fiduciary relationship, very different because of those factual questions that are not present here.

So, for all of those reasons, they have no basis for a claim.

While I'm at it, I'll just say briefly on the third point, the unjust enrichment point, which we haven't yet gotten to, either, why they don't satisfy the elements, either. I'll try to keep this simple.

Number one, unjust enrichment is basically about getting something -- keeping money, keeping fees for service

you didn't perform. In this case, there's no allegation that when Motto and Lack sent money in to Mizuho that Mizuho didn't perform the service that it was being paid $13 to perform.

Whatever else they may argue about what Mizuho should or shouldn't have done, it's not correct to say that Mizuho did not perform the service of whatever it -- of allowing Mt. Gox to deposit the money. In fact, they rely on Mizuho's acceptance of the deposit, as the Court did in its opinion, so there's no argument that that was not done.

Secondly, they have to argue that the defendant was -- was keeping a fee that it was paid unjustly. In this case, the fee was paid to Mt. Gox. There's no -- the plaintiffs' relationship was with Mt. Gox. Mt. Gox maybe charged fees, but they don't even say that they paid fees to Mt. Gox. They just speculate that maybe the cost was passed on.

That sort of information and belief pleading, as we discussed in our papers and I think is in the *Parrillo* case, is it, is insufficient -- the *Borsellino* and the *Pirelli* cases is insufficient. They don't say that actually Mizuho kept their money.

And then thirdly, the basis of the unjust enrichment allegation is the same set of facts that form the facts for the wrongful -- for the fraudulent concealment and tortious interference claims. It's the same facts.

And as this Court held in *Landlock*, if the unjust enrichment claim rests on the same improper conduct alleged in another claim, unjust enrichment will stand or fall with the related claim. In other words, unjust enrichment can't survive if the court dismisses the other two cases.

The plaintiffs' response to that is that, well, here it's a little different because the relief they're asking for is different. They're only asking for -- in the unjust enrichment claim, they're only asking for the return of the fees, and, therefore, it's not the same as the wrongful -- as the fraudulent concealment and tortious interference claim.

That reads the law incorrectly, because as the quote that I just read from your Honor's own opinion said, it's the same improper conduct that's alleged. The words used in the opinion are improper, it's the same improper conduct, not the same relief.

THE COURT: One second.

(Bench conference, not reported.)

THE COURT: Let me ask you to address the relationship component of the fraudulent concealment claim.

MR. LAWSON: Okay.

THE COURT: In other words, what Mizuho's arguing is that there's no duty because there's no --

Yeah, if you want to hand him your bottle, he can fill that up.

Does anybody else need -- do you guys want some water?

MR. SCHARG: No, thank you.

THE COURT: Are you sure?

MR. SCHARG: Yes.

THE COURT: Mr. Quinn, would you like anything?

MR. FORTINSKY: I'm good. Thank you, your Honor.

MR. FORTINSKY: I guess that's a sign that I'm talking too much, right?

THE COURT: I didn't say it.

So, what Mizuho's arguing is that in order for there to be fraudulent concealment, there has to be a duty to disclose.

MR. LAWSON: Right.

THE COURT: And that the relationship, if any, between Mizuho on the one hand and Lack and Motto on the other hand was not the kind of relationship that gives rise to a duty to disclose. Could you please address that issue.

MR. LAWSON: Yeah, sure. I'll start with the banking cases. Most of the cases cited in Mizuho's motion deal with the bank's failure to disclose the fraudulent activity of one of their customers, right? And that's not our allegation, which is the first reason why those cases are distinguishable.

But as Mr. Fortinsky sort of recounted, this is why we cited the *JP Morgan* case, because in that case, it was the

bank itself that was -- that had the duty to disclose because it was the fraudulent actor. And I think that makes the difference under Illinois law.

THE COURT: All right. And can you remind me what the facts are of -- it's the *JP Morgan versus East-West-Logistics* case?

MR. LAWSON: Yeah, I believe that they were -- they were moving money around to hide it, essentially.

THE COURT: JP Morgan -- oh, you mean East-West Logistics was?

MR. LAWSON: Yes. I believe those are the facts of that case, yeah.

THE COURT: I see.

MR. LAWSON: It's the person -- it's the fraudulent actor who has the duty to disclose, right, which is why the bank doesn't have a duty to disclose the fraudulent activity of its own depositor. We have no problem with that particular statement of the law. It's just that in this case, it was the bank's fraud that we are litigating and not -- well, we are also litigating the depositor's, but -- or Mt. Gox's, I suppose, but it isn't as though the bank was blameless here.

