Docket #1398 Date Filed: 6/18/2024

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

In re	Case No. 23-90611 (MI)
WESCO AIRCRAFT HOLDINGS, INC., *et al.*,[1]	Chapter 11
Debtors.	(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.	
LANGUR MAIZE, L.L.C., Crossclaim Plaintiff, *v.* **PLATINUM EQUITY ADVISORS, LLC,** *et al.*, Crossclaim 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 https://veritaglobal.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.,

Third-Party Plaintiff,

v.

UNNAMED PLATINUM FUNDS c/o PLATINUM EQUITY ADVISORS, LLC, *et al.*,

Third-Party Defendants.

LANGUR MAIZE, L.L.C.,

Counterclaim Plaintiff,

v.

WESCO AIRCRAFT HOLDINGS, INC., *et al.*,

Counterclaim Defendants.

COUNTERCLAIM DEFENDANTS' AMENDED JOINT POST-TRIAL BRIEF*

* This brief is amended to correct five inadvertent errors in the Counterclaim Defendants' Joint Post-Trial Brief (ECF No. 1386) filed on June 17, 2024. The changes on pages 77, 87, 89, and 93 are edits that were conveyed on June 17 by Carlyle or Platinum but were unintentionally omitted from the joint brief. The change on page 5 is a scrivener's error. A redlined copy the Brief is attached hereto as Exhibit A, reflecting these changes.

TABLE OF CONTENTS

Page

PRELIMINARY STATEMENT 1

BREACH OF CONTRACT CLAIMS 5

I. NATURE OF INDENTURE AGREEMENTS AND WHY IT MATTERS 5

II. THE ISSUANCE OF ADDITIONAL 2026 NOTES DID NOT BREACH THE INDENTURES 8

- A. The Company's Indentures Permitted Every Step Of The 2022 Transaction 8
- B. New York Law And The Express Terms Of The Indentures Respect Party Structuring Decisions 9
- C. The Integrated Agreement Doctrine Cannot Be Used To Collapse The Distinct Steps Of The 2022 Transaction 13
- D. The 2024/2026 Holders Have Failed To Show The 2022 Transaction Was Not Implemented As Intended 19
  - 1. The Third Supplemental Indenture, Note Purchase Agreement, And Additional 2026 Notes Issuance Were Effective Before The Fourth Supplemental Indenture and Exchange 19
  - 2. The Closing Reflected The Intended Sequencing 21
- E. The Original Secured Indentures Do Not Protect Noteholders From The Dilution Of Their Voting Power Through The Issuance Of Additional Notes 24
- F. Amending The Original 2026 Indenture To Authorize The Issuance Of The Additional 2026 Notes Did Not Breach The Indenture 27
  - 1. Issuing Additional 2026 Notes Did Not Breach Sections 2.01, 4.09, 4.12 or 4.26 of the Original 2026 Indenture 28
  - 2. The 2024/2026 Holders' Strained Attempt To Shoehorn Amendments To Secured Debt Capacity Into Heightened Consent Categories Fails 29

III. THE ADDITIONAL 2026 NOTES WERE VALID AND OUTSTANDING 35

- A. Facts Relevant To The Authentication Of The Additional 2026 Notes 36
- B. The Trustee Authenticated The Additional 2026 Notes 39
- C. The 2024/2026 Holders Cannot Challenge The Purported Defect In The Notes 42
- D. Even If There Were A Technical Defect In The Authentication Of The Additional 2026 Notes, The Notes Were Still Valid And Outstanding 44

IV. THE FOURTH SUPPLEMENTAL INDENTURES ARE EFFECTIVE AND BINDING ON ALL HOLDERS UNDER SECTION 9.04 47

V. NO RELIEF IS AVAILABLE AS TO 2024 HOLDERS 50

VI. THE 2022 TRANSACTION DID NOT VIOLATE THE "RIGHT OF PAYMENT" SACRED RIGHT 51

VII. THE COUNTERCLAIM DEFENDANTS ACTED IN GOOD FAITH AND THE EQUITABLE AND NON-CONTRACT CLAIMS MUST FAIL 53

VIII. THE 2024/2026 HOLDERS ARE NOT ENTITLED TO EQUITABLE REMEDIES 64

A. The 2024/2026 Holders Are Not Entitled To An Equitable Contract Remedy 65

B. Equitable Subordination Is Not Colorable In Light Of The Trial Evidence 68

C. There Is No Basis To Grant An Equitable Lien 71

D. The Equitable Subordination And Equitable Lien Claims Do Not Present A Live Article III Case Or Controversy As Against Citadel 72

IX. THE 2024/2026 HOLDERS' TORTIOUS INTERFERENCE CLAIMS FAIL 73

A. The 2022 Transaction Did Not Breach The Indentures 73

B. The Defendants Did Not *Intend* To Procure A Breach 73

C. The Economic Interest Doctrine Protects The Defendants 75

D. The 2024/2026 Holders Cannot Overcome The Economic Interest Defense 79

X. LANGUR MAIZE'S CLAIMS FAIL 80

A. The Unsecured Exchange Benefited Wesco And Was A Losing Bet For The Participants 80

B. Langur Maize Lacks Article III Standing To Assert Its Claims 81

C. Claims For Breach Of Contract Against Non-Parties Fail 85

D. Langur Maize Has Failed To Prove A Breach Of The Unsecured Indenture 86

E. There Was No Tortious Interference with the Unsecured Indenture 93

1. The Langur Maize Defendants Did Not Induce a Breach of the Indentures 94

2. The Economic Interest Doctrine Forecloses Tortious Interference Claims 95

F. There Was No Conspiracy To Commit Tortious Interference 99

XI. CONCLUSION 100

TABLE OF AUTHORITIES

Page

Cases

A & V 425 LLC Contracting Co. v. RFD 55th St. LLC,
15 Misc. 3d 196 (N.Y. Sup. Ct. 2007) 87

Abele Tractor & Equip. Co. v. Schaeffer,
167 A.D.3d 1256 (N.Y. App. Div. 3d Dep't 2018) 77

Acqis Tech., Inc. v. Comm'r,
T.C.M. (RIA) 2024-021 (T.C. 2024) 17

Adar Bays, LLC v. GeneSYS ID, Inc.,
179 N.E.3d 612 (N.Y. 2021)....................68

Ades & Berg Grp. Invs. v. Breeden (In re Ades & Berg Grp. Invs.),
550 F.3d 240 (2d Cir. 2008)....................66

Allen v. Laws. Mut. Ins. Co. of Ky.,
216 S.W.3d 657 (Ky. Ct. App. 2007) 43

In re Alta Mesa Res., Inc., et al.,
No. 19-35133, Jan. 21, 2020 50

Ames v. Fallert,
657 P.2d 224 (Or. App. 1983)....................48

Arlinghaus v. Ritenour,
622 F.2d 629 (2d Cir. 1980)....................101

Associated Recovery v. Does 1-44,
2018 WL 1517863 (N.D. Tex. Mar. 28, 2018) 68

Audax Credit Opportunities Offshore Ltd. v. TMK Hawk Parent, Corp.,
72 Misc.3d 1218(A) (N.Y. Sup. Ct. 2021)....................10, 14, 77, 79

In re B-Bar Tavern Inc.,
506 B.R. 879 (Bankr. D. Mont. 2013) 48

Bank of N.Y. Mellon v. Cart 1, Ltd.,
2021 WL 2358695 (S.D.N.Y. June 9, 2021) 77, 79, 98, 99

Bausch & Lomb Inc. v. Mimetogen Pharms., Inc.,
2016 WL 2622013 (W.D.N.Y. May 5, 2016)....................79

Bayou Liberty Ass'n, Inc. v. U.S. Army Corps of Eng'rs,
217 F.3d 393 (5th Cir. 2000) 73

Bd. of Comm'rs of Cherokee Cnty. v. U.S. Fid. & Guar. Co.,
40 P.2d 371 (1935)....................41

Beal Sav. Bank v. Sommer,
865 N.E.2d 1210 (N.Y. 2007)....................50

Black Diamond Comm. Fin. L.L.C. v. Murray Energy Corp. (In re Murray Energy Holdings),
616 B.R. 84 (Bankr. S.D. Ohio 2020)....................11, 12

BNP Paribas Mortg. Corp. v. Bank of Am., N.A.,
778 F. Supp. 2d 375 (S.D.N.Y. 2011)....................6, 43

Briarpatch Ltd., L.P. v. Geisler Roberdeau, Inc.,
2007 WL 1040809 (S.D.N.Y. Apr. 4, 2007)....................100

Broad v. Rockwell Int'l Corp.,
642 F.2d 929 (5th Cir. 1981) 6, 10

BWA Corp. v. Alltrans Express U.S.A., Inc.,
112 A.D.2d 850 (N.Y. App. Div. 1st Dep't 1985)....................13

In re Cambridge Marine Indus., Inc.,
61 Comp. Gen. 187 (Comp. Gen. Dec. 31, 1981)....................41

Carvel Corp. v. Noonan,
3 N.Y.3d 182 (2004) 80

Casebeer v. Comm'r,
909 F.2d 1360 (9th Cir. 1990) 17

Circuit City Stores, Inc. v. Adams,
532 U.S. 105 (2001)....................90

In re Colo. Mercantile Co.,
299 F. Supp. 55 (D. Colo. 1969)....................47

CooperVision, Inc. v. Intek Integration Techs.,
794 N.Y.S.2d 812 (N.Y. Sup. Ct. 2005) 15

Cornish v. Yarbrough,
558 S.W.2d 28 (Tex. App.—Waco 1977, no writ) 47

Cortlandt St. Recovery Corp. v. Bonderman,
96 N.E.3d 191 (N.Y. 2018)....................36

In re Cowin,
492 B.R. 858 (Bankr. S.D. Tex. 2013) 67

Ctr. for Biological Diversity, Inc. v. BP Am. Prod. Co.,
704 F.3d 413 (5th Cir. 2013) 74

Matter of CTS Truss, Inc.,
868 F.2d 146 (5th Cir. 1989) 69

Daire v. Sterling Ins. Co.,
204 A.D.3d 1189 (N.Y. App. Div. 3d Dep't 2022) 8

Danco Elec. Contractors, Inc. v. Dormitory Auth. of N.Y.,
75 N.Y.S.3d 28 (N.Y. App. Div. 1st Dep't 2018) 46

De Sole v. Knoedler Gallery, LLC,
139 F. Supp. 3d 618 (S.D.N.Y. 2015)...101

Dell's Maraschino Cherries Co. v. Shoreline Fruit Growers, Inc.,
887 F. Supp. 2d 459 (E.D.N.Y. 2012) 79

Deutsche Bank Nat'l Tr. Co. for Morgan Stanley Structured Tr. I 2007-1 v. Morgan Stanley Mortg. Cap. Holdings LLC,
289 F. Supp. 3d 484, 496 (S.D.N.Y. 2018)...67

Dexia SA/NV, Dexia Holdings, Inc. v. Morgan Stanley,
41 Misc. 3d 1214(A), (N.Y. Sup. Ct. 2013)...85

Diversified Realty Servs., Inc. v. Meyers Law Grp., P.C.,
2014 WL 547034 (N.D. Cal. Feb. 7, 2014) 91

Don King Prods., Inc. v. Smith,
47 F. App'x 12 (2d Cir. 2002) 79

Donohue v. Cuomo,
38 N.Y.3d 1 (N.Y. 2022) 25

Durante Bros. & Sons v. Flushing Nat'l Bank,
755 F.2d 239 (2d Cir. 1985), ECF 275 101

E.F. Hutton Int'l Assoc. v. Shearson Lehman Bros. Holdings,
281 A.D.2d 362 (N.Y. App. Div. 1st Dep't 2001)...80

Easton v. Butterfield Live Stock Co.,
279 P. 716 (Idaho 1929)..43, 44

In re Entrust Energy, Inc.,
2023 WL 3855817 (Bankr. S.D. Tex. June 6, 2023) 70

In re Equip. Equity Holdings, Inc.,
491 B.R. 792 (Bankr. N.D. Tex. 2013)..70

Matter of Fabricators, Inc.,
926 F.2d 1458 (5th Cir. 1991) 69, 72

Feinstein v. Levy,
503 N.Y.S.2d 821 (N.Y. App. Div. 2d Dep't 1986) 44

FMC Corp. v. Boesky,
825 F. Supp. 623 (S.D.N.Y. 1993) 68

Foster v. Churchill,
87 N.Y.2d 744 (1996) 77, 78, 80

Fox v. Hirschfeld,
157 A.D. 364 (N.Y. App. Div. 1st Dep't 1913)..83, 84

Freeman v. HSBC Holdings PLC,
57 F.4th 66 (2d Cir. 2023) 101

Friedman v. Otsego Mut. Fire Ins. Co.,
114 N.Y.S.3d 686 (N.Y. App. Div. 2d Dep't 2020) 68

Galli v. Metz,
973 F.2d 145 (2d Cir. 1992)...53

George Backer Mgmt. Corp. v. Acme Quilting Co.,
385 N.E.2d 1062 (N.Y. 1978)..47

Gillespie v. Moon,
1817 WL 1622 (N.Y. Ch. 1817) 48

Greenfield v. Philles Records, Inc.,
98 N.Y.2d 562 (N.Y. 2002) 10, 14

Gunther v. Mayer,
22 N.Y.S. 50 (N.Y. Gen. Term 1983)..46

Hawaiian Dredging Const. Co. v. United States,
59 Fed. Cl. 305 (Fed. Cl. 2004) 41

HBE Leasing Corp. v. Frank,
48 F.3d 623 (2d Cir. 1995)...18

Heath v. State,
278 A.D. 8 (N.Y. App. Div. 3d Dep't) 48

In re Hendrick Hudson Cent. Sch. Dist. v. Falinski,
2008 WL 8097192 (N.Y. Sup. Ct. Nov. 5, 2008) 16

Matter of Herby's Foods, Inc.,
2 F.3d 128 (5th Cir. 1993) 72

Hetchkop v. Woodlawn at Grassmere, Inc.,
116 F.3d 28 (2d Cir. 1997)....................68

Hicks v. Fruen Cereal Co.,
233 N.W. 828 (Minn. 1930)....................45, 47

Hill v. United States,
288 F. 192 (7th Cir. 1923) 41

Holt v. Robertson,
2008 WL 2130420 (Tex. App. May 21, 2008) 67

Huber v. ARCK Credit Co.,
LLC, 2015 WL 14077892 (S.D.N.Y. Jan. 28, 2015)....................25

Hudson Bay Master Fund Ltd. v. Patriot Nat'l, Inc.,
2019 WL 1649983 (S.D.N.Y. Mar. 28, 2019) 79

ICG Glob. Loan Fund 1 DAC v. Boardriders, Inc.,
2022 WL 10085886 (N.Y. Sup. Ct. Oct. 17, 2022)....................77, 80

In re iHeartMedia, Inc.,
597 B.R. 339 (Bankr. S.D. Tex. 2019) 67, 72

IMG Fragrance Brands, LLC v. Houbigant, Inc.,
679 F. Supp. 2d 395 (S.D.N.Y. 2009)....................81, 87

Imtrac Indus., Inc. v. Glassexport Co.,
1996 WL 39294 (S.D.N.Y. Feb. 1, 1996)....................79

In re Jackson,
231 B.R. 142 (Bankr. D. Mass. 1999) 48

Karmely v. Wertheimer,
737 F.3d 197 (2d Cir. 2013)....................53

Katz v. Oak Indus. Inc.,
508 A.2d 873 (Del. Ch. 1986)....................11

Kent v. Univ. Film Mfg. Co.,
200 A.D. 539 (N.Y. App. Div. 1st Dep't 1922)....................14, 15

Kham & Nate's Shoes No. 2, Inc. v. First Bank of Whiting,
908 F.2d 1351 (7th Cir. 1990) 69

Knight v. New York & Presbyterian Hosp.,
194 N.Y.S.3d 218 (N.Y. App. Div. 1st Dep't 2023) 68

Kurz v. United States,
156 F. Supp. 99 (S.D.N.Y. 1957) 17

Lake Placid Club Attached Lodges v. Elizabethtown Builders, Inc.,
521 N.Y.S.2d 165 (N.Y. App. Div. 3d Dep't 1987) 42

Lane v. Spriggs,
71 S.W.3d 286 (Tenn. Ct. App. 2001) 48

In re Lantana Motel,
124 B.R. 252 (Bankr. S.D. Ohio 1990)..54, 91

Law v. Siegel,
571 U.S. 415 (2014)...70

Laws.' Fund for Client Prot. v. Bank Leumi Tr. Co.,
94 N.Y.2d 398 (N.Y. 2000) 92

In re Lehman Bros. Holdings Inc.,
541 B.R. 551 (S.D.N.Y. 2015)...70

Life Partners Creditors' Tr. v. Black Diamond Lifeplan Fund,
2018 WL 4076491 (N.D. Tex. June 22, 2018) 69, 71

In re Life Partners Holdings, Inc.,
926 F.3d 103 (5th Cir. 2019) 69

Lovati v. Petroleos de Venez., S.A.,
2021 WL 5908953 (S.D.N.Y. Dec. 14, 2021) 85

Lucente v. Int'l Bus. Machs. Corp.,
310 F.3d 243 (2d Cir. 2002)...67

Madeleine, L.L.C. v. Casden,
950 F. Supp. 2d 685 (S.D.N.Y. 2013)..25

Martin v. Niagara Falls Mfg. Co.,
44 Hun. 130, 141 (N.Y. App. Div. 1887) 46

Maxim Crane Works, L.P. v. Zurich Am. Life Ins. Co.,
11 F.4th 345 (5th Cir. 2021) 84

MDC Corp., Inc. v. John H. Harland Co.,
228 F. Supp. 2d 387 (S.D.N.Y. 2002)....................78

MeehanCombs Global Credit Opportunities Funds, LP v. Caesars Ent. Corp.,
80 F. Supp. 3d 507 (S.D.N.Y. 2015)....................11

Mesibov, Glinert & Levy, Inc. v. Cohen Bros. Mfg. Co.,
157 N.E. 148 (N.Y. 1927)....................42

In re Mir,
2021 WL 1081405 (Bankr. S.D. Tex. Mar. 19, 2021)....................70

In re Model Imperial, Inc.,
250 B.R. 776 (Bankr. S.D. Fla. 2000)....................69

Momentive Performance Materials Inc. v. BOKF, NA (In re MPM Silicones, L.L.C.),
874 F.3d 787 (2d Cir. 2017)....................52

N.J. Bank, N. A. v. Bradford Sec. Operations, Inc.,
690 F.2d 339 (3d Cir. 1982)....................45

Nicholls v. Tufenkian Import/Export Ventures, Inc.,
367 F. Supp. 2d 514 (S.D.N.Y. 2005)....................47

Noddings Inv. Grp., Inc. v. Capstar Commc'ns, Inc.,
1999 WL 182568 (Del. Ch. Mar. 24, 1999)....................18

Norris v. Causey,
869 F.3d 360 (5th Cir. 2017) 84

Ocean Trails CLO VII v. MLN TopCo Ltd.,
Index No. 651327/2023 (N.Y. Sup. Ct. 2023) 78

Off. Comm. of Unsecured Creditors v. JP Morgan Chase Bank, N.A. (In re Motors Liquidation Co.),
777 F.3d 100 (2d Cir. 2015)....................51

Ohio v. Kovacs (In re Kovacs),
717 F.2d 984 (6th Cir. 1983) 66

Orr v. Kinderhill Corp.,
991 F.2d 31 (2d Cir. 1993)....................17

Paragon Res., Inc. v. Nat'l Fuel Gas Distrib. Corp.,
695 F.2d 991 (5th Cir. 1983) 25

In re Pasquariello,
16 F.3d 525 (3d Cir. 1994)....73

People, for Use of Rock Island Cnty. v. Lyons,
168 Ill. App. 396 (Ill. App. Ct. 1912)....48

Pepper v. Litton,
308 U.S. 295 (1939)....17

Placid Oil Co. v. C.C. Abbitt Farms, LLC,
561 B.R. 60 (N.D. Tex. 2016)....74

Pogo Res., LLC v. St. Paul Fire & Marine Ins. Co.,
2021 WL 12104836 (N.D. Tex. Jan. 12, 2021)....47

Portis v. First Nat'l Bank of New Albany,
34 F.3d 325 (5th Cir. 1994)....89, 94

Pyramid Transp., Inc. v. Greatwide Dallas Mavis, LLC,
2013 WL 840664 (N.D. Tex. Mar. 7, 2013)....84

Quadrant Structured Prods. Co., Ltd. v. Vertin,
23 N.Y.3d 549 (2014)....86, 92

In re Refco Inc. Sec. Litig.,
826 F. Supp. 2d 478 (S.D.N.Y. 2011)....74

Reiss v. Fin. Performance Corp.,
97 N.Y.2d 195 (N.Y. 2001)....10, 13

In re Residential Cap., LLC,
497 B.R. 403 (Bankr. S.D.N.Y. 2013)....50, 51

In re Revlon, Inc.,
2023 WL 2229352 (Bankr. S.D.N.Y. Feb. 24, 2023)....66, 68

Rice's Toyota World, Inc. v. Comm'r,
752 F.2d 89 (4th Cir. 1985)....17

Robb v. Pa. Co. for Ins. on Lives & Granting Annuities,
3 Pa. Super. 254 (Pa. Super. Ct. 1897)....41

Roche Diagnostics GmbH v. Enzo Biochem, Inc.,
992 F. Supp. 2d 213 (S.D.N.Y. 2013)....74

In re RONFIN Series C Bonds Sec. Interest Litig.,
182 F.3d 366 (5th Cir. 1999)....67, 72

Ruha v. Guior,
277 A.D.2d 116 (N.Y. App. Div. 1st Dep't 2000).....80

S & A Rest. Corp. v. Lane,
2007 WL 4403304 (N.D. Tex. Dec. 18, 2007).....47

Sahu v. Union Carbide Corp.,
418 F. Supp. 2d 407 (S.D.N.Y. 2005).....67

In re Sanchez Energy Corp.,
2023 WL 4986394 (Isgur, J.) (Bankr. S.D. Tex. Aug. 3, 2023).....66

SCM Corp. v. Xerox Corp.,
507 F.2d 358 (2d Cir. 1974).....67

Sec. Pac. Nat'l Bank v. Ginkowski,
410 N.W.2d 589 (Wis. Ct. App. 1987).....48

In re Servicom, LLC,
2021 WL 825155 (Bankr. D. Conn. Feb. 24 2021).....18

Shemwell v. City of McKinney,
63 F.4th 480 (5th Cir. 2023).....74

Sheridan Broad. Corp. v. Small,
19 A.D.3d 331 (N.Y. App. Div. 1st Dep't 2005).....87

In re SI Restructuring, Inc.,
532 F.3d 355 (5th Cir. 2008).....68

Smith v. Cram,
230 P. 812 (Or. 1924).....48

In re Snide,
418 N.E.2d 656 (N.Y. 1981).....48

Sokolow, Dunaud, Mercadier & Carreras LLP v. Lacher,
747 N.Y.S.2d 441 (N.Y. App. Div. 1st Dep't 2002).....67

Sony Corp. v. Fujifilm Holdings Corp.,
2017 WL 4342126 (S.D.N.Y. Sept. 28, 2017).....6

Springwell Navigation Corp. v. Sanluis Corporacion, S.A.,
46 A.D.3d 377 (N.Y. App. Div. 1st Dep't 2007).....84

Springwell Navigation Corp. v. Sanluis Corporacion, S.A.,
81 A.D.3d 557 (N.Y. App. Div. 1st Dep't 2011).....84

Standard Brands Inc. v. Straile,
260 N.Y.S.2d 913 (N.Y. App. Div. 1st Dep't 1965) 91

Suffolk Cty. Water Auth. v. Vill. of Greenport,
800 N.Y.S.2d 767 (N.Y. App. Div. 2d Dep't 2005) 92

Superintendent of Ins. for State of N.Y. v. Ochs (In re First Cent. Fin. Corp.),
377 F.3d 209 (2d Cir. 2004)....................67

Swain v. Wiley Coll.,
74 S.W.3d 143 (Tex. App. 2002)....................68

Teletech Europe B.V. v. Essar Servs. Mauritius,
83 A.D.3d 511 (N.Y. App. Div. 1st Dep't 2011)....................15

Tilton v. MBIA, Inc. (In re Zohar III, Corp.),
639 B.R. 73 (Bankr. D. Del. 2022) 69, 70

Town Council of Lexington v. Union Nat'l Bank,
22 So. 291 (Miss. 1897)....................44

In re TPC Group Inc.,
2022 WL 2498751 (Bankr. D. Del. July 6, 2022)....................8, 90

In re Tronox Inc.,
503 B.R. 239 (Bankr. S.D.N.Y. 2013)....................18

TVT Records v. Island Def Jam Music Group,
412 F.3d 82 (2d Cir. 2005)....................15

In re U.S. Abatement Corp.,
39 F.3d 556 (5th Cir. 1994) 69

U.S. Bank Nat'l Ass'n v. Triaxx Asset Mgmt. LLC,
2019 WL 4744220 (S.D.N.Y. Aug. 26, 2019)....................77, 80

U.S. Bank Nat'l Ass'n v. Wilmington Sav. Fund Soc'y, FSB (In re MPM Silicones, LLC),
531 B.R. 321 (S.D.N.Y. 2015)....................91, 92

U.S. Fid. & Guar. Co. v. Coca Cola Co.,
1972 WL 20863 (N.Y. Sup. Ct. 1972)....................43

Ultramar Energy v. Chase Manhattan Bank,
179 A.D.2d 592 (N.Y. App. Div. 1st Dep't 1992)....................77, 79, 80

United Coin Meter Co. v. Johnson-Campbell Lumber Co.,
493 S.W.2d 882 (Tex. Civ. App. 1973) 67

United States v. Bestfoods,
524 U.S. 51 (1998)....................95

In re Vetter Assets Serv., LLC,
609 B.R. 279 (Bankr. W.D. Okla. 2019)....................69

Victory Nat'l Bank of Nowata v. Okla. State Bank, Vinita,
520 P.2d 675 (Okla. 1974)....................45

Vinas v. Chubb Corp.,
499 F. Supp. 2d 427 (S.D.N.Y. 2007)....................78

W.R. Huff Asset Mgmt. Co. v. Deloitte & Touche LLP,
549 F.3d 100 (2d Cir. 2008)....................83

In re Waterford Wedgwood,
500 B.R. 371 (Bankr. S.D.N.Y. 2013)....................17

Wegman v. Dairylea Co-op., Inc.,
50 A.D.2d 108 (N.Y. App. Div. 4th Dep't 1975)....................101

Wells Fargo Bank, N.A. v. ADF Operating Corp.,
50 A.D.3d 280 (N.Y. App. Div. 1st Dep't 2008)....................79

White Plains Coat & Apron Co. v. Cintas Corp.,
8 N.Y.3d 422 (2007)....................74, 76, 77, 78, 79

White Rose Food v. Saleh,
99 N.Y.2d 589 (N.Y. 2003)....................16

Wilson v. Dantas,
2013 WL 92999 (S.D.N.Y. Jan. 7, 2013)....................95

Statutes

11 U.S.C. § 101(5)(B)....................66

11 U.S.C. § 105....................70

11 U.S.C. § 502(c)(2)....................66

11 U.S.C. § 544(b)(1)....................72

15 U.S.C. § 77ppp(b)....................90

N.Y. Gen. Oblig. Law § 13-107....................82, 83, 84, 86

N.Y. State Tech. Law § 304(2)....................42

N.Y. U.C.C. Law § 8-205 45

N.Y. U.C.C. Law § 8-208(a)....................44

N.Y. U.C.C. Law § 8-506 86

Nev. Rev. Stat. Ann. § 227.090 41

Other Authorities

American Bar Association, Section of Business Law,
Revised Model Simplified Indenture, 55 Bus. Law. 1115 (2000) 7, 36, 40, 43, 47

American Bar Foundation, COMMENTARIES ON INDENTURES (1971) 6, 43, 46

Autopen, MERRIAM-WEBSTER DICTIONARY
https://www.merriam-webster.com/dictionary/autopen 41

Facsimile, BLACK'S LAW DICTIONARY (11th ed. 2019) 41

Facsimile Signature, BLACK'S LAW DICTIONARY (11th ed. 2019)....................41

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https://www.sec.gov/Archives/edgar/data/892553/000119312521003205/d104
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Restatement (First) of Contracts § 235(c) (Am. L. Inst. 1932)....................14

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Restatement (Second) of Contracts § 302 (Am. L. Inst. 1981)....................43

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Am. Bankr. Inst. J. (Jan. 2024) 17

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PRELIMINARY STATEMENT[2]

The Counterclaim Defendants respectfully urge the Court to find that the Counterclaim Plaintiffs' claims are meritless and that the capital structure of the Company created through the 2022 Transaction is valid and can properly serve as the foundation for a plan of reorganization. Sections I-VI explain why the 2024/2026 Holders have failed to show the 2022 Transaction violated the indentures in any respect. Sections VII-IX outline why, even if the Court were to find a breach of the indentures, there is no basis for the 2024/2026 Holders' requests for equitable remedies or their tortious interference claims. Section X addresses Langur Maize's claims.

The 2024/2026 Holders' Claims. The 2024/2026 Holders promised the Court they would show that the Company and the Participating Noteholders, in a despicable display of creditor-on-creditor violence, maliciously targeted them in a manner that deprived them of inviolable rights, solely to move a few favored noteholders closer to the life rafts on what everyone knew was a sinking ship. After thirty days of trial, these inflammatory claims were conclusively disproven. Each of the key witnesses for the 2024/2026 Holders admitted that they understood, subject to a two-thirds consent threshold, that lien releases were permissible—and they understood the Company had the ability to issue new Notes to meet that threshold. And it was undisputed that, while Incora had liquidity problems, it had a business that had a reason to exist, it was experiencing a longer-than-expected downturn due to COVID and other macro-economic factors, and the Company had a viable business plan that required approximately $250 million, which it needed quickly. In other words, after much hyperbole, this case is and always has been about whether the Company's actions were permitted by its contracts.

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2 Capitalized terms used but not defined herein shall have the meanings ascribed to such terms in the *Debtors' Motion for Summary Judgment* [ECF 199]. ECF citations refer to the docket in this Adversary Proceeding unless otherwise indicated. All emphasis is added unless otherwise indicated.

In executing the various amendments and agreements in distinct steps, the Debtors did not breach the Original Secured Indentures. First, with the requisite consent of over fifty percent of each series of notes outstanding, the Company amended the Original Secured Indentures to expand the Company's debt capacity and permit the issuance of new Additional 2026 Notes. The Company then issued the Additional 2026 Notes to certain of the Participating Noteholders and received $250 million in new money. Then, with consent of over two-thirds of each series of secured notes then-outstanding, the parties released the liens securing the Original Secured Notes. The Company then exchanged the Participating Secured Noteholders' Secured Notes for New 1L Notes, which provided the Company with substantial debt service relief and maturity extensions.

Each of the amendments (and the agreements they facilitated) was permitted under the Original Secured Indentures. The institutions (including JPMorgan and BlackRock) who participated in the negotiation of Incora's indentures in 2019 had every ability to propose changes to the amendment provisions on the front end, but they did not. In 2022, the Company (and its counterparties) simply made use of the flexibility that had always been there, in the documents that governed the terms of the 2024/2026 Holders' notes.

Lacking support for their claims in the Indentures' plain language, the 2024/2026 Holders try two approaches. First, they invoke various inapplicable doctrines to urge the Court to disregard the sequenced actions that the Indentures permit. These are not availing. The integrated agreement doctrine is a canon of interpreting related agreements; it is not a basis for substantively collapsing multiple transactions or steps of a larger, complex transaction into one another. And the so-called "collapsing" and "sham" doctrines are equally inapposite. They derive from fraudulent transfer and tax law, where specific public policy preferences may override a party's ability to contract. Those doctrines have no bearing on the different question of whether a party's actions complied

with the language of a contract that the parties *agreed* would control their conduct. The Court should not break new ground by applying these doctrines to contract law. Doing so would rewrite the parties' bargain in a manner unfair to the Company and in violation of bedrock New York law.

Second, the 2024/2026 Holders raised a hyper-technical "wet ink signature" issue to argue that the 2022 Transaction was not effective. This argument leads nowhere. The Original Secured Indentures did not require the use of "wet ink" signatures or distinguish between an original manual signature or a copy of one. Moreover, WSFS, the Company, and the purchasers of the Additional 2026 Notes—*i.e.*, the parties that could cure this supposed "defect" in any event—all accepted the Additional 2026 Notes as valid. Furthermore, the 2024/2026 Holders are not parties for whose benefit the "manual signature" provision even exists. This attempt at a "gotcha" argument fails.

Importantly, the ***2024 Holders***, who have conceded from the get-go that the Company had the requisite two-thirds consents to release the liens under the 2024 Indenture, cannot even rely on these extra-contractual theories. They instead assert that unanimous consent was required to release liens, a position not one witness supported at trial and which is plainly at odds with the Indentures' terms and the 2024/2026 Holders' behavior in trying to amass a "blocking position."

Even if the 2024/2026 Holders were to prevail on their contract claim, they still have not established entitlement to equitable relief whether under a theory of equitable subordination, equitable lien, or some equitable contract remedy, nor that they are victims of a tort. It is undisputed that the Company had a good-faith need for more financing than its debt and lien covenants permitted without amendments, that the 2022 Transaction generated the required amount of new capital for the Company following arm's-length negotiations, and that the Company worked with the PIMCO and Silver Point Noteholders because of their early

organization and size. The evidence at trial established that each participant was motivated by its own economic interests in the Company, and the collective desire to improve the Company's prospects. After a lengthy trial, there is not a shred of evidence that any of the Counterclaim Defendants acted out of malice toward the 2024/2026 Holders, or that they defrauded anyone.

For their part, the 2024/2026 Holders were sophisticated market participants who understood the rules of their investment and made tactical choices to gain leverage against the Company for their own strategic aims. They were slow to organize and commence working with any of the throngs of willing and able advisors who approached them. When the 2024/2026 Holders did, eventually, retain a financial advisor to interact with the Company, their proposals fell short. They did not provide the Company with sufficient liquidity, and they carried significant execution risk. Moreover, while the 2024/2026 Holders claim that it was outrageous for the Company to go with the 2022 Transaction, their own proposals included a dropdown transaction that would have removed collateral from non-participating secured lenders, and a novel half-baked "Letter of Credit" proposal that no bank stood behind and that would have increased the Company's debt load by the same amount as the 2022 Transaction that they now criticize.

Golden Gate's entitlement to equitable relief is even more dubious. In the face of press reports about an impending uptier transaction, it engaged in a massive buying spree, including at above-market prices and with borrowed money. This ill-advised investment strategy took their holdings from just $11 million to over $200 million in a span of weeks, making it the largest 2024/2026 Holder. Golden Gate started down that path as part of a risky bet—hoping it could find others to form a "blocking position," achieve leverage over the Company, and reap profits.

Langur Maize's Claims. Langur Maize's claims fail for numerous reasons, not least of which is its lack of standing to assert them. It bought its interests in unsecured notes

opportunistically, in 2023, for pennies on the dollar. It is making a litigation play and could not even be bothered to bring a witness to trial. Its litigation problems include, but are not limited to: (1) lacking Article III standing, because no one who owned notes at the time of the 2022 Transaction assigned it a tort claim; (2) its theory is predicated on the Unsecured Exchange portion of the 2022 Transaction being a "redemption," which finds no support in the Unsecured Indenture's terms, the documentary evidence, or any witness's testimony; (3) non-participating unsecured holders felt no change in the payment terms of the Unsecured Indenture and therefore their "sacred rights" were not violated in any way; (4) non-participating holders were not harmed by the transaction—they benefited from it, and ultimately achieved a better economic outcome than participating holders; and (5) it cannot prove any of the non-Company Defendants it is suing took any actions to induce a breach, several (Carlyle, Platinum, Senator) were primarily "price-takers" on terms presented to them after the Company negotiated with the providers of new capital, and all agreed to participate in the March 2022 Transaction to advance their economic interest in Incora's business and their unsecured notes.

Finally, Langur Maize's recent statements during meet-and-confer discussions reveal that it is briefing completely new theories, disclosed for the first time post-trial. These claims are equally meritless and the Court should, in any event, decline to entertain them.

BREACH OF CONTRACT CLAIMS[3]

I. NATURE OF INDENTURE AGREEMENTS AND WHY IT MATTERS

This is a contract dispute over the validity of amendments to bond indentures. To understand how these indenture provisions operate and how they can be amended, it is critical to

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[3] This section addresses each of the 2024/2026 Holders' claims that the 2022 Transaction breached the Original Secured Indentures except for their claim under Section 3.02, for which the 2024/2026 Holders have adopted Langur Maize's arguments. *See* ECF 291 at 62. Because Langur Maize's claim for breach of Section 3.02 fails, *infra* Section X.D, the 2024/2026 Holders' analogous claim fails for the same reason.

understand their structure, the parties to them, and the restrictions imposed on (and the flexibility afforded) the issuer through covenants and amendment provisions.[4]

The Structure Of The Indentures. Bonds are largely "creatures of contract law," and the indentures that "govern the[ir] rights and obligations are often long and complex," in order to "deal with . . . all possible contingencies that might call into question the operation of those rights and obligations." *Broad*, 642 F.2d at 940-41. Importantly, the indenture trustee is the issuer's counterparty under the indenture and holds the contractual rights. *Id.* at 642 F.2d at 941-42. Although the bondholders hold the debt, they are not the issuer's counterparty; they are third party beneficiaries.[5] Thus, they do not have "standing to enforce every promise within [the indenture], including those not made for [their] benefit." *BNP Paribas Mortg. Corp. v. Bank of Am., N.A.*, 778 F. Supp. 2d 375, 415 (S.D.N.Y. 2011). Their contractual rights are limited to "those rights which the original parties to the contract intended [them] to have." *Sony Corp. v. Fujifilm Holdings Corp.*, 2017 WL 4342126, at *7 (S.D.N.Y. Sept. 28, 2017).

Accordingly, the rights of the 2024/2026 Holders, and the means to enforce those rights, only extend as far as the Original Secured Indentures provide. For example, Section 6.07 details the rights of the noteholders to receive payment and to bring suit to enforce such payment.[6] If bondholders are not paid, or any other event of default occurs, holders (acting through the Trustee), may enforce remedies, including by accelerating their debt, but only in ways that are

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[4] As the Fifth Circuit aptly noted in interpreting an indenture under New York law, "it is perhaps worthwhile to discuss briefly the way in which this type of contract operates, and the reasons why such contracts must be so long and detailed." *Broad v. Rockwell Int'l Corp.*, 642 F.2d 929, 940 (5th Cir. 1981).

[5] *See* American Bar Foundation, COMMENTARIES ON INDENTURES 7-8 (1971) (the "***ABF Commentaries***").

[6] *See* ECF 601-8 § 6.07 ("[T]he right of any Holder of a 2026 Secured Note to receive payment of principal of, or interest on, the 2026 Secured Note. . . or to bring suit for the enforcement of any such payment . . . shall not be impaired or affected without the consent of such Holder.").

prescribed by the Original Secured Indentures.[7] Invalidating transactions that purportedly breach the Original Indentures is ***not*** a remedy provided by those contracts.

Covenants And Amendments. Indentures routinely contain various provisions that reflect a negotiated balance bearing on the company's flexibility to take various actions going forward. These include negative covenants that restrict the company's ability to borrow additional money and grant liens—usually limited by pre-negotiated "baskets." Here, market participants focused on the covenants and baskets governing how much additional debt and liens the Company could incur without an amendment to the available baskets.[8] Indeed, JPMorgan insisted on tightening the initial debt and lien baskets as a condition to investing. Nonetheless, the Company also bargained for flexibility, including the ability to issue Additional 2026 Notes, subject to the baskets.[9]

Another key area of flexibility and focus of market participants are the amendment provisions.[10] Amendments are signed by the parties to the indenture (the issuer and indenture trustee), although depending on the nature of any amendment the parties may be obligated to receive consents from noteholders. Certain basic amendments, including those to fix ministerial defects in the indenture or the notes, do not require any consent, while others require some indication of consent by a specified amount of outstanding bonds.[11]

Different types of amendments may be subject to different consent thresholds. Under the Model Indenture, the general rule is that the issuer and the indenture trustee can amend or waive

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[7] *See id* § 6.02 (providing for acceleration by Holders of 30% of outstanding Notes upon an Event of Default).

[8] ECF 827 (Smith) at 46:13-47:3; *see* ECF 696-22 at 3, ECF 696-25.

[9] *See* ECF 601-8, §§ 2.01(e); 4.09(a), 4.12(a).

[10] *See* American Bar Association, Section of Business Law, *Revised Model Simplified Indenture*, 55 Bus. Law. 1115, 1146-47, §§ 9.01, 9.02 (2000) (the "***Model Indenture***").

[11] *Id.*

any provision with a ***majority*** of holders of outstanding notes unless it is expressly made subject to a higher voting threshold. There are also enumerated contract rights that require unanimous consent by those affected.[12] These are commonly referred to as "sacred rights" because they encompass the foundation of the debtor-creditor relationship (*e.g.*, the right to be paid principal and interest).[13] Certain other major changes to the indenture are not elevated to "sacred" status and can sometimes be subject to a super-majority consent, such as the consent of holders of two-thirds of the outstanding notes.[14] All of these features exist with respect to the Indentures at issue here, and the lenders did not seek to tighten them.[15]

With that background, the Counterclaim Defendants explain below that the evidence shows that the Company did not breach the Indenture. Even if it did, however, the remedy the 2024/2026 Holders urge—invalidation of the 2022 Transaction—is not available. *See infra* Section IV.

II. THE ISSUANCE OF ADDITIONAL 2026 NOTES DID NOT BREACH THE INDENTURES[16]

A. The Company's Indentures Permitted Every Step Of The 2022 Transaction

On March 28, 2022, the Company entered into two amendments to the Indentures (*i.e.*, the Third Supplemental Indentures and the Fourth Supplemental Indentures) and several other agreements, including the Note Purchase Agreement and Exchange Agreement. Each of the amendments and agreements complied with the Original Indentures. First, the Company entered into the Third Supplemental Indentures, which amended the Indentures' definitions of "Permitted

[12] Model Indenture at 1146, § 9.02.

[13] ECF 1249 (Morrison) at 66:12-17.

[14] *See*, *e.g.*, *In re TPC Grp. Inc.*, 2022 WL 2498751, at *11 (Bankr. D. Del. July 6, 2022) (discussing "hierarchy" of consents, including majority, super-majority, and "sacred" rights); ECF 827 (Smith) at 51:16-52:12.

[15] *See* ECF 827 (Smith) at 53:23-55:6; ECF 601-8, §§ 9.01, 9.02.

[16] As the parties alleging breach, the 2024/2026 Holders bear the burden of proof. *See Daire v. Sterling Ins. Co.*, 204 A.D.3d 1189, 1190 (N.Y. App. Div. 3d Dep't 2022).

Debt" and "Permitted Liens" to allow the Company to incur secured "Indebtedness represented by . . . Additional 2026 Secured Notes."[17] These changes required simple majority consent under Section 9.02's default rule, and that consent was given by the Participating Noteholders, who held well over two-thirds of the 2024 Notes and nearly 60% of the 2026 Notes outstanding at that time.[18]

The Company next issued Additional 2026 Secured Notes to the Participating Secured Noteholders. Under the terms of Section 2.01(e), these Notes were to "have the same terms as to status, redemption, or otherwise as the Initial Secured Notes."[19] Counting these Additional 2026 Notes, the Participating Secured Noteholders held over two-thirds of the then-outstanding principal amount in both the 2024 and 2026 series. The Participating Noteholders provided their consents for the Company to enter into the Fourth Supplemental Indentures, which released the liens securing the 2024 and 2026 Notes and permitted the Company to issue new secured debt.[20] The Company then issued 1L and 1.25L Notes under new Secured Indentures, and the Participating Secured and Unsecured Noteholders exchanged their Notes into the newly-issued 1L and 1.25L Notes. The Company cancelled the Notes it received pursuant to the exchange. As discussed in more detail below, these distinct actions each complied with the terms of the Original Indentures.

B. New York Law And The Express Terms Of The Indentures Respect Party Structuring Decisions

The 2024/2026 Holders argue that even if the parties implemented the 2022 Transaction in

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[17] *See* ECF 601-39 at § 2(c) (amending ECF 601-08 § 4.09(b)); ECF 601-30; ECF 604-18; ECF 604-9; *see also* ECF 601-8 ("The Issuer will not create . . . any Lien of any kind (other than Permitted Liens)"); ECF 601-39 at § 2(b) (amending "Permitted Liens" to include "Liens securing . . . the Additional 2026 Secured Notes").

[18] *See* ECF 628; ECF 1362; ECF 601-27; ECF 601-29; ECF 603-2; ECF 604-16. Majority consent was also given by holders of the 2027 Unsecured and 2028 PIK Notes. *See* ECF 602-37; ECF 604-40; ECF 603-5; ECF 603-16; ECF 604-24; ECF 604-2.

[19] *See* ECF 601-8 § 2.01(e).

[20] *See* ECF 601-34; ECF 604-4; ECF 601-33; ECF 604-32. For consents, see ECF 628; ECF 1362; ECF 602-22; ECF 603-17; ECF 603-8; ECF 603-10 (Consents related to the 2024 and 2026 Indentures). *See also* ECF 603-11; ECF 603-13; ECF 603-29; ECF 604-1; ECF 604-17; ECF 602-33 (Consents related to the Unsecured and PIK Indentures).

sequential steps involving a number of distinct amendments and agreements, the Court should use New York's integrated agreement doctrine to disregard those steps, merge them into a single instrument, and hold that they became effective simultaneously, such that the two-thirds consent threshold applies to both the Third and Fourth Supplemental Indentures and that the Company lacked the necessary consents to release the liens under the Original 2026 Indenture.[21] This argument ignores clear New York law that "fundamental, neutral precept of contract interpretation is that agreements are construed in accord with the parties' intent,"[22] and seeks to have the Court set aside the express terms of Indentures.[23]

Consistent with these principles of New York contract law, and directly contrary to what the 2024/2026 Holders are asking this Court to do, courts have respected the sequencing of steps in multi-step transactions, such as those involving so-called "exit" or "enter" consents (consents obtained by an issuer in connection with another transaction related to those notes, such as an exchange or purchase). Such cases are neither new nor unusual. For example, in *Audax Credit Opportunities Offshore Ltd. v. TMK Hawk Parent, Corp.*, the New York Supreme Court rejected an argument that a credit agreement's "required lenders" standard was not satisfied by consents provided by holders who had previously agreed to exchange their debt immediately after providing those consents. The court concluded that "the order of operations matters" because in corporate and finance matters "courts have hewn strictly to the chronology required by the contracts." 150

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[21] ECF 200 at 27; ECF 630 at 39-43.

[22] *Greenfield v. Philles Records, Inc.*, 98 N.Y.2d 562, 569 (N.Y. 2002); *see also Reiss v. Fin. Performance Corp.*, 97 N.Y.2d 195, 199 (N.Y. 2001) ("[C]ourts may not by construction add or excise terms, nor distort the meaning of those used and thereby make a new contract for the parties under the guise of interpreting the writing."); *Broad v. Rockwell Intern. Corp.*, 642 F.2d 929, 947 (5th Cir. 1981) (a court may not "rewrite a contract to accord with its instinct") (applying New York law). The doctrines cited by the 2024/2026 Holders to undermine these principles are not on point, as discussed in Sections II.B-II.D, *infra*.

[23] The caselaw expressly cited by the 2024/2026 Holders is rebutted more explicitly in Sections II.B-II.D, *infra*.

N.Y.S.3d 894, at *10-11 (N.Y. Sup. Ct. 2021). In *MeehanCombs Global Credit Opportunities Funds, LP v. Caesars Entertainment Corp.*, plaintiffs challenged a transaction on a theory that voting consents preceded a pre-arranged plan to sell the notes at issue. 80 F. Supp. 3d 507, 516-17 (S.D.N.Y. 2015). The court rejected the challenge because each step was permitted by the contract. *Id.* at 517 (the consents "were given *before* the notes were sold") (emphasis in original).

