Docket #1392 Date Filed: 6/17/2024

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

In re: **WESCO AIRCRAFT HOLDINGS, INC.**, *et al.,*[1] Debtors.	Case No. 23-90611 (MI) Chapter 11 (Jointly Administered)
WESCO AIRCRAFT HOLDINGS, INC., *et al.,* Plaintiffs, *v.* **SSD INVESTMENTS LTD.**, *et al.*, Defendants	Adv. Pro. No. 23-03091 (MI)
SSD INVESTMENTS LTD., *et al.*, Counterclaim Plaintiffs, *v.* **WESCO AIRCRAFT HOLDINGS, INC.**, *et al.*, Counterclaim Defendants.	

[1] The Debtors operate under the trade name Incora and have previously used the trade names Wesco, Pattonair, Haas, and Adams Aviation. A complete list of the Debtors in these chapter 11 cases, with each one's federal tax identification number and the address of its principal office, is available on the website of the Debtors' noticing agent at http://www.kccllc.net/Incora/. The service address for each of the Debtors in these cases is 2601 Meacham Blvd., Ste. 400, Fort Worth, TX 76137.

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LANGUR MAIZE, L.L.C. Crossclaim Plaintiffs, *v.* **PLATINUM EQUITY ADVISORS, L.L.C.** *et al.,* Crossclaim Defendants
Re **LANGUR MAIZE, L.L.C.** Third-Party Plaintiff, *v.* **UNNAMED PLATINUM FUNDS c/o PLATINUM EQUITY ADVISORS, L.L.C.** *et al.,* Third-Party Defendants
LANGUR MAIZE, L.L.C. Counterclaim Plaintiff, *v.* **WESCO AIRCRAFT HOLDINGS, INC.**, *et al.,* Counterclaim Defendants.

POST-TRIAL BRIEF OF THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS

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PRELIMINARY STATEMENT

1. On December 4, 2023, the Official Committee of Unsecured Creditors (the "UCC") sought standing[2] to prosecute, *inter alia*, breach of fiduciary duty and equitable subordination claims against Platinum Equity Advisors, LLC,[3] as well as breach of fiduciary duty claims against the Debtors' board,[4] for negotiating, approving, and engaging in a self-dealing transaction done for the benefit of Platinum, which controlled the Debtors and prioritized Platinum's financial interests as a debt holder over the best interests of the Debtors as a whole. The UCC also sought standing to prosecute aiding and abetting breach of fiduciary duty claims and equitable subordination against certain Participating Noteholders,[5] who were aware of, and substantially participated in, the breaches of fiduciary duty by Platinum and the Platinum Directors.

2. After filing its standing motion—but before that motion was fully briefed—the UCC reached a provisional settlement of the claims it sought standing to pursue, and agreed to support a chapter 11 plan that met certain requirements.[6] The UCC continues to support such a plan pursuant to the Committee Plan Support Stipulation.[7] But should the Debtors file a plan that does not comport with that Stipulation, the UCC will be forced to seek expedited relief on its Standing Motion. Because certain facts at issue in this adversary proceeding implicate some, but

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[2] *See* ECF No. 1020, *Corrected Omnibus (I) Motion of the Official Committee of Unsecured Creditors for Exclusive Leave, Standing, and Authority to Prosecute and Settle Certain Claims, Causes of Action, and Claim Objections on Behalf of the Debtors' Estates and (II) Claim Objection* (the "Standing Motion").

[3] Including certain subsidiaries and investment funds managed or controlled by it, including Wolverine Top Holding Corporation ("Wolverine TopCo" and, collectively, "Platinum").

[4] Michael Fabiano, John Holland, Louis Samson, Mary Ann Sigler, Malik Vorderwuelbecke (collectively, the "Platinum Directors"), and Patrick Bartels.

[5] *See* ECF No. 1020 at 13-14.