THE COURT: I see. So, what you're saying is that there's no -- there's ordinarily no duty to disclose from the bank to somebody like Lack and Motto; but if the bank is the bad actor, there is a duty to disclose?

MR. LAWSON: Yeah. If they're either participating or if they're doing something on their own, then, yes, they have the duty. Because in Illinois you have a duty to disclose if you act deceptively, that's what gives rise to the duty to speak, and that's where the material omission comes from.

THE COURT: I see. So, what are your thoughts on that, Mr. Fortinsky?

MR. FORTINSKY: There's still no duty to disclose to a third party. The third party here -- the plaintiffs are a third party to -- and there's no duty to disclose to them.

THE COURT: Are they? Are they third parties?

MR. FORTINSKY: Well, I guess it depends on how you look at, who you see the first and second parties are.

THE COURT: I don't mean third parties in terms of the plaintiff or defendant in this case. I mean in terms of the transaction. Are they third parties, or are they directly involved? They are sending money to Mizuho.

MR. FORTINSKY: What the plaintiffs are backing into, again, as I've said before, kind of backing into new theories as they go along, what they're backing into is the idea, in effect, that Mizuho committed a fraud. That's not what they alleged, but that's sort of what they're retreating into, that Mizuho was a participant in some sort of misleading theft of funds or something. That's not what they allege.

Where the -- the essence of the fraudulent concealment focuses on the communication. Did the -- did the actor conceal information? What they're now trying to say is essentially that Mizuho participated in a fraud.

There's no basis to say Mizuho participated in a fraud; and we get into a little bit of that in our papers, because for a variety of reasons, there's no statement by Mizuho, for example, and there's no inducement by Mizuho to solicit funds from any -- from any plaintiff, from any member of Mt. Gox. So, there's no allegation of and no actual fraud by Mizuho.

The allegation as to JP Morgan is -- there's much more extensive conduct by JP Morgan, where the allegation, at least, was that they were involved in moving money into phony accounts. I don't know whether that's actually true. But there's no allegation of similar flavor here as to Mizuho.

And I'm not even sure that in that case the ultimate gist of the argument was a duty to disclose issue. I think the -- you know, the -- sort of the gist of that case rested on sort of the alleged bad conduct.

THE COURT: I see.

MR. FORTINSKY: And I would add that in all of these other cases, there have been a variety of different theories that plaintiffs have tried to try to pin this duty to disclose on banks, and banks from nine different jurisdictions have

rejected all of them.

THE COURT: I see. Okay. Any final thoughts on that issue?

MR. LAWSON: Well, I would say we do allege a fraud on Mizuho's part. I think that that's pretty clear. But other than that -- the reason --

THE COURT: And the fraud is accepting deposits while knowing and not disclosing that --

MR. LAWSON: While knowing, yes.

THE COURT: -- that you can't withdraw it?

MR. LAWSON: You're failing to disclose something material. And you're right, your Honor, it isn't a third party to this transaction. Otherwise, the personal jurisdiction ruling would not have come out the way it did. Right? They're transacting at least in part directly with Mizuho. So, I think that renders most their cases about disclosing the fraudulent activity of a particular account holder inapposite.

THE COURT: I see. Okay. Anything else anybody would like to address, you know, knowing that I've read the briefs?

MR. LAWSON: I think -- I had two points in response to Mr. Fortinsky's earlier presentation.

On justification in the tortious interference context, I think it is actually clear. We cited the three

cases that talk about justification as an affirmative defense. I know that the *Nation* opinion from upstairs sort of talks about it as a moving target; but I note in the *Philip Mappa* case, which is the only Illinois state case in the reply, at least, the court talks about because the complaint pleaded justification, the plaintiff needed to show actual malice, which I think sort of highlights the burden-shifting that occurs under Illinois law. You allege the tortious interference, and in some cases, the justification of the privilege is apparent.

And what we say here is there's the allegation that Mizuho had represented that it was trying to protect its reputation, when we now know from the contract that it appears that they could have just ended the relationship without all of this rigmarole. And so I don't think that that is the kind of complete justification that serves as an affirmative defense that appears on the face of the complaint.

But once the tortious interference is alleged, it's the defendant's burden to show justification or privilege, and then the plaintiffs' to come back with actual malice. I mean, that's the -- I think it's actually a pretty well-established way of doing things, even though the Illinois courts do describe it as -- the third element of the claim as an unjustified interference.

And I would note also on the unjust enrichment claim,

Mr. Fortinsky described one kind of restitutionary recovery. I think he pretty much spelled out a *quantum meruit* theory. But there are other reasons. And we do agree that the fraudulent activity sort of is the legal wrong that gives rise to the unjust -- the restitutionary remedy in the unjust enrichment claim. So, if you don't buy the fraud theory, then yes, both claims do go down.