The Delaware Chancery Court similarly respected a multistep transaction in the context of a sequenced bond exchange transaction. *See Katz v. Oak Indus. Inc.*, 508 A.2d 873, 878-81 (Del. Ch. 1986). *Katz* concerned a two-step transaction, where consents were solicited from bondholders who would then exchange their securities with the issuer. The court rejected arguments that linking an exchange offer and consent solicitation created a "rigged vote" and upheld the transaction, explaining the structure did not violate "any of the express contractual provisions considered." *Id.* at 878, 881; *see also id.* at 879 (noting that indenture arrangements "are typically thoroughly negotiated and massively documented" and as such "[t]he rights and obligations of the various parties are or should be spelled out in that documentation" and "[t]he terms of the contractual relationship agreed to" not set by "broad concepts such as fairness").

Other courts are in accord. For example, in *In re Murray Energy Holdings*, the Bankruptcy Court for the Southern District of Ohio rejected the position that certain lenders' votes in favor of an amendment should not count because the votes were cast by lenders that had already committed to sell those loans back to the issuer. *See Black Diamond Comm. Fin. L.L.C. v. Murray Energy Corp. (In re Murray Energy Holdings)*, 616 B.R. 84, 98 (Bankr. S.D. Ohio 2020). The transaction there, like here, involved an amendment to loan documents, and a non-pro rata repurchase. *Id.* at 88. The court rejected—as "fiction and sophistry"—the argument that the loan repurchase should be treated as having occurred simultaneously with the delivery of the consents because

"[c]omitting to do something is not, of course, the same thing as doing it." *Id.* at 98. The court thus held that although the multiple steps of the transaction were "conducted that same day," there was "no merit" to the argument that committing to sell their loans undermined the holders' ability to vote them since the amendment "occurred before . . . notes were repurchased and cancelled." *Id.* The sequencing of the transaction complied with the terms of the agreement—and the court refused to collapse two steps simply because their contractual validity relied on their sequencing.

Similarly, here, when the 2024/2026 Holders ask the Court to "collapse" the steps of the 2022 Transaction, they are asking for protection that the terms of the Original Indentures did not provide. To the contrary, the Original 2026 Indenture enshrines the view—in plain language—that there is one requirement for the effectiveness of any consents: that they be based on the principal amount of 2026 Notes "then outstanding." Section 9.02 provides that "[t]his Indenture . . . may be amended or supplemented with ***the consent of the Holders of at least a majority in aggregate principal amount of the then outstanding*** 2026 Secured Notes . . . voting as a single class (***including, without limitation, consents obtained in connection with a tender offer or exchange offer for, or purchase of, the 2026 Secured Notes***)."[24] The Indenture is clear that the Notes to be counted are the Notes "outstanding" at any given time, and that consents obtained "in connection with a . . . purchase of[] the 2026 Secured Notes" are just as valid as any other consents obtained by the issuer in support of an amendment to the indentures. The Original 2026 Indenture thus expressly recognize as valid a transaction in which (a) notes are purchased and (b) those newly purchased notes consent to a subsequent amendment—***even if those consents were negotiated and obtained in connection with the purchase***. As such, the Original 2026

[24] ECF 601-8 § 9.02. Section 9.02's Supermajority Consent Provision contains similar language concerning purchase consents. *See id.* And the other Original Indentures contain identical language. *See* ECF 601-20 § 9.02; ECF 601-7 § 9.02.

Indenture's amendment provisions necessarily encompass (and condone) pre-planned multi-step transactions like the 2022 Transaction and those previously blessed by courts. To hold otherwise would rewrite the parties' bargain in violation of New York law. *See Reiss*, 97 N.Y.2d at 199 ("[C]ourts may not by construction add or excise terms, nor distort the meaning of those used and thereby make a new contract for the parties under the guise of interpreting the writing.").

C. The Integrated Agreement Doctrine Cannot Be Used To Collapse The Distinct Steps Of The 2022 Transaction

In the face of the contract's plain language, the 2024/2026 Holders ask the Court to set aside the party's sequenced transaction by distorting and commingling a variety of inapposite doctrines. The application of any of these doctrines, which are disentangled below, would be contrary to New York law, which respects the intent of the parties as set forth in their agreements.

The Integrated Agreement Doctrine Does Not Apply. The integrated agreement doctrine is ***not*** an instrument for collapsing transaction steps. Rather, it is a canon of contract interpretation that allows a court to read related agreements together so they are construed consistently and in accordance with party's contractual intent. As a New York appellate court explained in *BWA Corp. v. Alltrans Express U.S.A., Inc.*: "Where several instruments constitute part of the same transaction, they must be ***interpreted*** together. ***In the absence of anything to indicate a contrary intention***, instruments executed at the same time, by the same parties, for the same purpose, and in the course of the same transaction ***will be read and interpreted together***, it being said that they are, in the eye of the law, one instrument." 112 A.D.2d 850, 851-52 (N.Y. App. Div. 1st Dep't 1985). The integrated agreement doctrine allows a court to read separate agreements together to ***ascertain and enforce the intent of the parties to those contracts.*** The doctrine is consistent with the "[t]he fundamental, neutral precept of contract interpretation . . . that agreements are construed

in accord with the parties' intent." *Greenfield*, 98 N.Y.2d at 569.[25]

The 2024/2026 Holders' proposed application of the doctrine to collapse the steps of the 2022 Transaction turns this aim on its head. The 2024/2026 Holders are wrong because: (1) the doctrine does not support substantive collapsing of transactions or steps; and (2) as strangers to the Third and Fourth Supplemental Indentures, the 2024/2026 Holders urge the Court to apply the doctrine to ***override*** the Counterclaim Defendants' contractual ***intent***, rather than enforce it.[26]

New York law is clear that the doctrine is interpretive, not substantive.[27] Although the "one instrument" language in *BWA Corp.* (and similar, occasionally-used language in other cases) has been the source of some confusion, the Court should not be confused: the doctrine does not literally deem multiple agreements to be one. For example, in *Kent v. Universal Film Manufacturing. Co*., 200 A.D. 539, 550 (N.Y. App. Div. 1st Dep't 1922), the court made clear that the doctrine means that contracts may be "***construed*** together, and ***for the purpose of ascertaining what they mean may be read together as if*** a single agreement." But, as the court in *Kent* held, the "integrated agreement" principle "does not require that the two separate instruments must be deemed consolidated and one for all purposes or that a separate and independent provision of one . . . is to be deemed incorporated in the other." *Id*. at 550; *see also CooperVision, Inc. v. Intek*

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[25] The integrated agreement doctrine is listed in the Restatement (First) of Contracts as one of several "Rules Aiding Application of Standards of Interpretation," and provides: "A writing is interpreted as a whole and all writings forming part of the same transaction are interpreted together." RESTATEMENT (FIRST) OF CONTRACTS § 235(c) (Am. L. Inst. 1932).

[26] Any contention that a breach can sound in "anti-circumvention" principles ***underlying*** (or outside of) express contractual provisions is an end-run around the Court's dismissal of the implied covenant claim, which asserted exactly such a theory. *See e.g.*, ECF 144 at ¶ 262 (pleading the claim based on conduct "circumvent[ing]" the Indentures); ECF 291 at 49 (defending the claim as justified to prevent "circumvent[ing]" the terms of the Indenture). As the Court explained in dismissing this claim, "[t]he implied covenant cannot be used to impose obligations or restrictions going beyond what is set forth in the contract." ECF 508 at 51 (quoting *Audax Credit Opportunities Offshore Ltd.*, 150 N.Y.S.3d 894, at *10). The 2024/2026 Holders' breach theories must be limited to those based on the actual, express provisions of the contract they have, not the contract they want.

[27] This law is discussed in the Debtors' prior briefing, incorporated by reference. *See* ECF 199 at 42-47, 270 at 20-23, ECF 323 at 15-18.

Integration Techs., 794 N.Y.S.2d 812, 818 (N.Y. Sup. Ct. 2005) (same).

The 2024/2026 Holders cite *TVT Records v. Island Def Jam Music Group*, 412 F.3d 82 (2d Cir. 2005), to perpetuate the confusion, arguing that there the Second Circuit used the integrated agreement doctrine to "collapse" two instruments into one. That is not correct. The *TVT Records* court ascertained that, at the time the parties entered into their various agreements, the parties' intent was that the agreements were "meant to be read together as a single contract." *Id.* at 90. The court applied the doctrine as one of interpretation, not substantive collapsing of distinct agreements that the contract parties expressly intended to be separate instruments.

If the integrated agreement doctrine permitted literal collapsing of transactions, agreements, or steps, it would have absurd results. For example, a court might need to reconcile incompatible steps, or agreements that contain different choice of law or forum selection provisions. At least one New York court has explained that it would be improper to proceed in that manner. In *Teletech Europe B.V. v. Essar Services Mauritius*, the First Department rejected a reading of integrated agreement doctrine caselaw that would literally import an arbitration clause from one agreement into an escrow agreement just because they were related agreements. 83 A.D.3d 511, 512 (N.Y. App. Div. 1st Dep't 2011). The court treated the provisions of the agreements at issue—and the agreements themselves—as separate, even if they were to be interpreted together. *Id.* And, indeed, to collapse agreements or transactions simply because they had an overarching purpose would put into question the accepted mechanics of any number of corporate transactions, including those implemented through chapter 11. As a simple example: under many plans of reorganization, assets of a reorganized company are transferred free and clear of liens and new liens on the very same assets are issued "contemporaneously." But courts nevertheless respect the order of pre-determined operations—discharge, transfer, new pledge.

Second, the 2024/2026 Holders cite no New York cases applying the integrated agreement doctrine to override the terms of the contracts at issue. For example, the 2024/2026 Holders have previously cited *White Rose Food v. Saleh*, in which the court held that a guarantor's waiver of notice in a note bound him under the guarantee of that note pursuant to the integrated agreement doctrine. 99 N.Y.2d 589, 592 (N.Y. 2003). That case simply identified and enforced the parties' ***intent*** as reflected in those documents. The 2024/2026 Holders have also cited *In re Hendrick Hudson Central School District v. Falinski*, which they assert imported an arbitration clause from one contract to another. 71 A.D.3d 769, 769 (N.Y. App. Div. 2d Dep't 2010). Although *Hendrick Hudson* on its face contains no reasoning, the underlying briefing for the case reveals that, again, the parties ***intended*** for the second agreement to incorporate the arbitration agreement from the first, as demonstrated by reference to the arbitrator's name. *See* Resps.' Mem. of Law, *In re Hendrick Hudson Central Sch. Dist. v. Falinski,* 2008 WL 8097192 (N.Y. Sup. Ct. Nov. 5, 2008).

The 2024/2026 Holders also cite cases focused on whether various agreements are sufficiently interrelated with one another to qualify as being part of the "same transaction." But those cases are irrelevant. Those cases pose the "same transaction" question to ascertain whether, because separate contracts were executed at the same time, for a common purpose, the parties intended those contracts to be ***interpreted*** together. Here, the question is whether the parties to the 2022 Transaction sequenced their actions in a manner that complied with the Original Indentures—irrespective of whether those actions were part of one "transaction," or one "agreement," or many.

"Collapsing" And "Sham Transaction" Doctrines Do Not Apply. The 2024/2026 Holders do not stop at misinterpreting the integrated agreement doctrine. They then try to combine that doctrine of contractual interpretation with an entirely separate "collapsing" doctrine from the fraudulent transfer and tax contexts to form a non-existent super doctrine aimed at achieving their

desired outcome.[28] But that doctrine is even further afield. New York contract law provides no support for importing the "collapsing" or "sham transaction" tax and fraudulent transfer cases into the breach-of-contract context, where the language and intent of the parties to the underlying agreements (here, the Original Secured Indentures) supplies the relevant standards of conduct for a breach-of-contract claim.[29] In contrast, fraudulent transfer[30] and tax law[31] cases specifically look past the contractual language and reflect public policy preferences for imposing limits on the extent to which individuals can minimize or evade certain payment obligations. In other words, there are policy limits on a person's ability to structure his or her behavior in fraudulent transfer and tax cases that do not exist in contract law,[32] where parties can act as they wish, so long as

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[28] The 2024/2026 Holders routinely conflate the two doctrines, citing tax and fraudulent transfer cases as if they stood for general principles of contract law and not particular principles of statutory interpretation. *See, e.g.,* ECF 291; *id.* at 51 (citing *Kurz v. United States*, 156 F. Supp. 99, 103 (S.D.N.Y. 1957)) (tax); *id.* at 51 (citing *Orr v. Kinderhill Corp.*, 991 F.2d 31, 36 (2d Cir. 1993)) (fraudulent transfer); *id.* at 52 (citing *In re Waterford Wedgwood*, 500 B.R. 371, 379 (Bankr. S.D.N.Y. 2013)) (evaluating a fraudulent conveyance claim, and emphasizing "fraudulent conveyance principles" alongside five other cases, all of which evaluated tax or fraudulent transfer claims).

[29] If parties determine that existing indenture language yields results that are unfair, they are free to negotiate new language going forward. *See* Sean Scott *et. al.*, *The Dizzying Impact of LMTs: Where We Are Now*, Am. Bankr. Inst. J. (Jan. 2024) (discussing the market's response to the growing use of liability management transactions).

[30] *E.g., In re Waterford Wedgwood*, 500 B.R. at 379.

[31] *See e.g., Acqis Tech., Inc. v. Comm'r*, T.C.M. (RIA) 2024-021 (T.C. 2024) (explaining the origins of the sham transaction doctrine in tax law); *see also Casebeer v. Comm'r*, 909 F.2d 1360, 1362 (9th Cir. 1990) (analyzing whether transactions "are shams for tax purposes")*; Rice's Toyota World, Inc. v. Comm'r*, 752 F.2d 89, 91 (4th Cir. 1985) (same).

[32] For instance, in the fraudulent transfer context, collapsing makes sense because those are equitable claims, and—as the supreme court articulated over 80 years ago—the court may exercise its "equitable powers . . . to the end that fraud will not prevail, that substance will not give way to form, that technical considerations will not prevent substantial justice from being done." *Pepper v. Litton*, 308 U.S. 295, 304-05 (1939). Accordingly, an allegedly fraudulent conveyance must be evaluated in context; "[w]here a transfer is only a step in a general plan, the plan 'must be viewed as a whole with all its composite implications.' " *Orr v. Kinderhill Corp.*, 991 F.2d 31, 35 (2d Cir. 1993); *see also HBE Leasing Corp. v. Frank*, 48 F.3d 623, 635 (2d Cir. 1995) ("multilateral transactions may under appropriate circumstances be 'collapsed' and treated as phases of a single transaction for analysis ***under the UFCA***"); *In re Tronox Inc*., 503 B.R. 239, 269 (Bankr. S.D.N.Y. 2013) (same). But a collapsing analysis is only one element of a fraudulent transfer claim and the other elements must also be satisfied to find liability. *HBE Leasing*, 48 F.3d at 635 (discussing other elements of fraudulent transfer liability).

permitted by the applicable contract.[33] And to be clear: the concept of a "sham transaction," while applicable in tax law, has no place in analyzing contract-based claims under New York law.

In its summary judgment decision, the Court cited *In re Waterford Wedgwood*, in framing the collapsing inquiry. Respectfully, that case is inapplicable because it collapsed a transaction as a matter of fraudulent conveyance law, not contract law. *See* 500 B.R. at 379–81. New York contract law focuses on a different question—the parties' contractual intent. And if the parties intended distinct agreements, courts respect that.

Likewise, opinions that the 2024/2026 Holders have cited suggesting application of these types of doctrines to breach of contract cases are outliers and do not grapple with New York contract law. For example, they have previously cited *Noddings Investment Group, Inc. v. Capstar Communications, Inc*., in which a Delaware court applied what it called the "step transaction" doctrine in a contract dispute under New York law. 1999 WL 182568, at *7 (Del. Ch. Mar. 24, 1999). In the 25 years since that opinion issued, no New York court has cited *Noddings* for anything, nor does it appear that any New York court has applied a "step transaction" theory to find a breach of contract where the individual components of a transaction each complied with the parties' agreement. That court cited none.[34]

Even if, however, one were to import "collapsing" and "sham" or "step transaction" doctrines from these other bodies of law to breach of contract actions, the 2022 Transaction still provides no basis for their application. Each amendment and agreement composing the 2022 Transaction had its own economic effect and business justification: the Third Supplemental

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[33] The Court should likewise not rely on *In re Servicom, LLC*, 2021 WL 825155 (Bankr. D. Conn. Feb. 24 2021), pertaining to a claim for debt to equity recharacterization in bankruptcy. That also is about overriding the intentions of the party.

[34] *Noddings* relied only on tax and fraudulent conveyance cases.

Indentures expanded the Company's ability to raise new debt; the Note Purchase Agreement used that capacity to raise $250 million in cash (an amount based on the Company's liquidity need); the Fourth Supplemental Indentures obtained the flexibility to issue new secured debt; and the Exchange swapped notes for new debt, which featured with reduced debt service costs and deferred maturities.[35] Each were separate and distinct actions done sequentially for a discrete purpose.

The 2024/2026 Holders' theory of "collapsing" would also put courts to the impossible or arbitrary task—with no guidance from New York contract law—of deciding at what level of generality a party's "purpose" should be defined before deciding whether to deem one action subject to the same contractual standards (here, an amendment threshold) as another action. There is no basis for doing so, when the only question to answer is what the underlying contract allowed.

D. The 2024/2026 Holders Have Failed To Show The 2022 Transaction Was Not Implemented As Intended

Because the terms of the Indentures permitted the 2022 Transaction, the 2024/2026 Holders attempt to show that it was *not* executed as planned, and that the steps occurred either concurrently or out of order. They are wrong. A detailed timeline of events presented at trial shows that the parties planned and executed the transaction in a series of steps, such that the amendment authorizing the issuance of the Additional 2026 Notes became effective—and the issuance of notes occurred (upon the completion of the wire transfers)—***before*** any consents to the Fourth Supplemental Indentures took effect.

1. *The Third Supplemental Indenture, Note Purchase Agreement, And Additional 2026 Notes Issuance Were Effective Before The Fourth Supplemental Indenture and Exchange*

The parties carefully planned for the steps implementation order and drafted the various

[35] *See*, *e.g.*, ECF No. 536-24 at 5-9.

agreements accordingly. In mid-March, Milbank informed WSFS of the instructions that the parties would give, including that the execution of the Fourth Supplemental Indentures and the Exchange would occur ***only after*** the execution of the Third Supplemental Indentures and the "issu[ance of] the Additional 2026 Notes . . . for the new money."[36]

The agreement terms reflect this order. The Third Supplemental Indentures were not contingent on any further amendment, especially not the Fourth Supplemental Indentures—it did not even reference them.[37] Nor was the Note Purchase Agreement (which entitled the Company to the money) conditioned on the Exchange.[38] In other words, once issued, the Additional 2026 Notes were "outstanding" and had the same rights as all other 2026 Notes. There can be no confusion that if the Exchange did not happen, it would not affect the Additional 2026 Notes' validity or existence: the money would have already been wired. And there was not a condition to receiving the funds in exchange for the Additional 2026 Notes that the Exchange must occur. Consistent with this, the Exchange Agreement specified as conditions precedent to the Exchange the following steps: (i) the execution of the Third Supplemental Indentures; (ii) the consummation of the Note Purchase; and (iii) the execution of the Fourth Supplemental Indentures "***following*** the Note Purchase Closing and prior to the Exchange Closing."[39]

And while the 2024/2026 Holders cite the Exchange Agreement's specific performance remedy as evidence that events were planned to occur simultaneously,[40] it actually shows the opposite. The Exchange Agreement is the ***only*** agreement as part of the 2022 Transaction that

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36 *See* ECF 538-68 at 6.

37 *See* ECF 601-30; ECF 601-39; ECF 604-18.

38 *See* ECF 602-24.

39 ECF 604-19 (Exchange Agreement) §§ 4.02(j)-(k), 4.03(b)(c) (emphasis added).

40 *See* 2024/2026 Holders' Opening Slides at 7.

contains a specific performance provision, ***and that agreement did not become effective until after the Note Purchase was consummated***.[41] The specific performance provision provided a remedy if the Company did not exchange the Participating Noteholders' notes once they delivered the consents to the Fourth Supplemental Indentures and had nothing to do with the validity of the Additional 2026 Notes.[42] The specific performance remedy demonstrates the parties' understanding that delivery of the notes and receipt of the up-tiered notes was not simultaneous. If it were otherwise, there would have been no need for that provision at all. Moreover, even if the Third Supplemental Indentures or the Note Purchase Agreement had a specific performance provision requiring the entry into the Fourth Supplemental Indentures—***which they do not***—that would not undermine the transaction's steps, as long as they were executed in the correct sequence.

2. *The Closing Reflected The Intended Sequencing*

On the Closing Day, the parties proceeded through the planned sequence. On the Closing Call, the Company's counsel read an agenda outlining the order of steps to which each party assented, demonstrating the parties' authorization to effectuate amendments and transactions in a particular order, not at the same time. Per the terms of the agreements, the parties agreed to "release of all of their signature pages" in the following order: (1) "each of the 'Purchase Consent Documents'" (*i.e.*, the Third Supplemental Indentures and related consents); (2) "the Notes Purchase Agreement"; (3) ***after the "notes purchase has been consummated***, . . . each of the 'Exchange Consent Documents'" (*i.e.*, the Fourth Supplemental Indentures and related consents); (4) "the Permitted Pari Passu Secured Party Joinder and the Amended and Restated Notes Security

[41] ECF 1146-5 at 2-3.

[42] Of course, while the Additional 2026 Notes were "outstanding" prior to the exchange, the Company was incentivized to ensure the Exchange occurred to obtain the separate benefits of cash interest relief and maturity extensions. *See* ECF 955 (Dostart) at 174:8-175:3. Regardless, it is irrelevant whether there was risk that the Exchange would not have occurred once the Additional 2026 Notes were issued because each step of the 2022 Transaction complied with the Indentures. *See supra* Section II.A.

Agreement"; and finally (5) "the Exchange Agreement," the 1L and 1.25L Indentures, and other Exchange-related documents.[43] The Third Supplemental Indentures would be executed, the Notes Purchase Agreement effective, and the Additional 2026 Notes issued, before the signature pages to the Fourth Supplemental Indentures would be released or the Exchange consummated.

The transaction followed the agreed steps. The parties made sure, first, to allow for ***and*** consummate the Note Purchase, second, to provide consents to the Fourth Supplemental Indentures (including consents by the newly issued notes), and third, to consummate the Exchange:

- **March 28, 2022, 8:15 am ET**. All transaction parties[44] held a brief closing call (the "***Closing Call***")[45] and the Closing Call Agenda was read out loud in its entirety.[46] All parties provided their agreement to release their signatures in the order set forth in the Closing Call Agenda.[47]

- **March 28, 2022, 8:27 am ET and 8:30 am ET**. With the consent of over 50% of the then-outstanding Notes in each tranche, the Third Supplemental Indentures, along with supporting documents and noteholder consents, were delivered to WSFS and the Indentures were amended to allow for the issuance of the Additional 2026 Notes.[48]

- **March 28, 2022, 12:54 pm ET.** The wire process, which had been initiated after the Closing Call, completes with the final wire sent to the Company.[49]

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[43] ECF 1146-5 at 2-3. This process, in which each party agrees to release its signatures upon the occurrence of a subsequent events, is common in complex transactions. *See* ECF 1350 (Healy) at 59:12-18.

[44] ECF 1184 (Osornio) at 15:22-16:1.

[45] *Id.* at 15:4-5.

[46] *Id.* at 42:14-25, 43:16-18.

[47] *Id.* at 34:3-16; *see also id.* at 35:9-21 ("[T]he order started with the release of signature pages for the third supplemental indentures that allowed for the issuance of the initial notes. . . . Then the second was the release of the signature pages for the note purchase agreements for the initial notes. That was followed by the release of signature pages for the fourth supplemental indentures and related documentation. The next was the release of signature pages for the amended security agreement; And then, lastly, the -- the release of signature pages for the new 1L and one and a quarter L indentures and notes. Followed by the exchange-related documentation."); *see also* ECF 1146-5.

Any notion that the signatures were released at the same time (and thus all 2022 Transaction Documents became effective simultaneously) not only disregards the clear conditions precedent set forth in the 2022 Transaction Documents, but it misrepresents the parties' statements on the Closing Call, during which each party agreed to release its respective signatures at the appropriate time throughout the day.

[48] ECF 1150-4; ECF 1150-5. The relevant voting consents are available at: ECF 601-27; ECF 601-29; ECF 603-2; ECF 604-16; ECF 602-37; ECF 604-40; ECF 603-5; ECF 603-16; ECF 604-24; ECF 604-2; ECF 602-33 (consent letters); *see also* ECF 1362-7 at 5-7 (providing total outstanding principal amounts as of Mar. 22, 2022).

[49] ECF 1150-10.

- **March 28, 2022, 1:37 pm ET**. Once the Company confirmed receipt of funds from the Participating Secured Noteholders, the Company instructed WSFS to authenticate and issue the Additional 2026 Notes.[50]

- **March 28, 2022, 1:43 pm ET**. Scans of the Additional 2026 Notes were delivered via email to the applicable Participating Noteholders.[51]

- **March 28, 2022, 2:13 pm ET and 2:16 pm ET**. With the consent of holders who held 66⅔% of the 2024 and 2026 Notes then outstanding, as well as more than 50% of the outstanding Unsecured Notes, the Fourth Supplemental Indentures, along with supporting documents and noteholder consents, were delivered to WSFS and the Indentures were amended to allow for the release of the liens securing the 2024 and 2026 Notes and the Exchange.[52]

- **March 28, 2022, 2:19 pm ET**. The 1L and 1.25L Notes Indentures were delivered to WSFS along with an instruction to authenticate and issue the 1L and 1.25L Notes.[53]

- **March 28, 2022, 2:25 pm ET**. The Company instructed WSFS to begin the "DWAC process" in accordance with previously circulated spreadsheets.[54]

- **March 28, 2022, 3:08 pm ET**. The Company informed the Participating Noteholders that the 2022 Transaction was complete and reminded the Participating Noteholders to transfer their existing 2024 Notes, 2026 Notes, and Unsecured and PIK Notes to U.S. Bank for cancelation.[55]

- **March 28, 2022, around 3:08 pm ET**. The Additional 2026 Notes were cancelled via the application of a physical stamp by the Company's attorneys.[56]

In light of this chronology, it is obvious that the handful of cherry-picked, out-of-context email statements on which the 2024/2026 Holders relied in their Opening Statements,[57] were simply informal shorthand references to what was happening on the Closing Day. These emails

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[50] ECF 1150-11.

[51] ECF 1155-1; ECF 1155-2; ECF 1155-3; ECF 1155-4; ECF 1155-5; ECF 1155-6; ECF 1155-7.

[52] ECF 710-43 at 2; ECF 1150-16; ECF 1150-18. The relevant voting consents are available at: ECF 602-22; ECF 603-17; ECF 603-8; ECF 603-10; ECF 603-11; ECF 603-13; ECF 603-29; ECF 604-1; ECF 604-17 (consent letters); *see also* ECF 1362-7 at 5-7.

[53] ECF 1150-19.

[54] ECF 1150-21.

[55] ECF 1150-23.

[56] ECF 1184 (Osornio) at 139:19-140:23, *see, e.g.*; ECF 726-19, 726-20. WSFS authorized this process. ECF 1350 (Healy) at 130:5-16.

[57] *See, e.g.*, ECF 733-55 (Milbank email noting that documents would be released in order); ECF 710-9 (Davis Polk email referencing signature escrow release process); ECF 723-8 at 2 (Carlyle email (Jesse Hou) describing timing of closing).

simply cannot refute the timeline outlined above, which is backed not only by the sworn testimony of multiple witnesses, but also by objective, computer-generated time stamps showing when the transaction steps occurred.

At trial, the 2024/2026 Holders also made much of the fact that PIMCO's internal trade logs do not reference the Additional 2026 Notes.[58] But the 2024/2026 Holders ignored Silver Point's and Citadel's trading logs, which ***do*** show purchases of the Additional 2026 Notes on March 28. Plainly, the inconsistency in PIMCO's trade logs has no probative value (and, in any event, other contemporaneous PIMCO records do reflect receipt of the Additional 2026 Notes).[59] At most, this discrepancy reflects idiosyncrasies in the back-office bookkeeping practices.

E. The Original Secured Indentures Do Not Protect Noteholders From The Dilution Of Their Voting Power Through The Issuance Of Additional Notes

Aside from the inapposite integrated agreement doctrine, the 2024/2026 Holders offer a menu of contractual arguments, but each is a different serving of the same dish: an effort to read into the Indentures a protection against vote dilution that does not exist. They are clear: new notes may vote in connection with a purchase or exchange, including to release liens and allow for senior debt, and each step in multi-step transactions must be given effect. *See supra* Section II.B. The Court should rule for the Counterclaim Defendants based on those terms of the Indentures alone.

But to the extent the Court does find ambiguity in the Original Secured Indentures, the 2024/2026 Holders' own conduct and communications reveal that they understood full well that newly issued notes would be permitted to vote their consent.[60] That conduct shows that the

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[58] ECF 725-28, 725-21.

[59] *See* ECF 729-53 at 45; ECF 725-21 (row five); ECF 1155-1 at 1; *see also* ECF 1266 at 7-8.

[60] "Ambiguity in a contract arises when the contract, read as a whole, fails to disclose its purpose and the parties' intent, or when specific language is ***susceptible of two reasonable interpretations***." *Donohue v. Cuomo*, 38 N.Y.3d 1, 13 (N.Y. 2022). Where the Court finds ambiguity, the Court may consider extrinsic evidence to determine the Indentures' meaning. *See id.* (extrinsic evidence admissible if a court "finds an ambiguity in the

2024/2026 Holders expected that the issuance of new notes ***could*** be used for dilution, even though their litigation position is to the contrary.[61]

Significantly, in the winter of 2022, while attempting to assemble a purported "blocking position," the 2024/2026 Holders anticipated and planned for the possibility of dilution through the issuance of new notes and were unsurprised by reports that the Company might expand its debt baskets to issue additional notes for that purpose. The group specifically planned for the potential that the Company might issue $75 million under its existing baskets without any necessary consents or amendments.[62] Indeed, as of February 19, 2022—well ***before*** a March 1 press article reporting that the Company might issue additional notes to achieve supermajority consent—Golden Gate was "already running the math" as to whether the group had a "super-blocking position," meaning a dilution-protective position or "one-third of the 2026 notes, taking into account the company's existing baskets to issue additional secured notes."[63] In late February 2022, Mr. Seketa of JPMorgan advised his colleagues that the Company "might attempt to dilute our group's voting power" and recommended "growing the size of the block."[64]

The 2024/2026 Holders also understood the risk that their position could be diluted beyond the existing $75 million of debt capacity by way of an amendment. On March 1, 2022, Reorg

contract"); *see also Paragon Res., Inc. v. Nat'l Fuel Gas Distrib. Corp.*, 695 F.2d 991, 997 (5th Cir. 1983) ("Great weight should be given to a practical construction of the contract by defendant.") (applying New York law).

[61] The 2024/2026 Holders' post-hoc assertions about what the Original Secured Indentures purportedly require should, in contrast, be rejected. *See, e.g.*, *Huber v. ARCK Credit Co.*, LLC, 2015 WL 14077892, at *3 (S.D.N.Y. Jan. 28, 2015) (courts should "view a party's post-hoc statements" about contractual intent "made for purposes of litigation" with "skepticism"); *Madeleine, L.L.C. v. Casden*, 950 F. Supp. 2d 685, 694 (S.D.N.Y. 2013) (rejecting a "lawyer-and-litigation-driven" contract reading "having nothing to do with the actual intent of the parties at the time of drafting").

[62] *See* ECF 970 (Seketa) at 90:10-14; *see also id*. at 88:6-11 ("THE COURT: So did you consider the $75 million potential basket issuance in calculating whether you had reached the blocking percentage? THE WITNESS: Yes."); *id*. at 87:4-8.

[63] ECF 1062 (Wang) at 148:18-20; *see also* 147:19-23 (confirming the meaning of the term).

[64] ECF 705-58 at 2; *see also* ECF 970 (Seketa) at 94:2-4**;** *see also id.* at 95:9-12.

Research reported that the Company might dilute the 2024/2026 Holders' purported blocking position by amending the Company's existing debt baskets.[65] Mr. Seketa relayed to his boss Mr. Cook that the report revealed "***[n]othing particularly new***," merely "the idea that instead of offering $75mm to dilute us, they would raise more."[66] When Mr. Wang shared the same article at Golden Gate, his colleague Lionel Jolivot confirmed that "in a lot of bond structures, you can amend the regular debt incurrence covenant with only a regular majority of holders," which could allow the Company to "amend first, incur the additional debt, then get to the 2/3rds."[67] "Several" financial advisors also conveyed that additional notes issued under expanded baskets might be used to dilute the 2024/2026 Holders' purported "blocking" position.[68] Piper Sandler warned the 2024/2026 Holders that the Company "may seek to circumvent any block in the 2026s by upsizing the tranche to dilute the [2024/2026 Holders]" and that the Company could issue $100 to $200 million of *pari passu* secured debt "with ***majority consent*** from secured notes and unsecured notes."[69] Similarly, Rothschild and Guggenheim provided materials to the 2024/2026 Holders that advised the Company needed only majority consent to amend the Indentures' baskets.[70]

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[65] ECF 705-64 at 2-4 (Seketa sharing article, which concluded that because the two-thirds consent threshold "applies to secured notes '*then outstanding*,'" the Company "could theoretically issue a sufficient amount of additional 2026 secured notes such that the . . . 2026 secured notes held by the [2024/2026 Holders] represents *less* than 33.33% of all outstanding 2026 secured notes" and that "because amendments that provide the company with additional debt capacity require consent from only a majority of holders" and "there are no explicit prohibitions," the Company could "us[e] its general purpose debt capacity to issue additional 2026 secured notes to friendly investors, which could then provide the necessary consents for a superpriority uptier exchange").

[66] ECF 705-64 at 2; ECF 970 (Seketa) at 120:25-121:2 ("Q And you read this article very carefully before sending it to your boss, didn't you? A I hope so.").

[67] ECF 705-61; ECF 1062 (Wang) at 76:19-77:8 (Mr. Jolivot was a managing director at Golden Gate's affiliate, Angel Island Capital with a "wide brea[d]th of investing experience").

[68] ECF 970 (Seketa) at 99:1-13 (acknowledging receipt of "several decks that suggested that the issuance of new notes was a possibility.").

[69] ECF 705-65 at 11; ECF 970 (Seketa) at 102:14-17 ("Q And the strategic consideration in the right hand column warned you that the company may seek to circumvent any block that your group had. Isn't that correct? A Yes.").

[70] ECF 970 (Seketa) at 110:17-19 (identifying Rothschild discussion materials); *id.* at 116:10-14 ("Q Isn't it true that when you received this financial advisor [deck] Rothschild notified you that the requisite consent thresholds that were required to amend the indenture covenant baskets was 50 percent? A That's what this document says.").

The vote dilution technique was not new. Even prior to negotiating the Original Secured Indentures in 2019, JPMorgan knew first-hand that new notes could be used to dilute voting power—because JPMorgan itself used that tactic in the 2017 Windstream transaction. In that deal, the company (with JPMorgan's participation) issued new notes to dilute the voting power of a minority noteholder to prevent that holder from exercising its right to declare an event of default.[71]

Moreover, the 2024/2026 Holders' internal communications confirm that they shared the understanding that amending the Indentures' covenants on debt and lien capacity was subject only to a majority consent threshold—contrary to their current litigation position.[72] Most notably, shortly after the 2022 Transaction closed, JPMorgan acknowledged in a communication to its own investment clients that the Company had "***amass[ed] sufficient majorities*** in each of the respective debt issuances" before "remov[ing] the collateral securing the existing 8.5% and 9% notes."[73]

F. Amending The Original 2026 Indenture To Authorize The Issuance Of The Additional 2026 Notes Did Not Breach The Indenture

To manufacture an anti-dilution protection provision, the 2024/2026 Holders posit several theories as to why the Third Supplemental Indentures breached provisions of the Original 2026 Indenture or required supermajority consent under Section 9.02. Each of these arguments fails.

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[71] ECF 970 (Seketa) at 94:16-20 ("Q And you were specifically aware of the possibility of diluting votes through the issuance of new notes because you yourself attempted doing that very thing in Windstream. Right? A Windstream attempted to do that. We exchanged out bonds.").

[72] ECF 718-6 at 3 (JPMorgan email describing the 2022 Transaction as a "multi-step transaction" that "first amended the 9% 2026 indenture to allow the company to issue $250mm of new notes under that indenture (***required 50% of principal, which the PIMCO group had***; this new issuance diluted the blocking position that our group held)"); ECF 1025-1 at 4 (explaining that "[w]ith 50% of secured bonds, SP/PIMCO waived debt incurrence baskets . . . [and i]ssued $250m of new pari 2026 bonds to SP/PIMCO thereby diluting our minority blocking position to less than 1/3.").

[73] ECF 718-19 at 2 ("This is my summary we've sent to clients."); *see also* ECF 970 (Seketa) at 220:5-9 (The Court decided that this "external statement of what occurred" is "an adoption of the truth of the matters that are communicated to the clients.").

1. *Issuing Additional 2026 Notes Did Not Breach Sections 2.01, 4.09, 4.12 or 4.26 of the Original 2026 Indenture*

First, the 2024/2026 Holders assert that the Third Supplemental Indentures breached Sections 2.01, 4.09, and 4.12 of the Original 2026 Indenture by "indirectly" creating unpermitted debt and liens. The 2024/2026 Holders' argument rests on the false premise that, as they put it, "[t]he Governing Indentures expressly prohibit the issuance of any 'Additional Secured Notes' . . . to '***directly or indirectly***' create, incur, assume, or suffer to exist any Lien of any kind (other than Permitted Liens), securing Indebtedness of the Issuer."[74] But the Original Secured Indentures say no such thing. Rather, Section 2.01, which governs the issuance of "Additional Secured Notes," provides only that "the Issuer's ability to issue Additional Secured Notes shall be subject to the Issuer's compliance with Sections 4.09 and 4.12 hereof."[75]

In other words, the Company was permitted to issue Additional 2026 Notes ***up to the limits*** (*i.e.*, the "baskets") set forth in Sections 4.09 and 4.12, which govern, respectively, "Permitted Debt" and "Permitted Liens."[76] But those limits are not set in stone; like all provisions of the indenture, they are subject to amendment. The Company accordingly amended the debt and lien baskets imposed by Sections 4.09 and 4.12, including the definition of "Permitted Liens," before issuing the Additional 2026 Notes.[77] Before and after those notes were issued, the Company was in compliance with the limits on debt and liens then in effect.

To the extent that the 2024/2026 Holders argue that the prohibition in Section 4.12 against "directly or indirectly" creating liens other than Permitted Liens precluded the Participating

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74 Main Case ECF 652 ¶ 116 (quoting Original 2026 Indenture § 4.12) (emphasis in original).

75 ECF 601-8 § 2.01(e).

76 *See id.* §§ 4.09, 4.12.

77 *See* ECF 1150-4 (Mar. 28, 2022 email from A. Osornio of Milbank to P. Healy of WSFS attaching "the execution versions of the Third Supplemental Indenture[s] . . . ***to permit the incurrence*** of the 2026 Additional Notes").

Secured Noteholders from voting the Additional 2026 Notes in favor of the Fourth Supplemental Indentures, that argument is plainly foreclosed by the language of Section 9.02. As noted above, Section 9.02 provides that "consents obtained in connection with a . . . purchase of . . . the 2026 Secured Notes" must be counted for voting purposes.[78] Further, the notion that Additional 2026 Notes can never be voted in favor of releasing liens is contrary to Section 2.01(e), which provides that Additional 2026 Notes "shall have the same terms as to status, redemption, or otherwise as the Initial Secured Notes."

The 2024/2026 Holders have also insinuated (but never pleaded) that the 2022 Transaction breached the prohibition in Section 4.26 against "further pledge[s] [of] the Collateral as security or otherwise."[79] It did not. The prohibition against "further pledge[s] of the Collateral" is expressly "subject to Permitted Liens."[80] Because the definition of "Permitted Liens" was amended to include the liens securing the Additional 2026 Notes before the Additional 2026 Notes were issued, the issuance of the Additional 2026 Notes was not a prohibited "further pledge [of] the Collateral."

2. *The 2024/2026 Holders' Strained Attempt To Shoehorn Amendments To Secured Debt Capacity Into Heightened Consent Categories Fails*

Next, the 2024/2026 Holders argue that amending the Original 2026 Indenture to increase the Company's secured debt capacity required supermajority consent. But Section 9.02 provides that an amendment only requires the consent of holders of a majority of the outstanding principal amount of 2026 Notes, unless an exception specifically applies.[81] Nothing in the Original 2026

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[78] ECF 601-8 § 9.02.

[79] ECF 601-8 § 4.26.

[80] *Id.*

[81] *See* ECF 601-8 § 9.02 ("***Except as provided below*** in this Section 9.02, the Issuer, the Guarantors, the Trustee and the Notes Collateral Agent ***may amend or supplement this Indenture*** . . . ***with the consent of the Holders of at least a majority in aggregate principal amount*** of the then outstanding 2026 Secured Notes.").

Indenture suggests that its limitations on debt and liens are excepted from this default rule, and the Third Supplemental Indentures—which merely increased secured debt capacity—are the exact kind of run-of-the-mill amendments that are subject to the ordinary rule of majority consent. None of the supermajority consent provisions in Section 9.02[82] applies to this kind of amendment.

Supermajority Provision 1: Amendments that "have the effect of releasing all or substantially all of the Collateral from the Liens." The Third Supplemental Indentures did not "have the effect of releasing" ***any*** collateral from liens.[83] The Third Supplemental Indentures only (i) amended the definition of "Permitted Liens" to include "Liens securing . . . the Additional 2026 Secured Notes" and (ii) amended Section 4.09 to permit "the incurrence by the Issuer . . . of Indebtedness represented by . . . the Additional 2026 Secured Notes."[84] Neither of those changes released liens or had the effect of releasing liens.

To get around this obvious point, the 2024/2026 Holders argue that the Third Supplemental Indentures "had the effect" of releasing liens because their "purpose was to enable the preordained yet contemporaneous Fourth Supplemental Indenture."[85] Even if that were true, an amendment's supposed "purpose" (which can only be determined from the vantage point of particular parties) is distinct from its actual "effect." Thus, the 2024/2026 Holders' argument is unfaithful even to the text they try to squeeze into. Moreover, the record is clear that the Fourth Supplemental Indentures came after and were not "contemporaneous" with the Third Supplemental Indentures.[86] Further,

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[82] *See* ECF 601-8 § 9.02 ("[W]ithout the consent of at least 66⅔% in aggregate principal amount of the 2026 Secured Notes then outstanding (including, without limitation, consents obtained in connection with a purchase of, or tender offer or exchange offer for, the 2026 Secured Notes), no amendment, supplement, or waiver may . . . .").

[83] *Id.*

[84] ECF 601-39 § 2.

[85] ECF 200 at 18.

[86] *See supra* Section II.D.

the Debtors' interpretation of the clause does not render the "have the effect" language superfluous, as the 2024/2026 Holders have suggested. It is easy to conceive of an amendment that has the effect of releasing liens without actually doing so.[87] The language is inapplicable, not superfluous.

Supermajority Provision 2: Amendments that "make any change in the Security Documents, the Intercreditor Agreements or the provisions in this Indenture dealing with the application of proceeds of the Collateral that would adversely affect the Holders of the 2026 Secured Notes." As noted, the Third Supplemental Indentures amended the definition of "Permitted Liens" and the kinds of "Permitted Debt" allowed under Section 4.09. Neither of these provisions deal with the "application of proceeds of Collateral." Other provisions of the Original 2026 Indenture do. For example, Section 6.11 specifies the order in which "any money or other property distributable in respect of the Issuer's obligations under this Indenture" must be distributed. The definitions of Permitted Liens and Permitted Debt, in contrast, only concern the amount of secured debt the Company can incur, without regard to how collateral proceeds are distributed on account of such debt in the event of default or otherwise.

Supermajority Provision 3: Amendments that "modify the Security Documents or the provisions of this Indenture dealing with Collateral in any manner adverse to the Holders of the 2026 Secured Notes in any material respect other than in accordance with the terms of this Indenture, the Security Documents or the Intercreditor Agreements." To fall within this clause, an amendment must (i) either "modify the Security Documents" or "provisions of this Indenture dealing with Collateral," (ii) do so in a manner materially adverse to noteholders, and (iii) not have been done in accordance with the terms of the Indenture, Security Documents, or Intercreditor

[87] For example, an amendment to the Security Documents changing the beneficiaries of an existing lien would "have the effect" of releasing the lien as to the holders of the 2026 Notes, even though the lien itself would remain in place. So would amending the definition of "Excluded Collateral" in the Notes Security Agreement to include property securing the 2026 Notes that does not presently fall within the definition.

Agreements. The Third Supplemental Indentures did not satisfy any of these, let alone all three.

First, the Third Supplemental Indentures did not "modify the Security Documents" or "provisions of this Indenture dealing with Collateral." The Third Supplemental Indentures did not make any changes to the Security Documents for the 2026 Notes.[88] Although the Notes Security Agreement uses the term "Permitted Liens," the term is defined in the Notes Security Agreement to simply mean "any Lien that constitutes a 'Permitted Lien' under each Indenture ***then in effect***."[89] Thus the Third Supplemental Indentures did not modify the definition of "Permitted Lien" in the Notes Security Agreement: before and after the amendment, the term was the same—*i.e.*, any "Lien" that is a "Permitted Lien" under the Indenture "then in effect."[90]

The Third Supplemental Indentures also did not modify "provisions of [the Original 2026] Indenture dealing with Collateral." Unlike the many provisions that concern the maintenance, use, and disposition of "Collateral,"[91] the provisions amended by the Third Supplemental Indenture concern only the Company's ability to incur secured debt. Not every provision that relates to

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[88] *See* ECF 601-39 § 2.

[89] *See* ECF 601-24 Art. IX (definition of "Permitted Liens").

[90] Notably, the third supermajority provision of Section 9.02 does ***not*** use the "have the effect of" language contained in the first supermajority provision. Per the 2024/2026 Holders' own argument, the absence of this language implies that an amendment only "modif[ies] the Security Documents" if it directly changes the contents of the Security Documents, which did not happen here. In other words, if the use of the "have the effect of" language in the first supermajority provision expands the scope of that provision, its absence from the third supermajority provision necessarily means that the scope of that provision is more limited.

[91] *See, e.g.*, ECF 601-8 § 4.23(a) ("[T]he Issuer and Guarantors shall maintain the Collateral in good, safe and insurable operating order, condition and repair . . . and do all other acts as may be reasonably necessary or appropriate to maintain and preserve the Collateral."); *id.* § 4.23(b) ("[W]ith respect to Collateral, the Issuer will . . . maintain liability and property insurance policies and coverage with reasonable policy limits and deductibles as may be necessary to adequately protect the Notes Collateral Agent's interests in the Collateral."); *id.* § 5.01(a)(7) ("The Issuer will not . . . sell, assign, transfer, lease or otherwise dispose of all or substantially all of the properties or assets of the Issuer . . . unless . . . the Collateral owned by or sold, assigned, conveyed, leased, transferred or otherwise disposed of to the Surviving Entity shall [ ] continue to constitute Collateral under this Indenture and the Security Documents . . . ."); *id.* § 12.05 ("[S]o long as the Trustee . . . has not exercised rights or remedies with respect to the Collateral in connection with an Event of Default that has occurred and is continuing, the Issuer . . . shall have the right to remain in possession and retain exclusive control of and to exercise all rights with respect to the Collateral.").

secured debt is one that "deal[s] with Collateral." Indeed, if that were so, then nearly every provision in a secured note indenture would meet that criteria. There is perhaps no better evidence of this than the fact that the provisions of the Original Secured Indentures that "deal[] with Collateral" (*i.e.*, those that govern the maintenance, use, and disposition of "Collateral") ***are omitted from the Unsecured Indenture***.[92] The term "Collateral" is not even a defined term in the Unsecured Indenture. That makes perfect sense because unsecured noteholders by definition have no rights in the Collateral, so there was no reason for the unsecured indenture to contain provisions "dealing with Collateral." But the Unsecured Indenture ***does*** contain "Permitted Debt" and "Permitted Liens" baskets virtually identical to those in the Original Secured Indentures, thus confirming that the definitions of Permitted Liens and Permitted Debt are not provisions "dealing with Collateral." Indeed, Section 9.02 itself recognizes the distinction between ***security interests***, on the one hand, and ***Collateral***, on the other, by separately referencing amendments that bear on holders' security interests (*i.e.*, amendments that release liens or alter the application of Collateral proceeds) and amendments to provisions of [the Original 2026] Indenture dealing with Collateral."