[6] *See* ECF No. 1133, *First Amended Joint Chapter 11 Plan of Wesco Aircraft Holdings, Inc., et al.*

[7] *See* ECF No. 1191, *Stipulation Regarding (A) Corrected Omnibus (I) Motion of the Official Committee of Unsecured Creditors for Exclusive Leave, Standing, and Authority to Prosecute and Settle Certain Claims, Causes of Action and Claim Objections on Behalf of the Debtors' Estates and (II) Claim Objection and (B) First Amended Join Chapter 11 Plan of Wesco Aircraft Holdings, Inc., et. al.*

not all,[8] of the UCC's claims, the UCC participated in the adversary proceeding trial to protect against its claims being precluded by factual findings or rulings made at the trial.[9]

3. The UCC understands that the Debtors and Counterclaim Defendants seek findings that they participated in the Uptier Transaction in good faith to benefit the Debtors. The UCC will demonstrate in its closing arguments, however, that the trial record does not support making any findings that would prejudice the UCC's ability to prosecute – in the future should its settlement not be consummated – the claims set forth in the Standing Motion for breach of fiduciary duty, aiding and abetting breach of fiduciary duty, and equitable subordination.[10]

4. In addition to the arguments set forth below, the UCC incorporates by reference its previous written submissions, including its Standing Motion, and its Opposition to the Standing Motion filed by the 2024/2026 Noteholders.[11]

I. BREACH OF FIDUCIARY DUTIES

A. The Court Should Make No Findings That Would Prejudice The UCC's Ability To Prosecute Its Claims For Breach Of Fiduciary Duty.

5. Directors and controlling shareholders of a corporation owe the corporation and its shareholders fiduciary duties of care and loyalty.[12] *See, e.g., In re MultiPlan Corp. Stockholders Litig.*, 268 A.3d 784, 799 (Del. Ch. 2022). The duty of care requires directors to "use that amount

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[8] For example, the UCC asserted claims arising out of the 2020 leveraged buyout, *see, e.g.,* ECF No. 1020 at ¶¶ 430-481, which all parties have stipulated are not being tried in this adversary proceeding. *See* ECF No. 541, *Stipulation as to Scope of Adversary Proceeding Trial and Resolution of 2024/2026 Holders' Standing Motion*, at ¶¶ 3, 9.

[9] *See* Jan. 25, 2024 Trial Tr. at 102:17-103:25.

[10] The UCC also sought standing to bring claims for actual and constructive fraudulent transfer, which all parties agreed not to address in this opening post-trial brief. The UCC reserves its rights to submit further briefing on those claims in due course.

[11] Due to space limitations, the UCC sets forth here only a portion of evidence that supports its claims, and reserves the right to expand upon the evidence relied upon during closing arguments.

[12] The Debtors are incorporated in multiple jurisdictions, including Delaware and Texas. Under Texas law, a corporation's "internal affairs"—including for fiduciary duty claims—are governed by the law of the state where it was incorporated. *See* TEX. BUS. ORGS. CODE ANN. § 1.102. For the purposes of the analysis herein, the Committee has assumed applicable law is substantially similar to Delaware law (and is not aware of any material distinctions among the various sources of applicable law that would be relevant here).

of care which ordinarily careful and prudent men would use in similar circumstances." *In re Walt Disney Co. Deriv. Litig*., 907 A.2d 693, 749 (Del. Ch. 2005).

6. The duty of loyalty "is an affirmative obligation to protect and advance the interests of the corporation and mandates that [the director] absolutely refrain from any conduct that would harm the corporation." *Autobacs, Strauss, Inc. v. Autobacs Seven Co*. (*In re Autobacs*), 473 B.R. 525, 562 (Bankr. D. Del. 2012). A breach of the duty of loyalty occurs where, as here, fiduciaries (a) were interested in the transaction at issue, (b) acted without good faith, or (c) lacked independence. *See Crescent/Mach I Partners, L.P. v Turner*, 846 A.2d 963, 981 (Del. Ch. 2000); *see also Brehm v. Eisner*, 746 A.2d 244, 264 n.66 (Del. 2000).