But certain of their defenses to the fraudulent inducement claim I don't think would carry through to the unjust enrichment, which is pleaded separately for a couple of the reasons that Mr. Fortinsky noted; namely that it was a pass-through, so we're talking about a profit from the legal wrong, but which wouldn't necessarily come from the fraudulent inducement recovery itself, which is why they're separate. Also, a little bit of analytic clarity.

THE COURT: Understood.

MR. FORTINSKY: A couple of brief responses, your Honor. Actually, just one response and two additional points.

The *House of Brides* case and the cases it cites show that cases do -- that courts do dismiss claims for tortious interference where the conduct alleged on the face of the claim is justified. It's not something that has to go to summary judgment and be debated through pleading an affirmative defense.

The other point I wanted to come back to is on the

forum non conveniens. I would just make the point that here what we have are investors who chose willingly to put their money into a Japanese bitcoin exchange. And putting aside all of the other factors, that suggests a willingness to engage in Japan.

And the case law suggests that the -- that any -- any tilt in favor of the plaintiffs' choice of forum is, under those circumstances, diminished or eliminated. And I think we cite the case in our briefs. Because, after all, they've already shown a willingness to go to the other forum for purposes of investment.

In fact, if you imagine the situation in reverse and you had a U.S. hedge fund, for example, that attracted the interest of a Japanese investor, and the Japanese investor then tried to -- even though he was bringing claims about the relationship between the hedge fund and hypothetically the hedge fund's U.S. bank, what would we make of an argument that that case ought to be litigated in Japan?

I suspect that the U.S. hedge fund and the U.S. bank and even the U.S. courts would agree that that's the sort of case that ought to be litigated here in the U.S. Well, this is that same case in reverse.

I understand there are a lot of factors, but I'm just saying that as to that particular element, the preference that one -- that the plaintiffs ask the Court to give or the

presumption that the plaintiffs ask the Court to give to their choice of forum, that ought to be diminished under these circumstances.

And one final procedural point that I would raise is that the plaintiffs, in accordance with the Court's recent opinion, filed a new complaint. Our motion, our notice of motion was addressed to the second amended complaint, although I think both sides recognize that the issues are pretty much the same in the third amended complaint as the second amended complaint, especially in light of the references to Motto before the filing of the new complaint.

So, procedurally, I just wanted to raise with the Court the question as to how we ought to proceed in order to ensure that things don't get messed up, because, after all, our motion is directed to the second amended complaint, and the one that's the operative complaint at the moment is the third.

THE COURT: I'll consider the motion to be directed towards the third amended complaint.

MR. FORTINSKY: Thank you, your Honor.

THE COURT: The parties mentioned in one of the filings that they had reached an agreement regarding discovery?

MR. SCHARG: Yes.

THE COURT: Can you just tell me what that is?

MR. SCHARG: Yeah. We have agreed to -- that Mizuho would begin providing us with the light lift, you know, quote, unquote, light lift documents that they have. They've already made a production a couple of days ago. And then we are going to hold off on the heavier issues until you enter a ruling on the motion to dismiss.

THE COURT: All right. Okay. And do you agree with that?

MR. FORTINSKY: That's correct, your Honor.

THE COURT: So, why don't I set this for a status hearing -- and there's nothing magic about this date, so if it doesn't work, just say so. June 2nd at 9:00 o'clock?

MR. SCHARG: I am going to be having a child by at the latest the week before that, so if there's nothing magical about that date, if we could just kick it to the next week.

THE COURT: June 7th?

MR. SCHARG: Thank you.

THE COURT: 9:00 o'clock?

MR. FORTINSKY: I'm just checking my calendar, your Honor.

MR. SCHARG: And if it's an issue, then I don't have to be here. There's other counsel on the case. But I'd like to be, if possible.

THE COURT: And you can always phone in, Mr. Fortinsky, if you'd like.

MR. FORTINSKY: No, that date looks fine. Thank you.

THE COURT: Mr. Quinn, is that all right with you?

MR. QUINN: That's fine, your Honor. Thank you.

THE COURT: Okay. Well, thank you for your briefs, and thanks for your argument.

MR. FORTINSKY: Thank you, your Honor.

MR. SCHARG: Thank you, your Honor.

(Which were all the proceedings heard.)

CERTIFICATE

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

/s/Charles R. Zandi — *April 28, 2016*

Charles R. Zandi
Official Court Reporter — Date