Second, the Third Supplemental Indentures were not "adverse to the Holders of the 2026 Secured Notes in any material respect." The authorization to issue $250 million in Additional 2026 Notes was to infuse the Company with fresh capital at a critical time of financial distress. The subsequent voting of those notes to release the 2024/2026 Holders' liens was not part of the Third Supplemental Indentures and is only relevant if the Court collapses the 2022 Transaction steps which, as explained above, *supra* Section II.B, would be contrary to New York law. And while the 2024/2026 Holders have asserted that the issuance of the Additional 2026 Notes was materially adverse because "each new dollar of this $250 million in new secured

[92] None of the above-cited provisions, *supra* n.91, appear in the Unsecured Indenture. *See* ECF 601-7.

Indebtedness incurred against the Collateral diminished the 2026 Holders' preexisting security interests,"[93] this argument glosses over the fact that the cash raised through the Additional 2026 Notes was itself "Collateral" securing the 2026 Notes, and therefore did not diminish "the 2026 Holders' preexisting security interests."[94] As such, neither the Third Supplemental Indentures—which merely authorized the issuance of the Additional 2026 Notes—nor the issuance of Additional 2026 Notes, was materially adverse to the 2024/2026 Holders.

Third, the 2024/2026 Holders routinely omit the clause that begins with "other than in accordance with" from their arguments about this provision. But this language makes clear that the two-thirds consent requirement is only triggered if the amendment would separately result in a breach of the Indenture, the Security Documents or the Intercreditor Agreements. If the amendment would not result in such a breach, and the 2024/2026 Holders have not shown any here, then the default simply majority consent requirement applies.

Arguments Based on Rules of Construction. Because the supermajority consent provisions do not apply to the Third Supplemental Indenture, the 2024/2026 Holders have argued that the boilerplate "words in the singular include the plural" language of Section 1.03 requires the Court to collapse the amendments.[95] This argument makes no sense and is contrary to the plain language of the Indentures themselves, which expressly provides for different consent thresholds on an amendment-by-amendment basis.[96] And even if the Section 9.02 said "amendments," plural,

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[93] ECF 200 at 16.

[94] *See* ECF 601-24 (Notes Security Agreement) § 1.1(a)(ii) ("As security for the prompt and complete payment or performance . . . each Grantor does hereby pledge and grant to the Notes Collateral Agent, for the benefit of the Secured Parties, a continuing security interest in all of the right, title and interest of such Grantor in . . . whether now existing or hereafter from time to time acquired . . . all cash."); *see also* ECF 827 (Smith) at 89:24-90:3 ("And so the company was going to issue notes. They were going to get cash in return. That cash was going to sit in the guarantor group not get moved somewhere else.").

[95] ECF 326 at 10 n.10, 17.

[96] *See, e.g.*, ECF 601-8 § 9.02.

that still would not mean the effect of multiple amendments must be required cumulatively, rather than individually. The boilerplate "plural" rule simply does not have the reach that they try to impute to it.

The 2024/2026 Holders likewise argue that the rule that "[p]rovisions apply to successive events and transactions" also serves to "collapse" amendments or transactions.[97] That is also incorrect. That boilerplate language from the Revised Model Indenture serves an entirely different purpose: "*Successive Successors, Occurrences, etc.* Clause (5) is intended to ***underscore*** the intended application and re-application of definitional provisions like 'Company' and 'Trustee' in Section 1.01, and operating provisions like Sections 5.01 and 10.06, to successive obligors, fiduciaries, mergers, conversion adjustments, etc."[98] Moreover, while many provisions of the Original Secured Indentures specifically provide that they apply to "a series of transactions" or "a series of related transactions,"[99] Section 9.02 does not.[100] The provision simply is not on point.

III. THE ADDITIONAL 2026 NOTES WERE VALID AND OUTSTANDING

During trial, the 2024/2026 Holders devised a new argument: the Additional 2026 Notes were not valid and outstanding because they were not authenticated by a manual signature of the Trustee. This argument fails: the Additional 2026 Notes were authenticated with the Trustee's manual signature, but regardless, any alleged defect is only for the Issuer or Trustee to raise and is immaterial given that all the Parties to the Additional 2026 Notes agreed they were authentic.

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[97] *See, e.g.*, ECF 1297 at 178:14–22.

[98] Model Indenture, 55 Bus. Law. at 1146. Under New York law, such boilerplate provisions are given consistent interpretations in line with the model indenture provisions and associated commentaries. *See, e.g.*, *Cortlandt St. Recovery Corp. v. Bonderman*, 96 N.E.3d 191, 201-02 (N.Y. 2018).

[99] *See, e.g.*, ECF 601-8 at 13 ("Change of Control"), 34 ("Permitted Investments"), 40 ("Permitted Parent"), 44 ("Reorganizations"), § 4.11 ("Transactions with Affiliates").

[100] *See id.* § 9.02.

A. Facts Relevant To The Authentication Of The Additional 2026 Notes

The facts are not materially in dispute. The 2026 Indenture required WSFS, as Trustee, to "authenticate" the Additional 2026 Notes that were issued in connection with the 2022 Transaction upon receiving an "Authentication Order" from the Company.[101]

On March 20, 2022, the Company provided WSFS with a draft form of 2026 Additional Secured Note, a draft of the Authentication Order, and an "Authentication and Delivery" certification, pursuant to which WSFS would confirm that it had authenticated the notes.[102]

Prior to the closing, the Company asked WSFS to provide signature pages for the authentication of the Additional 2026 Notes.[103] Specifically, on March 11, 2022, Milbank asked Mr. Patrick Healy, a representative of WSFS, to provide 30 signature pages, which Mr. Healy executed.[104] Then, on March 18, 2022, the Company asked WSFS to provide 35 "additional wet ink signature pages for the Rule 144A definitive notes" (*i.e.*, the Additional 2026 Notes),[105] attaching the signature page for the Additional 2026 Notes to be executed.[106] At Mr. Healy's direction, Mr. John McNichol executed those signature pages.[107] WSFS's intent was "[t]o authenticate the notes."[108] On March 21, 2022, Mr. McNichol sent two FedEx packages to Milbank containing 36 signature pages (1 wet-ink page and 35 photocopies of the wet-ink page)

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[101] ECF 601-8 § 2.02 ("A 2026 Secured Note will not be valid until authenticated by the manual signature of an authorized signatory of the Trustee. . . . The Trustee will, upon receipt of a written order of the Issuer signed by an Officer of the Issuer (An *'Authentication Order'*) . . . authenticate . . . any Additional Secured Notes.").

[102] *See, e.g.*, ECF 1298-3 at 1, 18-30, 31-33, 34-36, ECF 1350 (Healy) at 60:8-21. The Authentication and Delivery certificate serves as an acknowledgement from WSFS "that the authentication has occurred and the notes have been delivered." ECF 1350 (Healy) at 99:18-23.

[103] *See* ECF 1298-4 at 1-2; ECF 1350 (Healy) at 69:2-25.

[104] ECF 1298-20; *see also* ECF 1350 (Healy) at 62:7-21, 63:9-12.

[105] ECF 1298-20; ECF 1350 (Healy) at 69:18-70:4.

[106] The signature page for the Additional 2026 Notes follows a form in the 2026 Indenture. ECF 601-8 at A-3.

[107] ECF 1350 (Healy) at 72:13-15; *see also id.* at 77:11-16.

[108] *Id.* at 77:21-24.

and 28 wet-ink signature pages executed by Mr. McNichol for the Additional 2026 Notes.[109] Then, on March 26, 2022, WSFS received executed versions of the Authentication Order and the Authentication and Delivery certificate for the Additional 2026 Notes, which were sent "in escrow pending express release."[110]

A representative of WSFS attended the closing call for the 2022 Transaction on March 28, 2022,[111] and confirmed that the releases of WSFS's signature pages on various documents were to take place in the planned agreed-upon order.[112]

Following the release to the Company of the escrowed purchase proceeds for the Additional 2026 Notes and other relevant closing steps,[113] Milbank, on behalf of the Company, directed WSFS to "move forward with the issuance and authentication of the" Additional 2026 Notes.[114] This direction was accompanied by an Authentication Order, through which the Company "authorize[d] and direct[ed] the Trustee to (i) authenticate on or prior to the date hereof . . . .the aggregate principal amount of $250,000,000 Notes . . . ."[115] The Authentication Order, like the drafts WSFS reviewed, included a schedule of each of the 38 Additional 2026 Notes WSFS was to authenticate, including the details of the registered holder and principal amount for

[109] ECF 1298-12; ECF 1298-13; ECF 1312-1 at 72-74. (FedEx labels). On March 21, 2022, Mr. McNichol executed the Additional 2026 Notes signature page using a wet-ink signature and sent a scan of that page to his counsel, David Smith, stating that "[t]he original and copies will be FedExed with [sic] morning." ECF 1298-4 at 1, 4. Mr. Smith, in turn, forwarded that signature page to Milbank along with the FedEx tracking number of the first package sent. ECF 716-6 at 2, 4.

[110] *See* ECF 711-10 at 1, 5-12; ECF 1350 (Healy) at 52:13-18, 54:20-55:3, 99:6-10.

[111] *See* ECF 1350 (Healy) at 303:13-20, 305:7-16; *see also* ECF 1184 (Osornio) at 15:22-16:1.

[112] *See* ECF 1146-5 at 2-3; *see also* ECF 1184 (Osornio) at 15:22-16:1, 34:3-16.

[113] ECF 1350 (Healy) at 110:25-111:20.

[114] ECF 1150-11 at 1.

[115] *Id.* at 2.

each note.[116] Mr. Smith (WSFS's counsel) confirmed receipt of this direction,[117] which served as confirmation to Milbank that WSFS had authenticated the Additional 2026 Notes and that the Additional 2026 Notes "could be released."[118] WSFS understood that its signatures only became effective on the closing date.[119]

Milbank, on the Company's behalf, then provided WSFS and Davis Polk (counsel to the purchasers of the Additional 2026 Notes) "execution versions" of the Additional 2026 Notes.[120] Again, on WSFS's behalf, Mr. Smith confirmed receipt of the execution versions of the Additional 2026 Notes.[121] Affixed to the "execution versions" of the Additional 2026 Notes were signatures provided by Mr. McNichol in his March 21 FedExes, each on the signature page that Milbank expressly requested for the definitive notes.[122] WSFS also executed the Authentication and Delivery certificate confirming that it had "authenticated an aggregate of $250,000,000" in Additional 2026 Notes, each of which was identified in the schedule to the Authentication and Delivery certificate.[123] WSFS provided the certification letter because it understood it had

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[116] *Id.* at 4-5.

[117] ECF 716-34 at 1.

[118] ECF 1350 (Healy) at 117:15-19.

[119] *Id.* at 117:20-118:3, 299:4-300:1.

[120] ECF 1155-1 at 1.

[121] ECF 1298-19 at 1.

[122] *Compare* ECF 1155-1 at 5, 17, 29, 41, 53, 65, 77, 89: *and* ECF 1155-2 at 8, 20, 32, 44, 56, 68, 80, 92; *and* ECF 1155-3 at 9, 21, 33, 45, 57, 69, 81, 93; *and* ECF 1155-4 at 10, 22, 34, 46, 58, 70, 82, 94; *and* ECF 1155-5 at 12, 24, 36, 48, 60, 72, 84; *and* ECF 1155-6 at 4, 16, 28, 40, 52, 64, 76, 88; *and* ECF 1155-7 at 8, 20, 32, 44; *with* ECF 1312-1 at 7-70. Certificates D-1 through D-36 of the Additional 2026 Notes bore the signature pages McNichol provided in one of the FedEx pages Milbank received on March 22, 2022. *See* ECF 1312-1 at 7-42. Certificates D-37 and D-38 bore signature pages from the other package Milbank received on March 22, 2022. *See* ECF 1312-1 at 43-44. Milbank was charged with affixing those signature pages (along with the Company's) to the Additional 2026 Notes. *See* ECF 1184 (Osornio) at 98:4-13; *see also* ECF 1350 (Healy) at 285:25-286:12. This was a common practice for WSFS. ECF 1350 (Healy) at 99:3-5.

[123] *See* ECF 601-35 at 1, 3-4.

authenticated the Additional 2026 Notes.[124]

B. The Trustee Authenticated The Additional 2026 Notes

Under Section 2.02 of the 2026 Indenture, "[a] 2026 Secured Note will not be valid until authenticated by the manual signature of an authorized signatory of the Trustee," which will be conclusive evidence that the 2026 Secured Note has been duly authenticated and delivered under this Indenture."[125] Section 2.02 also addresses the form of signature required from an officer of the Company: "At least one Officer must sign the 2026 Secured Notes for the Issuer by manual or facsimile signature."[126] In other words, a Trustee's signature must be "manual," while an Officer's may be a "manual signature" or "facsimile signature."[127] The 2024/2026 Holders seize on this distinction, but their interpretation of Section 2.02 fails. The 2026 Indenture does not require an original signature or wet ink signature; it requires only a "manual signature," which it distinguishes from a "facsimile signature." These terms are not defined in the Indenture, but their meanings are informed by their context and historical usage.

A "manual" signature is one created by hand, *i.e.*, a handwritten signature. *Manual*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("Used or performed by hand."). Thus, while a "manual" signature may be an original, wet-ink signature, nothing in Section 2.02 precludes the use of a duplicate of an original, wet-ink signature where the underlying signature was created "by hand." Other indentures show that industry participants recognize that there are both "original"

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[124] ECF 1350 (Healy) at 102:3-5 ("Q. Would WSFS have executed the authentication of delivery document if it did not believe that it had authenticated -- A. We would not have provided that letter.").

[125] ECF 601-8 § 2.02. This language is mirrored in the form of the 2026 Secured Note. *Id.* at 160.

[126] *Id.* § 2.02.

[127] Section 2.02 tracks the construction of the Model Indenture in this respect. *See* Model Indenture, 55 Bus. Law. at 1127. Older versions of the Model Indenture had more stringent authentication provisions. *See* ABF Commentaries, App. B § 304, at 20 (1965 model indenture provision providing that trustee's manual signature "*on such Debenture*" shall be "conclusive evidence, ***and the only evidence***" of authentication). Some modern indentures use this construction (*see, e.g.,* ECF 1358-2 at 63). The Original 2026 Indenture does not.

manual signatures and "photocopied" or "duplicate" manual signatures.[128] Mr. McNichol's signatures were *manual signatures* (*i.e.*, created by hand) within the meaning of Section 2.02.

The 2024/2026 Holders depart from the language of the Original Indentures by attempting to distinguish between a "facsimile" and an "original," arguing that the term "facsimile" includes anything that is a "copy."[129] This ignores the history of the term "facsimile signature," described in case law as a term of art, which describes ***a signature created through a mechanical process.***[130] *See Hawaiian Dredging Const. Co. v. United States*, 59 Fed. Cl. 305, 307 n.2 (Fed. Cl. 2004) ("A facsimile signature is a 'signature produced by mechanical means").[131] This is confirmed by Black's Law Dictionary, which provides a definition of "facsimile signature" dating back to 1892: "A signature that has been ***prepared and*** reproduced by mechanical or photographic means." *Facsimile Signature*, BLACK'S LAW DICTIONARY (11th ed. 2019). The quintessential "facsimile signature" is thus a signature produced by a rubber stamp or metal plate that can be applied to ***any*** document by ***anyone*** in possession of the stamp, and in more modern times, an autopen or check signing machine.[132] That is a different concept entirely from a signer manually signing a particular

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[128] *See, e.g.*, First Supplemental Indenture, Chart Industries, Inc. (Dec. 31, 2020) § 5 (differentiating between "(i) an original manual signature" and "(ii) a faxed, scanned, or photocopied manual signature"), *available at* https://www.sec.gov/Archives/edgar/data/892553/000119312521003205/d104801dex41.htm); Supplemental Indenture, Regional Management Insurance Trust (Oct. 30, 2020) § 6 (same), *available at* https://www.sec.gov/Archives/edgar/data/1519401/000156459020051441/rm-ex108_221.htm).

[129] *Facsimile*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("1. An exact copy. 2. FAX.").

[130] This distinction is supported by the fact that Black's Law Dictionary has separate definitions for *facsimile* and *facsimile signature*. *See Facsimile*, BLACK'S LAW DICTIONARY (11th ed. 2019); *Facsimile Signature*, BLACK'S LAW DICTIONARY (11th ed. 2019).

[131] State statutes apply the term "facsimile signature" similarly. *See, e.g.,* NEV. REV. STAT. ANN. § 227.090 (2001) ("The State Controller may use a facsimile signature produced through a mechanical device in place of his or her handwritten signature whenever the necessity may arise . . . .").

[132] *See, e.g.*, *Robb v. Pa. Co. for Ins. on Lives & Granting Annuities*, 3 Pa. Super. 254, 259 (Pa. Super. Ct. 1897) (referencing "rubber stamp by which a facsimile of [a] written signature may be affixed to papers"); *Hill v. United States*, 288 F. 192, 193 (7th Cir. 1923) (discussing use of facsimile signatures at a bank); *Bd. of Comm'rs of Cherokee Cnty. v. U.S. Fid. & Guar. Co.*, 40 P.2d 371, 372 (Kan. 1935) (discussing use of "facsimile signature stamp"). *Autopen*, MERRIAM-WEBSTER (last visited June 17, 2024), https://www.merriam-webster.com/dictionary/autopen ("a device that mechanically reproduces a person's signature").

signature page for a transaction and photocopying it for use in that transaction. *See In re Cambridge Marine Indus., Inc.*, 61 Comp. Gen. 187, 190 (Comp. Gen. Dec. 31, 1981) (accepting a photocopied handwritten signature as being a "***manually signed*** . . . duplicate of the original" and noting it was "not the same as a rubber-stamped 'signature' which can be affixed by anyone having access to the stamp."). The 2026 Indenture's use of the term "facsimile signature" is thus a reference to this type of mechanically-produced signature, not a prohibition on copies of a signature that was hand-created for a specific purpose.[133] Thus, the 2026 Indenture recognizes that a "manual signature" does not cease to be "manual" when it is scanned or photocopied.

In any event, there is also no question that WSFS intended for Mr. McNichol's hand-made signature, reproduced for use with multiple notes, to satisfy Section 2.02's signature requirement. The signatory's intent in that regard should control. *Mesibov, Glinert & Levy, Inc. v. Cohen Bros. Mfg. Co.*, 157 N.E. 148, 149 (N.Y. 1927) (explaining that the intent of the party will dictate whether the party's printed name constitutes a signature). WSFS signed signature pages for the Additional 2026 Notes, which conformed to the form appended to the 2026 Indenture.[134] WSFS then executed the required Authentication and Delivery certificate,[135] which was signed with a manual signature under New York law.[136] Mr. Healy, a Senior Vice President and 34-year industry veteran, confirmed that WSFS's intent was to authenticate the notes with Mr. McNichol's

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[133] Section 13.11 of the 2026 Indenture further supports that the parties understood that a manual signature does not cease to be "manual" because it is scanned, faxed, or photocopied. ECF 601-8 § 13.11 ("Delivery of an executed counterpart of a signature page to this Indenture by facsimile, email or other electronic means shall be effective as delivery of a manually executed counterpart of this Indenture.").

[134] *See* ECF 1312-1; *supra* n.109; ECF 608-1 at A-3 (form additional notes)

[135] ECF 711-10 at 9.

[136] Under New York law, an electronic signature has "the same validity and effect as the use of a signature affixed by hand." N.Y. State Tech. Law § 304(2). Mr. McNichol signed the Authentication and Delivery certificate with his "digital signature" through PDF. *See* ECF 1397-1 (McNichols' Dep. Tr.) at 143:12-24.

signatures.[137]

C. The 2024/2026 Holders Cannot Challenge The Purported Defect In The Notes

As third-party beneficiaries of the 2026 Indenture, the 2024/2026 Holders are not entitled to raise a purported signature defect in notes they do not hold based on the enforcement of a provision that was not intended for their benefit. *Lake Placid Club Attached Lodges v. Elizabethtown Builders, Inc.*, 521 N.Y.S.2d 165, 166 (N.Y. App. Div. 3d Dep't 1987) ("Nonparty enforcement of a contractual promise is limited to an 'intended' as contrasted with an 'incidental' beneficiary."); *see also* Restatement (Second) of Contracts § 302 (1981). "Status as a third party beneficiary does not imply standing to enforce every promise within [the indenture], including those not made for that party's benefit." *BNP Paribas Mortg. Corp.*, 778 at 415.

The manual signature requirement is not intended to benefit ***any*** holder of ***any*** notes issued under the Original Secured Indentures. Section 2.02 is instead intended to protect the Issuer and the Trustee from fraud (that is, counterfeit notes) or overissue (issuing more notes than the Issuer authorized).[138] Disallowing rubber-stamp signatures protects against unsanctioned authentication of unauthorized notes. *Cf. U.S. Fid. & Guar. Co. v. Coca Cola Co.*, 1972 WL 20863 (N.Y. Sup. Ct. 1972) (concerning facsimile signature machine used to create counterfeit stock certificates).

The few cases addressing non-issuer challenges to authentication uniformly reject them. For example, in *Allen v. Lawyers Mutual Insurance Company of Kentucky*, a holder sought to void a note—which stated it would "not be valid or become obligatory for any purpose until authenticated by the manual signature of the authenticating agent"—arguing it was not

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[137] ECF 1350 (Healy) at 5:22, 7:1-3, 77:21-24.

[138] New York courts consider the Model Indenture, including prior versions thereof such as American Bar Foundation Commentaries. *See, supra* n.98. The ABF Commentaries explain with reference to a virtually identical authentication provision that "the principal purposes of authentication are to identify debenture [i.e., the security] with the indenture" and to allow the Trustee to protect against overissue and counterfeiting. *ABF Commentaries* at 141; *see also* Model Indenture, 55 Bus. Law. at 1178.

authenticated with a manual signature but instead bore a stamped signature. 216 S.W.3d 657, 661 (Ky. Ct. App. 2007). The court rejected the challenge because the manual signature requirement "was obviously inserted to protect [the issuer] from delivery of unauthorized certificates" and was "at worst a defect of which [plaintiff] has no standing to complain" that "cannot serve as a basis for avoidance of the contract." *Id.*; *see also Easton v. Butterfield Live Stock Co.*, 279 P. 716, 717-18 (Idaho 1929) (rejecting certificate challenged by non-issuer because "the provision requiring the execution of [trustee's] certificate was ***plainly for the benefit of the [issuer]***").[139]

Further, all parties to the Additional 2026 Notes—the Issuer, the purchasers, and the Trustee—ratified the Notes as valid and outstanding, rendering any purported defect inconsequential. Parties to a contract may ratify or waive any defect through their performance. For example, in *Easton*, bonds were issued without the trustee's required certificate, but the court held that since the company (i) received the money in exchange for the bonds and (ii) treated the bonds as "valid obligations," the facts "clearly establish[ed] a ratification." 279 P. at 718; *see also Feinstein v. Levy*, 503 N.Y.S.2d 821, 822 (N.Y. App. Div. 2d Dep't 1986) (mortgage valid because of issuer's actions acquiescing to it); *Town Council of Lexington v. Union Nat'l Bank*, 22 So. 291, 294 (Miss. 1897) (rejecting argument that lithographic signatures rendered bonds invalid because "it would be a travesty of justice to permit a defeat of recovery on such a pretext" and, in any case, the validity of the bonds had been ratified by subsequent performance).

All of the parties to the Additional 2026 Notes ratified the notes as valid and outstanding. The Company received $250 million in exchange for the Notes and treated the notes as valid,

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[139] To the extent any holder benefits from the requirement, it is the holder ***of the note***. Authentication of a security by an "authenticating trustee" provides warranties "to a *purchaser* for value of the certificated security," including that: "(1) the certificate is genuine; (2) the [trustee's] own participation in the issue of the security is within [its] capacity and within the scope of the authority received by [it] from the issuer; and (3) the [trustee] has reasonable grounds to believe that the certificated security is in the form and within the amount the issuer is authorized to issue." N.Y. U.C.C. Law § 8-208(a).

including by certifying that it had the requisite consents to enter into the Fourth Supplemental Indenture.[140] WSFS represented to the Company that it had authenticated the Notes and executed the Fourth Supplemental Indenture.[141] The Company paid the same exchange fees on the Additional 2026 Notes as it did for the pre-existing 2026 Notes.[142] The Participating Noteholders also treated them as outstanding, purchasing them and representing in consent letters for the Fourth Supplemental Indenture that they owned them.[143]

Moreover, UCC Section 8-205 instructs that the Additional 2026 Notes were valid and outstanding because, where an unauthorized signature is placed on a security certificate in the course of issue, the security ***remains effective*** in favor of a purchaser for value without notice. N.Y.U.C.C. Law § 8-205.[144] Here, the Company directed WSFS to "authenticate" $250 million in notes in the amounts provided in Schedule A and "deliver the New Definitive Notes" to each relevant holder. Neither the Issuer nor any other party expressed any concern over the Trustee's authentication of the notes during their issuance.[145] The parties to the Additional 2026 Notes and the purchasers for value relied on their effectiveness, as they are entitled to under UCC 8-205.

D. Even If There Were A Technical Defect In The Authentication Of The Additional 2026 Notes, The Notes Were Still Valid And Outstanding

But even if there were a technical defect in WSFS's authentication of the Additional 2026 Notes, the Notes are still valid. *See* Restatement (Second) of Contracts § 229 (1981) ("[A] court

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[140] ECF 603-21.

[141] ECF 601-35; 1350 (Healy) at 84:23-86:11, 270:6-9.

[142] ECF 1298-22.

[143] ECF 603-10.

[144] *Cf. Victory Nat'l Bank of Nowata v. Okla. State Bank, Vinita*, 520 P.2d 675, 676 (Okla. 1974) (holder of fraudulent certificate's rights broader than the entitlement to be paid, as plaintiff was "entitled to enforce the certificate to the extent of [the fraudulent agent]'s obligation to the plaintiff secured by the pledge of the certificate of deposit."); *N.J. Bank, N. A. v. Bradford Sec. Operations, Inc.*, 690 F.2d 339, 344-45 (3d Cir. 1982) (Section 8-205 protects an innocent third party from losses occasioned by conduct of the issuer or transfer agent).

[145] ECF 1184 (Osornio) at 194:2-9.

may excuse the non-occurrence of that condition unless its occurrence was a material part of the agreed exchange."). Courts reject challenges to bonds based on minor technical defects, or even when the trustee's authentication is entirely absent. *See, e.g.*, *Hicks v. Fruen Cereal Co.*, 233 N.W. 828, 830 (Minn. 1930) (determining, in action to determine effect of bonds lacking required trustee certificate, that if holder "gave his money for the bonds" then "a court of equity will give them effect"); *Gunther v. Mayer*, 22 N.Y.S. 50, 52 (N.Y. Gen. Term 1983), *aff'd*, 34 N.E. 513 (N.Y. 1893) (absence of a trustee's certificate was not fatal to the bonds). Well-regarded treatises likewise recognize that technical errors cannot invalidate bonds. *See ABF Commentaries* at 158 ("As a general rule, technical defects in the execution of the debentures will not affect their validity as obligations of the Company.")[146] Rather, courts invalidate bonds only if there is forgery or a lack of authority to issue the bond:

> ***The absence of the required trustee's certificate, if its absence is merely the result of a technical defect, does not appear to invalidate the obligation of the bond***, but if the bonds were never issued by the company, then the absence of a trustee's certificate (or the presence of a forged certification) will be sufficient to avoid the obligation of the corporation . . . .[147]

This is consistent with New York law, which excuses compliance with conditions that are immaterial to the bargain and where the condition's enforcement would result in forfeiture. *See Danco Elec. Contractors, Inc. v. Dormitory Auth. of N.Y.*, 75 N.Y.S.3d 28, 29 (N.Y. App. Div. 1st Dep't 2018) (failure to provide verifications was a condition precedent, but was excused because noncompliance was "*de minimis*"); *see also* Restatement (Second) of Contracts § 229. In fact, the

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[146] *See also* Ralph & McLelland, THE LAW OF CORPORATE MORTGAGE BOND ISSUES 376 (1937) ("[D]efective or technically insufficient execution of a corporate bond will not avoid the obligation.") (citing *Martin v. Niagara Falls Mfg. Co.*, 44 Hun. 130, 141 (N.Y. App. Div. 1887) ("[T]he signature of the secretary was not essential to the validity of the instrument signed by the president in the name of the company")).

[147] RALPH & MCLELLAND, *supra* n.146, at 377.

Company and WSFS could fix this type of technical defect without even consulting anyone.[148]

The alleged defect here is immaterial. The requirement is boilerplate taken from the Model Indenture,[149] and none of the 2022 Transaction parties expressed any concern over WSFS's signature pages.[150] Any lack of a manual signature was not prejudicial to the 2024/2026 Holders, even if they would benefit from disqualifying the Additional 2026 Notes. *See Hicks*, 233 N.W. at 830 (determining, in action by holder to determine effect of secured bonds lacking required certificate of trustee, that although other bondholders "would gain by excluding him," the "other bondholders are not injured"); *cf. In re Colo. Mercantile Co.*, 299 F. Supp. 55, 57 (D. Colo. 1969) ("It seems clear to us, however, that the [statutory manual signature requirement for financing statement] . . . is procedural; ***that it is of no consequence to either the debtor or the other creditors whether the signature is manual or printed***.").

Finally, even if the parties did not comply with Section 2.02, their non-compliance was the result of a mutual mistake and should be reformed to align with the parties' understanding that the notes were valid and outstanding.[151] Courts reform contracts including bonds—retroactive to the time of their formation—where parties come to a particular agreement but fail to express that

[148] Under Section 9.01, the Company and WSFS could, "*without the consent of any Holder of 2026 Secured Notes*, . . . amend or supplement . . . the 2026 Secured Notes, . . . (a) to cure any ambiguity, mistake, defect or inconsistency . . . ." ECF 608-1 § 9.01.

[149] The Model Indenture provides: "A Security shall not be valid until an authorized signatory of the Trustee manually signs the certificate of authentication on the Security. The signature shall be conclusive evidence that the Security has been authenticated under this Indenture." Model Indenture, 55 Bus. Law. at 1127

[150] ECF 1184 (Osornio) at 99:2-25.

[151] The 2024/2026 Holders have asserted that they reserve rights to argue that the Defendants' responses were waived for failure to amend their Answers. The Counterclaim Defendants were not required to specifically plead any response, including reformation, but regardless had no obligation to amend their answer given that the 2024/2026 Holders' allegations regarding the signature were never themselves pled. *Nicholls v. Tufenkian Import/Export Ventures, Inc.*, 367 F. Supp. 2d 514, 524 (S.D.N.Y. 2005) (holding that an unpleaded affirmative defense was not waived where the parties understood what issues were being tried).

agreement due to a mutual mistake.[152] And courts, including the New York Court of Appeals, have reformed misapplied signatures. *See In re Snide*, 418 N.E.2d 656 (N.Y. 1981) (reforming wills inadvertently signed by opposite spouses); *see also Lane v. Spriggs*, 71 S.W.3d 286, 289-91 (Tenn. Ct. App. 2001) (reforming an agreement to insert an inadvertently omitted signature); *Ames v. Fallert*, 657 P.2d 224, 227 (Or. App. 1983) (same); *Smith v. Cram*, 230 P. 812, 815-16 (Or. 1924) (reforming a mortgage to add trustee signature).[153] All parties to the Additional 2026 Notes believed that WSFS had validly authenticated them. If they were mistaken, WSFS's signature should be reformed to align with the parties' intent.

IV. THE FOURTH SUPPLEMENTAL INDENTURES ARE EFFECTIVE AND BINDING ON ALL HOLDERS UNDER SECTION 9.04

Regardless of whether the Company breached the Indentures by entering into the 2022 Transaction (it did not), the Fourth Supplemental Indentures (including the lien release thereunder) to the 2024 and 2026 Indentures are effective and binding because each of the parties to the Fourth Supplemental Indentures had clear and express authority to enter into them and to release the liens.

The parties to the Indentures, including any supplemental indentures, are the Issuer, the Guarantors, the Trustee, and the Notes Collateral Agent ("***NCA***"). Section 9.02 provides that "the Trustee and Notes Collateral Agent, if applicable, will join with the Issuers and the Guarantors in

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[152] *See, e.g., George Backer Mgmt. Corp. v. Acme Quilting Co.*, 385 N.E.2d 1062, 1066 (N.Y. 1978) (reformation "restate[s] the intended terms of an agreement when the writing that memorializes that agreement is at variance with the intent of both parties") (internal citations omitted; *see also Pogo Res., LLC v. St. Paul Fire & Marine Ins. Co.*, 2021 WL 12104836, at *7 (N.D. Tex. Jan. 12, 2021) (cleaned up); *S & A Rest. Corp. v. Lane*, 2007 WL 4403304, at *5 (N.D. Tex. Dec. 18, 2007) ("court may reform the instrument to accurately reflect the parties' agreement."); *Cornish v. Yarbrough*, 558 S.W.2d 28, 32 (Tex. App.—Waco 1977, no writ) (relating back reformation to date of formation) *Heath v. State*, 278 A.D. 8, 10 (N.Y. App. Div. 3d Dep't), *aff'd*, 303 N.Y. 658 (N.Y. 1951) (same); *Gillespie v. Moon*, 1817 WL 1622 at *11 (N.Y. Ch. 1817) (bonds are capable of reformation).

[153] *See also In re B-Bar Tavern Inc.*, 506 B.R. 879, 935 (Bankr. D. Mont. 2013) (failure of party to sign in correct capacity capable of reformation); *In re Jackson*, 231 B.R. 142 (Bankr. D. Mass. 1999) (reforming agreement to include substitute defendant's signature in her individual capacity); *Sec. Pac. Nat'l Bank v. Ginkowski*, 410 N.W.2d 589, 591–92 (Wis. Ct. App. 1987) (reforming mortgage document to add signature); *People, for Use of Rock Island Cnty. v. Lyons*, 168 Ill. App. 396, 401 (Ill. App. Ct. 1912) (reforming contract to add omitted seals).

the execution" of a supplemental indenture and any amendment or supplement to the Security Documents on various conditions, including upon "the filing with the Trustee of evidence reasonably satisfactory to the Trustee of the consent of the Holders" and "upon receipt by the Trustee" of various Officer's Certificates and Opinions of Counsel that are either required to be furnished or requested by the Trustee.[154] Section 9.04 provides that "[a]n amendment, supplement or waiver becomes effective in accordance with its terms and thereafter binds every Holder."[155] According to their terms, and pursuant to Section 9.04, the Fourth Supplemental Indentures each "bec[ame] effective ***immediately upon [their] execution and delivery by the parties [t]hereto***."[156]

On March 28, 2022, the Original Indentures were amended in accordance with the prescribed process: WSFS received the Officer's Certificates and Opinions of Counsel stating that the Indenture's requirements for entering into the Fourth Supplemental Indentures had been satisfied,[157] and thereafter, the Fourth Supplemental Indentures were executed and distributed by the Issuer.[158] WSFS was entitled to rely on those documents without making its own investigation of whether the consent of the requisite amounts of noteholders had been received.[159]

As to the release of liens under Section 9.02 in the Fourth Supplemental Indentures specifically, the Indenture provides that liens will be released "upon the consent of the requisite Holders pursuant to Section 9.02" and "upon compliance with the conditions precedent to the release of the Collateral."[160] In determining whether the requisite consents and conditions

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[154] *See* ECF 601-8 § 9.02

[155] *See id.* § 9.04.

[156] ECF 601-30; ECF 601-39; ECF 604-18; ECF 604-09; ECF 601-33 at Section 3; ECF 601-34; ECF 604-4; ECF 604-32 § 5.

[157] ECF 1150-18; *see also* ECF 508 at 46.

[158] ECF 1150-16.

[159] *See* ECF 601-8 § 7.02; *id.* § 12.03.

[160] *Id.* § 12.03.

precedent had been met, WSFS was again entitled to conclusively rely on the "Officer's Certificate and an Opinion of Counsel" required to be delivered by the Issuer, stating that all relevant conditions precedent had been satisfied.[161] With the conditions of Section 9.02 satisfied, the Company instructed WSFS to execute and deliver each of the Fourth Supplemental Indentures, which WSFS did.[162]

Under New York law, a contract "should be enforced according to its terms." *Beal Sav. Bank v. Sommer*, 865 N.E.2d 1210, 1213 (N.Y. 2007). The bargain struck in the Original Secured Indentures was that Holders assented to the rule that amendments or supplements "become[] effective in accordance with" their terms and "thereafter bind[] every Holder."[163] *See In re Alta Mesa Res., Inc., et al.*, No. 19-35133, Jan. 21, 2020 Tr. at 11:10-12, 19-20 (Isgur, J.) (noting that when an agent acts with authority granted to it by contract, the Court is "allowed to rely on their agency authority, no matter whether they get that by the right vote or not" because the action undertaken "is their exercise of that authority" and rejecting argument that lenders only gave the Agent "the right to exercise that consent if [the lenders] unanimously voted that way," as lenders also "gave them the right to decide whether [the lenders] had unanimously voted that way").

Further, as to the release of liens specifically, the NCA had authority pursuant to the Indentures to release the liens. The Notes Security Agreement granted all security interests to the NCA, and as such, the NCA had the authority to release whatever liens had been granted to it.[164] *See also In re Residential Cap., LLC*, 497 B.R. 403, 407, 417 (Bankr. S.D.N.Y. 2013) (stating that

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[161] *Id.* § 7.02.

[162] *Id.* § 9.02.

[163] *Id.* § 9.04.

[164] ECF 601-24 (Note Security Agreement in which "each Grantor does hereby pledge and grant to the Notes Collateral Agent, for the benefit of the Secured Parties, a continuing security interest in" the "Collateral," as defined in the agreement); ECF 604-34 (BNY Assignment of NCA role to WSFS).

"[t]he Collateral Agent had the authority to release whatever liens the JSNs had been granted under the JSN Pledge Agreement because the agreement granted the security interests at issue 'to the Third Priority Collateral Agent'" and rejecting creditors' effort to undo a lien release on the basis that such lien release "breached the [ ] Indenture," noting that such argument is irrelevant because it would not "somehow render the releases ineffective").

WSFS exercised its authority and released the liens securing the 2024 and 2026 Notes pursuant to the Fourth Supplemental Indentures. The release of liens by WSFS, as the party holding the liens, was effective even if such release breached the Indentures upon subsequent determination. Indeed, even if it were later determined that certain Holders (who are not the lienholders themselves) did not intend for the grant of authority in the Security Documents and Indentures to the NCA to cover this particular release, the release is no less effective. *Cf. Off. Comm. of Unsecured Creditors v. JP Morgan Chase Bank, N.A. (In re Motors Liquidation Co.)*, 777 F.3d 100, 104-05 (2d Cir. 2015) (liens in termination statement were released where principal authorized agent to file termination statement releasing more liens than principal had intended); *In re Residential Cap.*, 497 B.R. at 417 (rejecting "case law involving purported releases executed by unauthorized parties who were not the secured parties" because the releases "were executed by the secured party itself," who had authority to execute them).

V. NO RELIEF IS AVAILABLE AS TO 2024 HOLDERS

The 2024/2026 Holders' breach claims are different between the 2024 and 2026 Indentures. Because it is undisputed that the Participating Noteholders held over 66 2/3% of the 2024 Notes, the 2024/2026 Holders' claim of breach of the 2024 Indenture is limited to sections 3.02 and the "sacred rights" provision of 9.02 of the Original 2024 Indenture. ECF 144 (First Am. Countercl.) at ¶ 252 ("The Company, the Guarantor Defendants, and WSFS breached the Governing Indentures, including (i) sections 2.01, 3.02, 4.09, 4.12, and 9.02 of the 2026 Original Secured

Note Indenture, and (ii) sections 3.02 and 9.02 of the 2024 Original Secured Note Indenture."). As discussed below, both claims fail.

VI. THE 2022 TRANSACTION DID NOT VIOLATE THE "RIGHT OF PAYMENT" SACRED RIGHT

The Court should reject the 2024/2026 Holders argument that the Fourth Supplemental Indentures implicated holders' so-called "sacred rights." They argue that those amendments implicated their "ranking in respect of right of payment," and therefore implicated a unanimous consent or "sacred right." And because the Participating Secured Holders at all times held over two-thirds of the 2024 Notes, this is the ***only*** basis on which to find a breach of the 2024 Indenture.

The Court held on summary judgment that the "[t]he term 'right of payment' is ambiguous" because it is "unclear whether right of payment applies to changes in rankings of, or stripping of, liens."[165] The Counterclaim Defendants respectfully submit that the Original Indentures unambiguously provide that an amendment may "have the effect of releasing all or substantially all of the Collateral from the Liens created pursuant to the Security Documents" as long as the amendment is ratified with "the consent of Holders of at least 66⅔% in aggregate principal amount of the [ ] Secured Notes then outstanding."[166] The Original Secured Indentures thus explicitly permit the releasing of liens ***without*** the consent of each holder adversely affected.[167] Any other

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[165] ECF 508 at 44.

[166] ECF 601-20 § 9.02.

[167] Section 4.09(c) of the Original Indentures further supports this conclusion, as it expressly provides that "no Indebtedness will be deemed to be ***contractually subordinated in right of payment*** to any other Indebtedness of the Issuer . . . ***solely by virtue of being unsecured or by virtue of being secured on a junior priority basis.***" ECF 601-8 §§ 4.09(c); *see* ECF 601-20 § 4.09(c); ECF 601-7 § 4.09(c). Other provisions are in accord. *See, e.g.*, ECF 601-20 § 4.10(b)(2) (proving that if the Company sells property or assets "not consisting of Collateral" in an "Asset Sale," it may use the proceeds of the sale to "repay . . . unsecured Obligations of the Issuer or a Guarantor ***that rank pari passu with the Secured Notes.***"). Cases also make clear the difference between lien and payment subordination. *See Momentive Performance Materials Inc. v. BOKF, NA (In re MPM Silicones, L.L.C.)*, 874 F.3d 787, 795 n.5 (2d Cir. 2017) ("Lien subordination involves two creditors with security interests in the same collateral, one of which has lien priority over the other. . . . By contrast, in payment subordination, the senior lender enjoys the right to be paid first from all assets of the borrower . . . whether or not constituting collateral security for the senior or subordinated lenders.").

reading would render the supermajority consent provision of Section 9.02 meaningless, contrary to New York law.[168] Further, the pre-2022 Transaction conduct by the 2024/2026 Holders discussed above, demonstrates that they understood full well that less than all noteholders could approve a lien release or the issuance of senior debt.[169]

For example, in a February 14, 2022 letter, then-counsel to the 2024/2026 Holders represented to the Company that the group believed that "a super senior priming transaction," which public reporting had indicated could include not only new senior debt but the release of existing liens, "requires . . . the consent of at least ***two-thirds*** of the aggregate outstanding principal amount of each of the 2024 Notes and the 2026 Notes."[170] The letter stated that, because holders with asserted holdings of "one-third of the outstanding principal amount of the 2026 Notes" did "not support" such a transaction, it "cannot be implemented."[171] This message cannot be reconciled with a belief that unanimous consent would be required for a "priming" transaction. Indeed, their effort to organize a "blocking position" would have been unnecessary if that were the case. But tellingly the 2024/2026 Holders' cooperation agreement only governed the 2026 Notes.

The record is replete with testimony by the 2024/2026 Holders acknowledging that they understood—both in 2019 and 2022—that unanimous consent was not necessary to release liens or issue senior debt,[172] including the corporate deposition testimony of Mr. Yu of BlackRock, who

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[168] *See, e.g.*, *Galli v. Metz*, 973 F.2d 145, 149 (2d Cir. 1992) ("Under New York law an interpretation of a contract that has the effect of rendering at least one clause superfluous or meaningless is not preferred and will be avoided if possible.").

[169] *See Karmely v. Wertheimer*, 737 F.3d 197, 207 (2d Cir. 2013) ("To ascertain the meaning of an ambiguous provision, the Court should heavily weigh this pre-litigation evidence.").

[170] ECF 601-20 § 9.02.

[171] *Id.*

[172] ECF 970 (Seketa) at 86:10-15 (Q "[A]fter reviewing the indenture for whatever you believed were the relevant provisions, your understanding was that Incora could strip out liens with 2/3 consent of holders. Correct? A Yes.") (discussing ECF 704-27 at 2); *see also* ECF 1249 (Cook) at 138:19-139:7 ("THE COURT: . . . And what was your belief back in 2019 about what it meant on the lien stripping with the two-thirds vote of the 2024s and 2026s? . . . . THE WITNESS: I would assume that you could strip the liens under that case."); ECF 1119 (Yu) at

conceded that sacred rights were not implicated by the 2022 Transaction, before recanting that testimony at trial.[173] The parties understood which consent thresholds could be implicated by the 2022 Transaction, and it was not unanimous consent.

Finally, the 2024/2026 Holders are wrong that the contingent springing maturity in the New 1L Notes (which could have moved their maturity date forward in time before the 2024 Notes, but was never triggered) modified holders' "ranking . . . in respect of right of payment." The maturity date of a given obligation (much less when that date is contingent) has no bearing on subordination in respect of the right of payment, which occurs only when "the subordinated creditor's right to payment and collection will be subordinate to the rights of another claimant." *In re Lantana Motel*, 124 B.R. 252, 255-26 (Bankr. S.D. Ohio 1990). To hold otherwise would lead to absurd results. For example, the Company regularly incurs unsecured trade debt that is due in a term of months; no party has ever suggested that such ordinary course conduct would breach the Indentures. Moreover, because the 2024/2026 Holders also contend that secured status bears on payment priority, it is impossible to know under their theory whether an earlier-maturing unsecured debt ranks higher or lower in payment priority than a later-maturing secured obligation. This unsupported reading of the Indentures must be rejected.

VII. THE COUNTERCLAIM DEFENDANTS ACTED IN GOOD FAITH AND THE EQUITABLE AND NON-CONTRACT CLAIMS MUST FAIL

The 2024/2026 Holders' and Langur Maize's equitable and other non-contract theories all rest on the purported narrative that they are the passive victims of parties who acted in bad faith, unfairly targeted with a scheme to deprive them of rights in ways they could not have contemplated

190:3-10 ("Q It was your commercial understanding that the company could release liens securing notes with the consent of holders of 66-2/3 of the then outstanding notes. Correct? A Correct.").

[173] ECF 1119 (Yu) at 190:11-22 ("Q Okay. At your deposition you testified that your belief at the time was that there were no sacred rights that were violated under the 2022 transaction. Correct? A Yes, that is what I said at the deposition.").

or mitigated, all for the self-enrichment of bad actors who drew up a sham transaction to harm them. But that story does not hold up.