7. The evidence at trial shows that Platinum and the Platinum Directors abdicated their role as corporate fiduciaries in negotiating, approving, and engaging in the Uptier Transaction. Platinum used its status and control to orchestrate the Uptier Transaction to benefit its interests as a debt holder over the best interests of the Debtors as a whole and the non-participating creditors. Platinum's primary goal was to improve its position in the capital structure with an eye toward a future bankruptcy filing,[13] and to that end insisted that Platinum be permitted to uptier its unsecured debt to the New 1.25L Notes (designed to recover ahead of unsecured creditors in a future bankruptcy proceeding), as part of the Uptier Transaction.[14] Indeed, when Carlyle proposed that Platinum not be included in the Uptier Transaction, the Platinum Directors counter-proposed that Platinum be permitted to participate,[15] prioritizing Platinum's interests over the interests of the non-participating creditors and the Company as a whole.

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[13] *See* Feb. 1, 2024 Malik Vorderwuelbecke Trial Tr. at 144:4-144:8.

[14] *See, e.g.,* ECF No. 610-15, *March 1, 2022 email attaching Carlyle Comprehensive Transaction Counterproposal* at 6 ("Company Proposal" would permit Platinum to participate in Uptier Transaction); ECF No. 610-16, *Mar. 2, 2022 email attaching Project Elevate Unsecured Proposal Comparison,* at 8 ("Company Counterproposal" insisting Platinum be included).

[15] *See* ECF No. 610-16 at 8; Feb. 8, 2024 Jesse Hou Trial Tr. at 300:12-300:20.

8. Attempting to benefit from the deferential business judgment standard, Platinum appointed Mr. Bartels as a purportedly independent director to bless Platinum's participation in the Uptier Transaction and to provide the veneer of propriety.[16] But neither Platinum nor the Platinum Directors can shield their conduct by pointing to Mr. Bartels' "independence;" the evidence at trial undeniably shows that Mr. Bartels' role was simply to rubber-stamp the Uptier Transaction.

9. Mr. Bartels was not even retained until February 8, 2022 (when the Uptier Transaction negotiations were closer to the end than the beginning), and after an agreement to include Platinum's notes in the Uptier Transaction had already been reached without his participation.[17] In fact, Mr. Bartels was told by the Company's advisors that if Platinum was not allowed to participate, then the Uptier Transaction would likely not close[18]—so Bartels did not have the opportunity to find the best deal for Debtors; he was presented a binary choice between bankruptcy and a Platinum giveaway. And to ensure Mr. Bartels voted as Platinum desired, the Debtors included a provision in his retention agreement that permitted the Platinum Directors to terminate his service as a director at any time for any (or no) reason, but term it a "resignation."[19]

10. That Platinum was the real party in interest driving the negotiations was no secret. The Court heard testimony that neither Mr. Bartels nor company management was ever directly involved in negotiations for the Uptier Transaction,[20] or negotiations regarding what parties would

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[16] *See* Feb. 21, 2024 James O'Connell III Trial Tr. at 350:19-350:24 (Company counsel submitted Mr. Bartels for the role of independent director); *see also* Apr. 4, 2024 Bartels Trial Tr. at 202:5-202:9 (the only people interviewing Mr. Bartels for his role, apart from Company counsel, were Platinum partners, employees, and/or board members).

[17] *See* Apr. 4, 2024, Bartels Trial Tr. at 238:7-239:6. With negotiations at such an advanced stage, Mr. Bartels failed to retain separate counsel or financial advisors to advise him regarding the Uptier Transaction. *See* Apr. 4, 2024 Bartels Trial Tr. at 160:16-17, 160:22-23 (the "only lawyers" Mr. Bartels had were Company counsel); *see also id.* at 201:2-201:16 (Mr. Bartels did not seek separate financial advice).

[18] *See* Feb. 21, 2024 O'Connell Trial Tr. at 352:20-352:24.

[19] *See* Apr. 4, 2024 Bartels Trial Tr. at 210:16-210:20.