Leading up to the 2022 Transaction, the Company faced a severe liquidity crisis as a result of the COVID-19 pandemic[174] and needed to act quickly to avoid a downward spiral into a free-fall bankruptcy.[175] This was no secret. By the fall of 2021, PIMCO, Silver Point, JPMorgan, Golden Gate, and BlackRock were all keenly aware of the Company's financial position.[176] As Golden Gate succinctly put it to Golden Gate's investment committee: "The company will be out of liquidity in 2022 . . . . ***The Company will need new money***."[177]

As explained above, in early 2022, the Company was faced with a downturn caused by COVID, not flaws in its business model. The non-Debtor Defendants were all existing stakeholders of Incora and appropriately acted to protect their investments. Their interests also aligned with Incora's. For example, Carlyle's Jesse Hou testified that Incora's "value prop[osition] was still strong" and that "the company would recover" once the pandemic abated.[178] The

174 *See, e.g.*, ECF 664 (Carney) at 34:21-35:4, 43:5-45:4, 48:13-21, 51:4-52:5, 54:14-20, 125:6-12; ECF 630 (Vorderwuelbecke) at 151:17-19, 190:3-15, 195:14-196:11, 197:8-18 (discussing the disruption of one of Incora's key customer contracts creating a sense of urgency to obtain liquidity); ECF 738 (O'Connell) at 11:23-12:5, 13:11-13 (discussing upcoming interest payment).

175 ECF 630 (Vorderwuelbecke) at 150:12-24 (Company sought to avoid an "unplanned," "chaotic," and "unpredictable" bankruptcy); ECF 738 (O'Connell) at 112:13-113:6 (the 2022 Transaction was "a much better option" than filing Chapter 11 in March 2022); ECF 955 (Dostart) at 52:13-23; ECF 868 (Bartels) at 227:16-25 ("[B]ankruptcy introduces uncertainty, costs and . . . time delays . . . ."); *see also* ECF 1007 (Cesarz) at 172:7-8 ("A near-term filing would likely have been messy and, thus, value-destructive."); *id.* at 170:22-171:5 (noting that in the beginning of March of 2022, Perella Weinberg Partners ("***PWP***"), remarked that the Company would need to get a deal done "in the next 30 to 60 days.").

176 *See* ECF 700-23 at 1 ("[A] liquidity event is probable in 1H22."), 929-1 at 1 (due to "weakness in the commercial aero hardware business" and the impact of the "global pandemic" on "cost savings and inventory release," the Company would "need further support to be able to bridge to a more robust commercial aero recovery"); ECF 1062 (Wang) at 26:14-24 ("Q And so as of September 2021, you had agreed with other market participants that Incora's liquidity needs would come to a head in 2022, correct? A Yeah, at this point in time."); ECF 1119 (Yu) at 195:9-16 (the Company's "earnings performance was a little bit less than expected").

177 ECF 700-46 at 12 (emphasis in original).

178 ECF 832 (Hou) at 90:22-91:3.

Company's largest secured lenders, the PIMCO and Silver Point Noteholders, believed the same;[179] Jason Prager, of Silver Point, testified that Incora could "emerge as a more valuable franchise than it had going into the downturn."[180] PIMCO's Samuel Dostart believed that the company could "capture the opportunity" created by the COVID downturn "instead of suffering from it."[181] Malik Vorderwuelbecke, an Incora board member and a Platinum employee, similarly testified that "we thought the business would be able to get through the rough patch and thrive subsequently."[182]

The Company's and its stakeholders' actions were consistent with these views. When liquidity problems became clear in fall 2021, Incora sprang into action. It expanded its Board of Directors to bring on additional expertise.[183] The Company also retained counsel (Milbank) and financial advisors (PJT and A&M)[184] and added Patrick Bartels as an independent board member.[185]

In December 2021, the Company received an unsolicited proposal from the PIMCO and Silver Point Noteholders—who after the fall earnings call had begun to develop a proposal for a new money transaction.[186] As outside investors, they reached out through their advisors, Davis

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[179] The Silver Point and PIMCO Noteholders each had begun investing in Incora during the height of the pandemic. By the end of September 2021, well before any proposal or negotiations began, they respectively held approximately $380 million and $440 million of Incora's debt. ECF 729-53, 729-54, 729-55, 700-58 at 5.

[180] ECF 1013 (Prager) at 86:14-87:19; *see also id.* at 16:18-17:8, 18:11-19:24 ("[W]hen the COVID-19 pandemic was over, Incora would once again be a valuable enterprise . . . ."); ECF 734-5.

[181] ECF 955 (Dostart) at 72:1-16; *see also id.* at 18:3-19:8, 19:16-22 (Incora was a real "value add" for its customers); ECF 700-58.

[182] ECF 697 (Vorderwuelbecke) at 229:5-10.

[183] *See* ECF 630 (Vorderwuelbecke) at 128:15-129:12, 130:14-23.

[184] *See* ECF 630 (Vorderwuelbecke) at 130:6-13 (Company hired Milbank and PJT "to be ready in case additional actions needed to be taken to generate liquidity" in Fall 2021).

[185] *See* ECF 659-8 at 1; *see also* ECF 659-1.

[186] *See* ECF 659-8, 610-3, ECF 639-1.

Polk and Evercore, and proposed a potential "uptier" transaction to make use of flexibility in the debt documents to secure a minimum of $200 million in new money financing while lowering near-term interest payment pressure through debt service relief and maturity extensions.[187] They believed their proposal offered a "substantial opportunity" for the Company and would protect their economic stakes in it.[188]

PJT and Milbank evaluated the proposal and began arm's-length negotiations with Davis Polk and Evercore, with oversight from Incora's Board, in which the PIMCO and Silver Point Noteholders made meaningful concessions.[189] Although several of Incora's board members worked for Platinum, their role as board member was distinct from their role at Platinum. And "Platinum," as a shareholder and noteholder, had almost no role in the 2022 Transaction. After all, the negotiations were led by Incora's advisors, who described Platinum as nothing more than a "price taker," and all Platinum-affiliated Board members recused themselves from the vote on Platinum's participation in the deal.[190]

One factor guiding the negotiations and the Company's evaluation of the PIMCO and Silver Point Noteholder proposal was PJT's analysis that $250 million was likely to bridge the Company through the expected remainder of the COVID downturn. The PIMCO and Silver Point

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[187] ECF 639-1 at 2; ECF 1013 (Prager) at 107:23-108:8 ("[T]he purpose of doing an uptier transaction [is] to lower the interest rate to the company, which is something we were focused on that would make the best offer for the company itself."); ECF 955 (Dostart) at 80:1-8 (an uptier would be "economically advantageous to the company" because of "[n]ew money, liquidity coming in on an economically attractive rate, cash interest relief on the rest of the money that was uptiered, [and the] maturity extension"); ECF 1142 (Rochard) at 165:12-18 (explaining that Citadel participated in the March 2022 Transaction "because our view was that Incora required additional capital. And we viewed this as a way to inject additional capital into the company in a manner that was commensurate, in terms of value, for the capital that was being provided to Incora.").

[188] ECF 955 (Dostart) at 71:19-72:16; *see also id.* at 75:15-76:1; ECF 1013 (Prager) at 144:23-145:25; ECF 955 (Dostart) at 57:21-58:6.

[189] *See* ECF 536-24 at 4-18; ECF 738 (O'Connell) at 31:1-9; ECF 955 (Dostart) at 111:11-18.

[190] *See* ECF 868 (Bartels) at 247:25-249:21; ECF 630 (Vorderwuelbecke) at 139:20-140:18; ECF 879 (O'Connell) at 330:19-331:4.

Noteholders' proposal provided $250 million in gross new money, as well as numerous other liquidity benefits. The Company and its advisors believed that the transaction would be in the Company's best interest and ultimately agreed to it after months of negotiations.[191] Both the Company and the holders who exchanged notes believed that each of the amendments were permissible under the Indentures. Milbank shared with the Trustee, WSFS, its opinion for the Company that the proposed 2022 Transaction complied with the Indentures.[192] The Company, for its part, represented in the Exchange Agreement that the 2022 Transaction documents did not conflict with any other "indenture."[193] Representatives of Silver Point and PIMCO testified to their commercial understandings that releasing liens required consent of two-thirds of noteholders,[194] but that a "simple majority" was all that was required to amend the debt baskets,[195] and that the "issuance of additional 2026 notes" would permit them to clear the two-thirds threshold to release liens.[196] Kevin Smith, an advisor to the Company and a Platinum employee who helped negotiate the indentures, testified that he reviewed the 2022 Transaction documents to form his own commercial view, and concluded that "amending the permitted lien definition and the indenture . . . required a majority consent to do," and that "there was a majority that was . . . willing to amend that definition."[197] He believed the transaction worked "within the four corners

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[191] ECF 630 (Vorderwuelbecke) at 209:17-19; ECF 738 (O'Connell) at 35:3-12; ECF 664 (Carney) at 65:3-14; ECF 868 (Bartels) at 234:6-9, 236:8-13, 238:15-239:5.

[192] *See* ECF 707-76.

[193] ECF 604-19 at 27-28.

[194] ECF 1013 (Prager) at 16:10-13; ECF 955 (Dostart) at 15:25-16:8.

[195] ECF 1013 (Prager)at 16:14-17; *see also* ECF 955 (Dostart) at 15:15-24.

[196] ECF 1013 (Prager) at 57:13-58:6. At the time the PIMCO and Silver Point Noteholders reached out, they had over 50% of the 2026 Notes and over 2/3 of the 2024 Notes then outstanding. *Id.* at 106:8-12; ECF 955 (Dostart) at 78:13-20. Given the PIMCO and Silver Point Noteholders' intent to provide substantial new money (at least $200 million), they understood they would be able to achieve the requisite thresholds either through (1) the issuance of new 2026 notes, (2) cooperating with other noteholders, or (3) purchasing additional bonds on the open market. ECF 1013 (Prager) at 57:13-17, 59:19-23, 62:3-16; ECF 969 (Dostart) at 29:24-31:24.

[197] ECF 827 (Smith) at 88:16-89:11.

of the document,"[198] and he shared his views with the Board, through Michael Fabiano, who had commissioned him to review the Transaction.[199]

While the Company and its advisors, and the Participating Noteholders and their advisors, were hard at work hammering out a deal to save the Company, the 2024/2026 Holders chose not to engage.[200] Despite recognizing the Company's liquidity needs in the Fall of 2021, they "took no actions to organize any creditors committees, or engage counsel, or financial advisors,"[201] and did not reach out to the Company for months to how they might be able to help.[202] It was not until the month of the closing of the 2022 Transaction that the 2024/2026 Holders retained a financial advisor and offered (belated and half-baked) proposals to the Company.[203] The Company engaged with the minority group, reviewed and considered the latter's March 6 and March 11 proposals,[204] and communicated regarding the minority group's drop-down concept over the course of March. The Company also provided due diligence to advisors to the 2024/2026 Holders when asked.[205]

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[198] *Id.* at 90:5-10; *id*. at 89:18-21.

[199] *Id.* at 93:24-94:25; *see also* ECF 630 (Vorderwuelbecke) at 143:5-8 (did not believe the Company was violating the indentures).

[200] The 2024/2026 Holders' inaction did not reflect any disagreement over the Company's need for liquidity, but rather respective tactical choices. *See* ECF 1247 (Cook) at 88:23-89:4 (agreeing it was "a fair assessment" that JPM's "choice in how to behave in the fall of 2021 was a tactical one"). Golden Gate wanted to "drive the restructuring" by "acquiring ~20% of the tranche," but did not buy in the Fall of 2021, when prices were above their "price target in the mid-eighties." ECF 700-46 at 12; ECF 1062 (Wang) at 36:2-6; *see* ECF 725-26 (Golden Gate trade log reflecting no purchases between September 14, 2021, and January 31, 2022). In 2021, BlackRock's actively managed funds conducted a "substantial sell off," leaving mostly passively managed funds holding Incora bonds. ECF 1119 (Yu) at 197:19-198:20 (specifying that selling occurred in "the actively managed high yield funds"); *id*. at 199:10 ("We did sell most of our position by January 2022, yes."); ECF 1072-10.

[201] ECF 970 (Seketa) at 151:18-24.

[202] *See* ECF 738 (O'Connell) at 72:13-19.

[203] *See* ECF 706-11 at 2 (Perella communicating to JPMorgan on March 2, 2022, the day before its retention, that a transaction would "need to happen in the next 30-60 days").

[204] *See* ECF 536-21 at 1-2 (Board engaged in comprehensive comparison of the PIMCO/Silver Point proposal and first Akin Group proposal on March 8), 536-22 (same, but considering both Plaintiffs' first, second, and alternative proposals); ECF 536-24 (same, on March 24).

[205] *See* ECF 706-75, 707-8; *see also* ECF 738 (O'Connell) at 64:10-17 ("[W]e were negotiating both concurrently, and that's something we often do is have as many financing options as possible that we would be negotiating.").

The problem was therefore not that the Company failed to engage; it was that the 2024/2026 Holders' counterproposals were nascent and unworkable. And their primary proposals, if accepted, would have substantially increased the Company's debt load while transferring assets from guarantor subsidiaries to non-guarantor subsidiaries (moving collateral outside the reach of Incora's preexisting secured noteholders without their consent).[206] And trial further exposed the 2024/2026 Holders' alternative "Letter of Credit" proposal as nothing but a walk down a primrose path. The 2024/2026 Holders never reached out to banks who could issue a letter of credit; never explained why a bank would have issued such a letter of credit; never offered any testimony that any of them would have provided funding to the Company to "backstop" a new unsecured loan; and none of them obtained approval for the "Letter of Credit" proposal from their respective investment committees.[207] This was just a thought experiment.

In fact, none of the 2024/2026 Holders' proposals was actionable. There is no evidence that the 2024/2026 Holders could have secured the requisite approval of other Noteholders. And Incora's board members held understandable doubts that the minority group's proposals could close on a timeline to solve the Company's upcoming audit deadline (if at all), as they were subject to "satisfactory legal and financial diligence" and carried "significantly more execution risks" than the 2022 Transaction.[208] Moreover, the 2024/2026 Holders conceded the limits of their proposals (and the benefits of the 2022 Transaction). Most importantly, John Cesarz of PWP acknowledged

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[206] *See* ECF 1007 (Cesarz) at 185:18-23 ("THE COURT: You're going to take their collateral and move it to another entity. What was your intention about their preexisting lien on that collateral? What would happen to that nonparticipating lender? THE WITNESS: They would no--they would no longer have a first lien on that collateral."); *see also id.* at 184:16-21 (acknowledging that nonparticipants in 2024/2026 proposed transactions would be "involuntarily subordinated").

[207] ECF 1007 (Cesarz) at 203:20-204:3 (group would need to obtain internal approval); *id.* at 199:12-20 (group had not approached any banks); ECF 970 (Seketa) at 244:19-245:23 (had no idea how long LOC concept would take).

[208] ECF 868 (Bartels) at 185:14-19, 210:15-20; *see also id.* at 205:5-25.

that the 2024 maturity problem was "front and center for the company" and that the minority group "***did not have a solution for [it]***."[209] Mr. Seketa of JPM conceded that there was execution risk on the primary transaction that the minority group was proposing, noting that "it was hard to judge" when, if ever, his group's proposals could close.[210] Conversely, the 2024/2026 Holders were aware of potential benefits of the 2022 Transaction.[211]

Despite these glaring defects, the Company considered all proposals and picked the one it judged to be the best: the 2022 Transaction.[212] Important to the Company was that the 2022 Transaction provided a "material injection of liquidity" in the amount of $250 million, extended "maturities in [a] material way," and "furnish[ed] the company with tools" in the form of increased debt basket capacity "to address" any remaining maturities coming due in 2024.[213] Another factor was that the 2022 Transaction could be closed in time to address the March audit deadline.[214]

Any criticisms from the 2024/2026 Holders about the Company's judgment in selecting a transaction from the majority holders are just hindsight-infused posturing. For example, when the minority group was making proposals to the Company in March 2022, none was "file for bankruptcy." Mr. Cesarz of PWP acknowledged that a near-term bankruptcy filing would have

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[209] ECF 1007 (Cesarz) at 149:24, 151:13-18.

[210] ECF 970 (Seketa) at 185:14-19.

[211] *See* ECF 536-24 at 7; 718-19 at 2 (JPMorgan: "[T]his recent transaction does provide the Company with significant, much needed liquidity."); 718-24 at 2 (JPMorgan: "[T]here is a path whereby the company can recover."); 716-43 (Golden Gate: "All of this is good for the Company's liquidity."); *cf.* ECF 1119 (Yu) at 172:2-7 (William Yu of BlackRock agreed that in the TriMark transaction, while BlackRock's "pre-existing position bec[a]me higher in the capital structure," the transaction "benefitted [BlackRock's] position, but we also extended new monies to the company.").

[212] ECF 738 (O'Connell) at 11:23-12:17, 13:22-14:10, 15:5-8, 32:14-33:2, 35:3-16, 112:9-113:6. Thereafter, the Exchange provided the additional benefits of cash interest savings, and deferred maturity on hundreds of millions of dollars of 2024 Notes. *See* ECF 536-24 at 5-6.

[213] ECF 630 (Vorderwuelbecke) at 201:3-12.

[214] ECF 697 (Vorderwuelbecke) at 227:10-228:7.

been "messy" and "thus, value-destructive."[215] The Company, its advisors, and all participating noteholders agreed: everyone was working to solve the Company's near-term liquidity problems based on a belief that it could not only avoid default and bankruptcy but thrive in the future.[216] So deeply held was this belief about the Company's prospects that Silver Point subsequently bought over $39 million worth of Incora's 2027 *unsecured* bonds, beginning on the first unrestricted trading day, believing "that all of the company's debts would likely [] be paid in full . . . [a]nd that the company had liquidity to last for years."[217] The 2024/2026 Holders' made-for-litigation arguments about the reasonableness of the participants' projections about the duration of COVID and beliefs in the 2022 Transaction as a solution for the Company are just hindsight and cannot show that the transaction was not executed in good faith.

Unrebutted expert testimony confirms that the Participating Noteholders' proposal was superior. Mark Rule of AlixPartners, an expert in solvency and valuation, reviewed the Company's contemporaneous assessments of its liquidity needs and compared the various alternatives. Mr. Rule opined that the 2022 Transaction best addressed the Company's challenges, as it "provided the most liquidity for the longest period of time" relative to the alternatives.[218] It provided Incora with $250 million in gross new money and scored higher than the alternatives on the following metrics: (1) ***debt basket capacity***, by increasing the Company's debt basket capacity

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[215] ECF 1007 (Cesarz) at 172:7-8.

[216] ECF 664 (Carney) at 34:21-35:17 (summarizing the Company's attempts to solve its liquidity problems); ECF 738 (O'Connell) at 27:1-10 (the Company's "goal" was "getting some liquidity relief"); ECF 630 (Vorderwuelbecke) at 188:14-189:15 (by "mid-March," solving the liquidity problem "was getting very pressing" for the Company's management "because outside of even these immediate liquidity concerns . . . we were also running up to . . . the deadline of the audits").

[217] ECF 1013 (Prager) at 147:24-148:9; ECF 727-3. Similarly, Mr. Dostart recommended to PIMCO portfolio managers that "all accounts . . . maintain exposure going forward," ECF 925-1 at 1, because he "was excited about the opportunities that this transaction was presenting in enabling Incora to pursue." ECF 969 (Dostart) at 140:10-18.

[218] ECF 1351 (Rule) at 12:9-13; ECF 1317-4.

to $777 million while there was "not any explicit capacity contemplated" by any of the alternatives;[219] (2) ***maturity extensions***, by extending the most 2024 maturities relative to the 2024/2026 Holders' alternatives;[220] (3) ***amortization reductions***, by reducing company's amortization payments by $56 million (an over 62% reduction) relative to the status quo while the reduction by the 2024/2026 Holders' alternatives was "not as significant";[221] (4) ***cash interest reductions***, by reducing Incora's cash interest obligations by $72 million, a 33% decrease.[222] Even the UCC's expert, Boris Steffen, agreed that the 2022 Transaction had "material cash flow benefits" in "2022, 2023, and the first part of 2024."[223]

The suggestion that anyone attempted to wrong the 2024/2026 Holders or acted maliciously or fraudulently toward them was not established at trial. Without actual evidence of fraud or malice, the 2024/2026 Holders assert that it is intrinsically malicious or inequitable to engage in an uptier or other liability management transaction. But multiple 2024/2026 Holders acknowledged that they themselves had participated in non-pro rata uptier transactions and that there is nothing inherently objectionable about them.[224] JPMorgan acknowledged its participation in the Windstream transaction, where "the goal was . . . for the company to issue notes as a technique to change the math" with respect to the threshold for declaring an event of default.[225] And the 2024/2026 Holders' own proposals to Incora would have also required moving collateral

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219 ECF 1351 (Rule) at 20:11-20.

220 *Id.* at 22:4-21, 23:21-23.

221 *Id.* at 32:1-3.

222 *Id.* at 33:1-10; ECF 1317-4 at 7.

223 ECF 1352 (Steffen) at 25:17-20.

224 ECF 1008 (Seketa) at 110:23-111:13; ECF 970 (Seketa) at 176:24-177:2; ECF 1119 (Yu) at 167:22-168:1, 173:19-21, 176:1-10, 178:1–17 (Yu acknowledging BlackRock's participation in multiple such transactions).

225 ECF 970 (Seketa) at 70:2-15.

out of the reach of nonparticipating noteholders.[226]

The 2024/2026 Holders thus acknowledged that fairness is not the question here. Mr. Seketa of JPMorgan testified that he "never liked the word fair" in situations like this one where one noteholder may improve its position at the (possible future) expense of another, because contractual permissibility, not fairness, is the relevant consideration.[227] In his words, everyone is "looking out for [their] interests . . . not balancing [others'] interest against [their] interest."[228]

The 2024/2026 Holders' own conduct reflects exactly that: they each acted based on their assessments of their own best interests, managing, accepting, and even taking intentional risks; that they are displeased with the consequences of this strategic conduct does nothing to justify being rescued by equities or tort liability.[229] BlackRock saw this risk of an uptier coming, and the managers of their active funds chose to mitigate that risk by selling out of *90%* of Incora note positions, leaving behind deliberately passive funds left with exposure to risk of lien release.[230] JPMorgan preferred that Platinum offer the Company new money or that creditors "tak[e] over the company" in bankruptcy, and so selected its path to "block[] any deal that lets value leak to the sponsor" and push the Company towards bankruptcy, going so far as to reject a proposal for partial

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[226] ECF 1007 (Cesarz) at 145:25-146:17 ("Q So I want to go back to this subject, the unsub financing. . . . When that approximately 100 million of assets would be transferred per this unrestricted subsidiary financing idea, any liens that had been attached to those assets when they were part of the restricted borrower, or guarantor group, would no[ ] longer attach to those assets, right? A That would . . . be correct. Q Isn't that the whole point of moving it, so that you can free up . . . the collateral to . . . have someone else lend against it now? A That's correct.").

[227] ECF 970 (Seketa) at 177:1-6.

[228] *Id.* at 176:24-177:11, 178:2-14; *see also* ECF 1007 (Cesarz) at 245:21-25 ("If [an uptier is] allowed under the documents, it's allowed under the documents. And those are documents that lenders either bought into or helped create.").

[229] *See, e.g.*, ECF 1062 (Wang) at 147:19-148:10.

[230] ECF 1119 (Yu) at 197:14-198:11; ECF 725-55.

participation in the transaction.[231] Golden Gate inexplicably went on a buying spree[232] in the hope of speculative gain, without having a cooperation agreement in place and without even retaining counsel to review the indentures.[233] That these sophisticated investors' strategies did not pay off is the consequence of the choices they made, and not the responsibility of other parties to remedy.

VIII. THE 2024/2026 HOLDERS ARE NOT ENTITLED TO EQUITABLE REMEDIES

This is a breach of contract case and the appropriate remedy for a breach of contract is money damages—even if that claim may be impaired by the Debtors' bankruptcy filing. The 2024/2026 Holders, however, have sought equitable relief in various forms, none of which is proper.[234] As the Court already determined, the 2024/2026 Holders' equitable claims are estate claims because they are "impermissible disguised avoidance actions."[235] Each of these are subject to a pending settlement, and the 2024/2026 Holders should not be granted derivative standing on those claims because they are not colorable.[236] The same is true of the equitable contract remedy

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[231] ECF 703-81 at 2; ECF 970 (Seketa) at 22:19-21 ("It's not our preference to be involved in those sorts of situations. We prefer to get our recoveries from the company or from assistance to the company through the equity sponsor.").

[232] ECF 1062 (Wang) at 316:23-317:4 (asked whether Golden Gate "went on a buying spree of secured 2026 notes in the first two weeks of February 2022," Wang acknowledged that he "bought a lot of notes"); *see also id*. at 50:16-21 (Golden Gate increased its holdings from $11.7 million to $208.48 million).

[233] ECF 1062 (Wang) at 97:15-24; 317:5-8, 319:16-320:23, 321:7-322:12; *see also id.* at 322:13-16 (Wang expressing uncertainty as to whether Golden Gate even sent counsel a copy of the indentures).

[234] To the extent that the Court determines an equitable remedy may be proper, the Counterclaim Defendants reserve all rights to conduct further submission of evidence, briefing, and argument regarding the effect of any equitable remedy on the indemnities provided for in the 2022 Transaction and in the *Final Order (I) Authorizing the Debtors to (A) Obtain Postpetition Financing (B) Use Case Collateral* [Main Case ECF 396].

[235] *See* ECF 508 at 7; ECF 509.

[236] Counterclaim Defendants incorporate by reference herein their oppositions to the 2024/2026 Holders' Amended and Supplemental Standing Motion. *See* Main Case ECF 1121 (Platinum Objection); ECF 1123 (PIMCO and Silver Point Noteholders Objection); ECF 1124 (Senator Objection); ECF 1125 (Carlyle and Spring Creek Objection); ECF 1126 (Debtors Objection); ECF 1129 (Bartels Objection). In addition, the parties agreed that the putative TUFTA claims contained in the 2024/2026 Holders' Proposed Second Amended Counterclaim Complaint [Main Case ECF 652-1] will not be briefed or otherwise argued during the first phase of the trial's closing. The proposed TUFTA claims will be argued later, including in connection with confirmation.

to unwind the transaction for which the 2024/2026 Holders sought standing.[237]

A. The 2024/2026 Holders Are Not Entitled To An Equitable Contract Remedy

The 2024/2026 Holders sought standing to pursue equitable contract remedies, including a declaration that the Third and Fourth Supplemental Indentures are "invalid and void ab initio" and "requiring that Counterclaim Defendants take all actions necessary to restore the 2024/2026 Holders' Liens to the same position as if" the 2022 Transaction "were never undertaken."[238] This effectively seeks the same relief as the 2024/2026 Holders' equitable lien claim and is likewise an "impermissible disguised avoidance action" that is property of the estate.[239] Regardless, this equitable contract relief is not available to the 2024/2026 Holders.

The Bankruptcy Code considers any "right to an equitable remedy for breach of performance" as nothing more than a "claim." *See* 11 U.S.C. §§ 101(5)(B), 502(c)(2). It is settled law that a party "essentially seeking to obtain a money payment" from a debtor cannot pursue equitable relief in bankruptcy, *Ohio v. Kovacs (In re Kovacs)*, 717 F.2d 984, 988 (6th Cir. 1983), *aff'd*, 469 U.S. 274 (1985), and that where a "breach gives rise to a right of payment," 11 U.S.C. § 101(5)(B), a creditor that is also entitled to equitable remedies may not enforce those remedies in bankruptcy, *Ades & Berg Grp. Invs. v. Breeden (In re Ades & Berg Grp. Invs.)*, 550 F.3d 240, 244-45 (2d Cir. 2008) (rejecting constructive trust), even when a debtor is unable to pay a creditor

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[237] To the extent the 2024/2026 Holders still seek standing to bring equitable claims against Carlyle and Spring Creek, those claims are not colorable: both are non-insiders against whom the 2024/2026 Holders have no claims. They have never even asserted breaches of the Unsecured Indenture, despite owning tens of millions worth of those bonds in March 2022. And, like Platinum, they have nothing to subordinate under the proposed plan.

[238] Main Case ECF 652-1 ¶ 262.

[239] *See* ECF 508 at 7; ECF 1126 ¶ 37 & n. 10. *In re Sanchez Energy Corp.*, 2023 WL 4986394, at *15 (Isgur, J.) (Bankr. S.D. Tex. Aug. 3, 2023) ("Section 550 permits the Trustee to recover the property or value of property transferred and avoided under various sections of the Bankruptcy Code."); *see also In re Revlon, Inc.*, 2023 WL 2229352, at *16 (Bankr. S.D.N.Y. Feb. 24, 2023) ("claims and theories" including a contract remedy are property of the estate where they "all seek the 'undoing' of those transactions or other measures to replicate as closely as possible the pre-transaction state of affairs," including "making estate property subject to liens that benefit Plaintiffs while subordinating or invalidating liens of others").

in full.[240]

As such, any request by the 2024/2026 Holders for an equitable remedy must be rejected because monetary damages are available.[241] "[I]t is basic that equitable relief will not be granted where an ***adequate remedy at law exists***." *SCM Corp. v. Xerox Corp.*, 507 F.2d 358, 363 (2d Cir. 1974) (emphasis added); *see also In re RONFIN Series C Bonds Sec. Interest Litig.*, 182 F.3d 366, 373 (5th Cir. 1999) (same).[242] This is true even if the remedy at law is imperfect because it is constrained by bankruptcy.[243] *See Superintendent of Ins. for State of N.Y. v. Ochs (In re First Cent. Fin. Corp.)*, 377 F.3d 209, 216 (2d Cir. 2004) (where a creditor will not be "made whole in the [bankruptcy] proceedings," that "does not mean its remedy is legally inadequate, simply that it is imperfect"). Here, money damages are available; indeed, the 2024/2026 Holders seek them.[244]

Nor is it possible to restore the parties to the status quo prior to the 2022 Transaction.[245]

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[240] *See also* ECF 199 at 84-86 (explaining unavailability of equitable relief); ECF 315 at 50-51; Main Case ECF 1126 ¶¶ 102-03.

[241] Applying "the choice of law rules of Texas" to the breach of contract claim, *In re iHeartMedia, Inc.*, 597 B.R. 339, 350 (Bankr. S.D. Tex. 2019), New York law determines the availability of remedies for breach of contract. Texas applies the Restatement (Second) of Conflict of Laws, which states that the "measure of recovery for a breach of contract is determined" by the law selected in a contract's choice of law clause governing the rights and duties of the parties under the contract. Restatement (Second) at §§ 187, 207. The Indentures contain a New York choice of law clause. *See, e.g.*, ECF 601-8 § 13.06. Texas law also provides the same result as New York law.

[242] *See also Lucente v. Int'l Bus. Machs. Corp.*, 310 F.3d 243, 262 (2d Cir. 2002); *Holt v. Robertson*, 2008 WL 2130420, at *6 (Tex. App. May 21, 2008); *cf. In re Cowin*, 492 B.R. 858, 903 (Bankr. S.D. Tex. 2013), *aff'd*, 538 B.R. 721 (S.D. Tex. 2015), *aff'd*, 864 F.3d 344 (5th Cir. 2017) (determining "monetary damages are the appropriate remedy" for defrauded lienholders).

[243] *See* ECF 199 at 71-81, 84-87; ECF 215 ¶¶ 69-73; ECF 318 at 50-59; ECF 321 ¶¶ 33-35; Main Case ECF 1123 ¶ 24; Main Case ECF 1126 ¶¶ 37 n. 10, 102-03.

[244] *See* ECF 199 at 86-87; ECF 652-1 (Prayer for Relief xii); *see also* ECF 207 at 8; ECF 213 at ¶¶ 37-42; ECF 214 ¶ 14; ECF 215 ¶¶ 69-72; Main Case ECF 1123 ¶ 26.

[245] ECF 215 ¶ 73; *see Sahu v. Union Carbide Corp.*, 418 F. Supp. 2d 407, 411 (S.D.N.Y. 2005) ("[A] court will not grant equitable relief where it appears to be impossible or impracticable" to do so); *Sokolow, Dunaud, Mercadier & Carreras LLP v. Lacher*, 747 N.Y.S.2d 441, 446-47 (N.Y. App. Div. 1st Dep't 2002); *see also Holt*, 2008 WL 2130420, at *5 ("rescission remains a viable option, so long as the status quo of the parties prior to entry of the contract can be restored . . ."); *Deutsche Bank Nat'l Tr. Co. for Morgan Stanley Structured Tr. I 2007-1 v. Morgan Stanley Mortg. Cap. Holdings LLC*, 289 F. Supp. 3d 484, 496 (S.D.N.Y. 2018) (specific performance not available where it "appears to be impossible or impracticable."); *United Coin Meter Co. v. Johnson-Campbell Lumber Co.*, 493 S.W.2d 882, 888 (Tex. Civ. App. 1973).

For one, the 2022 Transaction and the Participating Noteholders afforded the Company substantial benefits, including new money, debt service relief, and maturity extensions that allowed it to avoid bankruptcy and which cannot be "unwound." And since the 2022 Transaction, the Company has paid interest on its debt, including to third parties. Simply put "[t]here are no obvious means to undo the entire restructuring transaction." *FMC Corp. v. Boesky*, 825 F. Supp. 623, 637 (S.D.N.Y. 1993) (denying rescission remedy), *aff'd*, 36 F.3d 255 (2d Cir. 1994). This thus underscores that the request for equitable contract relief is ultimately simply a disguised request for imposition of an equitable lien. *In re Revlon*, 2023 WL 2229352, at *16.

Lastly, the extraordinary circumstances necessary for a voiding remedy are also not met here. Courts find contracts to be void *ab initio* only in extreme circumstances, such as where a contract was forged, is usurious or illegal, or was procured through fraudulent inducement, facts not present here. *See supra* Section VII; *Adar Bays, LLC v. GeneSYS ID, Inc.*, 179 N.E.3d 612, 621 (N.Y. 2021) (determining that "loans proven to violate the criminal usury statute" are void ab initio); *Knight v. New York & Presbyterian Hosp.*, 194 N.Y.S.3d 218, 223 (N.Y. App. Div. 1st Dep't 2023) ("[A] forged signature renders a contract void ab initio."); *Friedman v. Otsego Mut. Fire Ins. Co.*, 114 N.Y.S.3d 686, 688 (N.Y. App. Div. 2d Dep't 2020) (contract formed on "material misrepresentation" may be void ab initio); *Hetchkop v. Woodlawn at Grassmere, Inc.*, 116 F.3d 28 (2d Cir. 1997) (fraud in the execution may void an alleged agreement); *Swain v. Wiley Coll.*, 74 S.W.3d 143, 146 (Tex. App. 2002) ("A contract is only void if it violates a specific statute or is against public policy."); *Associated Recovery v. Does 1-44*, 2018 WL 1517863, at *14 (N.D. Tex. Mar. 28, 2018), *aff'd sub nom. Associated Recovery L.L.C. v. Does 1- 44*, 769 F. App'x 160 (5th Cir. 2019) ("A contract is void ab initio if it seriously offends law or public policy.").

B. Equitable Subordination Is Not Colorable In Light Of The Trial Evidence

The 2024/2026 Holders' equitable subordination claim is also not colorable. Equitable subordination is an "extraordinary" and "unusual remedy which should be applied only in limited circumstances." *In re SI Restructuring, Inc.*, 532 F.3d 355, 359 & n.2 (5th Cir. 2008) (cleaned up); *see also In re Life Partners Holdings, Inc.*, 926 F.3d 103, 122 (5th Cir. 2019). The Fifth Circuit has "largely confined equitable subordination to three general paradigms: (1) when a fiduciary of the debtor misuses his position to the disadvantage of other creditors; (2) when a third party controls the debtor to the disadvantage of other creditors; and (3) when a third party actually defrauds other creditors." *Id.*; *see* ECF 199 at 82-83, 87-88. Under this standard, even an intentional breach of contract *cannot* justify equitable subordination. *See In re U.S. Abatement Corp.*, 39 F.3d 556, 561-62 (5th Cir. 1994); *Kham & Nate's Shoes No. 2, Inc. v. First Bank of Whiting*, 908 F.2d 1351, 1357 (7th Cir. 1990) (reversing subordination of claim, holding that "'[i]nequitable conduct' in commercial life means breach plus some advantage-taking").[246]

Claims held by ***non-insiders*** can be equitably subordinated only if they engaged in fraud, spoliation, or overreaching (akin to abuse of the corporate form). *Matter of Fabricators, Inc.*, 926 F.2d 1458, 1465 (5th Cir. 1991).[247] ***No evidence*** supports such a finding. The cases the 2024/2026 Holders provided to the Court,[248] are unrelated to equitable subordination or easily distinguishable. For example, *In re Model Imperial, Inc.*, involved fraud and other crimes that were knowingly aided by outside lenders. 250 B.R. 776 (Bankr. S.D. Fla. 2000). ***No evidence*** of that sort was

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[246] "Absent more, 'a simple breach of contract is insufficient to support a claim of equitable subordination.'" *In re Vetter Assets Serv., LLC*, 609 B.R. 279, 287 (Bankr. W.D. Okla. 2019) (collecting cases).

[247] *See* also *Life Partners Creditors' Tr. v. Black Diamond Lifeplan Fund*, 2018 WL 4076491, at *5 (N.D. Tex. June 22, 2018); *Tilton v. MBIA, Inc. (In re Zohar III, Corp.)*, 639 B.R. 73, 91 (Bankr. D. Del. 2022), *aff'd*, 620 F. Supp. 3d 147 (D. Del. 2022) ("[T]he most important factor in determining if a claimant has engaged in inequitable conduct for the purposes of equitable subordination is whether the claimant was an insider or outsider in relation to the debtor at the time of the act.").

[248] *See* ECF 744.

adduced at trial. As outsiders to the Company, the majority holders had no fiduciary relationship that could be "misuse[d] . . . to the disadvantage of other creditors," *Matter of CTS Truss, Inc.*, 868 F.2d 146, 148 (5th Cir. 1989), and the 2022 Transaction was the product of robust, arm's length negotiations between the parties' respective financial advisors and counsel.[249] There is likewise no evidence that the 2022 Transaction involved fraud or was in any way a "sham." *See, e.g.*, *In re Equip. Equity Holdings, Inc.*, 491 B.R. 792, 843 (Bankr. N.D. Tex. 2013) (rejecting "sham" allegations as part of request for § 510(c) subordination).[250] To the contrary, the $250 million in new money provided through the Note Purchase was sized in early February 2022, before the 2024/2026 Holders even surfaced, based on the Company's critical business needs—it was not some sham purchase with no economic substance. And the exchange provided separate and independent benefits in the form of debt service relief and maturity extensions.

Equitable subordination should also be denied because the 2022 Transaction was not unfair to the 2024/2026 Holders. They understood that the liens could be released, and made tactical choices that they hoped would generate profit at the Company's expense, and have themselves engaged in non-pro rata uptier transactions, agreeing there is nothing inherently improper about them. *See supra* Section II.E; *In re Mir*, 2021 WL 1081405, at *4 n.28 (Bankr. S.D. Tex. Mar. 19, 2021).[251] This is not the sort of conduct that section 510(c) is meant to redress.

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[249] *See infra* Section X.B; ECF 610-3; ECF 610-6; ECF 610-30; ECF 610-27; ECF 610-9; ECF 610-10; ECF 610-12; ECF 610-11 (reflecting numerous proposals and counterproposals exchanged by the advisors); ECF 738 (O'Connell) at 127:6-19 (Company's board followed PJT's recommendation and was not controlled by other parties); *see also supra* Section VII.

[250] S*ee also In re Lehman Bros. Holdings Inc.*, 541 B.R. 551, 576 (S.D.N.Y. 2015) (suggesting "sham" would involve an "intent to defraud"); *In re Zohar III, Corp.*, 639 B.R. 73, 99 (Bankr. D. Del.) (rejecting equitable subordination claim based on sham allegations), *aff'd*, 620 F. Supp. 3d 147 (D. Del. 2022), *appeal dismissed*, 2022 WL 19038638 (3d Cir. Nov. 10, 2022).

[251] Nor is 11 U.S.C. § 105 a mechanism through which the Court may modify the Company's capital structure. While Section 105 has been used to recharacterize certain debt transactions as equity, its powers are narrower than those of Section 510(c). *See In re Entrust Energy, Inc.*, 2023 WL 3855817, at *13 (Bankr. S.D. Tex. June 6, 2023) (Isgur, J.); *see also Law v. Siegel*, 571 U.S. 415, 421 (2014) ("It is hornbook law that § 105(a) 'does not allow the

Moreover, even assuming *arguendo* that equitable subordination could apply, the Court would need to consider myriad factors established at trial, including (without limitation): (i) no 2024 holder has cause to complain whatsoever; (ii) the largest 2026 holder (Golden Gate) self-inflicted most of its loss by borrowing money to buy over $200 million in 2026 Notes, including at above-market prices, after learning of the rumored financing; (iii) the participating creditors capitalized their past due interest payments and reduced the cash-portion of subsequent interest payments, and also extended maturities on their 2024 Notes; (iv) the PIMCO and Silver Point Noteholders advanced $250 million in new money for the Company's benefit, causing them losses that other holders did not suffer; and (v) the 2024/2026 Holders entered into a cooperation agreement instead of selling their bonds in the open market, as to which the only record evidence is that the debt was trading at or close to par at the time. Furthermore, the Court would need to conduct an inquiry into what the Company would have faced (and the resulting recoveries) in the absence of the rescue financing, which would include a free-fall bankruptcy. It would be inappropriate for the Court to simply rewire the rights of parties as they exist now without considering these equitable factors.

Finally, if the UCC (and the 2024/2026 Holders) argue that "Platinum," presumably as controlling shareholder, allegedly breached its fiduciary duties to Incora, this argument fails. *First*, there is no reason to address the merits of any equitable subordination claim against Platinum. There is nothing to subordinate: there is no evidence that the 1.25L Notes have any value and, removing all doubt, the 1.25L holders (including Platinum) have already agreed to give up any distribution on account of those notes pursuant to a settlement embodied in the pending plan of

bankruptcy court to override explicit mandates of other sections of the Bankruptcy Code.'" (quoting 2 Collier on Bankruptcy ¶ 105.01[2], p. 105-06 (16th ed. 2013)).

reorganization. *See Life Partners Creditors Tr. v. Black Diamond Lifeplan Fund*, 2018 WL 4076491, *4 (N.D. Tex. June 22, 2018) (equitable subordination proper only to the extent it can "offset the harm" caused). *Second*, the UCC and the 2024/2026 Holders cannot prove breach of any fiduciary duty. Platinum, as controlling shareholder, can only be held liable if it "actually use[s] its power to control to its own advantage or to the other creditors' detriment." *Matter of Fabricators*, 926 F.2d at 1467. Here, "Platinum" took no formal actions as a shareholder to compel any aspect of the 2022 Transaction. Nor is there any evidence that Platinum (again, as distinct from any employees that were also directors) improperly directed or influenced the negotiations.[252] In any event, there can be no breach of fiduciary duty or equitable subordination because "the good faith of the [2022 Transaction] and its inherent fairness" has been clearly established. *Matter of Herby's Foods, Inc.*, 2 F.3d 128, 131 (5th Cir. 1993). The 2022 Transaction was plainly Incora's best option.[253] Nor is there any genuine dispute that Platinum's participation in the transaction was good for the company.[254]

C. There Is No Basis To Grant An Equitable Lien

The 2024/2026 Holders are also foreclosed from obtaining derivative standing to pursue an equitable lien. As the Court already held, the equitable lien claim is simply an improperly "disguised avoidance action[] belonging to Wesco's estate."[255] And even if the 2024/2026 Holders could pursue an equitable lien claim, any such claim is not colorable. To establish an equitable lien, a party must prove "(1) that there exists an express or implied agreement between the parties

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[252] ECF 879 (O'Connell) at 330:19-25 (testifying that Platinum was a "price taker").

[253] *See supra* Section VII.

[254] *See* ECF 738 (O'Connell) at 132:11-17:2; ECF 868 (Bartels) at 233:1-234:22.

[255] ECF 508 at 14. Under the Court's summary judgment decision, then, the 2024/2026 Holders can only seek a claim under 11 U.S.C. 544(b)(1), and they would need derivative standing to do so. The parties reserve all arguments on such standing for future briefing and argument.

demonstrating a clear intent to create a security interest in order to secure an obligation between them; (2) that the parties intended specific property to secure the payment; (3) and that there is no adequate remedy at law." *In re RONFIN*, 182 F.3d at 371; *In re iHeartMedia, Inc.*, 597 B.R. 339, 360-61 (Bankr. S.D. Tex. 2019) (Isgur, J.) (denying equitable lien); *see also* ECF 199 at 84-87; ECF 215 at 40-43. This standard cannot be satisfied by the trial evidence.

The 2024/2026 Holders have not proven the requisite "express or implied agreement" to create a security interest in their favor, as the governing agreements expressly permitted the removal of the security interest and were amended to eliminate such an interest. Even if there were such an agreement, they have a remedy at law, damages.[256]

D. The Equitable Subordination And Equitable Lien Claims Do Not Present A Live Article III Case Or Controversy As Against Citadel

Citadel no longer owns any of the 1L Notes or 2026 Notes. Citadel shut down the credit strategy that had led to its investment in Incora and sold out its entire position in August 2022, well before the Debtors' bankruptcy.[257] Thus, even if the equitable subordination and equitable lien claims were colorable, Citadel simply does not possess claims or liens against the Debtors' estate that the Court could subordinate in favor of the 2024/2026 Holders. Whether analyzed as Article III standing or mootness, the Court can no longer grant the 2024/2026 Holders meaningful relief on their equitable lien and equitable subordination claims against Citadel and there is no live case or controversy with Citadel with respect to these claims. The Court thus lacks subject matter jurisdiction to adjudicate them. *See Bayou Liberty Ass'n, Inc. v. U.S. Army Corps of Eng'rs*, 217

[256] *See supra* Section VIII.A. To the extent that the 2024/2026 Holders contend that an equitable lien may be granted to remedy a general "injustice," derivative standing should also be denied as not colorable for the same reasons that the equitable subordination claim must be denied: there is no evidence in the record of any such injustice. *See In re Pasquariello*, 16 F.3d 525, 531 (3d Cir. 1994) (affirming dismissal of a "plethora of equitable remedies," including equitable subordination and equitable lien claims, on the same grounds); Debtors' Motion for Summary Judgment at 84-86; PIMCO and Silver Point Noteholders' Motion for Summary Judgment at 40-43.

[257] ECF 1142 (Rochard) at 162:21-163:15.

F.3d 393, 398 (5th Cir. 2000) (claims for declaratory and injunctive relief became moot upon completion of construction of the retail facility sought to be enjoined).[258]

IX. THE 2024/2026 HOLDERS' TORTIOUS INTERFERENCE CLAIMS FAIL

A. The 2022 Transaction Did Not Breach The Indentures

A plaintiff alleging tortious interference "must show the existence of its valid contract with a third party, defendant's knowledge of that contract, defendant's ***intentional and improper procuring of a breach***, and damages." *White Plains Coat & Apron Co. v. Cintas Corp.*, 8 N.Y.3d 422, 426 (2007). The 2024/2026 Holders cannot meet this standard.

B. The Defendants Did Not *Intend* To Procure A Breach

A defendant intentionally interferes with a contract when it is his "goal" to "cause a breach of contractual relations between [plaintiff] and [the breaching party]." *In re Refco Inc. Sec. Litig.*, 826 F. Supp. 2d 478, 521 (S.D.N.Y. 2011). "[I]t is not enough that a defendant engaged in conduct with a third-party that happened to constitute a breach . . . instead, the evidence must show that the defendant's ***objective*** was to procure such a breach." *Roche Diagnostics GmbH v. Enzo Biochem, Inc.*, 992 F. Supp. 2d 213, 221 (S.D.N.Y. 2013) (emphasis added).

No Defendants intended to procure a breach of the Indentures. The Participating Noteholders made an economic offer regarding the terms on which they would provide financing and other relief under their understanding of the Indentures' flexibility, and then consented to amendments proposed by the Company, and which the Company represented in various documents

[258] *See also Shemwell v. City of McKinney*, 63 F.4th 480, 483-84 (5th Cir. 2023) (challenge to municipality's recall procedures became moot once the plaintiff lost the election); *Ctr. for Biological Diversity, Inc. v. BP Am. Prod. Co.*, 704 F.3d 413, 426 (5th Cir. 2013) (action for injunctive relief against oil well discharge became moot once well was plugged and no meaningful relief could be granted by injunction); *Placid Oil Co. v. C.C. Abbitt Farms, LLC*, 561 B.R. 60, 65-67 (N.D. Tex. 2016) (suit for violation of a bankruptcy discharge injunction moot once the defendant removed the offending claims from its state court complaint).

were permitted under the Indentures.[259] As outsiders they did not and could not have caused the Company to amend the Indentures or enter into any agreement; indeed, the Company witnesses uniformly testified that they independently determined that the deal was in the Company's best interest.[260] The resulting deal reflected a robust, arm's length negotiation between the Company and the Participating Noteholders. *See supra* Section VII.

Citadel and Senator were even further removed from the Debtors' decision to enter into the deal. After being invited by PIMCO to join its group in mid-February of 2022, Citadel had no role in the negotiations with the Company and no meaningful input into the transaction's terms.[261] Ultimately, Citadel contributed only approximately 1% of the $250 million in new money provided to the Company.[262] Citadel could not possibly have induced the Company to do anything it did not decide on its own to do. Similarly, Senator understood that the material terms of the deal were already negotiated when it was approached in February 2022; it never even hired a financial advisor.[263] As Mr. O'Connell testified, Senator had no material influence on any of the terms.[264]

For their part, Platinum also did not engage in any of the actions that Plaintiffs allege procured a breach. Counterclaim Plaintiffs' theory of tortious interference as to Platinum hinges on conflating the actions of Incora's board of directors with Platinum. *See infra* Section X.E

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[259] *See* ECF 1013 (Prager) at 13:15-14:13, 51:17-52:1; ECF 955 (Dostart) at 14:17-16:8, 66:11-20. The Company and its advisors represented that the 2022 Transaction was permitted. *See, e.g.*, ECF 604-19 at 7 (Exchange Agreement stating parties to the Fourth Supplemental Indentures were "authorized to execute and deliver" those amendments); ECF 1150-11 (Officer's Certificate and Opinion of Counsel for issuance of Additional 2026 Notes sent to counsel for the PIMCO and Silver Point Noteholders on March 28, 2022); ECF 710-56 (Officer's Certificates sent to counsel for PIMCO and Silver Point Noteholders).

[260] ECF 630 (Vorderwuelbecke) at 209:15-19; ECF 738 (O'Connell) at 35:3-12, 112:9-113:17; ECF 664 (Carney) at 57:2-7, 65:5-14.

[261] ECF 1142 (Rochard) at 143:14-144:21, 145:2-4; ECF 955 (Dostart) at 91:24-92:4, 92:13-93:3.

[262] ECF 1142 (Rochard) at 147:4-13.

[263] ECF 1384-1 (Bharadwa Dep. Tr.) at 74:14-75:8, 77:15-78:17,111:10-112:6, 121:10-22.

[264] ECF 738 (O'Connell) at 157:16-20.

(discussing no inducement by Platinum as to Langur Maize's claims). In fact, corporate formalities were diligently observed, including that the transaction was approved by Incora's board of directors acting in their capacity as such, and that Platinum did not vote on, or participate in board meeting discussions concerning, the inclusion of its own debt in the transaction. *See infra id.* The meager facts they may cite to suggest that corporate formalities were ignored do not show what they want them to show. For instance, they may contend that there was something improper about the fact that Ms. Sigler signed the $25 million promissory note issued to Platinum in November 2020 for both Incora and TopCo. But, as Counterclaim Plaintiffs have acknowledged, a single individual acting in multiple roles in this way is not uncommon,[265] and in fact they themselves engage in the practice of a single person signing for both counterparties to an agreement.[266] Or, Counterclaim Plaintiffs may suggest that Platinum should have negotiated the $25 million unsecured promissory note at arms' length with the Debtors rather than simply taking the note on similar terms to the Unsecured Notes. But this ignores that new money in November 2020 was not otherwise available to the Debtors on ***any*** terms—much less better terms.[267] The suggestion that there was anything untoward about Platinum's relationship to Incora is unfounded.

C. The Economic Interest Doctrine Protects The Defendants

Even if this Court finds that the Defendants intentionally procured a breach of the Indentures, they are protected under New York's economic interest doctrine. Tortious interference requires an "intentional *and improper* procuring" of a breach. *White Plains*, 8 N.Y.3d at 426. Under black-letter New York law, a defendant does not act improperly when it "act[s] to protect

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[265] ECF 970 (Seketa) at 226:1-14.

[266] *See* ECF 1017-2 (Assignment and Assumption Agreement).

[267] *See* ECF 694 (Carney) at 163:1-6 ("Q: [W]as anybody else, at that time, willing to—willing to put in additional money into the company in November of 2020 to your knowledge? A: Not to my knowledge.").

its own legal or financial stake in the breaching party's business," including when that defendant is "the breaching party's creditor." *Id.*[268] "The imposition of liability in spite of a defense of economic interest requires a showing of either malice on the one hand, or fraudulent or illegal means on the other." *Foster v. Churchill*, 87 N.Y.2d 744, 750 (1996). The doctrine goes so far as to protect creditors who *knowingly* cause the companies in which they invest to violate existing financial obligations to others.[269]

In at least three recent cases challenging uptier transactions like the one challenged here, courts have dismissed tortious interference claims at the pleading stage—even when confronted with allegations of bad faith conduct. In *Audax Credit Opportunities Offshore Ltd. v. TMK Hawk Parent, Corp.*, 72 Misc.3d 1218(A) (N.Y. Sup. Ct. 2021) ("***TriMark***"), the court held that "[o]ne who has a financial interest in the business of another possesses a ***privilege to interfere*** with the contract between the other and someone else ***if his purpose is to protect his own interests***"—even where that defendant's actions "left one group of First Lien lenders . . . subordinated, without their consent, to the interests of another group." *Id.* at *1-2, *11; *see also ICG Glob. Loan Fund 1 DAC v. Boardriders, Inc.*, 2022 WL 10085886, at *9-10 (N.Y. Sup. Ct. Oct. 17, 2022) (finding economic interest defense applied given defendant's financial interest in the breaching party and holding that "[a]lthough [defendant] may not have acted in good faith in [its] actions, specifically with regard to shutting down avenues of communication, . . . plaintiff fails to allege that the actions were

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[268] *See also* ECF 215 ¶¶ 56-58 ; ECF 321 ¶¶ 23-26; ECF 702.

[269] *See, e.g.*, *Bank of N.Y. Mellon v. Cart 1, Ltd.*, 2021 WL 2358695, at *4 (S.D.N.Y. June 9, 2021) (bondholder acted to protect "a legal and a financial interest," and was "justified" since the creditor increased its own payout); *U.S. Bank Nat'l Ass'n v. Triaxx Asset Mgmt. LLC*, 2019 WL 4744220, at *9 (S.D.N.Y. Aug. 26, 2019) ("Because PIMCO, as a senior noteholder, is alleged to have an economic interest in the CDOs . . . the Court finds that PIMCO is entitled to the economic interest defense."); *Ultramar Energy v. Chase Manhattan Bank*, 179 A.D.2d 592, 592-93 (N.Y. App. Div. 1st Dep't 1992) (creditor protected because it was acting to increase the collateral available to cover its own security interests); *White Plains*, 8 N.Y.3d at 426 n.9 (creditor may raise defense citing *Ultramar*); *Abele Tractor & Equip. Co. v. Schaeffer*, 167 A.D.3d 1256, 1258-59 (N.Y. App. Div. 3d Dep't 2018).

fraudulent or illegal"). And in *Ocean Trails CLO VII v. MLN TopCo Ltd.*, Index No. 651327/2023 (N.Y. Sup. Ct. 2023) ("*Mitel*"), the New York Supreme Court dismissed a plaintiff's tortious interference claim against a creditor that had participated in a liability-management transaction.[270]

There is no reason to deviate from the New York courts' decisions. PIMCO and Silver Point invested hundreds of millions of dollars in Incora and acted to provide financing and other relief to help the Company.[271] Citadel invested approximately $2.5 million for the same reason. Senator provided necessary consents under the Holdco PIK Notes.[272] And Platinum—as parent, sole equity holder, and debt holder—likewise possesses the type of interests in Incora that courts routinely recognize as the sort of economic interest that supports application of the defense.[273]

The 2024/2026 Holders have asserted that the defense is unavailable because the Defendants acted for their "own, direct" interests.[274] But the cases the 2024/2026 Holders have cited stand only for the proposition that the defense does not apply when the defendant is acting in furtherance of some interest ***independent*** of that in the breaching party, or to the ***detriment*** of the

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[270] ECF 701-2 at 56:7-57:10 (dismissing claim against Credit Suisse on the basis that "case law recognizes a creditor has an interest in repayment of a loan that it has"); *see also id.* at 54:8-22.

[271] *See supra* Section VII.

[272] ECF 738 (O'Connell) at 45:2-6, 89:22-90:5.

[273] *See* ECF 702 at ¶¶ 10-14; *see also White Plains Coat & Apron*, 8 N.Y.3d at 426 & n. 8 (holding that the defense necessarily applies "where defendant and the breaching party had a parent-subsidiary relationship"); *Vinas v. Chubb Corp*., 499 F. Supp. 2d 427, 433 (S.D.N.Y. 2007) (recognizing that "many of the cases involving [successful deployment of the] economic interest defense in the context of a tortious interference with contract claim have involved parent-subsidiary relationships"); *MDC Corp., Inc. v. John H. Harland Co*., 228 F. Supp. 2d 387, 398 (S.D.N.Y. 2002) (a parent having "malice" as to a subsidiary's interests is economically irrational and "improbable . . . where the parent is said to be meddling in its own subsidiary[']s affairs" (citing *Foster*, 87 N.Y.2d at 750)). As discussed in greater detail in the Langur Maize section, below, and omitted here to avoid duplication, Section 13.05 of the Secured Indenture also forecloses tortious interference claims against Platinum.

[274] ECF 291 at 60.

breaching party.[275] The defense applies even when the defendant furthers its interest "directly."[276] A party need not be an altruist to benefit from the defense. *See Don King Prods., Inc. v. Smith*, 47 F. App'x 12, 15 (2d Cir. 2002); *Imtrac Indus., Inc. v. Glassexport Co.,* 1996 WL 39294, at *8 (S.D.N.Y. Feb. 1, 1996) (the defense is "the self-interest privilege"); *Mitel*, ECF 701-2 at 57:2-4 (creditors always "ha[ve] an interest in repayment").

Similarly, there is no merit to the 2024/2026 Holders' argument that the Participating Noteholders are not entitled to the defense because they acted "to further an investment thesis premised on taking value from . . . excluded noteholders in an uptier transaction."[277] Such an argument would completely eliminate the economic interest doctrine, because the very premise of a tortious interference claim is that one person has interfered with a contract that has value to a contracting party, which value has thereby been "taken" from them. The economic interest doctrine provides a "privilege to interfere." *TriMark*, 72 Misc.3d 1218(A), at *11.[278] In any event, the Participating Noteholders infused $250 million of new money, provided cash interest relief,

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[275] *See Bausch & Lomb Inc. v. Mimetogen Pharms., Inc.*, 2016 WL 2622013, at *12 (W.D.N.Y. May 5, 2016) (plaintiff plausibly alleged malice and where defendant acted to protect its interest in competitor, not in the breaching company); *Hudson Bay Master Fund Ltd. v. Patriot Nat'l, Inc.*, 2019 WL 1649983, at *16 (S.D.N.Y. Mar. 28, 2019) (defense inappropriate where "only" the director defendant, not the company, "could benefit" by his action because he was "pursuing a personal, and not corporate, interest"); *Dell's Maraschino Cherries Co. v. Shoreline Fruit Growers, Inc.*, 887 F. Supp. 2d 459, 484 (E.D.N.Y. 2012) (economic interest defense unavailable where defendants conceded "that any alleged interference would be in their own interests, not those of [the breaching party]"); *Wells Fargo Bank, N.A. v. ADF Operating Corp.*, 50 A.D.3d 280, 280-81 (N.Y. App. Div. 1st Dep't 2008) (defense inapplicable where "defendants were not acting to protect their financial interests in [the breaching party] . . . but rather . . . to profit themselves to the detriment of [the breaching party's business]").

[276] *See, e.g.*, *Ultramar*, 179 A.D.2d at 593 (tortious interference failed because defendant, "in attempting to protect ***its security interest,*** cannot be construed as malicious or carried out with intent to harm the plaintiff").

[277] ECF 620 ¶ 11.

[278] Debt investors do not bear a heavier burden in asserting the defense than equity investors. *See White Plains*, 8 N.Y.3d at 426 (drawing no distinction between the defense as applied to "significant stockholders," "parent-subsidiary relationship[s]," "the breaching party's creditor," and defendants with "a managerial contract with the breaching party"); *Don King Prods.*, 47 F. App'x at 15 n.4 (rejecting plaintiff's argument that the defense "only applies where the defendant has an ownership interest in the breaching party"); *Cart 1, Ltd.*, 2021 WL 2358695, at *4 ("Even if [a bondholder] procured [the Trustee's] breach of the Indenture, it was justified in any good-faith attempt to enforce its rights."); *Ultramar*, 179 A.D.2d at 592-93.

and extended maturities. They were not obligated to offer these benefits for free. Any argument against Platinum fails for similar reasons. Further, Patrick Bartels was the board member who approved the Platinum portion of the transaction, which he approved following a review of Platinum's concessions with respect to interest, maturities, and the monitoring fee that Incora owed it annually.[279] Again, these concessions had real, positive liquidity benefits for Incora, *see supra* Section VII, and Platinum, too, was not obligated to provide them for free.

D. The 2024/2026 Holders Cannot Overcome The Economic Interest Defense

The 2024/2026 Holders failed to meet their burden of establishing any malice (*i.e.*, that any Defendant acted with the "***sole purpose*** of inflicting intentional harm"), fraud, or illegality that could overcome the economic interest defense. *Triaxx*, 2019 WL 4744220, at *10 (quoting *Carvel Corp. v. Noonan*, 3 N.Y.3d 182, 190 (2004) (emphasis in *Triaxx*)).[280]

There is simply no evidence that any Defendant acted to cause harm to the 2024/2026 Holders or that there was any fraud or illegality.[281] *See supra* Section VIII.B; *Ruha v. Guior*, 277 A.D.2d 116, 116 (N.Y. App. Div. 1st Dep't 2000) ("[P]laintiffs' bare allegations of malice do not suffice . . . [and] are contradicted by plaintiffs' own claims that defendants' actions were financially motivated."); *see also IMG Fragrance Brands, LLC v. Houbigant, Inc.*, 679 F. Supp. 2d 395, 406-09 (S.D.N.Y. 2009) (rejecting illegality and fraud where the "illegal means" complained of was a "mere breach of contract").

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[279] ECF 868 (Bartels) at 234:3-17, 252:20-253:14; ECF 536-24 at 19-20.

[280] *See also TriMark*, 72 Misc. 3d 1218(A), at *1 (citing *Foster*, 87 N.Y.2d at 750). Foreseeability of harm is not malice or "bad faith." *See id.* at *11 ("[E]ven bad faith, without more, does not satisfy the malice requirement."); *E.F. Hutton Int'l Assoc. v. Shearson Lehman Bros. Holdings*, 281 A.D.2d 362, 362-63 (N.Y. App. Div. 1st Dep't 2001) (that defendant "may have known that this would negatively affect [plaintiffs] does not raise an issue of fact as to whether the breach was motivated by malice"); *Ultramar*, 179 A.D.2d at 592-93 (economic interest defense covered creditor's actions which foreseeably deprived a breaching party's customer of their contractual right); *see also Boardriders*, 2022 WL 10085886; *Mitel*, Index No. 651327/2023, ECF 701-2.

[281] *See supra* Sections VII; VIII; *infra* Section X.E.

X. LANGUR MAIZE'S CLAIMS FAIL

A. The Unsecured Exchange Benefited Wesco And Was A Losing Bet For The Participants

Platinum, Carlyle, and Senator (together, the "***Participating Unsecured Noteholders***") separately transacted with the Company to provide additional liquidity (the "***Unsecured Exchange***").[282] For the Unsecured Exchange, WSFS and Wesco amended the Unsecured Indenture via the Third Supplemental Unsecured Indenture, which allowed Wesco to incur additional secured debt and removed a restriction on affiliate transactions.[283] WSFS and Wesco then entered into the Fourth Supplemental Unsecured Indenture, which removed additional covenants from the Unsecured Indenture.[284] These amendments were executed with the requisite majority noteholder consents.[285] Finally, the Company purchased and retired the participating debt in exchange for newly issued 1.25L Notes pursuant to the Exchange Agreement.[286]

Participating Unsecured Holders received a second lien security interest and a PIK/Amendment fee of 1.125% payable in 1.25L Notes.[287] In return, they (i) PIK'd all accrued interest as of the Exchange Date (~$22 million); (ii) accepted 4% cash prorated for 2022, and 6% cash from 2023–2027, and PIK'd the balance of the 13.125% interest they were otherwise owed; and (iii) consented to a $1.05 billion basket for additional 1.25L debt (~$580 million remained

[282] Carlyle, along with its co-investor Spring Creek, owned $269 million of Unsecured Notes at the time of the transaction. ECF 603-06 at 5; ECF 832 (Hou) 77:13-18. Senator owned $35 million of Unsecured Notes and $29.8 million of secured 2024 and 2026 notes, 603-06 at 1-2, 5; ECF 602-37 at 4, and alone participated in the Secured ***and*** Unsecured exchanges. Senator also owned $38.4 million of the Holdco PIK Notes. ECF 604-2 at 4. Platinum owned $141.8 million Unsecured Notes, the 2023 maturing $25 million Promissory Note, and $120 million in Holdco PIK notes. ECF 603-6 at 5; ECF 827 (Smith) 70:2-4; ECF 738 (O'Connell) 13:2-6. No Holdco PIK Notes were exchanged in the Transaction.

[283] ECF 604-18 at 1-2; ECF 1184 (Osornio) 35:5-12.

[284] ECF No. 601-33 at 2-3; ECF 1184 (Osornio) 35:15-16.

[285] ECF 603-16; ECF 603-13; ECF 602-37.

[286] ECF 604-19; ECF 604-20; ECF 604-22.

[287] ECF 601-32; ECF 604-39; ECF 602-14.

post-Exchange).[288] The PIK benefit alone provided $43 million in immediate liquidity savings for the Company in 2022 and promised over $100 million in 2023-2027. The deal also immediately extended the 2023 Promissory Note maturity. No consents necessary to do this transaction required the Additional 2026 Secured Notes or placed formerly unsecured holdings into a first lien.[289] The Unsecured Exchange was a fair risk-adjusted bet on Wesco: participants forfeited material cash interest expecting Wesco's value to improve. In light of the June 2023 bankruptcy filing, the bet was lost: non-participating 2027 holders ***did better*** economically than participating holders, who are out of the money under the proposed plan.[290]

B. Langur Maize Lacks Article III Standing To Assert Its Claims

Because Langur Maize has not suffered a direct injury, its Article III standing requires an assignment from an injured party. It received no such assignment.

Section 13-107 Did Not Automatically Transfer Claims to Langur Maize. As the Court held on summary judgment, New York General Obligations Law § 13-107 did not assign third-party claims to Langur Maize; it also reflects a legislative choice not to assign such claims that is entitled to deference.[291]

No Assignment from DTC. Assignment of litigation claims outside of § 13-107 must be express and does not occur automatically upon assignment of a contract. *Fox v. Hirschfeld*, 157 A.D. 364, 366, 368 (N.Y. App. Div. 1st Dep't 1913) (home purchase contract stating, "I hereby sell, assign, transfer, and set over unto [my wife] all my right, title, and interest in and to the within contract," did not assign claims for fraud in the sale). Langur Maize has admitted that no prior

[288] ECF 603-28 § 4.09(b)(3)(b); ECF 1352 (Steffen) at 95:3-12, 96:9-23; ECF 536-24 at 6.

[289] *See* ECF 601-30 at 2; ECF 601-39 at 2.

[290] ECF 508 at 20-21.

[291] ECF 832 (Hou) at 143:6-17, 144:2-6, 144:21-145:14.

holder has assigned it any claims.[292]

Langur Maize instead posits that it received third party claims from DTC. But DTC does not have any claims, because—as this Court has already held—it was not directly injured.[293] Nor has DTC been assigned those claims from an entity that *was* injured.[294] DTC has nothing relevant to assign.[295]

Nor does the Unsecured Indenture or Global Note structure result in the automatic assignment of claims to DTC. An assignment of claims must clearly manifest an intention to transfer ownership of those claims.[296] Langur Maize points to two DTC letters, neither of which purports to *transfer* claims.[297] Those letters document that Langur Maize may bring any lawsuit *Langur Maize* has Article III standing to bring, notwithstanding that DTC is the record holder.[298] *See W.R. Huff Asset Mgmt. Co. v. Deloitte & Touche LLP*, 549 F.3d 100, 107 (2d Cir. 2008); *see also Pyramid Transp., Inc. v. Greatwide Dallas Mavis, LLC*, 2013 WL 840664, at *5 (N.D. Tex. Mar. 7, 2013). The letters expressly state that "***Cede & Co. has no interest in this matter*** other than to take those steps which are necessary to ensure that ***the Beneficial Owner is not denied its rights and remedies as the beneficial owner*** of the Subject Notes on the Subject Date."[299]

Langur Maize's previous citations to state-court cases regarding beneficial owners' *capacity* or *right to sue* have no bearing on *Article III standing*. *Springwell* concerns "capacity"

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[292] Langur Maize Resp. to Platinum RFA No. 11 ("Langur Maize admits . . . it did not seek or receive from the prior beneficial owners in writing expressly assigning claims . . . .").

[293] ECF 508 at 20-21.

[294] *See* ECF 1375 (Cimala Depo. Tr.) at 78:23-79:12.

[295] *See id.*

[296] *See* Platinum Opp'n to Langur Maize Mot. Summ. J., ECF 280, at 13-15.

[297] *See* ECF 1075-3, Ex. 2.

[298] *See id.*; *see also* ECF 1375 (Cimala Depo. Tr.) at 193:7-11; 195:8-21.

[299] *See* ECF 1075-3, Ex. 2.

to sue under "an indenture agreement that reserved" the "right to sue" to "the registered holder," not injury-in-fact. *Springwell Navigation Corp. v. Sanluis Corporacion, S.A.*, 46 A.D.3d 377, 377 (N.Y. App. Div. 1st Dep't 2007); *Springwell Navigation Corp. v. Sanluis Corporacion, S.A.*, 81 A.D.3d 557, 558 (N.Y. App. Div. 1st Dep't 2011). Capacity and the right to sue are entirely distinct from Article III standing. *Norris v. Causey*, 869 F.3d 360, 367 (5th Cir. 2017) (capacity); *Maxim Crane Works, L.P. v. Zurich Am. Life Ins. Co.*, 11 F.4th 345, 350-51 (5th Cir. 2021) (right to sue).

The Indenture Did Not Effect an Automatic Assignment of Claims. Langur Maize's theory that an indenture may effect an automatic assignment of claims is contrary to New York law and to the plain text of the Unsecured Indenture. *See Fox*, 157 A.D. at 366, 368. Langur Maize points to sections 2.06(b) and 2.06(b)(1) of the Unsecured Indenture, which permit transfers of "[b]eneficial interests" in the Unsecured Notes to be effected through DTC rather than the trustee, and impose certain restrictions under the securities laws and the private placement legend for the Notes. The leap in logic that this is tantamount to an assignment of third-party claims is contrary to § 13-107 and without any authority.

And even if Langur Maize's general theory of "assignment via global notes" were correct, which it is not, it still could not have acquired claims against *Platinum,* because the Global Note expressly disclaims the existence of such claims even for prior holders. Section 13.05 of the Unsecured Indenture and Section 15 of the Global Note provide that Incora's direct and indirect owners shall have no liability for any claim "based on" obligations created by the Unsecured Notes.[300] The Holder of the Global Note "waives and releases all such liability" by an equity

[300] ECF 538-3 ¶ 15.

owner.[301] The Global Note cannot effectuate a transfer of claims it expressly disclaimed.

Prior Beneficial Owners of the Unsecured Notes Retain Standing. The Court previously expressed concern that if Langur Maize lacked standing, but the prior beneficial owners of the Unsecured Notes were contractually barred from filing suit, then "sellers to Langur Maize could 'own' claims, but could never prosecute them"—which the Court called "an absurd result."[302]

But that Catch-22 will not arise because prior beneficial owners retain their Article III standing to assert claims based on their beneficial interests at the time of the 2022 Transaction. *See, e.g.*, *Lovati v. Petroleos de Venez., S.A.*, 2021 WL 5908953, at *2 (S.D.N.Y. Dec. 14, 2021). When there is no express assignment of litigation claims by the seller of a security to the purchaser, the seller retains standing to sue on those claims. *See, e.g.*, *Dexia SA/NV, Dexia Holdings, Inc. v. Morgan Stanley*, 41 Misc. 3d 1214(A), at *3 (N.Y. Sup. Ct. 2013), *aff'd*, 135 A.D.3d 497 (N.Y. App. Div. 1st Dep't 2016).

Nothing in the Unsecured Indenture (or DTC policy) limits the prior beneficial owners' ability to file suit against third parties for damages. The DTC authorization requirement applies only to suits to vindicate "rights *under the Indenture*."[303] "Rights under the Indenture" concern events of "Default," and are limited to suits "to collect the payment of principal of, premium on, if any, or interest on, the Unsecured Notes or to enforce the performance of any provision of the Unsecured Notes or th[e] [Unsecured] Indenture."[304] That language does not encompass tort claims against third parties; it appears to include claims against parties expressly covered by § 13-107. Further, the Unsecured Indenture's limitations on suit apply only to current beneficial

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301 *Id.*

302 ECF 553 at 2.

303 *Id.*, Ex. A, § 11; ECF 601-7 § 2.08.

304 ECF 601-7 § 6.03.

owners, not prior owners, since the indenture is silent on the topic of such *prior* beneficial owners' rights. *See Quadrant Structured Prods. Co., Ltd. v. Vertin*, 23 N.Y.3d 549, 560 (2014) ("[N]o-action clauses are to be construed strictly and thus read narrowly.").

Langur Maize's argument that Article 8 (specifically, § 8-506) of the UCC forecloses suit by a prior beneficial owner is wrong.[305] That section provides, "A securities intermediary shall exercise rights with respect to a financial asset if directed to do so by an entitlement holder." Section 8-506 says what an intermediary is supposed to do when directed; it says nothing about whether a prior beneficial holder needs to direct DTC to do anything, much less seek the intermediary's permission before bringing a third-party tort claim. It "deals with the aspects of securities holding that are related to investment decisions," such as "forward[ing] proxy materials" or "exercis[ing] a conversion right." N.Y. U.C.C. § 8-506 cmts. 2-3.

C. Claims For Breach Of Contract Against Non-Parties Fail

As an initial matter, Langur Maize is purporting to sue the Participating Unsecured Holders for breach of the Unsecured Indenture—and tortious interference as an alternative theory. The Participating Unsecured Holders cannot have breached the Unsecured Indenture or the Global Note because they are not parties to either instrument.[306] While the Court, on summary judgment, applied this principle to dismiss contract claims under the Secured Indentures, it did not address a parallel argument raised by the Langur Maize counterclaim defendants.[307] But the Secured and Unsecured Indentures are the same in this regard, and thus Langur Maize's claims fail. *See, e.g.*, *A & V 425 LLC Contracting Co. v. RFD 55th St. LLC*, 15 Misc. 3d 196, 204 (N.Y. Sup. Ct. 2007)

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[305] *See* Langur Maize Suppl. Br. Regarding Standing ("***Langur Maize Suppl. Standing Br.***"), ECF 524 at 4.

[306] *See, e.g.*, ECF 601-7 at 1 (issuer, trustee, and guarantors are only parties).

[307] *See* ECF 508 at 53 ("Because the Silver Point Noteholders, the PIMCO Noteholders, the Senator Noteholder, and the Citadel Noteholder are not parties to the Secured indentures, they cannot be obligated under the Secured Indentures.").

("[T]o be liable for a breach of contract, that person must be a party to the contract.").

Langur Maize may seek to circumvent its lack of privity with Platinum specifically by arguing that Platinum "dominated and controlled" the Debtors, but it cannot. Holding a parent corporation liable for a breach of contract committed by its subsidiary requires proof both that the parent "exercised complete domination of [the subsidiary] corporation," *IMG*, 679 F. Supp. 2d at 403-04, and that "such domination was the instrument of fraud or otherwise resulted in wrongful or inequitable consequences," *Sheridan Broad. Corp. v. Small*, 19 A.D.3d 331, 332 (N.Y. App. Div. 1st Dep't 2005). The most Langur Maize can show is that Platinum-affiliated individuals also played roles at Incora. *See supra* Section VII. In any event, Section 13.05 forecloses this theory.

D. Langur Maize Has Failed To Prove A Breach Of The Unsecured Indenture

Langur Maize has failed to prove any breach of the Unsecured Indenture, whether styled as a contract claim or a predicate for a tortious interference claim. It called no witnesses and offered no evidence to sustain its burden on the meaning of any contractual provision at issue. The trial evidence, including the plain language of the Indenture, disproves its claims.

3.02 and 3.07(h) Were Not Breached. Langur Maize has failed to establish a breach of Section 3.02 because the Unsecured Exchange was not a "redemption." The Unsecured Exchange was effected via Section 3.07(h) of the Indenture, which governs "purchases," and the Court has already held that Section 3.02 applies only to redemptions, not purchases.[308]

Transactions that qualify as "redemptions" are set forth in Sections 3.07(a)-(c) & (e)-(g).

[308] *See* ECF 508 at 42-43. Whatever Langur Maize argues in its post-trial submissions, it consistently maintained prior to the Court's summary judgment decision that the 2022 Transaction was ***not*** a redemption. *See, e.g.*, ECF No. 202 at 12 ("[N]o 2027 Notes[ ] were redeemed in the Selective Exchange."); ECF No. 328 at 2 ("[S]ome of the 2027 Notes were purchased in the Selective Exchange, but none were redeemed."); ECF No. 281 at 7 ("Langur Maize has never asserted that the Selective Exchange should be recharacterized as a 'redemption.'"); ECF No. 362 at 23 ("No notes were redeemed in the Selective Exchange.").

Those provisions describe types of redemptions and each uses the words "redeem" or "redemption" to describe specific, pre-negotiated terms on which the issuer is permitted, at its option, to prepay some or all of the outstanding principal and must under those circumstances pay a specified "make-whole" premium, in cash. None applies here. Section 3.07(h) is the only subsection of 3.07 that does not use the terms "redeem" or "redemption." The Unsecured Exchange plainly meets the terms of that provision—it was a "purchase [of] Unsecured Notes" by "[t]he Issuer" through "open market or privately negotiated transactions . . . or otherwise," and the purchased Notes were cancelled. Because Section 3.02 governs only redemptions, ECF 508 at 42-43, a Section 3.07(h) transaction cannot breach Section 3.02.

The unrebutted evidence at trial further confirmed that the Unsecured Exchange was not a redemption. No term sheet or other document talked about "redeeming" notes or "redemptions."[309] All witnesses who testified on this point said that they did not understand the transaction to be a redemption, and that the transaction was *not* consistent with their commercial understanding of what a redemption would be, and no one contradicted them.[310]

Even if the Unsecured Exchange were a redemption (it was not), Langur Maize cannot prove that, had WSFS conducted a Section 3.02 lottery, it would have selected Notes held by Langur Maize's predecessor for exchange or that Langur Maize's predecessor would have accepted any exchange offer (which involved sacrificing cash interest payments).

Langur Maize's belatedly asserted claim that Section 3.07(h) was breached, because

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[309] ECF 610-7; ECF 610-9; ECF 610-10; ECF 610-13; ECF 610-14; ECF 610-15; ECF 610-27; ECF 610-35.

[310] ECF 832 (Hou) at 157:6-10; 157:20-158:1 ("[A] redemption is a situation where the company can pay down [an] instrument without [creditors'] consent . . . in a pre-negotiated manner."); ECF 827 (Smith) at 104:16-18, 106:8-10 (to his "commercial understanding," the transaction did not effectuate a redemption" because "an optional redemption is something that's done at the issuer's election when they are at their option, calling bonds and redeeming them"; ECF 738 (O'Connell) at 138:16-19 (no one at PJT "ever refer[red] to the March 2022 exchange as a 'redemption' of bonds."); ECF 1350 (Healy) at 197:23-24 (WSFS "didn't consider . . . any part of the [2022] transaction to be a redemption.").

Platinum was not a "third party" from whom notes could be purchased, also lacks merit. First, because Langur Maize never put Defendants on notice of such a theory through its pleadings, it is forfeited. *See Portis v. First Nat'l Bank of New Albany*, 34 F.3d 325, 332 (5th Cir. 1994). In any event, Langur Maize's interpretation is plainly wrong: its reading ignores language in the sentence that says Section 3.07(h) transactions can be from third parties, "or otherwise." Moreover, Platinum *is* a "third party" because it is not a party to the Indenture. When the Unsecured Indenture precludes transactions with third parties who are affiliates, it does so explicitly, and uses the defined term "Affiliates."[311] Section 3.07(h) does not prohibit transactions with Affiliates, and the use of the separate phrase "third party" permits transactions with Platinum.

6.05 Was Not Breached. Section 6.05 allows majority owners of the Notes to "direct . . . the Trustee," WSFS. As the Court already held, it imposes no obligations on beneficial owners, ECF 508 at 49 ("Reading 'may' in the first sentence of § 6.05 to obligate the noteholders would be an unreasonable interpretation of the contract."). Moreover, the Unsecured Exchange was not effected through Section 6.05 or any directive from beneficial owners. WSFS acted pursuant to Section 13.02, which applies to "any request . . . *by the Issuer* . . . to take any action under th[e] Indenture," provided that an officer's certificate and opinion of counsel are furnished to the Trustee, which materials were provided.[312]

Section 9.02(10)'s Sacred Rights Provision Was Not Breached. Langur Maize's "sacred rights" argument is based on the same "sacred rights" language discussed in connection with the 2024/2026 Holders' claims, *supra* Section VI. Langur Maize's argument lacks merit for the same reasons as set forth above, as well as the additional reasons set forth below.

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[311] *See* ECF 601-7 § 1.01, at 3; *id.* § 4.11.

[312] ECF 1350 (Healy) at 106:10-108:1; 129:15-17; 151:13-155:11.

The Unsecured Exchange did not implicate any unsecured holders' ranking in respect of "right of payment." Section 9.02(10) prevents "any amendment, supplement, or waiver" to or of, *inter alia*, Sections 4.01 (guaranteeing payment of principal and interest), 6.11 (setting order of payments), or similar express contractual provisions governing payment terms without the consent of any "adversely affected" Holder. This is consistent with the Trust Indenture Act, which dictates that "the right of any holder of any indenture security to receive ***payment of the principal of and interest*** on such indenture security" is a fundamental right that "shall not be impaired or affected without the consent of such holder." 15 U.S.C. § 77ppp(b) ("Prohibition of impairment of holder's ***right to payment***"). The Unsecured Exchange did not entail an amendment of any such provision. Most of the other, more specific sacred rights in the Indenture similarly deal with protections for principal and interest payments.[313] *See, e.g.*, *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 106 (2001) (generic clause "controlled and defined by reference to" specific preceding terms); *see also In re TPC Grp. Inc.*, 2022 WL 2498751, at *3 n.12 (Bankr. D. Del. July 6, 2022) (applying same rule to interpretation of sacred rights provision under New York law). Section 9.02(10) is a more general provision protecting against changes to similar payment terms that would cause some holders to become "lower ranked" by withholding their payments until after other holders are paid.

Langur Maize confuses the "right of payment" (which governs the distribution of principal and interest) with the "right of security" (which governs access to collateral in a liquidation). Numerous cases recognize that "right of payment" concerns and protects against "payment subordination," a distinct concept from "lien subordination." *See, e.g.*, *U.S. Bank Nat'l Ass'n v. Wilmington Sav. Fund Soc'y, FSB (In re MPM Silicones, LLC)*, 531 B.R. 321, 328-30 (S.D.N.Y.

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[313] *See, e.g.*, Sections 9.02(1) (amount of principal); 9.02(2) ("Stated Maturity," which is defined in terms of "payment of interest or principal"), 9.02(3) (rate of interest), 9.02(4) (current defaults in "payment of principal"), 9.02(5) (currency of payment), 9.02(6) (past defaults in "payments of principal"), amendments to the foregoing (9.02(9)).

2015) ("The words 'in right of payment' clearly refer only to payment subordination . . . ."), *aff'd in relevant part and rev'd in part on other grounds*, 874 F.3d 787 (2d Cir. 2017); *Diversified Realty Servs., Inc. v. Meyers Law Grp., P.C.*, 2014 WL 547034, at *3 (N.D. Cal. Feb. 7, 2014), *aff'd*, 647 F. App'x 736 (9th Cir. 2016); *In re Lantana Motel*, 124 B.R. at 255-56. Lien subordination "involves two senior creditors with security interests in the same collateral, one of which has lien priority over the other." *Diversified*, 2014 WL 547034, at *3. Protections against changes adversely affecting holders "in respect of right of payment" prevent "payment subordination."

What occurred in the Unsecured Exchange, however, was lien subordination. It gave the 1.25L Notes priority over the Unsecured Notes "with respect to the debtor's assets . . . when a . . . distribution of the debtor's assets is made to creditors." *Standard Brands Inc. v. Straile*, 260 N.Y.S.2d 913, 916 (N.Y. App. Div. 1st Dep't 1965). Section 4.09(c) also confirms that "no Indebtedness will be deemed to be contractually subordinated in right of payment to any other Indebtedness of the Issuer or any Restricted Subsidiary solely by virtue of being unsecured or by virtue of being secured on a junior priority basis."[314] As Langur Maize concedes, "Section 9.02(10) is implicated only when "***the time and amount [beneficial owners] will be paid on their notes*** is changed."[315] That did not occur here. Thus, the incurrence of the 1.25L Notes, senior only by virtue of being secured, did not implicate Section 9.02(10).

Moreover, the Unsecured Indenture elsewhere uses the term "Subordinated Indebtedness," which refers, in relevant part, to "any Indebtedness of the Issuer which is by its terms expressly subordinated in ***right of payment*** to the Unsecured Notes."[316] Section 4.12 imposed a covenant that "in the case of Liens securing Subordinated Indebtedness, the Unsecured Notes [must be]

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[314] ECF 601-7 § 4.09(c).

[315] ECF 603-28 at 53.

[316] ECF 1350 (Healy) at 106:10-108:1; 129:15-17; 151:13-155:11.

secured by a Lien on such [shared collateral] that is senior in priority to such Liens." This covenant would have been superfluous if debt that is "subordinated in right of payment" meant, by definition, debt that had a lower priority claim to collateral than the Unsecured Notes—if that were the case, it would have been impossible for Subordinated Indebtedness to have senior lien priority. This confirms that "right of payment" is unrelated to security. *See, e.g.*, *Suffolk Cty. Water Auth. v. Vill. of Greenport*, 800 N.Y.S.2d 767, 768 (N.Y. App. Div. 2d Dep't 2005) ("[A]n interpretation which renders language in the contract superfluous is unsupportable.") (citing *Laws.' Fund for Client Prot. v. Bank Leumi Tr. Co.*, 94 N.Y.2d 398, 404 (N.Y. 2000)).[317]

In the Alternative, Any Subordination Was Not Caused by an Amendment, Supplement, or Waiver. Section 9.02(10) applies only to "amendment[s], supplement[s] or waiver[s]"; some credit documents—including in *TriMark*—contain sacred rights provisions that more broadly cover any "agreements." *See TriMark*, 72 Misc. 3d 1218(A), at *11; *see generally Quadrant*, 23 N.Y.3d at 560. Langur Maize has argued that entry into the Exchange Agreement breached Section 9.02(10),[318] but the Exchange Agreement is not an amendment, supplement, or waiver of any terms of the Unsecured Indenture. It is a separate contract among different parties, and that separate agreement cannot be a breach of Section 9.02(10).

In the Alternative, Non-Participating Holders Were Not "Adversely Affected." Section 9.02(10) requires consent only for amendments, supplements, or waivers that "*adversely* affect the" holders in respect of their right of payment (emphasis added). Because no holders of 2027 Unsecured Notes were adversely affected, their consent was not required.

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[317] Other New York law governed indentures similarly refer to debt that ranks "senior in right of payment" but is "unsecured." *MPM Silicones*, 531 B.R. at 325. This would be impossible if ranking senior in right of payment meant having a senior lien.

[318] ECF 142 at 34.

First, the Unsecured Exchange did not deprive the Unsecured 2027 Noteholders of any coupon payments—rather, it enabled them to receive coupon payments in full on May 15 and November 15, 2022, totaling 13.125% in cash that the Company otherwise would have missed.[319]

Second, Langur Maize has failed to show that the Unsecured Exchange adversely affected the trading price of the Unsecured Notes. FINRA trading data, which reflect actual trades,[320] show that prices of the Unsecured Notes *increased* after the announcement of the transaction.[321] On March 30, the price of the unsecured notes traded up by over 10 cents, from 28.67 to 41.46, and stayed at approximately that level for several days.[322] Silver Point's trading data show the same thing: Silver Point internally commented on March 14, 2022 that the Unsecured Notes were trading "in the 20s" and then bought over $3 million of those notes at 41.25 cents on March 30, its first unrestricted trading day.[323] It purchased $39 million in Unsecured Notes from March 30, through June 7, 2022, all at prices higher than the "20s" discussed on March 14.[324] The 1.25L Notes, by contrast, were illiquid and never traded.[325] The 2022 Transaction thus benefited non-participating unsecured holders—not one of whom has ever surfaced to complain about the Unsecured Exchange.[326] It has utterly failed to show "adversity" to the non-participating 2027

[319] ECF 664 (Carney) at 61:6-11; ECF 832 (Hou) 142:5-12.

[320] *See* ECF 1238-9.

[321] *See id.* (showing average prices of 28.67 cents on March 29—the date on which the March 2022 Transaction was disclosed and cleansed, in the afternoon—increasing to 41.46 cents on March 30, 41.89 cents Transaction was disclosed and cleansed, in the afternoon—increasing to 41.46 cents on March 30, 41.89 cents on March 31, and 43.19 cents on April 1); ECF 1016-7; ECF 1016-8; ECF 1016-9 (cleansing materials released on March 29, 022); ECF 1297 (Denham) at 95:15-96:3; 100:24-101:3.

[322] ECF 1297 (Denham) at 112:3-10; ECF 1238-9; ECF 1016-7; ECF 1016-8; ECF 1016-9 (cleansing materials released on March 29, 2022).

[323] ECF 563-1 (internal comment); ECF 729-53 at 62 (trading activity).

[324] ECF 729-53 at 62.

[325] ECF 832 (Hou) at 147:4-8.

[326] ECF 978-5 at 7; ECF 725-55.

holders.[327]

6.11 Was Not Breached, and That Claim Is Waived. Because Langur Maize never pleaded a breach of 6.11, it is waived. *See Portis v. First Nat'l Bank of New Albany*, 34 F.3d 325, 332 (5th Cir. 1994). In any event, it was not breached. It applies only when "the Trustee collects any money . . . distributable in respect of the Issuer's obligations under this Indenture." It then specifies the order in which such money shall be distributed. Langur Maize has neither alleged nor shown that the Trustee collected any money under the Unsecured Indenture nor that the Trustee has paid out any such money other than pursuant to the specified order. Moreover, an expressly permitted transaction, such as a voluntary purchase under Section 3.07(h), cannot result in a prohibited "distribution" under Section 6.11.

Section 13.05 Bars Langur Maize's Claims Against Platinum. Langur Maize's breach of contract and tortious interference claims against Platinum should be dismissed because Section 13.05 of the indenture unambiguously provides that equity owners like Platinum will not be subject to recourse or liability under the Unsecured Indenture or the unsecured notes, and that Unsecured noteholders waive and release all such claims.[328]

E. There Was No Tortious Interference with the Unsecured Indenture

Langur Maize has not proved a breach of contract, so its tortious interference claims fail. As independent grounds to defeat its tortious interference claims, Langur Maize has not proven an "intentional and unjustified" breach by any defendant, each of whom acted in its economic interest.

[327] Langur Maize may argue that the Unsecured Exchange was adverse to non-participating holders, based on the same Silver Point email described above which stated Silver Points "desk value[d] the notes at ~70." ECF 563-1. That purported valuation was never explained or substantiated; unlike the unsecured notes "trading in the 20s" at the time, the "~70" cannot be based on trading prices—the 1.25L Notes did not exist on March 14, were not even the subject of rumors in the trade press, and that speculative valuation was disproved by testimony from Mr. Hou, who was unable to sell 1.25L Notes at prices even lower than that. ECF 832 (Hou) at 147:4-8.

[328] *See* ECF 601-7 § 13.05; ECF 538-3 § 15.

Wilson v. Dantas, 2013 WL 92999, at *7 (S.D.N.Y. Jan. 7, 2013), *aff'd*, 746 F.3d 530 (2d Cir. 2014). In addition, for the same reasons Langur Maize cannot show any holders were "adversely affected," *supra* Section X.D, it has failed to prove any harm.

1. *The Langur Maize Defendants Did Not Induce a Breach of the Indentures*

Platinum did not induce a breach. Langur Maize has not shown that *Platinum* took any action that induced a breach. Instead, Langur Maize conflates the actions of the Company's directors with Platinum itself. Acting in dual roles is common in the industry,[329] and courts respect corporate formalities. *See, e.g.*, *United States v. Bestfoods*, 524 U.S. 51, 61 (1998) ("[A] parent corporation . . . is not liable for the acts of its subsidiaries."). Corporate formalities were observed, and the 2022 Transaction was approved by the Company's board.[330] Platinum also did not induce a breach for similar reasons identified by Carlyle, below: it did not solicit the 2022 Transaction; it was a price-taker in connection with the transaction, and it did not believe its actions would result in a breach.[331]

Carlyle did not induce a breach. Carlyle did not solicit a role in the 2022 Transaction. The Company approached Carlyle on February 16, 2022 and asked Carlyle and Platinum to PIK all of their interest for a year.[332] Carlyle rejected that proposal.[333] On February 27, the Company advanced a new proposal, previously agreed with the Ad Hoc Group, for $250 million of new money, which required amendments to (and consents from a majority of holders under) the

[329] *See* ECF 970 (Seketa) at 226:1-14.

[330] *See* ECF 536-24 at 2 (March 24, 2024, Board minutes); ECF 630 (Vorderwuelbecke) at 140:15-18 ("Q: Where was the decision made to approve the transaction? A: At the board. Q: At—at Incora's board? A: Yes.").

[331] *See* ECF 659-8; ECF 639-1; ECF 879 (O'Connell) at 330:19-25; ECF 827 (Smith) at 90:5-10, 93:24-25; *see also* ECF 630 (Vorderwuelbecke) at 143:5-8.

[332] ECF 610-7 at 63; ECF 832 (Hou) 105:21-106:9.

[333] *See* ECF 832 (Hou); ECF 106:2-9 (the proposal was "very much" not attractive to Carlyle); ECF 610-7 at 63; 610-13 at 4; ECF 832 (Hou) at 110:1-24. .