[20] *See* Feb. 21, 2024 O'Connell Trial Tr. at 351:15-351:18; Jan. 31, 2024 Raymond Carney Trial Tr. at 137:11-137:25.

be eligible to participate in the Uptier Transaction.[21] Instead, Michael Fabiano, a Platinum Director, was invited to all weekly calls between Mr. Bartels and the Company's advisors,[22] who could not recall ever meeting with Mr. Bartels without some member of Platinum in attendance.[23]

11. When the time came for Mr. Bartels to approve Platinum's participation in the Uptier Transaction, he was fed a deceiving list of benefits that purportedly would flow from including Platinum. Even under the Debtors' generous view, those benefits were limited to the "extension of maturity [of the Wolverine Note], . . . PIKing of their interest . . . [and] the continuation of the accrual of [] the sponsor management fee."[24]

12. Regarding the management fees, not only were none of the Debtors ever contractually obligated to pay the fees,[25] but Platinum had already made the decision to forego collecting management fees for 2021 and 2022 *before* the Uptier Transaction;[26] it was only to bolster the supposed benefits from inclusion of Platinum in the Uptier Transaction that the deferral of managements fees was presented to Mr. Bartels as a benefit of Platinum's participation in the transaction. At trial, Mr. Bartels conceded that the Debtors already had the benefit of Platinum's deferral of collection of management fees.[27] In other words, Platinum merely agreed to continue

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[21] *See id.* at 352:2-352:6.

[22] *See* ECF No. 1071-3; April 4, 2024 Bartels Trial Tr. at 37:23-38:11. *See also* Apr. 4, 2024 Bartels Trial Tr. at 44:23-45:6 (Testimony by Mr. Bartels that he did not recall the static invitation ever being changed).

[23] *See* Feb. 21, 2024 O'Connell Trial Tr. at 430:9-430:15 ("I can't point to a specific time and date of a meeting [in which I met just with Patrick Bartels without an employee or a partner in Platinum present]").

[24] *See* ECF No. 536-24, *Mar. 24, 2022 Minutes of a Meeting of the Board of Directors of Wolverine Intermediate Holding Corporation* at 20; Apr. 5, 2024 Bartels Trial Tr. at 104:10-104:16.

[25] The Debtors were not a party to the Corporate Advisory Services Agreement (the "CASA"), and there was no fixed amount of fees due to Platinum under its terms. *See generally* ECF No. 536-8, *Corporate Advisory Services Agreement*; *see also* Feb. 1, 2024 Vorderwuelbecke Trial Tr. at 202:16-203:5.

[26] *See* Nov. 17, 2023 Mary Ann Sigler Dep. Tr. at 88:19-22, 91:10-92:10 [redacted]; *id.* at 88:24-89:09 [redacted]

[27] *See* Apr. 5, 2024 Bartels Trial Tr. at 107:5-107:9 ("It was already being accrued.")

deferring a management fee they had already decided not to collect, but then touted that deferral as a supposed benefit Platinum was providing to participate in the Uptier Transaction.

13. The Debtors also did not truly receive any benefit from the extension of the maturity of the Wolverine Note, which bore many hallmarks of equity, rather than true debt.[28] The "status quo" financial projections presented to the board assumed that the Debtors would not pay the Wolverine Note off at maturity, notwithstanding the available liquidity to do so. In other words, the Debtors' advisors assumed that even if the maturity of the Wolverine Note was *not* extended—a maturity date that was not negotiated but rather imposed by fiat upon the Debtor Wesco Aircraft Holdings, Inc. by Platinum—the Debtors nonetheless would not pay the Wolverine Note.[29]

14. Finally, the PIK interest on the Uptier Debt provided a short-term benefit at the cost of rendering an already over-levered company even more unsustainably over-levered, and making a future refinancing more expensive if not impossible.[30] Nonetheless, to the extent the PIKing of interest is considered a benefit to the Debtors, then there was no reason not to permit the non-participating noteholders to uptier and PIK their interest as well–other than that being less beneficial to the personal pecuniary interests of Platinum and the other Participating Noteholders.

15. According to Debtors, these were the only benefits obtained through Platinum's inclusion in the Uptier Transaction.[31] Unlike other noteholders, Platinum's vote as a debtholder was not required for the Company to receive the additional liquidity that the Uptier Transaction was purportedly designed to obtain. The terms of the Original Indentures[32] expressly provided that

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[28] *See* ECF No. 1020, at ¶¶ 188, 509; *see also* Nov. 17, 2023 Sigler Dep. Tr. at 49:23-50:17 [redacted]

[29] *See* ECF No. 538-53, *Mar. 3, 2022 Minutes Of A Meeting Of The Board Of Directors Of Wolverine Intermediate Holding Corporation* at 14; Feb. 21, 2024 O'Connell Trial Tr. at 232:22-233:4.