Unsecured Indenture. It also proposed that Carlyle, Senator, and Platinum would "exchange into a super senior second-out tranche" with PIK'd interest—the genesis of the 2022 Transaction.[334] Carlyle negotiated the terms of that exchange with the Company, and generally "lost" most "point[s]" in the negotiations, other than a small cash interest concession.[335]

Senator did not induce a breach. Similarly, when the Company approached Senator in February 2022 about participating "the terms [of the 2022 Transaction] were already baked."[336] Senator had no material influence on the negotiations at all, and thus, was not involved in procuring any alleged breach.[337]

2. *The Economic Interest Doctrine Forecloses Tortious Interference Claims*

As set forth above, the economic interest defense forecloses Langur Maize's claims. *See supra* Section IX. Every New York case involving an uptier transaction has recognized the economic interest defense and dismissed tortious interference claims. *Id.* (discussing *TriMark*, *Boardriders*, *Mitel*).

The 2022 Transaction Protected Platinum's Economic Interests in Wesco. As mentioned above, Platinum was the Company's parent, sole equity holder, as well as a debt holder.[338] *See supra* Section IX. The 2022 Transaction both protected those interests and provided Incora with significant liquidity benefits. *Id.*

The 2022 Transaction Protected Carlyle's Economic Interests in Wesco. Carlyle and

[334] *See* ECF 832 (Hou) at 113:15-122:3; 123:23-124:5; *see also* ECF 610-14.

[335] ECF 610-35; ECF 832 (Hou) at 125:3–18 (basket capacity), 126:20-127:12 (consultation right for use of basket); 130:7-22 (veto right for use of basket); ECF 738 (O'Connell Day 1) 36:22-23; ECF 879 (O'Connell Day 2) 126:1-13, 345:18-22.

[336] ECF 1384-1 (Bharadwa Dep. Tr.) at 74:14-75:8; 121:10-22.

[337] ECF 738 (O'Connell) at 157:16-20.

[338] ECF 630 (Vorderwuelbecke) at 112:25-113:22, 125:11-23, 126:7-127:9.

Spring Creek owned $269 million at the time of the 2022 Transaction.[339] They participated in the Unsecured Exchange to protect their investments in unsecured debt that would be badly harmed by Wesco's potential bankruptcy in 2022.[340] Jesse Hou testified that "Carlyle provided consent for the company to raise $250 million of new money" to provide "balance sheet liquidity for the business to improve its runway," and thought the business would recover to pre-COVID EBITDA by 2024.[341] The alternative of a bankruptcy filing was bad for Carlyle, Spring Creek, and all unsecured creditors.

The 2022 Transaction Protected Senator's Economic Interests in Wesco. At the time of the 2022 Transaction, Senator held multiple tranches of Wesco's debt.[342] Mr. Bharadwa, Senator's co-CIO, testified that participating in the transaction seemed like a "good economic outcome" and that "from an investment case standpoint, [it was] a no-brainer.[343] Indeed, given the prominence of Senator's holdings of Holdco PIK Notes, it was in Senator's economic interest for the Company's financial position to improve so that the Company would have the ability to repay all structural senior debt in full. At all points in time, this tied Senator's economic best interest with the best interest of the Company.

Langur Maize contends that the requisite economic interests are of no import because it has cleverly premised its theory of breach on WSFS, not the Debtors. This argument fails for two reasons. *First*, the record demonstrates that WSFS acted solely on instructions and information

[339] ECF 832 (Hou) at 77:14-77:18.

[340] *Id.* at 78:7-9.

[341] *Id.* at 137:14-138:6 ("[T]here were so many positives that came out of this—the runway, the ability to kind of right the ship, and get the Company back on track.").

[342] ECF 1363-22; ECF 1384-1 (Bharadwa Dep. Tr.) at 15:22-16:20.

[343] ECF 1384-1 (Bharadwa Dep. Tr.) at 26:23-27:11, 65:25-66:8, 71:14-72:12, 88:17-89:17.

from the Debtor.[344] WSFS engaged in the allegedly breaching conduct (*e.g.*, not inviting Langur Maize's predecessor to participate in the Unsecured Exchange) only because the Debtors' counsel and CFO supplied opinions and certificates to WSFS that the transaction complied with the indenture.[345] There is no evidence that the noteholders did anything to induce WSFS to breach.[346] The conduct that "induced" WSFS came from the Debtors, in whom Defendants had an economic interest. Nor is there evidence that anyone but the Debtors—not WSFS—could have decided to issue such additional notes. There is no escaping that Langur Maize's theory is premised upon the Debtors' conduct, not WSFS's.

Second, even if Langur Maize's tortious interference claim were based solely on an alleged breach by WSFS, the economic interest defense would still apply. Defendants' interest in the unsecured notes they held before the 2022 Transaction, for which WSFS indisputably served as trustee, gave them an economic interest in WSFS sufficient to invoke the defense. *See, e.g.*, *Bank of N.Y. Mellon v. Cart 1, Ltd.*, 2021 WL 2358695, at *4 (S.D.N.Y. June 9, 2021) (defendant with financial stake in asset held by trustee had an economic interest in trustee that triggered defense).

Langur Maize also argues that the economic interest doctrine is unavailable to the defendants, based on a theory that the 2022 Transaction "harmed Wesco" because it did not permit all unsecured creditors to participate, which would have been better for the Company by PIK'ing more interest. That argument correctly failed in *TriMark*, where plaintiffs advanced the same argument and the court found "no authority holding that the economic interest defense turns on whether the challenged transaction was 'the best deal [the breaching party] could secure at the

[344] *See* ECF 216-2; ECF 216-9; ECF 216-10; ECF 276-1; ECF 276-2; ECF 276-3; ECF 602-20; ECF 604-28; ECF 603-27.

[345] ECF 1350 (Healy) at 151:13-152:20.

[346] *Id.* at 154:10-155:74.

time." *TriMark*, 2021 WL 3671541, at *15. The court declined to "license[] judicial second-guessing of rational actors' economic decisions" in that manner, noting that the allegation that a better deal could have been negotiated only "***serve[d] to highlight***" the "***shared economic interests between [the company] and the Equity Sponsors.***" *Id.*

The claim that Participating Unsecured Holders, including Carlyle, "excluded" non-participating 2027 holders is also inaccurate,[347] but in any case also does not overcome the economic interest doctrine. Carlyle *attempted* to limit the basket available for issuing 1.25L Notes to only Carlyle and Senator, but the Company rejected that proposal and successfully negotiated for $1.05 billion in basket capacity for 1.25L Notes, as well as Platinum's participation. Carlyle had no ability to prevent Wesco from launching an exchange of 1.25L Notes for outstanding Unsecured Notes using the remaining ~$580 million basket capacity.[348] Carlyle lost that negotiation point. Regardless, Carlyle only *attempted* to limit the basket because doing so was in its *economic interest*: limiting participants in the Unsecured Exchange would avoid jeopardizing an already complex negotiation,[349] and diluting Carlyle's liens.[350] Carlyle agreed to the 1.25L basket, and the Company could at any time exchange additional 2027 unsecured notes if the Company decided it was in its economic interest to do so.

The economic interest defense applies, and Langur Maize cannot satisfy the test for overcoming it, as described above. Langur Maize has never claimed fraud or illegality. Nor has it adduced any evidence that any participant in the 2022 Transaction acted with the specific intent to harm Langur Maize's predecessor holders of the Unsecured Notes. The intent was to save the

[347] *See* ECF 832 (Hou) 139:6-25.

[348] *See* ECF 603-28 § 4.09(b)(3)(b); ECF 536-24 at 6; ECF 832 (Hou) 130:7–22.

[349] ECF 832 (Hou) at 139:4-21; *see also id.* at 179:16-180:1.

[350] *Id.* at 140:13-20.

Company.[351] The transaction participants did not even know the identity of the non-participating noteholders, much less act with malice (or worse) towards them.[352]

F. There Was No Conspiracy To Commit Tortious Interference

Langur Maize has also brought a boilerplate civil conspiracy claim against the Participating Unsecured Holders, premised on the claim that "Carlyle and Senator expressly agreed to include Unsecured Notes held by Platinum in the Selective Exchange, and acted in furtherance of Platinum's tortious interference with the Indenture by virtue of such agreement."[353] Not so.

"New York courts do not recognize an independent tort of civil conspiracy." *Briarpatch Ltd., L.P. v. Geisler Roberdeau, Inc.*, 2007 WL 1040809, at *25 (S.D.N.Y. Apr. 4, 2007), *aff'd sub nom. Briarpatch Ltd. LP v. Phoenix Pictures, Inc.*, 312 F. App'x 433 (2d Cir. 2009). Civil conspiracy requires proof of "the underlying tort . . . , plus . . . : (1) an agreement between two or more parties; (2) an overt act in furtherance of the agreement; (3) the parties' intentional participation in the furtherance of a common purpose or plan; and, (4) resulting damage or injury." *De Sole v. Knoedler Gallery, LLC*, 139 F. Supp. 3d 618, 659 (S.D.N.Y. 2015) (quotation omitted). A conspiracy claim—such as Langur Maize's—that "add[s] no new allegations" to a substantive tort claim, other than stating defendants "conspired to commit the acts [elsewhere] described," must be rejected as duplicative. *Durante Bros. & Sons v. Flushing Nat'l Bank*, 755 F.2d 239, 251 (2d Cir. 1985).[354]

In any event, the fact that Carlyle, Senator, and Platinum ultimately participated in the 2022 Transaction does not prove a conspiracy. Conspiracy requires "an *agreement* between two or more

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[351] *See, e.g.*, ECF 630 (Vorderwuelbecke) at 141:18-21, 143:16–20.

[352] *See* ECF 832 (Hou) at 179:14-17.

[353] ECF 275 at 26 (footnote omitted).

[354] ECF 275 at 26.

persons to participate in an unlawful act," with a "unity of purpose or a common design." *Freeman v. HSBC Holdings PLC*, 57 F.4th 66, 79-80 (2d Cir. 2023) (cleaned up). Because the Participating Unsecured Holders acted only to protect their financial interests in Wesco and did not share a common purpose to commit a tort, there was no conspiratorial agreement. *See Freeman*, 57 F.4th at 80; *Wegman v. Dairylea Co-op., Inc.*, 50 A.D.2d 108, 114 (N.Y. App. Div. 4th Dep't 1975). The only evidence of agreement that Langur Maize can cite is that Senator, Carlyle, and Platinum signed the Exchange Agreement. This is insufficient; "agreement" to a contract is not the same as "agreement" to commit a tort. *See Arlinghaus v. Ritenour*, 622 F.2d 629, 639-40 (2d Cir. 1980) (Friendly, J.). There is no evidence of interactions between Senator, Carlyle, and Platinum in negotiating the 2022 Transaction; negotiations occurred independently by each one of them solely with the Company and its representatives.[355] Carlyle repeatedly took negotiating positions opposing the inclusion of Platinum.[356] Langur Maize's conspiracy claims thus fail as both duplicative of their other tort claims, and because it adduced not facts to support the conspiracy that it posits.

XI. CONCLUSION

For the reasons set forth above, the Court should reject the 2024/2026 Holders' and Langur Maize's claims.

[355] ECF 832 (Hou) 226:21-24.

[356] ECF 610-13, at 3-4 (Carlyle counter-proposing adverse treatment for Platinum); ECF 832 (Hou) 112:19-22 (treatment of Platinum was "worse" than all other unsecured holders); ECF 610-15, at 6 (Carlyle counterproposal under which "Platinum shall not participate in exchange and all Platinum debt shall be PIK'd for life").

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Respectfully submitted:

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CERTIFICATE OF SERVICE

I, Christopher D. Porter, hereby certify that on June 18, 2024, a copy of the foregoing Amended Brief was served via the Electronic Case Filing System for the United States Bankruptcy Court for the Southern District of Texas.

/s/ Christopher D. Porter
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EXHIBIT A

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.	
LANGUR MAIZE, L.L.C., Crossclaim Plaintiff, *v.* **PLATINUM EQUITY ADVISORS, LLC**, *et al.*, Crossclaim Defendants.	
LANGUR MAIZE, L.L.C., Third-Party Plaintiff, *v.* **UNNAMED PLATINUM FUNDS c/o PLATINUM EQUITY ADVISORS, LLC**, *et al.*, Third-Party 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 https://veritaglobal.net/incora. The service address for each of the Debtors in these cases is 2601 Meacham Blvd., Ste. 400, Fort Worth, TX 76137.

LANGUR MAIZE, L.L.C.,
Counterclaim Plaintiff,
v.
WESCO AIRCRAFT HOLDINGS, INC., *et al.*,
Counterclaim Defendants.

COUNTERCLAIM DEFENDANTS' AMENDED JOINT POST-TRIAL BRIEF*

* This brief is amended to correct five inadvertent errors in the Counterclaim Defendants' Joint Post-Trial Brief (ECF No. 1386) filed on June 17, 2024. The changes on pages 77, 87, 89, and 93 are edits that were conveyed on June 17 by Carlyle or Platinum but were unintentionally omitted from the joint brief. The change on page 5 is a scrivener's error. A redlined copy the Brief is attached hereto as Exhibit A, reflecting these changes.

TABLE OF CONTENTS

Page

PRELIMINARY STATEMENT 1

BREACH OF CONTRACT CLAIMS 5

I. NATURE OF INDENTURE AGREEMENTS AND WHY IT MATTERS 5

II. THE ISSUANCE OF ADDITIONAL 2026 NOTES DID NOT BREACH THE INDENTURES 8

A. The Company's Indentures Permitted Every Step Of The 2022 Transaction 8

B. New York Law And The Express Terms Of The Indentures Respect Party Structuring Decisions 9

C. The Integrated Agreement Doctrine Cannot Be Used To Collapse The Distinct Steps Of The 2022 Transaction 13

D. The 2024/2026 Holders Have Failed To Show The 2022 Transaction Was Not Implemented As Intended 19

1. The Third Supplemental Indenture, Note Purchase Agreement, And Additional 2026 Notes Issuance Were Effective Before The Fourth Supplemental Indenture and Exchange 19

2. The Closing Reflected The Intended Sequencing 21

E. The Original Secured Indentures Do Not Protect Noteholders From The Dilution Of Their Voting Power Through The Issuance Of Additional Notes 24

F. Amending The Original 2026 Indenture To Authorize The Issuance Of The Additional 2026 Notes Did Not Breach The Indenture 27

1. Issuing Additional 2026 Notes Did Not Breach Sections 2.01, 4.09, 4.12 or 4.26 of the Original 2026 Indenture 28

2. The 2024/2026 Holders' Strained Attempt To Shoehorn Amendments To Secured Debt Capacity Into Heightened Consent Categories Fails 29

III. THE ADDITIONAL 2026 NOTES WERE VALID AND OUTSTANDING 35

A. Facts Relevant To The Authentication Of The Additional 2026 Notes 36

B. The Trustee Authenticated The Additional 2026 Notes 39

C. The 2024/2026 Holders Cannot Challenge The Purported Defect In The Notes 42

D. Even If There Were A Technical Defect In The Authentication Of The Additional 2026 Notes, The Notes Were Still Valid And Outstanding 44

IV. THE FOURTH SUPPLEMENTAL INDENTURES ARE EFFECTIVE AND BINDING ON ALL HOLDERS UNDER SECTION 9.04 47

V. NO RELIEF IS AVAILABLE AS TO 2024 HOLDERS 50

VI. THE 2022 TRANSACTION DID NOT VIOLATE THE "RIGHT OF PAYMENT" SACRED RIGHT 51

VII. THE COUNTERCLAIM DEFENDANTS ACTED IN GOOD FAITH AND THE EQUITABLE AND NON-CONTRACT CLAIMS MUST FAIL 53

VIII. THE 2024/2026 HOLDERS ARE NOT ENTITLED TO EQUITABLE REMEDIES 64

A. The 2024/2026 Holders Are Not Entitled To An Equitable Contract Remedy 65

B. Equitable Subordination Is Not Colorable In Light Of The Trial Evidence 68

C. There Is No Basis To Grant An Equitable Lien 71

D. The Equitable Subordination And Equitable Lien Claims Do Not Present A Live Article III Case Or Controversy As Against Citadel 72

IX. THE 2024/2026 HOLDERS' TORTIOUS INTERFERENCE CLAIMS FAIL 73

A. The 2022 Transaction Did Not Breach The Indentures 73

B. The Defendants Did Not *Intend* To Procure A Breach 73

C. The Economic Interest Doctrine Protects The Defendants 75

D. The 2024/2026 Holders Cannot Overcome The Economic Interest Defense 79

X. LANGUR MAIZE'S CLAIMS FAIL 80

A. The Unsecured Exchange Benefited Wesco And Was A Losing Bet For The Participants 80

B. Langur Maize Lacks Article III Standing To Assert Its Claims 81

C. Claims For Breach Of Contract Against Non-Parties Fail 85

D. Langur Maize Has Failed To Prove A Breach Of The Unsecured Indenture 86

E. There Was No Tortious Interference with the Unsecured Indenture 93

1. The Langur Maize Defendants Did Not Induce a Breach of the Indentures 93

2. The Economic Interest Doctrine Forecloses Tortious Interference Claims 95

F. There Was No Conspiracy To Commit Tortious Interference 99

XI. CONCLUSION 100

TABLE OF AUTHORITIES

Page

Cases

A & V 425 LLC Contracting Co. v. RFD 55th St. LLC,
15 Misc. 3d 196 (N.Y. Sup. Ct. 2007) ... 87

Abele Tractor & Equip. Co. v. Schaeffer,
167 A.D.3d 1256 (N.Y. App. Div. 3d Dep't 2018) ... 77

Acqis Tech., Inc. v. Comm'r,
T.C.M. (RIA) 2024-021 (T.C. 2024) ... 17

Adar Bays, LLC v. GeneSYS ID, Inc.,
179 N.E.3d 612 (N.Y. 2021) ... 68

Ades & Berg Grp. Invs. v. Breeden (In re Ades & Berg Grp. Invs.),
550 F.3d 240 (2d Cir. 2008) ... 66

Allen v. Laws. Mut. Ins. Co. of Ky.,
216 S.W.3d 657 (Ky. Ct. App. 2007) ... 43

In re Alta Mesa Res., Inc., et al.,
No. 19-35133, Jan. 21, 2020 ... 50

Ames v. Fallert,
657 P.2d 224 (Or. App. 1983) ... 48

Arlinghaus v. Ritenour,
622 F.2d 629 (2d Cir. 1980) ... 101

Associated Recovery v. Does 1-44,
2018 WL 1517863 (N.D. Tex. Mar. 28, 2018) ... 68

Audax Credit Opportunities Offshore Ltd. v. TMK Hawk Parent, Corp.,
72 Misc.3d 1218(A) (N.Y. Sup. Ct. 2021) ... 10, 14, 77, 79

In re B-Bar Tavern Inc.,
506 B.R. 879 (Bankr. D. Mont. 2013) ... 48

Bank of N.Y. Mellon v. Cart 1, Ltd.,
2021 WL 2358695 (S.D.N.Y. June 9, 2021) ... 77, 79, 98, 99

Bausch & Lomb Inc. v. Mimetogen Pharms., Inc.,
2016 WL 2622013 (W.D.N.Y. May 5, 2016) 79

Bayou Liberty Ass'n, Inc. v. U.S. Army Corps of Eng'rs,
217 F.3d 393 (5th Cir. 2000) 73

Bd. of Comm'rs of Cherokee Cnty. v. U.S. Fid. & Guar. Co.,
40 P.2d 371 (1935) 41

Beal Sav. Bank v. Sommer,
865 N.E.2d 1210 (N.Y. 2007) 50

Black Diamond Comm. Fin. L.L.C. v. Murray Energy Corp. (In re Murray Energy Holdings),
616 B.R. 84 (Bankr. S.D. Ohio 2020) 11, 12

BNP Paribas Mortg. Corp. v. Bank of Am., N.A.,
778 F. Supp. 2d 375 (S.D.N.Y. 2011) 6, 43

Briarpatch Ltd., L.P. v. Geisler Roberdeau, Inc.,
2007 WL 1040809 (S.D.N.Y. Apr. 4, 2007) 100

Broad v. Rockwell Int'l Corp.,
642 F.2d 929 (5th Cir. 1981) 6, 10

BWA Corp. v. Alltrans Express U.S.A., Inc.,
112 A.D.2d 850 (N.Y. App. Div. 1st Dep't 1985) 13

In re Cambridge Marine Indus., Inc.,
61 Comp. Gen. 187 (Comp. Gen. Dec. 31, 1981) 41

Carvel Corp. v. Noonan,
3 N.Y.3d 182 (2004) 80

Casebeer v. Comm'r,
909 F.2d 1360 (9th Cir. 1990) 17

Circuit City Stores, Inc. v. Adams,
532 U.S. 105 (2001) 90

In re Colo. Mercantile Co.,
299 F. Supp. 55 (D. Colo. 1969) 47

CooperVision, Inc. v. Intek Integration Techs.,
794 N.Y.S.2d 812 (N.Y. Sup. Ct. 2005) 15

Cornish v. Yarbrough,
558 S.W.2d 28 (Tex. App.—Waco 1977, no writ) 47

Cortlandt St. Recovery Corp. v. Bonderman,
96 N.E.3d 191 (N.Y. 2018) 36

In re Cowin,
492 B.R. 858 (Bankr. S.D. Tex. 2013) 67

Ctr. for Biological Diversity, Inc. v. BP Am. Prod. Co.,
704 F.3d 413 (5th Cir. 2013) 74

Matter of CTS Truss, Inc.,
868 F.2d 146 (5th Cir. 1989) 69

Daire v. Sterling Ins. Co.,
204 A.D.3d 1189 (N.Y. App. Div. 3d Dep't 2022) 8

Danco Elec. Contractors, Inc. v. Dormitory Auth. of N.Y.,
75 N.Y.S.3d 28 (N.Y. App. Div. 1st Dep't 2018) 46

De Sole v. Knoedler Gallery, LLC,
139 F. Supp. 3d 618 (S.D.N.Y. 2015) 101

Dell's Maraschino Cherries Co. v. Shoreline Fruit Growers, Inc.,
887 F. Supp. 2d 459 (E.D.N.Y. 2012) 79

Deutsche Bank Nat'l Tr. Co. for Morgan Stanley Structured Tr. I 2007-1 v. Morgan Stanley Mortg. Cap. Holdings LLC,
289 F. Supp. 3d 484, 496 (S.D.N.Y. 2018) 67

Dexia SA/NV, Dexia Holdings, Inc. v. Morgan Stanley,
41 Misc. 3d 1214(A), (N.Y. Sup. Ct. 2013) 85

Diversified Realty Servs., Inc. v. Meyers Law Grp., P.C.,
2014 WL 547034 (N.D. Cal. Feb. 7, 2014) 91

Don King Prods., Inc. v. Smith,
47 F. App'x 12 (2d Cir. 2002) 79

Donohue v. Cuomo,
38 N.Y.3d 1 (N.Y. 2022) 25

Durante Bros. & Sons v. Flushing Nat'l Bank,
755 F.2d 239 (2d Cir. 1985), ECF 275 101

E.F. Hutton Int'l Assoc. v. Shearson Lehman Bros. Holdings,
281 A.D.2d 362 (N.Y. App. Div. 1st Dep't 2001) 80

Easton v. Butterfield Live Stock Co.,
279 P. 716 (Idaho 1929) 43, 44

In re Entrust Energy, Inc.,
2023 WL 3855817 (Bankr. S.D. Tex. June 6, 2023) 70

In re Equip. Equity Holdings, Inc.,
491 B.R. 792 (Bankr. N.D. Tex. 2013) 70

Matter of Fabricators, Inc.,
926 F.2d 1458 (5th Cir. 1991) 69, 72

Feinstein v. Levy,
503 N.Y.S.2d 821 (N.Y. App. Div. 2d Dep't 1986) 44

FMC Corp. v. Boesky,
825 F. Supp. 623 (S.D.N.Y. 1993) 68

Foster v. Churchill,
87 N.Y.2d 744 (1996) 77, 78, 80

Fox v. Hirschfeld,
157 A.D. 364 (N.Y. App. Div. 1st Dep't 1913) 83, 84

Freeman v. HSBC Holdings PLC,
57 F.4th 66 (2d Cir. 2023) 101

Friedman v. Otsego Mut. Fire Ins. Co.,
114 N.Y.S.3d 686 (N.Y. App. Div. 2d Dep't 2020) 68

Galli v. Metz,
973 F.2d 145 (2d Cir. 1992) 53

George Backer Mgmt. Corp. v. Acme Quilting Co.,
385 N.E.2d 1062 (N.Y. 1978) 47

Gillespie v. Moon,
1817 WL 1622 (N.Y. Ch. 1817) 48

Greenfield v. Philles Records, Inc.,
98 N.Y.2d 562 (N.Y. 2002) 10, 14

Gunther v. Mayer,
22 N.Y.S. 50 (N.Y. Gen. Term 1983) 46

Hawaiian Dredging Const. Co. v. United States,
59 Fed. Cl. 305 (Fed. Cl. 2004) 41

HBE Leasing Corp. v. Frank,
48 F.3d 623 (2d Cir. 1995) 18

Heath v. State,
278 A.D. 8 (N.Y. App. Div. 3d Dep't) 48

In re Hendrick Hudson Cent. Sch. Dist. v. Falinski,
2008 WL 8097192 (N.Y. Sup. Ct. Nov. 5, 2008) 16

Matter of Herby's Foods, Inc.,
2 F.3d 128 (5th Cir. 1993) 72

Hetchkop v. Woodlawn at Grassmere, Inc.,
116 F.3d 28 (2d Cir. 1997) 68

Hicks v. Fruen Cereal Co.,
233 N.W. 828 (Minn. 1930) 45, 47

Hill v. United States,
288 F. 192 (7th Cir. 1923) 41

Holt v. Robertson,
2008 WL 2130420 (Tex. App. May 21, 2008) 67

Huber v. ARCK Credit Co.,
LLC, 2015 WL 14077892 (S.D.N.Y. Jan. 28, 2015) 25

Hudson Bay Master Fund Ltd. v. Patriot Nat'l, Inc.,
2019 WL 1649983 (S.D.N.Y. Mar. 28, 2019) 79

ICG Glob. Loan Fund 1 DAC v. Boardriders, Inc.,
2022 WL 10085886 (N.Y. Sup. Ct. Oct. 17, 2022) 77, 80

In re iHeartMedia, Inc.,
597 B.R. 339 (Bankr. S.D. Tex. 2019) 67, 72

IMG Fragrance Brands, LLC v. Houbigant, Inc.,
679 F. Supp. 2d 395 (S.D.N.Y. 2009) 81, 87

Imtrac Indus., Inc. v. Glassexport Co.,
1996 WL 39294 (S.D.N.Y. Feb. 1, 1996) 79

In re Jackson,
231 B.R. 142 (Bankr. D. Mass. 1999) 48

Karmely v. Wertheimer,
737 F.3d 197 (2d Cir. 2013) 53

Katz v. Oak Indus. Inc.,
508 A.2d 873 (Del. Ch. 1986) 11

Kent v. Univ. Film Mfg. Co.,
200 A.D. 539 (N.Y. App. Div. 1st Dep't 1922) ... 14, 15

Kham & Nate's Shoes No. 2, Inc. v. First Bank of Whiting,
908 F.2d 1351 (7th Cir. 1990) ... 69

Knight v. New York & Presbyterian Hosp.,
194 N.Y.S.3d 218 (N.Y. App. Div. 1st Dep't 2023) ... 68

Kurz v. United States,
156 F. Supp. 99 (S.D.N.Y. 1957) ... 17

Lake Placid Club Attached Lodges v. Elizabethtown Builders, Inc.,
521 N.Y.S.2d 165 (N.Y. App. Div. 3d Dep't 1987) ... 42

Lane v. Spriggs,
71 S.W.3d 286 (Tenn. Ct. App. 2001) ... 48

In re Lantana Motel,
124 B.R. 252 (Bankr. S.D. Ohio 1990) ... 54, 91

Law v. Siegel,
571 U.S. 415 (2014) ... 70

Laws.' Fund for Client Prot. v. Bank Leumi Tr. Co.,
94 N.Y.2d 398 (N.Y. 2000) ... 92

In re Lehman Bros. Holdings Inc.,
541 B.R. 551 (S.D.N.Y. 2015) ... 70

Life Partners Creditors' Tr. v. Black Diamond Lifeplan Fund,
2018 WL 4076491 (N.D. Tex. June 22, 2018) ... 69, 71

In re Life Partners Holdings, Inc.,
926 F.3d 103 (5th Cir. 2019) ... 69

Lovati v. Petroleos de Venez., S.A.,
2021 WL 5908953 (S.D.N.Y. Dec. 14, 2021) ... 85

Lucente v. Int'l Bus. Machs. Corp.,
310 F.3d 243 (2d Cir. 2002) ... 67

Madeleine, L.L.C. v. Casden,
950 F. Supp. 2d 685 (S.D.N.Y. 2013) ... 25

Martin v. Niagara Falls Mfg. Co.,
44 Hun. 130, 141 (N.Y. App. Div. 1887) ... 46

Maxim Crane Works, L.P. v. Zurich Am. Life Ins. Co.,
11 F.4th 345 (5th Cir. 2021) 84

MDC Corp., Inc. v. John H. Harland Co.,
228 F. Supp. 2d 387 (S.D.N.Y. 2002) 78

MeehanCombs Global Credit Opportunities Funds, LP v. Caesars Ent. Corp.,
80 F. Supp. 3d 507 (S.D.N.Y. 2015) 11

Mesibov, Glinert & Levy, Inc. v. Cohen Bros. Mfg. Co.,
157 N.E. 148 (N.Y. 1927) 42

In re Mir,
2021 WL 1081405 (Bankr. S.D. Tex. Mar. 19, 2021) 70

In re Model Imperial, Inc.,
250 B.R. 776 (Bankr. S.D. Fla. 2000) 69

Momentive Performance Materials Inc. v. BOKF, NA (In re MPM Silicones, L.L.C.),
874 F.3d 787 (2d Cir. 2017) 52

N.J. Bank, N. A. v. Bradford Sec. Operations, Inc.,
690 F.2d 339 (3d Cir. 1982) 45

Nicholls v. Tufenkian Import/Export Ventures, Inc.,
367 F. Supp. 2d 514 (S.D.N.Y. 2005) 47

Noddings Inv. Grp., Inc. v. Capstar Commc'ns, Inc.,
1999 WL 182568 (Del. Ch. Mar. 24, 1999) 18

Norris v. Causey,
869 F.3d 360 (5th Cir. 2017) 84

Ocean Trails CLO VII v. MLN TopCo Ltd.,
Index No. 651327/2023 (N.Y. Sup. Ct. 2023) 78

Off. Comm. of Unsecured Creditors v. JP Morgan Chase Bank, N.A. (In re Motors Liquidation Co.),
777 F.3d 100 (2d Cir. 2015) 51

Ohio v. Kovacs (In re Kovacs),
717 F.2d 984 (6th Cir. 1983) 66

Orr v. Kinderhill Corp.,
991 F.2d 31 (2d Cir. 1993) 17

Paragon Res., Inc. v. Nat'l Fuel Gas Distrib. Corp.,
695 F.2d 991 (5th Cir. 1983)....25

In re Pasquariello,
16 F.3d 525 (3d Cir. 1994)....73

People, for Use of Rock Island Cnty. v. Lyons,
168 Ill. App. 396 (Ill. App. Ct. 1912)....48

Pepper v. Litton,
308 U.S. 295 (1939)....17

Placid Oil Co. v. C.C. Abbitt Farms, LLC,
561 B.R. 60 (N.D. Tex. 2016)....74

Pogo Res., LLC v. St. Paul Fire & Marine Ins. Co.,
2021 WL 12104836 (N.D. Tex. Jan. 12, 2021)....47

Portis v. First Nat'l Bank of New Albany,
34 F.3d 325 (5th Cir. 1994)....89, 94

Pyramid Transp., Inc. v. Greatwide Dallas Mavis, LLC,
2013 WL 840664 (N.D. Tex. Mar. 7, 2013)....84

Quadrant Structured Prods. Co., Ltd. v. Vertin,
23 N.Y.3d 549 (2014)....86, 92

In re Refco Inc. Sec. Litig.,
826 F. Supp. 2d 478 (S.D.N.Y. 2011)....74

Reiss v. Fin. Performance Corp.,
97 N.Y.2d 195 (N.Y. 2001)....10, 13

In re Residential Cap., LLC,
497 B.R. 403 (Bankr. S.D.N.Y. 2013)....50, 51

In re Revlon, Inc.,
2023 WL 2229352 (Bankr. S.D.N.Y. Feb. 24, 2023)....66, 68

Rice's Toyota World, Inc. v. Comm'r,
752 F.2d 89 (4th Cir. 1985)....17

Robb v. Pa. Co. for Ins. on Lives & Granting Annuities,
3 Pa. Super. 254 (Pa. Super. Ct. 1897)....41

Roche Diagnostics GmbH v. Enzo Biochem, Inc.,
992 F. Supp. 2d 213 (S.D.N.Y. 2013)....74

In re RONFIN Series C Bonds Sec. Interest Litig.,
182 F.3d 366 (5th Cir. 1999) 67, 72

Ruha v. Guior,
277 A.D.2d 116 (N.Y. App. Div. 1st Dep't 2000) 80

S & A Rest. Corp. v. Lane,
2007 WL 4403304 (N.D. Tex. Dec. 18, 2007) 47

Sahu v. Union Carbide Corp.,
418 F. Supp. 2d 407 (S.D.N.Y. 2005) 67

In re Sanchez Energy Corp.,
2023 WL 4986394 (Isgur, J.) (Bankr. S.D. Tex. Aug. 3, 2023) 66

SCM Corp. v. Xerox Corp.,
507 F.2d 358 (2d Cir. 1974) 67

Sec. Pac. Nat'l Bank v. Ginkowski,
410 N.W.2d 589 (Wis. Ct. App. 1987) 48

In re Servicom, LLC,
2021 WL 825155 (Bankr. D. Conn. Feb. 24 2021) 18

Shemwell v. City of McKinney,
63 F.4th 480 (5th Cir. 2023) 74

Sheridan Broad. Corp. v. Small,
19 A.D.3d 331 (N.Y. App. Div. 1st Dep't 2005) 87

In re SI Restructuring, Inc.,
532 F.3d 355 (5th Cir. 2008) 68

Smith v. Cram,
230 P. 812 (Or. 1924) 48

In re Snide,
418 N.E.2d 656 (N.Y. 1981) 48

Sokolow, Dunaud, Mercadier & Carreras LLP v. Lacher,
747 N.Y.S.2d 441 (N.Y. App. Div. 1st Dep't 2002) 67

Sony Corp. v. Fujifilm Holdings Corp.,
2017 WL 4342126 (S.D.N.Y. Sept. 28, 2017) 6

Springwell Navigation Corp. v. Sanluis Corporacion, S.A.,
46 A.D.3d 377 (N.Y. App. Div. 1st Dep't 2007) 84

Springwell Navigation Corp. v. Sanluis Corporacion, S.A.,
81 A.D.3d 557 (N.Y. App. Div. 1st Dep't 2011) 84

Standard Brands Inc. v. Straile,
260 N.Y.S.2d 913 (N.Y. App. Div. 1st Dep't 1965) 91

Suffolk Cty. Water Auth. v. Vill. of Greenport,
800 N.Y.S.2d 767 (N.Y. App. Div. 2d Dep't 2005) 92

Superintendent of Ins. for State of N.Y. v. Ochs (In re First Cent. Fin. Corp.),
377 F.3d 209 (2d Cir. 2004) 67

Swain v. Wiley Coll.,
74 S.W.3d 143 (Tex. App. 2002) 68

Teletech Europe B.V. v. Essar Servs. Mauritius,
83 A.D.3d 511 (N.Y. App. Div. 1st Dep't 2011) 15

Tilton v. MBIA, Inc. (In re Zohar III, Corp.),
639 B.R. 73 (Bankr. D. Del. 2022) 69, 70

Town Council of Lexington v. Union Nat'l Bank,
22 So. 291 (Miss. 1897) 44

In re TPC Group Inc.,
2022 WL 2498751 (Bankr. D. Del. July 6, 2022) 8, 90

In re Tronox Inc.,
503 B.R. 239 (Bankr. S.D.N.Y. 2013) 18

TVT Records v. Island Def Jam Music Group,
412 F.3d 82 (2d Cir. 2005) 15

In re U.S. Abatement Corp.,
39 F.3d 556 (5th Cir. 1994) 69

U.S. Bank Nat'l Ass'n v. Triaxx Asset Mgmt. LLC,
2019 WL 4744220 (S.D.N.Y. Aug. 26, 2019) 77, 80

U.S. Bank Nat'l Ass'n v. Wilmington Sav. Fund Soc'y, FSB (In re MPM Silicones, LLC),
531 B.R. 321 (S.D.N.Y. 2015) 91, 92

U.S. Fid. & Guar. Co. v. Coca Cola Co.,
1972 WL 20863 (N.Y. Sup. Ct. 1972) 43

Ultramar Energy v. Chase Manhattan Bank,
179 A.D.2d 592 (N.Y. App. Div. 1st Dep't 1992) 77, 79, 80

United Coin Meter Co. v. Johnson-Campbell Lumber Co.,
493 S.W.2d 882 (Tex. Civ. App. 1973) 67

United States v. Bestfoods,
524 U.S. 51 (1998) 95

In re Vetter Assets Serv., LLC,
609 B.R. 279 (Bankr. W.D. Okla. 2019) 69

Victory Nat'l Bank of Nowata v. Okla. State Bank, Vinita,
520 P.2d 675 (Okla. 1974) 45

Vinas v. Chubb Corp.,
499 F. Supp. 2d 427 (S.D.N.Y. 2007) 78

W.R. Huff Asset Mgmt. Co. v. Deloitte & Touche LLP,
549 F.3d 100 (2d Cir. 2008) 83

In re Waterford Wedgwood,
500 B.R. 371 (Bankr. S.D.N.Y. 2013) 17

Wegman v. Dairylea Co-op., Inc.,
50 A.D.2d 108 (N.Y. App. Div. 4th Dep't 1975) 101

Wells Fargo Bank, N.A. v. ADF Operating Corp.,
50 A.D.3d 280 (N.Y. App. Div. 1st Dep't 2008) 79

White Plains Coat & Apron Co. v. Cintas Corp.,
8 N.Y.3d 422 (2007) 74, 76, 77, 78, 79

White Rose Food v. Saleh,
99 N.Y.2d 589 (N.Y. 2003) 16

Wilson v. Dantas,
2013 WL 92999 (S.D.N.Y. Jan. 7, 2013) 95

Statutes

11 U.S.C. § 101(5)(B) 66

11 U.S.C. § 105 70

11 U.S.C. § 502(c)(2) 66

11 U.S.C. § 544(b)(1) 72

15 U.S.C. § 77ppp(b) 90

N.Y. Gen. Oblig. Law § 13-107 ..... 82, 83, 84, 86

N.Y. State Tech. Law § 304(2) 42

N.Y. U.C.C. Law § 8-205 45

N.Y. U.C.C. Law § 8-208(a) 44

N.Y. U.C.C. Law § 8-506 86

Nev. Rev. Stat. Ann. § 227.090 41

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Revised Model Simplified Indenture, 55 Bus. Law. 1115 (2000) 7, 36, 40, 43, 47

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Autopen, MERRIAM-WEBSTER DICTIONARY
https://www.merriam-webster.com/dictionary/autopen 41

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https://www.sec.gov/Archives/edgar/data/892553/000119312521003205/d104801dex41.htm) 40

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(1937) 46

Restatement (First) of Contracts § 235(c) (Am. L. Inst. 1932) 14

Restatement (Second) of Contracts § 229 (Am. L. Inst. 1981) 45, 46

Restatement (Second) of Contracts § 302 (Am. L. Inst. 1981) 43

Sean Scott *et. al.*, *The Dizzying Impact of LMTs: Where We Are Now*,
Am. Bankr. Inst. J. (Jan. 2024) 17

Supplemental Indenture, Regional Management Insurance Trust (Oct. 30, 2020),
https://www.sec.gov/Archives/edgar/data/1519401/000156459020051441/rm-ex108_221.htm) 40

PRELIMINARY STATEMENT[2]

The Counterclaim Defendants respectfully urge the Court to find that the Counterclaim Plaintiffs' claims are meritless and that the capital structure of the Company created through the 2022 Transaction is valid and can properly serve as the foundation for a plan of reorganization. Sections I-VI explain why the 2024/2026 Holders have failed to show the 2022 Transaction violated the indentures in any respect. Sections VII-IX outline why, even if the Court were to find a breach of the indentures, there is no basis for the 2024/2026 Holders' requests for equitable remedies or their tortious interference claims. Section X addresses Langur Maize's claims.

The 2024/2026 Holders' Claims. The 2024/2026 Holders promised the Court they would show that the Company and the Participating Noteholders, in a despicable display of creditor-on-creditor violence, maliciously targeted them in a manner that deprived them of inviolable rights, solely to move a few favored noteholders closer to the life rafts on what everyone knew was a sinking ship. After thirty days of trial, these inflammatory claims were conclusively disproven. Each of the key witnesses for the 2024/2026 Holders admitted that they understood, subject to a two-thirds consent threshold, that lien releases were permissible—and they understood the Company had the ability to issue new Notes to meet that threshold. And it was undisputed that, while Incora had liquidity problems, it had a business that had a reason to exist, it was experiencing a longer-than-expected downturn due to COVID and other macro-economic factors, and the Company had a viable business plan that required approximately $250 million, which it needed quickly. In other words, after much hyperbole, this

[2] Capitalized terms used but not defined herein shall have the meanings ascribed to such terms in the *Debtors' Motion for Summary Judgment* [ECF 199]. ECF citations refer to the docket in this Adversary Proceeding unless otherwise indicated. All emphasis is added unless otherwise indicated.

case is and always has been about whether the Company's actions were permitted by its contracts.

In executing the various amendments and agreements in distinct steps, the Debtors did not breach the Original Secured Indentures. First, with the requisite consent of over fifty percent of each series of notes outstanding, the Company amended the Original Secured Indentures to expand the Company's debt capacity and permit the issuance of new Additional 2026 Notes. The Company then issued the Additional 2026 Notes to certain of the Participating Noteholders and received $250 million in new money. Then, with consent of over two-thirds of each series of secured notes then-outstanding, the parties released the liens securing the Original Secured Notes. The Company then exchanged the Participating Secured Noteholders' Secured Notes for New 1L Notes, which provided the Company with substantial debt service relief and maturity extensions.

Each of the amendments (and the agreements they facilitated) was permitted under the Original Secured Indentures. The institutions (including JPMorgan and BlackRock) who participated in the negotiation of Incora's indentures in 2019 had every ability to propose changes to the amendment provisions on the front end, but they did not. In 2022, the Company (and its counterparties) simply made use of the flexibility that had always been there, in the documents that governed the terms of the 2024/2026 Holders' notes.

Lacking support for their claims in the Indentures' plain language, the 2024/2026 Holders try two approaches. First, they invoke various inapplicable doctrines to urge the Court to disregard the sequenced actions that the Indentures permit. These are not availing. The integrated agreement doctrine is a canon of interpreting related agreements; it is not a basis for substantively collapsing multiple transactions or steps of a larger, complex transaction into one

another. And the so-called "collapsing" and "sham" doctrines are equally inapposite. They derive from fraudulent transfer and tax law, where specific public policy preferences may override a party's ability to contract. Those doctrines have no bearing on the different question of whether a party's actions complied with the language of a contract that the parties *agreed* would control their conduct. The Court should not break new ground by applying these doctrines to contract law. Doing so would rewrite the parties' bargain in a manner unfair to the Company and in violation of bedrock New York law.

Second, the 2024/2026 Holders raised a hyper-technical "wet ink signature" issue to argue that the 2022 Transaction was not effective. This argument leads nowhere. The Original Secured Indentures did not require the use of "wet ink" signatures or distinguish between an original manual signature or a copy of one. Moreover, WSFS, the Company, and the purchasers of the Additional 2026 Notes—*i.e.*, the parties that could cure this supposed "defect" in any event—all accepted the Additional 2026 Notes as valid. Furthermore, the 2024/2026 Holders are not parties for whose benefit the "manual signature" provision even exists. This attempt at a "gotcha" argument fails.

Importantly, the ***2024 Holders***, who have conceded from the get-go that the Company had the requisite two-thirds consents to release the liens under the 2024 Indenture, cannot even rely on these extra-contractual theories. They instead assert that unanimous consent was required to release liens, a position not one witness supported at trial and which is plainly at odds with the Indentures' terms and the 2024/2026 Holders' behavior in trying to amass a "blocking position."

Even if the 2024/2026 Holders were to prevail on their contract claim, they still have not established entitlement to equitable relief whether under a theory of equitable subordination,

equitable lien, or some equitable contract remedy, nor that they are victims of a tort. It is undisputed that the Company had a good-faith need for more financing than its debt and lien covenants permitted without amendments, that the 2022 Transaction generated the required amount of new capital for the Company following arm's-length negotiations, and that the Company worked with the PIMCO and Silver Point Noteholders because of their early organization and size. The evidence at trial established that each participant was motivated by its own economic interests in the Company, and the collective desire to improve the Company's prospects. After a lengthy trial, there is not a shred of evidence that any of the Counterclaim Defendants acted out of malice toward the 2024/2026 Holders, or that they defrauded anyone.

For their part, the 2024/2026 Holders were sophisticated market participants who understood the rules of their investment and made tactical choices to gain leverage against the Company for their own strategic aims. They were slow to organize and commence working with any of the throngs of willing and able advisors who approached them. When the 2024/2026 Holders did, eventually, retain a financial advisor to interact with the Company, their proposals fell short. They did not provide the Company with sufficient liquidity, and they carried significant execution risk. Moreover, while the 2024/2026 Holders claim that it was outrageous for the Company to go with the 2022 Transaction, their own proposals included a dropdown transaction that would have removed collateral from non-participating secured lenders, and a novel half-baked "Letter of Credit" proposal that no bank stood behind and that would have increased the Company's debt load by the same amount as the 2022 Transaction that they now criticize.

Golden Gate's entitlement to equitable relief is even more dubious. In the face of press reports about an impending uptier transaction, it engaged in a massive buying spree, including at

above-market prices and with borrowed money. This ill-advised investment strategy took their holdings from just $11 million to over $200 million in a span of weeks, making it the largest 2024/2026 Holder. Golden Gate started down that path as part of a risky bet—hoping it could find others to form a "blocking position," achieve leverage over the Company, and reap profits.

Langur Maize's Claims. Langur Maize's claims fail for numerous reasons, not least of which is its lack of standing to assert them. It bought its interests in unsecured notes opportunistically, in 2023, for pennies on the dollar. It is making a litigation play and could not even be bothered to bring a witness to trial. Its litigation problems include, but are not limited to: (1) lacking Article III standing, because no one who owned notes at the time of the 2022 Transaction assigned it a tort claim; (2) its theory is predicated on the Unsecured Exchange portion of the 2022 Transaction being a "redemption," which finds no support in the Unsecured Indenture's terms, the documentary evidence, or any witness's testimony; (3) non-participating unsecured holders felt no change in the payment terms of the Unsecured Indenture and therefore their "sacred rights" were not violated in any way; (4) non-participating holders were not harmed by the transaction—they benefited from it, and ultimately achieved a better economic outcome than participating holders; and (5) it cannot prove any of the non-Company Defendants it is suing took any actions to induce a breach, several (Carlyle, ~~Citadel~~Platinum, Senator) were primarily "price-takers" on terms presented to them after the Company negotiated with the providers of new capital, and all agreed to participate in the March 2022 Transaction to advance their economic interest in Incora's business and their unsecured notes.

Finally, Langur Maize's recent statements during meet-and-confer discussions reveal that it is briefing completely new theories, disclosed for the first time post-trial. These claims are equally meritless and the Court should, in any event, decline to entertain them.