[30] *See* ECF No. 1020 at ¶¶ 118, 122, 362.

[31] *See* Oct. 25, 2023 O'Connell Dep. Tr. at 291:20-293:1.

[32] *See* ECF No. 1020 at n.138.

Platinum's vote—as an insider—was to be disregarded for the purposes of calculating support for indenture amendments.[33]

B. The Court Should Make No Findings Which Would Prejudice The UCC's Ability To Prosecute Claims For Aiding And Abetting, And Knowingly Participating In, Breach Of Fiduciary Duty.

16. Where a third party knowingly participates in the breach of a fiduciary's duties, such third party becomes a joint tortfeasor with the fiduciary and is liable as such. *See Meadows v. Hartford Life Ins. Co*., 492 F.3d 634, 639 (5th Cir. 2007) (citing *Kinzbach Tool Co. v. CorbettWallace Corp*., 160 S.W.2d 509, 514 (Tex. 1942)); *see also Chester Cty. Employees' Ret. Fund v. KCG Holdings, Inc.*, 2019 WL 2564093, at *18 (Del. Ch. June 21, 2019) ("A party is liable for aiding and abetting when it knowingly participates in any fiduciary breach.").

17. A claim for knowing participation requires: (a) the existence of a fiduciary relationship; (b) the third party's knowledge of it; and (c) the third party's awareness that it was participating in the breach of that fiduciary relationship. *See Meadows*, 492 F.3d at 639 (*citing Cox Tex. Newspapers, L.P. v. Wootten*, 59 S.W.3d 717, 721-22 (Tex. App. 2001)).

18. As set forth above, Platinum and the Platinum Directors had fiduciary duties to the Debtors. The Participating Noteholders knowingly enabled Platinum's breach of fiduciary duty and are independently liable for aiding and abetting that breach. The Participating Noteholders all understood that Platinum owned and controlled the Debtors and that the individuals with whom they were negotiating were directors of the Debtors. Indeed, even as parties were finalizing the terms of the Uptier Transaction, Carlyle witness Jesse Hou noted when Mr. Fabiano (a Platinum appointed Debtor board member) joined a call on March 22, 2022 to negotiate those terms, and suspected Mr. Fabiano was there to "look[] after [Platinum's $148mm unsecured bond

[33] *See* ECF No. 548-36 at 16 (showing company agreed with position that the "Consents Required" from the 2027 Unsecured Notes was "Majority of non-Platinum holders").

position."[34] As sophisticated parties represented by experienced counsel, the Participating Noteholders no doubt understood that Platinum and the Platinum Directors owed fiduciary duties to the Debtors. And the Participating Noteholders knew that Platinum's participation in the Uptier Transaction benefitted Platinum at the expense of Debtors and various non-participating creditors, and nevertheless participated in the Uptier Transaction, most notably by providing the consents without which the Uptier Transaction could not have occurred.[35] The Participating Noteholders knew that Platinum's vote was not necessary for the Debtors to receive the additional $250 million in liquidity since, as an insider, its vote would be disregarded for the purposes of calculating support for indenture amendments, but they also knew the Platinum was using its control to insert Platinum into the transaction to benefit Platinum and acceded to Platinum doing so because that Platinum controlled the Debtors.[36]

19. The Participating Noteholders knew the Debtors were insisting that Platinum be permitted to exchange its Unsecured Notes and the Wolverine Note for New 1.25L Notes as part of the Uptier Transaction.[37] Carlyle initially objected to Platinum's participation, but eventually acquiesced in the Debtors' insistence that Platinum be permitted to uptier both pieces of debt.[38] Silver Point and PIMCO, fully understanding that Platinum represented the Company in discussions with other principals to the Uptier Transaction,[39] did not [redacted] since Platinum's inclusion [redacted]

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[34] *See* ECF No. 723-8 at 7.

[35] *See* ECF No. 1020 at ¶¶ 106-107.

[36] *See* Oct. 30, 2023 Roopesh Shah Dep. Tr. at 157:19-158: [redacted]

[37] *See* ECF No. 610-16 at 8.

[38] *See* ECF No. 610-17 at 8; Feb. 8, 2024 Hou Trial Tr. at 300:12-300:20.

[39] *See* Oct. 30, 2023 Shah Dep. Tr. at 185:15- 185:24.

[redacted][40] In Silver Point's and PIMCO's view, because Platinum controlled the Company, [redacted][41] In short, once Platinum decided to award itself benefits from the Uptier Transaction, the Participating Noteholders supplied the votes to do so.

II. EQUITABLE SUBORDINATION

A. The Court Should Make No Findings That Would Prejudice The UCC's Ability To Prosecute Claims For Equitable Subordination On Account Breaches Of Fiduciary Duties And Substantially Participating In, Or Aiding And Abetting Of, Breaches Of Fiduciary Duty.

20. Under section 510(c) of the Bankruptcy Code, a court has the power to equitably subordinate an allowed claim where (a) the claimant has engaged in inequitable conduct, (b) the misconduct injured other creditors or conferred an unfair advantage, and (c) equitable subordination is not inconsistent with the Bankruptcy Code. *See Benjamin v. Diamond* (*In re Mobile Steel Co.*), 563 F.2d 692, 699-700 (5th Cir. 1977).

21. Courts have generally recognized three categories of inequitable conduct that may give rise to equitable subordination: "(1) fraud, illegality, breach of fiduciary duties; (2) undercapitalization; and (3) claimant's use of the debtor as a mere instrumentality or alter ego." *Wilson v. Huffman* (*In re Missionary Baptist Found. of Am., Inc.*), 712 F.2d 206, 212 (5th Cir. 1983). Other courts have allowed equitable subordination when the claimant is unjustly enriched "through another's loss brought about by one's own unconscionable, unjust, unfair, close or double dealing or foul conduct." *Fundex Capital Corp. v. Balaber-Strauss* (*In re Tampa Chain Co.*), 53 B.R. 772, 779 (Bankr. S.D.N.Y. 1985) (quoting *In re Harvest Milling Co.*, 221 F. Supp. 836, 838 (D. Or. 1963)). Any inequitable conduct directed at the debtor or its creditors may be sufficient to

[40] *See id.* at 156:16-156:21.

[41] *See id.* at 157:19-158:7.

warrant subordination of the creditor's claim, regardless of whether that inequitable conduct was related to the acquisition or assertion of that claim. *See In re Mobile Steel Co*., 563 F.2d at 700.

22. Platinum and the Participating Noteholders' conduct in connection with the Uptier Transaction was inequitable, warranting subordination. As set forth above, Platinum and the Platinum Directors owed fiduciary duties to the Debtors and the Participating Noteholders knew it. The Uptier Transaction benefited Platinum to the detriment of the Company and its non-participating creditors by design, a point that was not lost on (and was in fact encouraged by) the Participating Noteholders. The Participating Noteholders colluded and substantially participated with Platinum in effectuating the Uptier Transaction by providing the necessary consents and otherwise advancing their position to the detriment of non-participating creditors by purchasing the New 1L Notes and New 1.25L Notes, as applicable.[42] Therefore, the Court should make no findings that would prejudice the ability of the UCC to bring claims against Platinum and the Participating Noteholders for equitable subordination should the UCC settlement not be consummated.

CONCLUSION

23. For the reasons set forth above, and to be supplemented at closing arguments, the Court should not make any factual findings inhibiting the Committee from pursuing claims set forth in its Standing Motion.

[42] *See* Feb. 1, 2024 Vorderwuelbecke Trial Tr. at 104:9-104:16, 104:25-105:4; *see also* ECF No. 538-53 at 2; ECF No. 1020 at ¶¶ 106-107.

Dated: June 17, 2024

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on June 17, 2024, I caused a copy of the foregoing document to be served by the Electronic Case Filing System for the United States Bankruptcy Court for the Southern District of Texas.

/s/ Charles R. Gibbs
Charles R. Gibbs