BREACH OF CONTRACT CLAIMS[3]

I. NATURE OF INDENTURE AGREEMENTS AND WHY IT MATTERS

This is a contract dispute over the validity of amendments to bond indentures. To understand how these indenture provisions operate and how they can be amended, it is critical to understand their structure, the parties to them, and the restrictions imposed on (and the flexibility afforded) the issuer through covenants and amendment provisions.[4]

The Structure Of The Indentures. Bonds are largely "creatures of contract law," and the indentures that "govern the[ir] rights and obligations are often long and complex," in order to "deal with . . . all possible contingencies that might call into question the operation of those rights and obligations." *Broad*, 642 F.2d at 940-41. Importantly, the indenture trustee is the issuer's counterparty under the indenture and holds the contractual rights. *Id.* at 642 F.2d at 941-42. Although the bondholders hold the debt, they are not the issuer's counterparty; they are third party beneficiaries.[5] Thus, they do not have "standing to enforce every promise within [the indenture], including those not made for [their] benefit." *BNP Paribas Mortg. Corp. v. Bank of Am., N.A.*, 778 F. Supp. 2d 375, 415 (S.D.N.Y. 2011). Their contractual rights are limited to "those rights which the original parties to the contract intended [them] to have." *Sony Corp. v. Fujifilm Holdings Corp.*, 2017 WL 4342126, at *7 (S.D.N.Y. Sept. 28, 2017).

Accordingly, the rights of the 2024/2026 Holders, and the means to enforce those rights,

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[3] This section addresses each of the 2024/2026 Holders' claims that the 2022 Transaction breached the Original Secured Indentures except for their claim under Section 3.02, for which the 2024/2026 Holders have adopted Langur Maize's arguments. *See* ECF 291 at 62. Because Langur Maize's claim for breach of Section 3.02 fails, *infra* Section X.D, the 2024/2026 Holders' analogous claim fails for the same reason.

[4] As the Fifth Circuit aptly noted in interpreting an indenture under New York law, "it is perhaps worthwhile to discuss briefly the way in which this type of contract operates, and the reasons why such contracts must be so long and detailed." *Broad v. Rockwell Int'l Corp.*, 642 F.2d 929, 940 (5th Cir. 1981).

[5] *See* American Bar Foundation, COMMENTARIES ON INDENTURES 7-8 (1971) (the "***ABF Commentaries***").

only extend as far as the Original Secured Indentures provide. For example, Section 6.07 details the rights of the noteholders to receive payment and to bring suit to enforce such payment.[6] If bondholders are not paid, or any other event of default occurs, holders (acting through the Trustee), may enforce remedies, including by accelerating their debt, but only in ways that are prescribed by the Original Secured Indentures.[7] Invalidating transactions that purportedly breach the Original Indentures is ***not*** a remedy provided by those contracts.

Covenants And Amendments. Indentures routinely contain various provisions that reflect a negotiated balance bearing on the company's flexibility to take various actions going forward. These include negative covenants that restrict the company's ability to borrow additional money and grant liens—usually limited by pre-negotiated "baskets." Here, market participants focused on the covenants and baskets governing how much additional debt and liens the Company could incur without an amendment to the available baskets.[8] Indeed, JPMorgan insisted on tightening the initial debt and lien baskets as a condition to investing. Nonetheless, the Company also bargained for flexibility, including the ability to issue Additional 2026 Notes, subject to the baskets.[9]

Another key area of flexibility and focus of market participants are the amendment provisions.[10] Amendments are signed by the parties to the indenture (the issuer and indenture trustee), although depending on the nature of any amendment the parties may be obligated to

6 *See* ECF 601-8 § 6.07 ("[T]he right of any Holder of a 2026 Secured Note to receive payment of principal of, or interest on, the 2026 Secured Note. . . or to bring suit for the enforcement of any such payment . . . shall not be impaired or affected without the consent of such Holder.").

7 *See id* § 6.02 (providing for acceleration by Holders of 30% of outstanding Notes upon an Event of Default).

8 ECF 827 (Smith) at 46:13-47:3; *see* ECF 696-22 at 3, ECF 696-25.

9 *See* ECF 601-8, §§ 2.01(e); 4.09(a), 4.12(a).

10 *See* American Bar Association, Section of Business Law, *Revised Model Simplified Indenture*, 55 Bus. Law. 1115, 1146-47, §§ 9.01, 9.02 (2000) (the "***Model Indenture***").

receive consents from noteholders. Certain basic amendments, including those to fix ministerial defects in the indenture or the notes, do not require any consent, while others require some indication of consent by a specified amount of outstanding bonds.[11]

Different types of amendments may be subject to different consent thresholds. Under the Model Indenture, the general rule is that the issuer and the indenture trustee can amend or waive any provision with a ***majority*** of holders of outstanding notes unless it is expressly made subject to a higher voting threshold. There are also enumerated contract rights that require unanimous consent by those affected.[12] These are commonly referred to as "sacred rights" because they encompass the foundation of the debtor-creditor relationship (*e.g.*, the right to be paid principal and interest).[13] Certain other major changes to the indenture are not elevated to "sacred" status and can sometimes be subject to a super-majority consent, such as the consent of holders of two-thirds of the outstanding notes.[14] All of these features exist with respect to the Indentures at issue here, and the lenders did not seek to tighten them.[15]

With that background, the Counterclaim Defendants explain below that the evidence shows that the Company did not breach the Indenture. Even if it did, however, the remedy the 2024/2026 Holders urge—invalidation of the 2022 Transaction—is not available. *See infra* Section IV.

[11] *Id.*

[12] Model Indenture at 1146, § 9.02.

[13] ECF 1249 (Morrison) at 66:12-17.

[14] *See*, *e.g.*, *In re TPC Grp. Inc.*, 2022 WL 2498751, at *11 (Bankr. D. Del. July 6, 2022) (discussing "hierarchy" of consents, including majority, super-majority, and "sacred" rights); ECF 827 (Smith) at 51:16-52:12.

[15] *See* ECF 827 (Smith) at 53:23-55:6; ECF 601-8, §§ 9.01, 9.02.

II. THE ISSUANCE OF ADDITIONAL 2026 NOTES DID NOT BREACH THE INDENTURES[16]

A. The Company's Indentures Permitted Every Step Of The 2022 Transaction

On March 28, 2022, the Company entered into two amendments to the Indentures (*i.e.*, the Third Supplemental Indentures and the Fourth Supplemental Indentures) and several other agreements, including the Note Purchase Agreement and Exchange Agreement. Each of the amendments and agreements complied with the Original Indentures. First, the Company entered into the Third Supplemental Indentures, which amended the Indentures' definitions of "Permitted Debt" and "Permitted Liens" to allow the Company to incur secured "Indebtedness represented by . . . Additional 2026 Secured Notes."[17] These changes required simple majority consent under Section 9.02's default rule, and that consent was given by the Participating Noteholders, who held well over two-thirds of the 2024 Notes and nearly 60% of the 2026 Notes outstanding at that time.[18]

The Company next issued Additional 2026 Secured Notes to the Participating Secured Noteholders. Under the terms of Section 2.01(e), these Notes were to "have the same terms as to status, redemption, or otherwise as the Initial Secured Notes."[19] Counting these Additional 2026 Notes, the Participating Secured Noteholders held over two-thirds of the then-outstanding principal amount in both the 2024 and 2026 series. The Participating Noteholders provided their

[16] As the parties alleging breach, the 2024/2026 Holders bear the burden of proof. *See Daire v. Sterling Ins. Co.*, 204 A.D.3d 1189, 1190 (N.Y. App. Div. 3d Dep't 2022).

[17] *See* ECF 601-39 at § 2(c) (amending ECF 601-08 § 4.09(b)); ECF 601-30; ECF 604-18; ECF 604-9; *see also* ECF 601-8 ("The Issuer will not create . . . any Lien of any kind (other than Permitted Liens)"); ECF 601-39 at § 2(b) (amending "Permitted Liens" to include "Liens securing . . . the Additional 2026 Secured Notes").

[18] *See* ECF 628; ECF 1362; ECF 601-27; ECF 601-29; ECF 603-2; ECF 604-16. Majority consent was also given by holders of the 2027 Unsecured and 2028 PIK Notes. *See* ECF 602-37; ECF 604-40; ECF 603-5; ECF 603-16; ECF 604-24; ECF 604-2.

[19] *See* ECF 601-8 § 2.01(e).

consents for the Company to enter into the Fourth Supplemental Indentures, which released the liens securing the 2024 and 2026 Notes and permitted the Company to issue new secured debt.[20] The Company then issued 1L and 1.25L Notes under new Secured Indentures, and the Participating Secured and Unsecured Noteholders exchanged their Notes into the newly-issued 1L and 1.25L Notes. The Company cancelled the Notes it received pursuant to the exchange. As discussed in more detail below, these distinct actions each complied with the terms of the Original Indentures.

B. New York Law And The Express Terms Of The Indentures Respect Party Structuring Decisions

The 2024/2026 Holders argue that even if the parties implemented the 2022 Transaction in sequential steps involving a number of distinct amendments and agreements, the Court should use New York's integrated agreement doctrine to disregard those steps, merge them into a single instrument, and hold that they became effective simultaneously, such that the two-thirds consent threshold applies to both the Third and Fourth Supplemental Indentures and that the Company lacked the necessary consents to release the liens under the Original 2026 Indenture.[21] This argument ignores clear New York law that "fundamental, neutral precept of contract interpretation is that agreements are construed in accord with the parties' intent,"[22] and seeks to

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[20] *See* ECF 601-34; ECF 604-4; ECF 601-33; ECF 604-32. For consents, see ECF 628; ECF 1362; ECF 602-22; ECF 603-17; ECF 603-8; ECF 603-10 (Consents related to the 2024 and 2026 Indentures). *See also* ECF 603-11; ECF 603-13; ECF 603-29; ECF 604-1; ECF 604-17; ECF 602-33 (Consents related to the Unsecured and PIK Indentures).

[21] ECF 200 at 27; ECF 630 at 39-43.

[22] *Greenfield v. Philles Records, Inc.*, 98 N.Y.2d 562, 569 (N.Y. 2002); *see also Reiss v. Fin. Performance Corp.*, 97 N.Y.2d 195, 199 (N.Y. 2001) ("[C]ourts may not by construction add or excise terms, nor distort the meaning of those used and thereby make a new contract for the parties under the guise of interpreting the writing."); *Broad v. Rockwell Intern. Corp.*, 642 F.2d 929, 947 (5th Cir. 1981) (a court may not "rewrite a contract to accord with its instinct") (applying New York law). The doctrines cited by the 2024/2026 Holders to undermine these principles are not on point, as discussed in Sections II.B-II.D, *infra*.

have the Court set aside the express terms of Indentures.[23]

Consistent with these principles of New York contract law, and directly contrary to what the 2024/2026 Holders are asking this Court to do, courts have respected the sequencing of steps in multi-step transactions, such as those involving so-called "exit" or "enter" consents (consents obtained by an issuer in connection with another transaction related to those notes, such as an exchange or purchase). Such cases are neither new nor unusual. For example, in *Audax Credit Opportunities Offshore Ltd. v. TMK Hawk Parent, Corp.*, the New York Supreme Court rejected an argument that a credit agreement's "required lenders" standard was not satisfied by consents provided by holders who had previously agreed to exchange their debt immediately after providing those consents. The court concluded that "the order of operations matters" because in corporate and finance matters "courts have hewn strictly to the chronology required by the contracts." 150 N.Y.S.3d 894, at *10-11 (N.Y. Sup. Ct. 2021). In *MeehanCombs Global Credit Opportunities Funds, LP v. Caesars Entertainment Corp.*, plaintiffs challenged a transaction on a theory that voting consents preceded a pre-arranged plan to sell the notes at issue. 80 F. Supp. 3d 507, 516-17 (S.D.N.Y. 2015). The court rejected the challenge because each step was permitted by the contract. *Id.* at 517 (the consents "were given *before* the notes were sold") (emphasis in original).

The Delaware Chancery Court similarly respected a multistep transaction in the context of a sequenced bond exchange transaction. *See Katz v. Oak Indus. Inc.*, 508 A.2d 873, 878-81 (Del. Ch. 1986). *Katz* concerned a two-step transaction, where consents were solicited from bondholders who would then exchange their securities with the issuer. The court rejected arguments that linking an exchange offer and consent solicitation created a "rigged vote" and

[23] The caselaw expressly cited by the 2024/2026 Holders is rebutted more explicitly in Sections II.B-II.D, *infra*.

upheld the transaction, explaining the structure did not violate "any of the express contractual provisions considered." *Id.* at 878, 881; *see also id.* at 879 (noting that indenture arrangements "are typically thoroughly negotiated and massively documented" and as such "[t]he rights and obligations of the various parties are or should be spelled out in that documentation" and "[t]he terms of the contractual relationship agreed to" not set by "broad concepts such as fairness").

Other courts are in accord. For example, in *In re Murray Energy Holdings*, the Bankruptcy Court for the Southern District of Ohio rejected the position that certain lenders' votes in favor of an amendment should not count because the votes were cast by lenders that had already committed to sell those loans back to the issuer. *See Black Diamond Comm. Fin. L.L.C. v. Murray Energy Corp. (In re Murray Energy Holdings)*, 616 B.R. 84, 98 (Bankr. S.D. Ohio 2020). The transaction there, like here, involved an amendment to loan documents, and a non-pro rata repurchase. *Id.* at 88. The court rejected—as "fiction and sophistry"—the argument that the loan repurchase should be treated as having occurred simultaneously with the delivery of the consents because "[c]omitting to do something is not, of course, the same thing as doing it." *Id.* at 98. The court thus held that although the multiple steps of the transaction were "conducted that same day," there was "no merit" to the argument that committing to sell their loans undermined the holders' ability to vote them since the amendment "occurred before . . . notes were repurchased and cancelled." *Id.* The sequencing of the transaction complied with the terms of the agreement—and the court refused to collapse two steps simply because their contractual validity relied on their sequencing.

Similarly, here, when the 2024/2026 Holders ask the Court to "collapse" the steps of the 2022 Transaction, they are asking for protection that the terms of the Original Indentures did not provide. To the contrary, the Original 2026 Indenture enshrines the view—in plain

language—that there is one requirement for the effectiveness of any consents: that they be based on the principal amount of 2026 Notes "then outstanding." Section 9.02 provides that "[t]his Indenture . . . may be amended or supplemented with ***the consent of the Holders of at least a majority in aggregate principal amount of the then outstanding*** 2026 Secured Notes . . . voting as a single class (***including, without limitation, consents obtained in connection with a tender offer or exchange offer for, or purchase of, the 2026 Secured Notes***)."[24] The Indenture is clear that the Notes to be counted are the Notes "outstanding" at any given time, and that consents obtained "in connection with a . . . purchase of[] the 2026 Secured Notes" are just as valid as any other consents obtained by the issuer in support of an amendment to the indentures. The Original 2026 Indenture thus expressly recognize as valid a transaction in which (a) notes are purchased and (b) those newly purchased notes consent to a subsequent amendment—***even if those consents were negotiated and obtained in connection with the purchase***. As such, the Original 2026 Indenture's amendment provisions necessarily encompass (and condone) pre-planned multi-step transactions like the 2022 Transaction and those previously blessed by courts. To hold otherwise would rewrite the parties' bargain in violation of New York law. *See Reiss*, 97 N.Y.2d at 199 ("[C]ourts may not by construction add or excise terms, nor distort the meaning of those used and thereby make a new contract for the parties under the guise of interpreting the writing.").

C. The Integrated Agreement Doctrine Cannot Be Used To Collapse The Distinct Steps Of The 2022 Transaction

In the face of the contract's plain language, the 2024/2026 Holders ask the Court to set

[24] ECF 601-8 § 9.02. Section 9.02's Supermajority Consent Provision contains similar language concerning purchase consents. *See id.* And the other Original Indentures contain identical language. *See* ECF 601-20 § 9.02; ECF 601-7 § 9.02.

aside the party's sequenced transaction by distorting and commingling a variety of inapposite doctrines. The application of any of these doctrines, which are disentangled below, would be contrary to New York law, which respects the intent of the parties as set forth in their agreements.

The Integrated Agreement Doctrine Does Not Apply. The integrated agreement doctrine is ***not*** an instrument for collapsing transaction steps. Rather, it is a canon of contract interpretation that allows a court to read related agreements together so they are construed consistently and in accordance with party's contractual intent. As a New York appellate court explained in *BWA Corp. v. Alltrans Express U.S.A., Inc.*: "Where several instruments constitute part of the same transaction, they must be ***interpreted*** together. ***In the absence of anything to indicate a contrary intention***, instruments executed at the same time, by the same parties, for the same purpose, and in the course of the same transaction ***will be read and interpreted together***, it being said that they are, in the eye of the law, one instrument." 112 A.D.2d 850, 851-52 (N.Y. App. Div. 1st Dep't 1985). The integrated agreement doctrine allows a court to read separate agreements together to ***ascertain and enforce the intent of the parties to those contracts.*** The doctrine is consistent with the "[t]he fundamental, neutral precept of contract interpretation . . . that agreements are construed ***in accord with the parties' intent***." *Greenfield*, 98 N.Y.2d at 569.[25]

The 2024/2026 Holders' proposed application of the doctrine to collapse the steps of the 2022 Transaction turns this aim on its head. The 2024/2026 Holders are wrong because: (1) the

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[25] The integrated agreement doctrine is listed in the Restatement (First) of Contracts as one of several "Rules Aiding Application of Standards of Interpretation," and provides: "A writing is interpreted as a whole and all writings forming part of the same transaction are interpreted together." RESTATEMENT (FIRST) OF CONTRACTS § 235(c) (Am. L. Inst. 1932).

doctrine does not support substantive collapsing of transactions or steps; and (2) as strangers to the Third and Fourth Supplemental Indentures, the 2024/2026 Holders urge the Court to apply the doctrine to ***override*** the Counterclaim Defendants' contractual ***intent***, rather than enforce it.[26]

New York law is clear that the doctrine is interpretive, not substantive.[27] Although the "one instrument" language in *BWA Corp.* (and similar, occasionally-used language in other cases) has been the source of some confusion, the Court should not be confused: the doctrine does not literally deem multiple agreements to be one. For example, in *Kent v. Universal Film Manufacturing. Co*., 200 A.D. 539, 550 (N.Y. App. Div. 1st Dep't 1922), the court made clear that the doctrine means that contracts may be "***construed*** together, and ***for the purpose of ascertaining what they mean may be read together as if*** a single agreement." But, as the court in *Kent* held, the "integrated agreement" principle "does not require that the two separate instruments must be deemed consolidated and one for all purposes or that a separate and independent provision of one . . . is to be deemed incorporated in the other." *Id*. at 550; *see also CooperVision, Inc. v. Intek Integration Techs.*, 794 N.Y.S.2d 812, 818 (N.Y. Sup. Ct. 2005) (same).

The 2024/2026 Holders cite *TVT Records v. Island Def Jam Music Group*, 412 F.3d 82 (2d Cir. 2005), to perpetuate the confusion, arguing that there the Second Circuit used the integrated agreement doctrine to "collapse" two instruments into one. That is not correct. The

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[26] Any contention that a breach can sound in "anti-circumvention" principles ***underlying*** (or outside of) express contractual provisions is an end-run around the Court's dismissal of the implied covenant claim, which asserted exactly such a theory. *See e.g.*, ECF 144 at ¶ 262 (pleading the claim based on conduct "circumvent[ing]" the Indentures); ECF 291 at 49 (defending the claim as justified to prevent "circumvent[ing]" the terms of the Indenture). As the Court explained in dismissing this claim, "[t]he implied covenant cannot be used to impose obligations or restrictions going beyond what is set forth in the contract." ECF 508 at 51 (quoting *Audax Credit Opportunities Offshore Ltd.*, 150 N.Y.S.3d 894, at *10). The 2024/2026 Holders' breach theories must be limited to those based on the actual, express provisions of the contract they have, not the contract they want.

[27] This law is discussed in the Debtors' prior briefing, incorporated by reference. *See* ECF 199 at 42-47, 270 at 20-23, ECF 323 at 15-18.

TVT Records court ascertained that, at the time the parties entered into their various agreements, the parties' intent was that the agreements were "meant to be read together as a single contract." *Id.* at 90. The court applied the doctrine as one of interpretation, not substantive collapsing of distinct agreements that the contract parties expressly intended to be separate instruments.

If the integrated agreement doctrine permitted literal collapsing of transactions, agreements, or steps, it would have absurd results. For example, a court might need to reconcile incompatible steps, or agreements that contain different choice of law or forum selection provisions. At least one New York court has explained that it would be improper to proceed in that manner. In *Teletech Europe B.V. v. Essar Services Mauritius*, the First Department rejected a reading of integrated agreement doctrine caselaw that would literally import an arbitration clause from one agreement into an escrow agreement just because they were related agreements. 83 A.D.3d 511, 512 (N.Y. App. Div. 1st Dep't 2011). The court treated the provisions of the agreements at issue—and the agreements themselves—as separate, even if they were to be interpreted together. *Id.* And, indeed, to collapse agreements or transactions simply because they had an overarching purpose would put into question the accepted mechanics of any number of corporate transactions, including those implemented through chapter 11. As a simple example: under many plans of reorganization, assets of a reorganized company are transferred free and clear of liens and new liens on the very same assets are issued "contemporaneously." But courts nevertheless respect the order of pre-determined operations—discharge, transfer, new pledge.

Second, the 2024/2026 Holders cite no New York cases applying the integrated agreement doctrine to override the terms of the contracts at issue. For example, the 2024/2026 Holders have previously cited *White Rose Food v. Saleh*, in which the court held that a

guarantor's waiver of notice in a note bound him under the guarantee of that note pursuant to the integrated agreement doctrine. 99 N.Y.2d 589, 592 (N.Y. 2003). That case simply identified and enforced the parties' ***intent*** as reflected in those documents. The 2024/2026 Holders have also cited *In re Hendrick Hudson Central School District v. Falinski*, which they assert imported an arbitration clause from one contract to another. 71 A.D.3d 769, 769 (N.Y. App. Div. 2d Dep't 2010). Although *Hendrick Hudson* on its face contains no reasoning, the underlying briefing for the case reveals that, again, the parties ***intended*** for the second agreement to incorporate the arbitration agreement from the first, as demonstrated by reference to the arbitrator's name. *See* Resps.' Mem. of Law, *In re Hendrick Hudson Central Sch. Dist. v. Falinski,* 2008 WL 8097192 (N.Y. Sup. Ct. Nov. 5, 2008).

The 2024/2026 Holders also cite cases focused on whether various agreements are sufficiently interrelated with one another to qualify as being part of the "same transaction." But those cases are irrelevant. Those cases pose the "same transaction" question to ascertain whether, because separate contracts were executed at the same time, for a common purpose, the parties intended those contracts to be ***interpreted*** together. Here, the question is whether the parties to the 2022 Transaction sequenced their actions in a manner that complied with the Original Indentures—irrespective of whether those actions were part of one "transaction," or one "agreement," or many.

"Collapsing" And "Sham Transaction" Doctrines Do Not Apply. The 2024/2026 Holders do not stop at misinterpreting the integrated agreement doctrine. They then try to combine that doctrine of contractual interpretation with an entirely separate "collapsing" doctrine from the fraudulent transfer and tax contexts to form a non-existent super doctrine aimed at achieving their desired outcome.[28] But that doctrine is even further afield. New York contract

[28] The 2024/2026 Holders routinely conflate the two doctrines, citing tax and fraudulent transfer cases as if they stood for general principles of contract law and not particular principles of statutory interpretation. *See, e.g.,*

law provides no support for importing the "collapsing" or "sham transaction" tax and fraudulent transfer cases into the breach-of-contract context, where the language and intent of the parties to the underlying agreements (here, the Original Secured Indentures) supplies the relevant standards of conduct for a breach-of-contract claim.[29] In contrast, fraudulent transfer[30] and tax law[31] cases specifically look past the contractual language and reflect public policy preferences for imposing limits on the extent to which individuals can minimize or evade certain payment obligations. In other words, there are policy limits on a person's ability to structure his or her behavior in fraudulent transfer and tax cases that do not exist in contract law,[32] where parties can act as they wish, so long as permitted by the applicable contract.[33] And to be clear: the concept of a "sham

stood for general principles of contract law and not particular principles of statutory interpretation. *See, e.g.,* ECF 291; *id.* at 51 (citing *Kurz v. United States*, 156 F. Supp. 99, 103 (S.D.N.Y. 1957)) (tax); *id.* at 51 (citing *Orr v. Kinderhill Corp.*, 991 F.2d 31, 36 (2d Cir. 1993)) (fraudulent transfer); *id.* at 52 (citing *In re Waterford Wedgwood*, 500 B.R. 371, 379 (Bankr. S.D.N.Y. 2013)) (evaluating a fraudulent conveyance claim, and emphasizing "fraudulent conveyance principles" alongside five other cases, all of which evaluated tax or fraudulent transfer claims).

29 If parties determine that existing indenture language yields results that are unfair, they are free to negotiate new language going forward. *See* Sean Scott *et. al.*, *The Dizzying Impact of LMTs: Where We Are Now*, Am. Bankr. Inst. J. (Jan. 2024) (discussing the market's response to the growing use of liability management transactions).

30 *E.g., In re Waterford Wedgwood*, 500 B.R. at 379.

31 *See e.g., Acqis Tech., Inc. v. Comm'r*, T.C.M. (RIA) 2024-021 (T.C. 2024) (explaining the origins of the sham transaction doctrine in tax law); *see also Casebeer v. Comm'r*, 909 F.2d 1360, 1362 (9th Cir. 1990) (analyzing whether transactions "are shams for tax purposes")*; Rice's Toyota World, Inc. v. Comm'r*, 752 F.2d 89, 91 (4th Cir. 1985) (same).

32 For instance, in the fraudulent transfer context, collapsing makes sense because those are equitable claims, and—as the supreme court articulated over 80 years ago—the court may exercise its "equitable powers . . . to the end that fraud will not prevail, that substance will not give way to form, that technical considerations will not prevent substantial justice from being done." *Pepper v. Litton*, 308 U.S. 295, 304-05 (1939). Accordingly, an allegedly fraudulent conveyance must be evaluated in context; "[w]here a transfer is only a step in a general plan, the plan 'must be viewed as a whole with all its composite implications.' " *Orr v. Kinderhill Corp.*, 991 F.2d 31, 35 (2d Cir. 1993); *see also HBE Leasing Corp. v. Frank*, 48 F.3d 623, 635 (2d Cir. 1995) ("multilateral transactions may under appropriate circumstances be 'collapsed' and treated as phases of a single transaction for analysis ***under the UFCA***"); *In re Tronox Inc.*, 503 B.R. 239, 269 (Bankr. S.D.N.Y. 2013) (same). But a collapsing analysis is only one element of a fraudulent transfer claim and the other elements must also be satisfied to find liability. *HBE Leasing*, 48 F.3d at 635 (discussing other elements of fraudulent transfer liability).

33 The Court should likewise not rely on *In re Servicom, LLC*, 2021 WL 825155 (Bankr. D. Conn. Feb. 24 2021), pertaining to a claim for debt to equity recharacterization in bankruptcy. That also is about overriding the intentions of the party.

transaction," while applicable in tax law, has no place in analyzing contract-based claims under New York law.

In its summary judgment decision, the Court cited *In re Waterford Wedgwood*, in framing the collapsing inquiry. Respectfully, that case is inapplicable because it collapsed a transaction as a matter of fraudulent conveyance law, not contract law. *See* 500 B.R. at 379–81. New York contract law focuses on a different question—the parties' contractual intent. And if the parties intended distinct agreements, courts respect that.

Likewise, opinions that the 2024/2026 Holders have cited suggesting application of these types of doctrines to breach of contract cases are outliers and do not grapple with New York contract law. For example, they have previously cited *Noddings Investment Group, Inc. v. Capstar Communications, Inc.*, in which a Delaware court applied what it called the "step transaction" doctrine in a contract dispute under New York law. 1999 WL 182568, at *7 (Del. Ch. Mar. 24, 1999). In the 25 years since that opinion issued, no New York court has cited *Noddings* for anything, nor does it appear that any New York court has applied a "step transaction" theory to find a breach of contract where the individual components of a transaction each complied with the parties' agreement. That court cited none.[34]

Even if, however, one were to import "collapsing" and "sham" or "step transaction" doctrines from these other bodies of law to breach of contract actions, the 2022 Transaction still provides no basis for their application. Each amendment and agreement composing the 2022 Transaction had its own economic effect and business justification: the Third Supplemental Indentures expanded the Company's ability to raise new debt; the Note Purchase Agreement used that capacity to raise $250 million in cash (an amount based on the Company's liquidity

[34] *Noddings* relied only on tax and fraudulent conveyance cases.

need); the Fourth Supplemental Indentures obtained the flexibility to issue new secured debt; and the Exchange swapped notes for new debt, which featured with reduced debt service costs and deferred maturities.[35] Each were separate and distinct actions done sequentially for a discrete purpose.

The 2024/2026 Holders' theory of "collapsing" would also put courts to the impossible or arbitrary task—with no guidance from New York contract law—of deciding at what level of generality a party's "purpose" should be defined before deciding whether to deem one action subject to the same contractual standards (here, an amendment threshold) as another action. There is no basis for doing so, when the only question to answer is what the underlying contract allowed.

D. The 2024/2026 Holders Have Failed To Show The 2022 Transaction Was Not Implemented As Intended

Because the terms of the Indentures permitted the 2022 Transaction, the 2024/2026 Holders attempt to show that it was *not* executed as planned, and that the steps occurred either concurrently or out of order. They are wrong. A detailed timeline of events presented at trial shows that the parties planned and executed the transaction in a series of steps, such that the amendment authorizing the issuance of the Additional 2026 Notes became effective—and the issuance of notes occurred (upon the completion of the wire transfers)—***before*** any consents to the Fourth Supplemental Indentures took effect.

1. *The Third Supplemental Indenture, Note Purchase Agreement, And Additional 2026 Notes Issuance Were Effective Before The Fourth Supplemental Indenture and Exchange*

The parties carefully planned for the steps implementation order and drafted the various

[35] *See*, *e.g.*, ECF No. 536-24 at 5-9.

agreements accordingly. In mid-March, Milbank informed WSFS of the instructions that the parties would give, including that the execution of the Fourth Supplemental Indentures and the Exchange would occur ***only after*** the execution of the Third Supplemental Indentures and the "issu[ance of] the Additional 2026 Notes . . . for the new money."[36]

The agreement terms reflect this order. The Third Supplemental Indentures were not contingent on any further amendment, especially not the Fourth Supplemental Indentures—it did not even reference them.[37] Nor was the Note Purchase Agreement (which entitled the Company to the money) conditioned on the Exchange.[38] In other words, once issued, the Additional 2026 Notes were "outstanding" and had the same rights as all other 2026 Notes. There can be no confusion that if the Exchange did not happen, it would not affect the Additional 2026 Notes' validity or existence: the money would have already been wired. And there was not a condition to receiving the funds in exchange for the Additional 2026 Notes that the Exchange must occur. Consistent with this, the Exchange Agreement specified as conditions precedent to the Exchange the following steps: (i) the execution of the Third Supplemental Indentures; (ii) the consummation of the Note Purchase; and (iii) the execution of the Fourth Supplemental Indentures "***following*** the Note Purchase Closing and prior to the Exchange Closing."[39]

And while the 2024/2026 Holders cite the Exchange Agreement's specific performance remedy as evidence that events were planned to occur simultaneously,[40] it actually shows the opposite. The Exchange Agreement is the ***only*** agreement as part of the 2022 Transaction that

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36 *See* ECF 538-68 at 6.

37 *See* ECF 601-30; ECF 601-39; ECF 604-18.

38 *See* ECF 602-24.

39 ECF 604-19 (Exchange Agreement) §§ 4.02(j)-(k), 4.03(b)(c) (emphasis added).

40 *See* 2024/2026 Holders' Opening Slides at 7.

contains a specific performance provision, ***and that agreement did not become effective until after the Note Purchase was consummated***.[41] The specific performance provision provided a remedy if the Company did not exchange the Participating Noteholders' notes once they delivered the consents to the Fourth Supplemental Indentures and had nothing to do with the validity of the Additional 2026 Notes.[42] The specific performance remedy demonstrates the parties' understanding that delivery of the notes and receipt of the up-tiered notes was not simultaneous. If it were otherwise, there would have been no need for that provision at all. Moreover, even if the Third Supplemental Indentures or the Note Purchase Agreement had a specific performance provision requiring the entry into the Fourth Supplemental Indentures—***which they do not***—that would not undermine the transaction's steps, as long as they were executed in the correct sequence.

2. *The Closing Reflected The Intended Sequencing*

On the Closing Day, the parties proceeded through the planned sequence. On the Closing Call, the Company's counsel read an agenda outlining the order of steps to which each party assented, demonstrating the parties' authorization to effectuate amendments and transactions in a particular order, not at the same time. Per the terms of the agreements, the parties agreed to "release of all of their signature pages" in the following order: (1) "each of the 'Purchase Consent Documents'" (*i.e.*, the Third Supplemental Indentures and related consents); (2) "the Notes Purchase Agreement"; (3) ***after the "notes purchase has been consummated***, . . . each of

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[41] ECF 1146-5 at 2-3.

[42] Of course, while the Additional 2026 Notes were "outstanding" prior to the exchange, the Company was incentivized to ensure the Exchange occurred to obtain the separate benefits of cash interest relief and maturity extensions. *See* ECF 955 (Dostart) at 174:8-175:3. Regardless, it is irrelevant whether there was risk that the Exchange would not have occurred once the Additional 2026 Notes were issued because each step of the 2022 Transaction complied with the Indentures. *See supra* Section II.A.

the 'Exchange Consent Documents'" (*i.e.*, the Fourth Supplemental Indentures and related consents); (4) "the Permitted Pari Passu Secured Party Joinder and the Amended and Restated Notes Security Agreement"; and finally (5) "the Exchange Agreement," the 1L and 1.25L Indentures, and other Exchange-related documents.[43] The Third Supplemental Indentures would be executed, the Notes Purchase Agreement effective, and the Additional 2026 Notes issued, before the signature pages to the Fourth Supplemental Indentures would be released or the Exchange consummated.

The transaction followed the agreed steps. The parties made sure, first, to allow for ***and*** consummate the Note Purchase, second, to provide consents to the Fourth Supplemental Indentures (including consents by the newly issued notes), and third, to consummate the Exchange:

- **March 28, 2022, 8:15 am ET**. All transaction parties[44] held a brief closing call (the "***Closing Call***")[45] and the Closing Call Agenda was read out loud in its entirety.[46] All parties provided their agreement to release their signatures in the order set forth in the Closing Call Agenda.[47]

- **March 28, 2022, 8:27 am ET and 8:30 am ET**. With the consent of over 50% of the then-outstanding Notes in each tranche, the Third Supplemental Indentures, along with

[43] ECF 1146-5 at 2-3. This process, in which each party agrees to release its signatures upon the occurrence of a subsequent events, is common in complex transactions. *See* ECF 1350 (Healy) at 59:12-18.

[44] ECF 1184 (Osornio) at 15:22-16:1.

[45] *Id.* at 15:4-5.

[46] *Id.* at 42:14-25, 43:16-18.

[47] *Id.* at 34:3-16; *see also id.* at 35:9-21 ("[T]he order started with the release of signature pages for the third supplemental indentures that allowed for the issuance of the initial notes. . . . Then the second was the release of the signature pages for the note purchase agreements for the initial notes. That was followed by the release of signature pages for the fourth supplemental indentures and related documentation. The next was the release of signature pages for the amended security agreement; And then, lastly, the -- the release of signature pages for the new 1L and one and a quarter L indentures and notes. Followed by the exchange-related documentation."); *see also* ECF 1146-5.

Any notion that the signatures were released at the same time (and thus all 2022 Transaction Documents became effective simultaneously) not only disregards the clear conditions precedent set forth in the 2022 Transaction Documents, but it misrepresents the parties' statements on the Closing Call, during which each party agreed to release its respective signatures at the appropriate time throughout the day.

supporting documents and noteholder consents, were delivered to WSFS and the Indentures were amended to allow for the issuance of the Additional 2026 Notes.[48]

- **March 28, 2022, 12:54 pm ET.** The wire process, which had been initiated after the Closing Call, completes with the final wire sent to the Company.[49]

- **March 28, 2022, 1:37 pm ET**. Once the Company confirmed receipt of funds from the Participating Secured Noteholders, the Company instructed WSFS to authenticate and issue the Additional 2026 Notes.[50]

- **March 28, 2022, 1:43 pm ET**. Scans of the Additional 2026 Notes were delivered via email to the applicable Participating Noteholders.[51]

- **March 28, 2022, 2:13 pm ET and 2:16 pm ET**. With the consent of holders who held 66⅔% of the 2024 and 2026 Notes then outstanding, as well as more than 50% of the outstanding Unsecured Notes, the Fourth Supplemental Indentures, along with supporting documents and noteholder consents, were delivered to WSFS and the Indentures were amended to allow for the release of the liens securing the 2024 and 2026 Notes and the Exchange.[52]

- **March 28, 2022, 2:19 pm ET**. The 1L and 1.25L Notes Indentures were delivered to WSFS along with an instruction to authenticate and issue the 1L and 1.25L Notes.[53]

- **March 28, 2022, 2:25 pm ET**. The Company instructed WSFS to begin the "DWAC process" in accordance with previously circulated spreadsheets.[54]

- **March 28, 2022, 3:08 pm ET**. The Company informed the Participating Noteholders that the 2022 Transaction was complete and reminded the Participating Noteholders to transfer their existing 2024 Notes, 2026 Notes, and Unsecured and PIK Notes to U.S. Bank for cancelation.[55]

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48 ECF 1150-4; ECF 1150-5. The relevant voting consents are available at: ECF 601-27; ECF 601-29; ECF 603-2; ECF 604-16; ECF 602-37; ECF 604-40; ECF 603-5; ECF 603-16; ECF 604-24; ECF 604-2; ECF 602-33 (consent letters); *see also* ECF 1362-7 at 5-7 (providing total outstanding principal amounts as of Mar. 22, 2022).

49 ECF 1150-10.

50 ECF 1150-11.

51 ECF 1155-1; ECF 1155-2; ECF 1155-3; ECF 1155-4; ECF 1155-5; ECF 1155-6; ECF 1155-7.

52 ECF 710-43 at 2; ECF 1150-16; ECF 1150-18. The relevant voting consents are available at: ECF 602-22; ECF 603-17; ECF 603-8; ECF 603-10; ECF 603-11; ECF 603-13; ECF 603-29; ECF 604-1; ECF 604-17 (consent letters); *see also* ECF 1362-7 at 5-7.

53 ECF 1150-19.

54 ECF 1150-21.

55 ECF 1150-23.

- **March 28, 2022, around 3:08 pm ET**. The Additional 2026 Notes were cancelled via the application of a physical stamp by the Company's attorneys.[56]

In light of this chronology, it is obvious that the handful of cherry-picked, out-of-context email statements on which the 2024/2026 Holders relied in their Opening Statements,[57] were simply informal shorthand references to what was happening on the Closing Day. These emails simply cannot refute the timeline outlined above, which is backed not only by the sworn testimony of multiple witnesses, but also by objective, computer-generated time stamps showing when the transaction steps occurred.

At trial, the 2024/2026 Holders also made much of the fact that PIMCO's internal trade logs do not reference the Additional 2026 Notes.[58] But the 2024/2026 Holders ignored Silver Point's and Citadel's trading logs, which ***do*** show purchases of the Additional 2026 Notes on March 28. Plainly, the inconsistency in PIMCO's trade logs has no probative value (and, in any event, other contemporaneous PIMCO records do reflect receipt of the Additional 2026 Notes).[59] At most, this discrepancy reflects idiosyncrasies in the back-office bookkeeping practices.

E. The Original Secured Indentures Do Not Protect Noteholders From The Dilution Of Their Voting Power Through The Issuance Of Additional Notes

Aside from the inapposite integrated agreement doctrine, the 2024/2026 Holders offer a menu of contractual arguments, but each is a different serving of the same dish: an effort to read into the Indentures a protection against vote dilution that does not exist. They are clear: new

[56] ECF 1184 (Osornio) at 139:19-140:23, *see, e.g.*; ECF 726-19, 726-20. WSFS authorized this process. ECF 1350 (Healy) at 130:5-16.

[57] *See, e.g.*, ECF 733-55 (Milbank email noting that documents would be released in order); ECF 710-9 (Davis Polk email referencing signature escrow release process); ECF 723-8 at 2 (Carlyle email (Jesse Hou) describing timing of closing).

[58] ECF 725-28, 725-21.

[59] *See* ECF 729-53 at 45; ECF 725-21 (row five); ECF 1155-1 at 1; *see also* ECF 1266 at 7-8.

notes may vote in connection with a purchase or exchange, including to release liens and allow for senior debt, and each step in multi-step transactions must be given effect. *See supra* Section II.B. The Court should rule for the Counterclaim Defendants based on those terms of the Indentures alone.

But to the extent the Court does find ambiguity in the Original Secured Indentures, the 2024/2026 Holders' own conduct and communications reveal that they understood full well that newly issued notes would be permitted to vote their consent.[60] That conduct shows that the 2024/2026 Holders expected that the issuance of new notes ***could*** be used for dilution, even though their litigation position is to the contrary.[61]

Significantly, in the winter of 2022, while attempting to assemble a purported "blocking position," the 2024/2026 Holders anticipated and planned for the possibility of dilution through the issuance of new notes and were unsurprised by reports that the Company might expand its debt baskets to issue additional notes for that purpose. The group specifically planned for the potential that the Company might issue $75 million under its existing baskets without any necessary consents or amendments.[62] Indeed, as of February 19, 2022—well ***before*** a March 1

[60] "Ambiguity in a contract arises when the contract, read as a whole, fails to disclose its purpose and the parties' intent, or when specific language is ***susceptible of two reasonable interpretations***." *Donohue v. Cuomo*, 38 N.Y.3d 1, 13 (N.Y. 2022). Where the Court finds ambiguity, the Court may consider extrinsic evidence to determine the Indentures' meaning. *See id.* (extrinsic evidence admissible if a court "finds an ambiguity in the contract"); *see also Paragon Res., Inc. v. Nat'l Fuel Gas Distrib. Corp.*, 695 F.2d 991, 997 (5th Cir. 1983) ("Great weight should be given to a practical construction of the contract by defendant.") (applying New York law).

[61] The 2024/2026 Holders' post-hoc assertions about what the Original Secured Indentures purportedly require should, in contrast, be rejected. *See, e.g.*, *Huber v. ARCK Credit Co.*, LLC, 2015 WL 14077892, at *3 (S.D.N.Y. Jan. 28, 2015) (courts should "view a party's post-hoc statements" about contractual intent "made for purposes of litigation" with "skepticism"); *Madeleine, L.L.C. v. Casden*, 950 F. Supp. 2d 685, 694 (S.D.N.Y. 2013) (rejecting a "lawyer-and-litigation-driven" contract reading "having nothing to do with the actual intent of the parties at the time of drafting").

[62] *See* ECF 970 (Seketa) at 90:10-14; *see also id.* at 88:6-11 ("THE COURT: So did you consider the $75 million potential basket issuance in calculating whether you had reached the blocking percentage? THE WITNESS: Yes."); *id.* at 87:4-8.

press article reporting that the Company might issue additional notes to achieve supermajority consent—Golden Gate was "already running the math" as to whether the group had a "super-blocking position," meaning a dilution-protective position or "one-third of the 2026 notes, taking into account the company's existing baskets to issue additional secured notes."[63] In late February 2022, Mr. Seketa of JPMorgan advised his colleagues that the Company "might attempt to dilute our group's voting power" and recommended "growing the size of the block."[64]

The 2024/2026 Holders also understood the risk that their position could be diluted beyond the existing $75 million of debt capacity by way of an amendment. On March 1, 2022, Reorg Research reported that the Company might dilute the 2024/2026 Holders' purported blocking position by amending the Company's existing debt baskets.[65] Mr. Seketa relayed to his boss Mr. Cook that the report revealed "***[n]othing particularly new***," merely "the idea that instead of offering $75mm to dilute us, they would raise more."[66] When Mr. Wang shared the same article at Golden Gate, his colleague Lionel Jolivot confirmed that "in a lot of bond structures, you can amend the regular debt incurrence covenant with only a regular majority of holders," which could allow the Company to "amend first, incur the additional debt, then get to

[63] ECF 1062 (Wang) at 148:18-20; *see also* 147:19-23 (confirming the meaning of the term).

[64] ECF 705-58 at 2; *see also* ECF 970 (Seketa) at 94:2-4**;** *see also id.* at 95:9-12.

[65] ECF 705-64 at 2-4 (Seketa sharing article, which concluded that because the two-thirds consent threshold "applies to secured notes '*then outstanding*,'" the Company "could theoretically issue a sufficient amount of additional 2026 secured notes such that the . . . 2026 secured notes held by the [2024/2026 Holders] represents *less* than 33.33% of all outstanding 2026 secured notes" and that "because amendments that provide the company with additional debt capacity require consent from only a majority of holders" and "there are no explicit prohibitions," the Company could "us[e] its general purpose debt capacity to issue additional 2026 secured notes to friendly investors, which could then provide the necessary consents for a superpriority uptier exchange").

[66] ECF 705-64 at 2; ECF 970 (Seketa) at 120:25-121:2 ("Q And you read this article very carefully before sending it to your boss, didn't you? A I hope so.").

the 2/3rds."[67] "Several" financial advisors also conveyed that additional notes issued under expanded baskets might be used to dilute the 2024/2026 Holders' purported "blocking" position.[68] Piper Sandler warned the 2024/2026 Holders that the Company "may seek to circumvent any block in the 2026s by upsizing the tranche to dilute the [2024/2026 Holders]" and that the Company could issue $100 to $200 million of *pari passu* secured debt "with ***majority consent*** from secured notes and unsecured notes."[69] Similarly, Rothschild and Guggenheim provided materials to the 2024/2026 Holders that advised the Company needed only majority consent to amend the Indentures' baskets.[70]

The vote dilution technique was not new. Even prior to negotiating the Original Secured Indentures in 2019, JPMorgan knew first-hand that new notes could be used to dilute voting power—because JPMorgan itself used that tactic in the 2017 Windstream transaction. In that deal, the company (with JPMorgan's participation) issued new notes to dilute the voting power of a minority noteholder to prevent that holder from exercising its right to declare an event of default.[71]

Moreover, the 2024/2026 Holders' internal communications confirm that they shared the

[67] ECF 705-61; ECF 1062 (Wang) at 76:19-77:8 (Mr. Jolivot was a managing director at Golden Gate's affiliate, Angel Island Capital with a "wide brea[d]th of investing experience").

[68] ECF 970 (Seketa) at 99:1-13 (acknowledging receipt of "several decks that suggested that the issuance of new notes was a possibility.").

[69] ECF 705-65 at 11; ECF 970 (Seketa) at 102:14-17 ("Q And the strategic consideration in the right hand column warned you that the company may seek to circumvent any block that your group had. Isn't that correct? A Yes.").

[70] ECF 970 (Seketa) at 110:17-19 (identifying Rothschild discussion materials); *id*. at 116:10-14 ("Q Isn't it true that when you received this financial advisor [deck] Rothschild notified you that the requisite consent thresholds that were required to amend the indenture covenant baskets was 50 percent? A That's what this document says.").

[71] ECF 970 (Seketa) at 94:16-20 ("Q And you were specifically aware of the possibility of diluting votes through the issuance of new notes because you yourself attempted doing that very thing in Windstream. Right? A Windstream attempted to do that. We exchanged out bonds.").

understanding that amending the Indentures' covenants on debt and lien capacity was subject only to a majority consent threshold—contrary to their current litigation position.[72] Most notably, shortly after the 2022 Transaction closed, JPMorgan acknowledged in a communication to its own investment clients that the Company had "***amass[ed] sufficient majorities*** in each of the respective debt issuances" before "remov[ing] the collateral securing the existing 8.5% and 9% notes."[73]

F. Amending The Original 2026 Indenture To Authorize The Issuance Of The Additional 2026 Notes Did Not Breach The Indenture

To manufacture an anti-dilution protection provision, the 2024/2026 Holders posit several theories as to why the Third Supplemental Indentures breached provisions of the Original 2026 Indenture or required supermajority consent under Section 9.02. Each of these arguments fails.

1. *Issuing Additional 2026 Notes Did Not Breach Sections 2.01, 4.09, 4.12 or 4.26 of the Original 2026 Indenture*

First, the 2024/2026 Holders assert that the Third Supplemental Indentures breached Sections 2.01, 4.09, and 4.12 of the Original 2026 Indenture by "indirectly" creating unpermitted debt and liens. The 2024/2026 Holders' argument rests on the false premise that, as they put it, "[t]he Governing Indentures expressly prohibit the issuance of any 'Additional Secured Notes'

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[72] ECF 718-6 at 3 (JPMorgan email describing the 2022 Transaction as a "multi-step transaction" that "first amended the 9% 2026 indenture to allow the company to issue $250mm of new notes under that indenture (***required 50% of principal, which the PIMCO group had***; this new issuance diluted the blocking position that our group held)"); ECF 1025-1 at 4 (explaining that "[w]ith 50% of secured bonds, SP/PIMCO waived debt incurrence baskets . . . [and i]ssued $250m of new pari 2026 bonds to SP/PIMCO thereby diluting our minority blocking position to less than 1/3.").

[73] ECF 718-19 at 2 ("This is my summary we've sent to clients."); *see also* ECF 970 (Seketa) at 220:5-9 (The Court decided that this "external statement of what occurred" is "an adoption of the truth of the matters that are communicated to the clients.").

. . . to '***directly or indirectly***' create, incur, assume, or suffer to exist any Lien of any kind (other than Permitted Liens), securing Indebtedness of the Issuer."[74] But the Original Secured Indentures say no such thing. Rather, Section 2.01, which governs the issuance of "Additional Secured Notes," provides only that "the Issuer's ability to issue Additional Secured Notes shall be subject to the Issuer's compliance with Sections 4.09 and 4.12 hereof."[75]

In other words, the Company was permitted to issue Additional 2026 Notes ***up to the limits*** (*i.e.*, the "baskets") set forth in Sections 4.09 and 4.12, which govern, respectively, "Permitted Debt" and "Permitted Liens."[76] But those limits are not set in stone; like all provisions of the indenture, they are subject to amendment. The Company accordingly amended the debt and lien baskets imposed by Sections 4.09 and 4.12, including the definition of "Permitted Liens," before issuing the Additional 2026 Notes.[77] Before and after those notes were issued, the Company was in compliance with the limits on debt and liens then in effect.

To the extent that the 2024/2026 Holders argue that the prohibition in Section 4.12 against "directly or indirectly" creating liens other than Permitted Liens precluded the Participating Secured Noteholders from voting the Additional 2026 Notes in favor of the Fourth Supplemental Indentures, that argument is plainly foreclosed by the language of Section 9.02. As noted above, Section 9.02 provides that "consents obtained in connection with a . . . purchase of . . . the 2026 Secured Notes" must be counted for voting purposes.[78] Further, the notion that

[74] Main Case ECF 652 ¶ 116 (quoting Original 2026 Indenture § 4.12) (emphasis in original).

[75] ECF 601-8 § 2.01(e).

[76] *See id.* §§ 4.09, 4.12.

[77] *See* ECF 1150-4 (Mar. 28, 2022 email from A. Osornio of Milbank to P. Healy of WSFS attaching "the execution versions of the Third Supplemental Indenture[s] . . . ***to permit the incurrence*** of the 2026 Additional Notes").

[78] ECF 601-8 § 9.02.

Additional 2026 Notes can never be voted in favor of releasing liens is contrary to Section 2.01(e), which provides that Additional 2026 Notes "shall have the same terms as to status, redemption, or otherwise as the Initial Secured Notes."

The 2024/2026 Holders have also insinuated (but never pleaded) that the 2022 Transaction breached the prohibition in Section 4.26 against "further pledge[s] [of] the Collateral as security or otherwise."[79] It did not. The prohibition against "further pledge[s] of the Collateral" is expressly "subject to Permitted Liens."[80] Because the definition of "Permitted Liens" was amended to include the liens securing the Additional 2026 Notes before the Additional 2026 Notes were issued, the issuance of the Additional 2026 Notes was not a prohibited "further pledge [of] the Collateral."

2. *The 2024/2026 Holders' Strained Attempt To Shoehorn Amendments To Secured Debt Capacity Into Heightened Consent Categories Fails*

Next, the 2024/2026 Holders argue that amending the Original 2026 Indenture to increase the Company's secured debt capacity required supermajority consent. But Section 9.02 provides that an amendment only requires the consent of holders of a majority of the outstanding principal amount of 2026 Notes, unless an exception specifically applies.[81] Nothing in the Original 2026 Indenture suggests that its limitations on debt and liens are excepted from this default rule, and the Third Supplemental Indentures—which merely increased secured debt capacity—are the exact kind of run-of-the-mill amendments that are subject to the ordinary rule of majority consent. None of the supermajority consent provisions in Section 9.02[82] applies to this kind of

79 ECF 601-8 § 4.26.

80 *Id.*

81 *See* ECF 601-8 § 9.02 ("***Except as provided below*** in this Section 9.02, the Issuer, the Guarantors, the Trustee and the Notes Collateral Agent ***may amend or supplement this Indenture*** . . . ***with the consent of the Holders of at least a majority in aggregate principal amount*** of the then outstanding 2026 Secured Notes.").

82 *See* ECF 601-8 § 9.02 ("[W]ithout the consent of at least 66⅔% in aggregate principal amount of the 2026 Secured Notes then outstanding (including, without limitation, consents obtained in connection with a purchase

amendment.

Supermajority Provision 1: Amendments that "have the effect of releasing all or substantially all of the Collateral from the Liens." The Third Supplemental Indentures did not "have the effect of releasing" ***any*** collateral from liens.[83] The Third Supplemental Indentures only (i) amended the definition of "Permitted Liens" to include "Liens securing . . . the Additional 2026 Secured Notes" and (ii) amended Section 4.09 to permit "the incurrence by the Issuer . . . of Indebtedness represented by . . . the Additional 2026 Secured Notes."[84] Neither of those changes released liens or had the effect of releasing liens.

To get around this obvious point, the 2024/2026 Holders argue that the Third Supplemental Indentures "had the effect" of releasing liens because their "purpose was to enable the preordained yet contemporaneous Fourth Supplemental Indenture."[85] Even if that were true, an amendment's supposed "purpose" (which can only be determined from the vantage point of particular parties) is distinct from its actual "effect." Thus, the 2024/2026 Holders' argument is unfaithful even to the text they try to squeeze into. Moreover, the record is clear that the Fourth Supplemental Indentures came after and were not "contemporaneous" with the Third Supplemental Indentures.[86] Further, the Debtors' interpretation of the clause does not render the "have the effect" language superfluous, as the 2024/2026 Holders have suggested. It is easy to conceive of an amendment that has the effect of releasing liens without actually doing so.[87] The

Secured Notes then outstanding (including, without limitation, consents obtained in connection with a purchase of, or tender offer or exchange offer for, the 2026 Secured Notes), no amendment, supplement, or waiver may . . . .").

83 *Id.*

84 ECF 601-39 § 2.

85 ECF 200 at 18.

86 *See supra* Section II.D.

87 For example, an amendment to the Security Documents changing the beneficiaries of an existing lien would "have the effect" of releasing the lien as to the holders of the 2026 Notes, even though the lien itself would

language is inapplicable, not superfluous.

Supermajority Provision 2: Amendments that "make any change in the Security Documents, the Intercreditor Agreements or the provisions in this Indenture dealing with the application of proceeds of the Collateral that would adversely affect the Holders of the 2026 Secured Notes." As noted, the Third Supplemental Indentures amended the definition of "Permitted Liens" and the kinds of "Permitted Debt" allowed under Section 4.09. Neither of these provisions deal with the "application of proceeds of Collateral." Other provisions of the Original 2026 Indenture do. For example, Section 6.11 specifies the order in which "any money or other property distributable in respect of the Issuer's obligations under this Indenture" must be distributed. The definitions of Permitted Liens and Permitted Debt, in contrast, only concern the amount of secured debt the Company can incur, without regard to how collateral proceeds are distributed on account of such debt in the event of default or otherwise.

Supermajority Provision 3: Amendments that "modify the Security Documents or the provisions of this Indenture dealing with Collateral in any manner adverse to the Holders of the 2026 Secured Notes in any material respect other than in accordance with the terms of this Indenture, the Security Documents or the Intercreditor Agreements." To fall within this clause, an amendment must (i) either "modify the Security Documents" or "provisions of this Indenture dealing with Collateral," (ii) do so in a manner materially adverse to noteholders, and (iii) not have been done in accordance with the terms of the Indenture, Security Documents, or Intercreditor Agreements. The Third Supplemental Indentures did not satisfy any of these, let alone all three.

"have the effect" of releasing the lien as to the holders of the 2026 Notes, even though the lien itself would remain in place. So would amending the definition of "Excluded Collateral" in the Notes Security Agreement to include property securing the 2026 Notes that does not presently fall within the definition.

First, the Third Supplemental Indentures did not "modify the Security Documents" or "provisions of this Indenture dealing with Collateral." The Third Supplemental Indentures did not make any changes to the Security Documents for the 2026 Notes.[88] Although the Notes Security Agreement uses the term "Permitted Liens," the term is defined in the Notes Security Agreement to simply mean "any Lien that constitutes a 'Permitted Lien' under each Indenture ***then in effect***."[89] Thus the Third Supplemental Indentures did not modify the definition of "Permitted Lien" in the Notes Security Agreement: before and after the amendment, the term was the same—*i.e.*, any "Lien" that is a "Permitted Lien" under the Indenture "then in effect."[90]

The Third Supplemental Indentures also did not modify "provisions of [the Original 2026] Indenture dealing with Collateral." Unlike the many provisions that concern the maintenance, use, and disposition of "Collateral,"[91] the provisions amended by the Third Supplemental Indenture concern only the Company's ability to incur secured debt. Not every provision that relates to secured debt is one that "deal[s] with Collateral." Indeed, if that were

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[88] *See* ECF 601-39 § 2.

[89] *See* ECF 601-24 Art. IX (definition of "Permitted Liens").

[90] Notably, the third supermajority provision of Section 9.02 does ***not*** use the "have the effect of" language contained in the first supermajority provision. Per the 2024/2026 Holders' own argument, the absence of this language implies that an amendment only "modif[ies] the Security Documents" if it directly changes the contents of the Security Documents, which did not happen here. In other words, if the use of the "have the effect of" language in the first supermajority provision expands the scope of that provision, its absence from the third supermajority provision necessarily means that the scope of that provision is more limited.

[91] *See, e.g.*, ECF 601-8 § 4.23(a) ("[T]he Issuer and Guarantors shall maintain the Collateral in good, safe and insurable operating order, condition and repair . . . and do all other acts as may be reasonably necessary or appropriate to maintain and preserve the Collateral."); *id.* § 4.23(b) ("[W]ith respect to Collateral, the Issuer will . . . maintain liability and property insurance policies and coverage with reasonable policy limits and deductibles as may be necessary to adequately protect the Notes Collateral Agent's interests in the Collateral."); *id.* § 5.01(a)(7) ("The Issuer will not . . . sell, assign, transfer, lease or otherwise dispose of all or substantially all of the properties or assets of the Issuer . . . unless . . . the Collateral owned by or sold, assigned, conveyed, leased, transferred or otherwise disposed of to the Surviving Entity shall [ ] continue to constitute Collateral under this Indenture and the Security Documents . . . ."); *id.* § 12.05 ("[S]o long as the Trustee . . . has not exercised rights or remedies with respect to the Collateral in connection with an Event of Default that has occurred and is continuing, the Issuer . . . shall have the right to remain in possession and retain exclusive control of and to exercise all rights with respect to the Collateral.").

so, then nearly every provision in a secured note indenture would meet that criteria. There is perhaps no better evidence of this than the fact that the provisions of the Original Secured Indentures that "deal[] with Collateral" (*i.e.*, those that govern the maintenance, use, and disposition of "Collateral") ***are omitted from the Unsecured Indenture***.[92] The term "Collateral" is not even a defined term in the Unsecured Indenture. That makes perfect sense because unsecured noteholders by definition have no rights in the Collateral, so there was no reason for the unsecured indenture to contain provisions "dealing with Collateral." But the Unsecured Indenture ***does*** contain "Permitted Debt" and "Permitted Liens" baskets virtually identical to those in the Original Secured Indentures, thus confirming that the definitions of Permitted Liens and Permitted Debt are not provisions "dealing with Collateral." Indeed, Section 9.02 itself recognizes the distinction between ***security interests***, on the one hand, and ***Collateral***, on the other, by separately referencing amendments that bear on holders' security interests (*i.e.*, amendments that release liens or alter the application of Collateral proceeds) and amendments to provisions of [the Original 2026] Indenture dealing with Collateral."

Second, the Third Supplemental Indentures were not "adverse to the Holders of the 2026 Secured Notes in any material respect." The authorization to issue $250 million in Additional 2026 Notes was to infuse the Company with fresh capital at a critical time of financial distress. The subsequent voting of those notes to release the 2024/2026 Holders' liens was not part of the Third Supplemental Indentures and is only relevant if the Court collapses the 2022 Transaction steps which, as explained above, *supra* Section II.B, would be contrary to New York law. And while the 2024/2026 Holders have asserted that the issuance of the Additional 2026 Notes was materially adverse because "each new dollar of this $250 million in new secured Indebtedness

[92] None of the above-cited provisions, *supra* n.91, appear in the Unsecured Indenture. *See* ECF 601-7.

incurred against the Collateral diminished the 2026 Holders' preexisting security interests,"[93] this argument glosses over the fact that the cash raised through the Additional 2026 Notes was itself "Collateral" securing the 2026 Notes, and therefore did not diminish "the 2026 Holders' preexisting security interests."[94] As such, neither the Third Supplemental Indentures—which merely authorized the issuance of the Additional 2026 Notes—nor the issuance of Additional 2026 Notes, was materially adverse to the 2024/2026 Holders.

Third, the 2024/2026 Holders routinely omit the clause that begins with "other than in accordance with" from their arguments about this provision. But this language makes clear that the two-thirds consent requirement is only triggered if the amendment would separately result in a breach of the Indenture, the Security Documents or the Intercreditor Agreements. If the amendment would not result in such a breach, and the 2024/2026 Holders have not shown any here, then the default simply majority consent requirement applies.

Arguments Based on Rules of Construction. Because the supermajority consent provisions do not apply to the Third Supplemental Indenture, the 2024/2026 Holders have argued that the boilerplate "words in the singular include the plural" language of Section 1.03 requires the Court to collapse the amendments.[95] This argument makes no sense and is contrary to the plain language of the Indentures themselves, which expressly provides for different consent thresholds on an amendment-by-amendment basis.[96] And even if the Section 9.02 said

[93] ECF 200 at 16.

[94] *See* ECF 601-24 (Notes Security Agreement) § 1.1(a)(ii) ("As security for the prompt and complete payment or performance . . . each Grantor does hereby pledge and grant to the Notes Collateral Agent, for the benefit of the Secured Parties, a continuing security interest in all of the right, title and interest of such Grantor in . . . whether now existing or hereafter from time to time acquired . . . all cash."); *see also* ECF 827 (Smith) at 89:24-90:3 ("And so the company was going to issue notes. They were going to get cash in return. That cash was going to sit in the guarantor group not get moved somewhere else.").

[95] ECF 326 at 10 n.10, 17.

[96] *See, e.g.*, ECF 601-8 § 9.02.

"amendments," plural, that still would not mean the effect of multiple amendments must be required cumulatively, rather than individually. The boilerplate "plural" rule simply does not have the reach that they try to impute to it.

The 2024/2026 Holders likewise argue that the rule that "[p]rovisions apply to successive events and transactions" also serves to "collapse" amendments or transactions.[97] That is also incorrect. That boilerplate language from the Revised Model Indenture serves an entirely different purpose: "*Successive Successors, Occurrences, etc.* Clause (5) is intended to ***underscore*** the intended application and re-application of definitional provisions like 'Company' and 'Trustee' in Section 1.01, and operating provisions like Sections 5.01 and 10.06, to successive obligors, fiduciaries, mergers, conversion adjustments, etc."[98] Moreover, while many provisions of the Original Secured Indentures specifically provide that they apply to "a series of transactions" or "a series of related transactions,"[99] Section 9.02 does not.[100] The provision simply is not on point.

III. THE ADDITIONAL 2026 NOTES WERE VALID AND OUTSTANDING

During trial, the 2024/2026 Holders devised a new argument: the Additional 2026 Notes were not valid and outstanding because they were not authenticated by a manual signature of the Trustee. This argument fails: the Additional 2026 Notes were authenticated with the Trustee's manual signature, but regardless, any alleged defect is only for the Issuer or Trustee to raise and

97 *See, e.g.*, ECF 1297 at 178:14–22.

98 Model Indenture, 55 Bus. Law. at 1146. Under New York law, such boilerplate provisions are given consistent interpretations in line with the model indenture provisions and associated commentaries. *See, e.g.*, *Cortlandt St. Recovery Corp. v. Bonderman*, 96 N.E.3d 191, 201-02 (N.Y. 2018).

99 *See, e.g.*, ECF 601-8 at 13 ("Change of Control"), 34 ("Permitted Investments"), 40 ("Permitted Parent"), 44 ("Reorganizations"), § 4.11 ("Transactions with Affiliates").

100 *See id.* § 9.02.

is immaterial given that all the Parties to the Additional 2026 Notes agreed they were authentic.

A. Facts Relevant To The Authentication Of The Additional 2026 Notes

The facts are not materially in dispute. The 2026 Indenture required WSFS, as Trustee, to "authenticate" the Additional 2026 Notes that were issued in connection with the 2022 Transaction upon receiving an "Authentication Order" from the Company.[101]

On March 20, 2022, the Company provided WSFS with a draft form of 2026 Additional Secured Note, a draft of the Authentication Order, and an "Authentication and Delivery" certification, pursuant to which WSFS would confirm that it had authenticated the notes.[102]

Prior to the closing, the Company asked WSFS to provide signature pages for the authentication of the Additional 2026 Notes.[103] Specifically, on March 11, 2022, Milbank asked Mr. Patrick Healy, a representative of WSFS, to provide 30 signature pages, which Mr. Healy executed.[104] Then, on March 18, 2022, the Company asked WSFS to provide 35 "additional wet ink signature pages for the Rule 144A definitive notes" (*i.e.*, the Additional 2026 Notes),[105] attaching the signature page for the Additional 2026 Notes to be executed.[106] At Mr. Healy's direction, Mr. John McNichol executed those signature pages.[107] WSFS's intent was "[t]o

[101] ECF 601-8 § 2.02 ("A 2026 Secured Note will not be valid until authenticated by the manual signature of an authorized signatory of the Trustee. . . . The Trustee will, upon receipt of a written order of the Issuer signed by an Officer of the Issuer (An *'Authentication Order'*) . . . authenticate . . . any Additional Secured Notes.").

[102] *See, e.g.*, ECF 1298-3 at 1, 18-30, 31-33, 34-36, ECF 1350 (Healy) at 60:8-21. The Authentication and Delivery certificate serves as an acknowledgement from WSFS "that the authentication has occurred and the notes have been delivered." ECF 1350 (Healy) at 99:18-23.

[103] *See* ECF 1298-4 at 1-2; ECF 1350 (Healy) at 69:2-25.

[104] ECF 1298-20; *see also* ECF 1350 (Healy) at 62:7-21, 63:9-12.

[105] ECF 1298-20; ECF 1350 (Healy) at 69:18-70:4.

[106] The signature page for the Additional 2026 Notes follows a form in the 2026 Indenture. ECF 601-8 at A-3.

[107] ECF 1350 (Healy) at 72:13-15; *see also id.* at 77:11-16.

authenticate the notes."[108] On March 21, 2022, Mr. McNichol sent two FedEx packages to Milbank containing 36 signature pages (1 wet-ink page and 35 photocopies of the wet-ink page) and 28 wet-ink signature pages executed by Mr. McNichol for the Additional 2026 Notes.[109] Then, on March 26, 2022, WSFS received executed versions of the Authentication Order and the Authentication and Delivery certificate for the Additional 2026 Notes, which were sent "in escrow pending express release."[110]

A representative of WSFS attended the closing call for the 2022 Transaction on March 28, 2022,[111] and confirmed that the releases of WSFS's signature pages on various documents were to take place in the planned agreed-upon order.[112]

Following the release to the Company of the escrowed purchase proceeds for the Additional 2026 Notes and other relevant closing steps,[113] Milbank, on behalf of the Company, directed WSFS to "move forward with the issuance and authentication of the" Additional 2026 Notes.[114] This direction was accompanied by an Authentication Order, through which the Company "authorize[d] and direct[ed] the Trustee to (i) authenticate on or prior to the date hereof . . . .the aggregate principal amount of $250,000,000 Notes . . . ."[115] The Authentication

[108] *Id.* at 77:21-24.

[109] ECF 1298-12; ECF 1298-13; ECF 1312-1 at 72-74. (FedEx labels). On March 21, 2022, Mr. McNichol executed the Additional 2026 Notes signature page using a wet-ink signature and sent a scan of that page to his counsel, David Smith, stating that "[t]he original and copies will be FedExed with [sic] morning." ECF 1298-4 at 1, 4. Mr. Smith, in turn, forwarded that signature page to Milbank along with the FedEx tracking number of the first package sent. ECF 716-6 at 2, 4.

[110] *See* ECF 711-10 at 1, 5-12; ECF 1350 (Healy) at 52:13-18, 54:20-55:3, 99:6-10.

[111] *See* ECF 1350 (Healy) at 303:13-20, 305:7-16; *see also* ECF 1184 (Osornio) at 15:22-16:1.

[112] *See* ECF 1146-5 at 2-3; *see also* ECF 1184 (Osornio) at 15:22-16:1, 34:3-16.

[113] ECF 1350 (Healy) at 110:25-111:20.

[114] ECF 1150-11 at 1.

[115] *Id.* at 2.

Order, like the drafts WSFS reviewed, included a schedule of each of the 38 Additional 2026 Notes WSFS was to authenticate, including the details of the registered holder and principal amount for each note.[116] Mr. Smith (WSFS's counsel) confirmed receipt of this direction,[117] which served as confirmation to Milbank that WSFS had authenticated the Additional 2026 Notes and that the Additional 2026 Notes "could be released."[118] WSFS understood that its signatures only became effective on the closing date.[119]

Milbank, on the Company's behalf, then provided WSFS and Davis Polk (counsel to the purchasers of the Additional 2026 Notes) "execution versions" of the Additional 2026 Notes.[120] Again, on WSFS's behalf, Mr. Smith confirmed receipt of the execution versions of the Additional 2026 Notes.[121] Affixed to the "execution versions" of the Additional 2026 Notes were signatures provided by Mr. McNichol in his March 21 FedExes, each on the signature page that Milbank expressly requested for the definitive notes.[122] WSFS also executed the Authentication and Delivery certificate confirming that it had "authenticated an aggregate of $250,000,000" in Additional 2026 Notes, each of which was identified in the schedule to the

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[116] *Id.* at 4-5.

[117] ECF 716-34 at 1.

[118] ECF 1350 (Healy) at 117:15-19.

[119] *Id.* at 117:20-118:3, 299:4-300:1.

[120] ECF 1155-1 at 1.

[121] ECF 1298-19 at 1.

[122] *Compare* ECF 1155-1 at 5, 17, 29, 41, 53, 65, 77, 89: *and* ECF 1155-2 at 8, 20, 32, 44, 56, 68, 80, 92; *and* ECF 1155-3 at 9, 21, 33, 45, 57, 69, 81, 93; *and* ECF 1155-4 at 10, 22, 34, 46, 58, 70, 82, 94; *and* ECF 1155-5 at 12, 24, 36, 48, 60, 72, 84; *and* ECF 1155-6 at 4, 16, 28, 40, 52, 64, 76, 88; *and* ECF 1155-7 at 8, 20, 32, 44; *with* ECF 1312-1 at 7-70. Certificates D-1 through D-36 of the Additional 2026 Notes bore the signature pages McNichol provided in one of the FedEx pages Milbank received on March 22, 2022. *See* ECF 1312-1 at 7-42. Certificates D-37 and D-38 bore signature pages from the other package Milbank received on March 22, 2022. *See* ECF 1312-1 at 43-44. Milbank was charged with affixing those signature pages (along with the Company's) to the Additional 2026 Notes. *See* ECF 1184 (Osornio) at 98:4-13; *see also* ECF 1350 (Healy) at 285:25-286:12. This was a common practice for WSFS. ECF 1350 (Healy) at 99:3-5.

Authentication and Delivery certificate.[123] WSFS provided the certification letter because it understood it had authenticated the Additional 2026 Notes.[124]

B. The Trustee Authenticated The Additional 2026 Notes

Under Section 2.02 of the 2026 Indenture, "[a] 2026 Secured Note will not be valid until authenticated by the manual signature of an authorized signatory of the Trustee," which will be conclusive evidence that the 2026 Secured Note has been duly authenticated and delivered under this Indenture."[125] Section 2.02 also addresses the form of signature required from an officer of the Company: "At least one Officer must sign the 2026 Secured Notes for the Issuer by manual or facsimile signature."[126] In other words, a Trustee's signature must be "manual," while an Officer's may be a "manual signature" or "facsimile signature."[127] The 2024/2026 Holders seize on this distinction, but their interpretation of Section 2.02 fails. The 2026 Indenture does not require an original signature or wet ink signature; it requires only a "manual signature," which it distinguishes from a "facsimile signature." These terms are not defined in the Indenture, but their meanings are informed by their context and historical usage.

A "manual" signature is one created by hand, *i.e.*, a handwritten signature. *Manual*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("Used or performed by hand."). Thus, while a "manual" signature may be an original, wet-ink signature, nothing in Section 2.02 precludes the

[123] *See* ECF 601-35 at 1, 3-4.

[124] ECF 1350 (Healy) at 102:3-5 ("Q. Would WSFS have executed the authentication of delivery document if it did not believe that it had authenticated -- A. We would not have provided that letter.").

[125] ECF 601-8 § 2.02. This language is mirrored in the form of the 2026 Secured Note. *Id.* at 160.

[126] *Id.* § 2.02.

[127] Section 2.02 tracks the construction of the Model Indenture in this respect. *See* Model Indenture, 55 Bus. Law. at 1127. Older versions of the Model Indenture had more stringent authentication provisions. *See* ABF Commentaries, App. B § 304, at 20 (1965 model indenture provision providing that trustee's manual signature "*on such Debenture*" shall be "conclusive evidence, ***and the only evidence***" of authentication). Some modern indentures use this construction (*see, e.g.,* ECF 1358-2 at 63). The Original 2026 Indenture does not.

use of a duplicate of an original, wet-ink signature where the underlying signature was created "by hand." Other indentures show that industry participants recognize that there are both "original" manual signatures and "photocopied" or "duplicate" manual signatures.[128] Mr. McNichol's signatures were *manual signatures* (*i.e.*, created by hand) within the meaning of Section 2.02.

The 2024/2026 Holders depart from the language of the Original Indentures by attempting to distinguish between a "facsimile" and an "original," arguing that the term "facsimile" includes anything that is a "copy."[129] This ignores the history of the term "facsimile signature," described in case law as a term of art, which describes ***a signature created through a mechanical process.***[130] *See Hawaiian Dredging Const. Co. v. United States*, 59 Fed. Cl. 305, 307 n.2 (Fed. Cl. 2004) ("A facsimile signature is a 'signature produced by mechanical means").[131] This is confirmed by Black's Law Dictionary, which provides a definition of "facsimile signature" dating back to 1892: "A signature that has been ***prepared and*** reproduced by mechanical or photographic means." *Facsimile Signature*, BLACK'S LAW DICTIONARY (11th ed. 2019). The quintessential "facsimile signature" is thus a signature produced by a rubber stamp or metal plate that can be applied to ***any*** document by ***anyone*** in possession of the stamp,

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128 *See, e.g.*, First Supplemental Indenture, Chart Industries, Inc. (Dec. 31, 2020) § 5 (differentiating between "(i) an original manual signature" and "(ii) a faxed, scanned, or photocopied manual signature"), *available at* https://www.sec.gov/Archives/edgar/data/892553/000119312521003205/d104801dex41.htm); Supplemental Indenture, Regional Management Insurance Trust (Oct. 30, 2020) § 6 (same), *available at* https://www.sec.gov/Archives/edgar/data/1519401/000156459020051441/rm-ex108_221.htm).

129 *Facsimile*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("1. An exact copy. 2. FAX.").

130 This distinction is supported by the fact that Black's Law Dictionary has separate definitions for *facsimile* and *facsimile signature*. *See Facsimile*, BLACK'S LAW DICTIONARY (11th ed. 2019); *Facsimile Signature*, BLACK'S LAW DICTIONARY (11th ed. 2019).

131 State statutes apply the term "facsimile signature" similarly. *See, e.g.,* NEV. REV. STAT. ANN. § 227.090 (2001) ("The State Controller may use a facsimile signature produced through a mechanical device in place of his or her handwritten signature whenever the necessity may arise . . . .").

and in more modern times, an autopen or check signing machine.[132] That is a different concept entirely from a signer manually signing a particular signature page for a transaction and photocopying it for use in that transaction. *See In re Cambridge Marine Indus., Inc.*, 61 Comp. Gen. 187, 190 (Comp. Gen. Dec. 31, 1981) (accepting a photocopied handwritten signature as being a "***manually signed*** . . . duplicate of the original" and noting it was "not the same as a rubber-stamped 'signature' which can be affixed by anyone having access to the stamp."). The 2026 Indenture's use of the term "facsimile signature" is thus a reference to this type of mechanically-produced signature, not a prohibition on copies of a signature that was hand-created for a specific purpose.[133] Thus, the 2026 Indenture recognizes that a "manual signature" does not cease to be "manual" when it is scanned or photocopied.

In any event, there is also no question that WSFS intended for Mr. McNichol's hand-made signature, reproduced for use with multiple notes, to satisfy Section 2.02's signature requirement. The signatory's intent in that regard should control. *Mesibov, Glinert & Levy, Inc. v. Cohen Bros. Mfg. Co.*, 157 N.E. 148, 149 (N.Y. 1927) (explaining that the intent of the party will dictate whether the party's printed name constitutes a signature). WSFS signed signature pages for the Additional 2026 Notes, which conformed to the form appended to the 2026

[132] *See, e.g.*, *Robb v. Pa. Co. for Ins. on Lives & Granting Annuities*, 3 Pa. Super. 254, 259 (Pa. Super. Ct. 1897) (referencing "rubber stamp by which a facsimile of [a] written signature may be affixed to papers"); *Hill v. United States*, 288 F. 192, 193 (7th Cir. 1923) (discussing use of facsimile signatures at a bank); *Bd. of Comm'rs of Cherokee Cnty. v. U.S. Fid. & Guar. Co.*, 40 P.2d 371, 372 (Kan. 1935) (discussing use of "facsimile signature stamp"). *Autopen*, MERRIAM-WEBSTER (last visited June 17, 2024), https://www.merriam-webster.com/dictionary/autopen ("a device that mechanically reproduces a person's signature").

[133] Section 13.11 of the 2026 Indenture further supports that the parties understood that a manual signature does not cease to be "manual" because it is scanned, faxed, or photocopied. ECF 601-8 § 13.11 ("Delivery of an executed counterpart of a signature page to this Indenture by facsimile, email or other electronic means shall be effective as delivery of a manually executed counterpart of this Indenture.").

Indenture.[134] WSFS then executed the required Authentication and Delivery certificate,[135] which was signed with a manual signature under New York law.[136] Mr. Healy, a Senior Vice President and 34-year industry veteran, confirmed that WSFS's intent was to authenticate the notes with Mr. McNichol's signatures.[137]

C. The 2024/2026 Holders Cannot Challenge The Purported Defect In The Notes

As third-party beneficiaries of the 2026 Indenture, the 2024/2026 Holders are not entitled to raise a purported signature defect in notes they do not hold based on the enforcement of a provision that was not intended for their benefit. *Lake Placid Club Attached Lodges v. Elizabethtown Builders, Inc.*, 521 N.Y.S.2d 165, 166 (N.Y. App. Div. 3d Dep't 1987) ("Nonparty enforcement of a contractual promise is limited to an 'intended' as contrasted with an 'incidental' beneficiary."); *see also* Restatement (Second) of Contracts § 302 (1981). "Status as a third party beneficiary does not imply standing to enforce every promise within [the indenture], including those not made for that party's benefit." *BNP Paribas Mortg. Corp.*, 778 at 415.

The manual signature requirement is not intended to benefit ***any*** holder of ***any*** notes issued under the Original Secured Indentures. Section 2.02 is instead intended to protect the Issuer and the Trustee from fraud (that is, counterfeit notes) or overissue (issuing more notes than the Issuer authorized).[138] Disallowing rubber-stamp signatures protects against

[134] *See* ECF 1312-1; *supra* n.109; ECF 608-1 at A-3 (form additional notes)

[135] ECF 711-10 at 9.

[136] Under New York law, an electronic signature has "the same validity and effect as the use of a signature affixed by hand." N.Y. State Tech. Law § 304(2). Mr. McNichol signed the Authentication and Delivery certificate with his "digital signature" through PDF. *See* ECF 1397-1 (McNichols' Dep. Tr.) at 143:12-24.

[137] ECF 1350 (Healy) at 5:22, 7:1-3, 77:21-24.

[138] New York courts consider the Model Indenture, including prior versions thereof such as American Bar Foundation Commentaries. *See, supra* n.98. The ABF Commentaries explain with reference to a virtually identical authentication provision that "the principal purposes of authentication are to identify debenture [i.e., the security] with the indenture" and to allow the Trustee to protect against overissue and counterfeiting. *ABF Commentaries* at 141; *see also* Model Indenture, 55 Bus. Law. at 1178.

unsanctioned authentication of unauthorized notes. *Cf. U.S. Fid. & Guar. Co. v. Coca Cola Co.*, 1972 WL 20863 (N.Y. Sup. Ct. 1972) (concerning facsimile signature machine used to create counterfeit stock certificates).

The few cases addressing non-issuer challenges to authentication uniformly reject them. For example, in *Allen v. Lawyers Mutual Insurance Company of Kentucky*, a holder sought to void a note—which stated it would "not be valid or become obligatory for any purpose until authenticated by the manual signature of the authenticating agent"—arguing it was not authenticated with a manual signature but instead bore a stamped signature. 216 S.W.3d 657, 661 (Ky. Ct. App. 2007). The court rejected the challenge because the manual signature requirement "was obviously inserted to protect [the issuer] from delivery of unauthorized certificates" and was "at worst a defect of which [plaintiff] has no standing to complain" that "cannot serve as a basis for avoidance of the contract." *Id.*; *see also Easton v. Butterfield Live Stock Co.*, 279 P. 716, 717-18 (Idaho 1929) (rejecting certificate challenged by non-issuer because "the provision requiring the execution of [trustee's] certificate was ***plainly for the benefit of the [issuer]***").[139]

Further, all parties to the Additional 2026 Notes—the Issuer, the purchasers, and the Trustee—ratified the Notes as valid and outstanding, rendering any purported defect inconsequential. Parties to a contract may ratify or waive any defect through their performance. For example, in *Easton*, bonds were issued without the trustee's required certificate, but the court held that since the company (i) received the money in exchange for the bonds and (ii)

[139] To the extent any holder benefits from the requirement, it is the holder ***of the note***. Authentication of a security by an "authenticating trustee" provides warranties "to a *purchaser* for value of the certificated security," including that: "(1) the certificate is genuine; (2) the [trustee's] own participation in the issue of the security is within [its] capacity and within the scope of the authority received by [it] from the issuer; and (3) the [trustee] has reasonable grounds to believe that the certificated security is in the form and within the amount the issuer is authorized to issue." N.Y. U.C.C. Law § 8-208(a).

treated the bonds as "valid obligations," the facts "clearly establish[ed] a ratification." 279 P. at 718; *see also Feinstein v. Levy*, 503 N.Y.S.2d 821, 822 (N.Y. App. Div. 2d Dep't 1986) (mortgage valid because of issuer's actions acquiescing to it); *Town Council of Lexington v. Union Nat'l Bank*, 22 So. 291, 294 (Miss. 1897) (rejecting argument that lithographic signatures rendered bonds invalid because "it would be a travesty of justice to permit a defeat of recovery on such a pretext" and, in any case, the validity of the bonds had been ratified by subsequent performance).

All of the parties to the Additional 2026 Notes ratified the notes as valid and outstanding. The Company received $250 million in exchange for the Notes and treated the notes as valid, including by certifying that it had the requisite consents to enter into the Fourth Supplemental Indenture.[140] WSFS represented to the Company that it had authenticated the Notes and executed the Fourth Supplemental Indenture.[141] The Company paid the same exchange fees on the Additional 2026 Notes as it did for the pre-existing 2026 Notes.[142] The Participating Noteholders also treated them as outstanding, purchasing them and representing in consent letters for the Fourth Supplemental Indenture that they owned them.[143]

Moreover, UCC Section 8-205 instructs that the Additional 2026 Notes were valid and outstanding because, where an unauthorized signature is placed on a security certificate in the course of issue, the security ***remains effective*** in favor of a purchaser for value without notice. N.Y.U.C.C. Law § 8-205.[144] Here, the Company directed WSFS to "authenticate" $250 million

[140] ECF 603-21.

[141] ECF 601-35; 1350 (Healy) at 84:23-86:11, 270:6-9.

[142] ECF 1298-22.

[143] ECF 603-10.

[144] *Cf. Victory Nat'l Bank of Nowata v. Okla. State Bank, Vinita*, 520 P.2d 675, 676 (Okla. 1974) (holder of fraudulent certificate's rights broader than the entitlement to be paid, as plaintiff was "entitled to enforce the

in notes in the amounts provided in Schedule A and "deliver the New Definitive Notes" to each relevant holder. Neither the Issuer nor any other party expressed any concern over the Trustee's authentication of the notes during their issuance.[145] The parties to the Additional 2026 Notes and the purchasers for value relied on their effectiveness, as they are entitled to under UCC 8-205.

D. Even If There Were A Technical Defect In The Authentication Of The Additional 2026 Notes, The Notes Were Still Valid And Outstanding

But even if there were a technical defect in WSFS's authentication of the Additional 2026 Notes, the Notes are still valid. *See* Restatement (Second) of Contracts § 229 (1981) ("[A] court may excuse the non-occurrence of that condition unless its occurrence was a material part of the agreed exchange."). Courts reject challenges to bonds based on minor technical defects, or even when the trustee's authentication is entirely absent. *See, e.g.*, *Hicks v. Fruen Cereal Co.*, 233 N.W. 828, 830 (Minn. 1930) (determining, in action to determine effect of bonds lacking required trustee certificate, that if holder "gave his money for the bonds" then "a court of equity will give them effect"); *Gunther v. Mayer*, 22 N.Y.S. 50, 52 (N.Y. Gen. Term 1983), *aff'd*, 34 N.E. 513 (N.Y. 1893) (absence of a trustee's certificate was not fatal to the bonds). Well-regarded treatises likewise recognize that technical errors cannot invalidate bonds. *See ABF Commentaries* at 158 ("As a general rule, technical defects in the execution of the debentures will not affect their validity as obligations of the Company.")[146] Rather, courts

certificate to the extent of [the fraudulent agent]'s obligation to the plaintiff secured by the pledge of the certificate of deposit."); *N.J. Bank, N. A. v. Bradford Sec. Operations, Inc.*, 690 F.2d 339, 344-45 (3d Cir. 1982) (Section 8-205 protects an innocent third party from losses occasioned by conduct of the issuer or transfer agent).

[145] ECF 1184 (Osornio) at 194:2-9.

[146] *See also* Ralph & McLelland, THE LAW OF CORPORATE MORTGAGE BOND ISSUES 376 (1937) ("[D]efective or technically insufficient execution of a corporate bond will not avoid the obligation.") (citing *Martin v. Niagara Falls Mfg. Co.*, 44 Hun. 130, 141 (N.Y. App. Div. 1887) ("[T]he signature of the secretary was not essential to the validity of the instrument signed by the president in the name of the company")).

invalidate bonds only if there is forgery or a lack of authority to issue the bond:

> ***The absence of the required trustee's certificate, if its absence is merely the result of a technical defect, does not appear to invalidate the obligation of the bond***, but if the bonds were never issued by the company, then the absence of a trustee's certificate (or the presence of a forged certification) will be sufficient to avoid the obligation of the corporation . . . .[147]

This is consistent with New York law, which excuses compliance with conditions that are immaterial to the bargain and where the condition's enforcement would result in forfeiture. *See Danco Elec. Contractors, Inc. v. Dormitory Auth. of N.Y.*, 75 N.Y.S.3d 28, 29 (N.Y. App. Div. 1st Dep't 2018) (failure to provide verifications was a condition precedent, but was excused because noncompliance was "*de minimis*"); *see also* Restatement (Second) of Contracts § 229. In fact, the Company and WSFS could fix this type of technical defect without even consulting anyone.[148]

The alleged defect here is immaterial. The requirement is boilerplate taken from the Model Indenture,[149] and none of the 2022 Transaction parties expressed any concern over WSFS's signature pages.[150] Any lack of a manual signature was not prejudicial to the 2024/2026 Holders, even if they would benefit from disqualifying the Additional 2026 Notes. *See Hicks*, 233 N.W. at 830 (determining, in action by holder to determine effect of secured bonds lacking required certificate of trustee, that although other bondholders "would gain by excluding him," the "other bondholders are not injured"); *cf. In re Colo. Mercantile Co.*, 299 F. Supp. 55, 57 (D.

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[147] RALPH & MCLELLAND, *supra* n.146, at 377.

[148] Under Section 9.01, the Company and WSFS could, "*without the consent of any Holder of 2026 Secured Notes*, . . . amend or supplement . . . the 2026 Secured Notes, . . . (a) to cure any ambiguity, mistake, defect or inconsistency . . . ." ECF 608-1 § 9.01.

[149] The Model Indenture provides: "A Security shall not be valid until an authorized signatory of the Trustee manually signs the certificate of authentication on the Security. The signature shall be conclusive evidence that the Security has been authenticated under this Indenture." Model Indenture, 55 Bus. Law. at 1127

[150] ECF 1184 (Osornio) at 99:2-25.

Colo. 1969) ("It seems clear to us, however, that the [statutory manual signature requirement for financing statement] . . . is procedural; ***that it is of no consequence to either the debtor or the other creditors whether the signature is manual or printed.***").

Finally, even if the parties did not comply with Section 2.02, their non-compliance was the result of a mutual mistake and should be reformed to align with the parties' understanding that the notes were valid and outstanding.[151] Courts reform contracts including bonds—retroactive to the time of their formation—where parties come to a particular agreement but fail to express that agreement due to a mutual mistake.[152] And courts, including the New York Court of Appeals, have reformed misapplied signatures. *See In re Snide*, 418 N.E.2d 656 (N.Y. 1981) (reforming wills inadvertently signed by opposite spouses); *see also Lane v. Spriggs*, 71 S.W.3d 286, 289-91 (Tenn. Ct. App. 2001) (reforming an agreement to insert an inadvertently omitted signature); *Ames v. Fallert*, 657 P.2d 224, 227 (Or. App. 1983) (same); *Smith v. Cram*, 230 P. 812, 815-16 (Or. 1924) (reforming a mortgage to add trustee signature).[153]

[151] The 2024/2026 Holders have asserted that they reserve rights to argue that the Defendants' responses were waived for failure to amend their Answers. The Counterclaim Defendants were not required to specifically plead any response, including reformation, but regardless had no obligation to amend their answer given that the 2024/2026 Holders' allegations regarding the signature were never themselves pled. *Nicholls v. Tufenkian Import/Export Ventures, Inc.*, 367 F. Supp. 2d 514, 524 (S.D.N.Y. 2005) (holding that an unpleaded affirmative defense was not waived where the parties understood what issues were being tried).

[152] *See, e.g., George Backer Mgmt. Corp. v. Acme Quilting Co.*, 385 N.E.2d 1062, 1066 (N.Y. 1978) (reformation "restate[s] the intended terms of an agreement when the writing that memorializes that agreement is at variance with the intent of both parties") (internal citations omitted; *see also Pogo Res., LLC v. St. Paul Fire & Marine Ins. Co.*, 2021 WL 12104836, at *7 (N.D. Tex. Jan. 12, 2021) (cleaned up); *S & A Rest. Corp. v. Lane*, 2007 WL 4403304, at *5 (N.D. Tex. Dec. 18, 2007) ("court may reform the instrument to accurately reflect the parties' agreement."); *Cornish v. Yarbrough*, 558 S.W.2d 28, 32 (Tex. App.—Waco 1977, no writ) (relating back reformation to date of formation) *Heath v. State*, 278 A.D. 8, 10 (N.Y. App. Div. 3d Dep't), *aff'd*, 303 N.Y. 658 (N.Y. 1951) (same); *Gillespie v. Moon*, 1817 WL 1622 at *11 (N.Y. Ch. 1817) (bonds are capable of reformation).

[153] *See also In re B-Bar Tavern Inc.*, 506 B.R. 879, 935 (Bankr. D. Mont. 2013) (failure of party to sign in correct capacity capable of reformation); *In re Jackson*, 231 B.R. 142 (Bankr. D. Mass. 1999) (reforming agreement to include substitute defendant's signature in her individual capacity); *Sec. Pac. Nat'l Bank v. Ginkowski*, 410 N.W.2d 589, 591–92 (Wis. Ct. App. 1987) (reforming mortgage document to add signature); *People, for Use of Rock Island Cnty. v. Lyons*, 168 Ill. App. 396, 401 (Ill. App. Ct. 1912) (reforming contract to add omitted seals).

All parties to the Additional 2026 Notes believed that WSFS had validly authenticated them. If they were mistaken, WSFS's signature should be reformed to align with the parties' intent.

IV. THE FOURTH SUPPLEMENTAL INDENTURES ARE EFFECTIVE AND BINDING ON ALL HOLDERS UNDER SECTION 9.04

Regardless of whether the Company breached the Indentures by entering into the 2022 Transaction (it did not), the Fourth Supplemental Indentures (including the lien release thereunder) to the 2024 and 2026 Indentures are effective and binding because each of the parties to the Fourth Supplemental Indentures had clear and express authority to enter into them and to release the liens.

The parties to the Indentures, including any supplemental indentures, are the Issuer, the Guarantors, the Trustee, and the Notes Collateral Agent ("***NCA***"). Section 9.02 provides that "the Trustee and Notes Collateral Agent, if applicable, will join with the Issuers and the Guarantors in the execution" of a supplemental indenture and any amendment or supplement to the Security Documents on various conditions, including upon "the filing with the Trustee of evidence reasonably satisfactory to the Trustee of the consent of the Holders" and "upon receipt by the Trustee" of various Officer's Certificates and Opinions of Counsel that are either required to be furnished or requested by the Trustee.[154] Section 9.04 provides that "[a]n amendment, supplement or waiver becomes effective in accordance with its terms and thereafter binds every Holder."[155] According to their terms, and pursuant to Section 9.04, the Fourth Supplemental Indentures each "bec[ame] effective ***immediately upon [their] execution and delivery by the***

[154] *See* ECF 601-8 § 9.02

[155] *See id.* § 9.04.

parties [t]hereto."[156]

On March 28, 2022, the Original Indentures were amended in accordance with the prescribed process: WSFS received the Officer's Certificates and Opinions of Counsel stating that the Indenture's requirements for entering into the Fourth Supplemental Indentures had been satisfied,[157] and thereafter, the Fourth Supplemental Indentures were executed and distributed by the Issuer.[158] WSFS was entitled to rely on those documents without making its own investigation of whether the consent of the requisite amounts of noteholders had been received.[159]

As to the release of liens under Section 9.02 in the Fourth Supplemental Indentures specifically, the Indenture provides that liens will be released "upon the consent of the requisite Holders pursuant to Section 9.02" and "upon compliance with the conditions precedent to the release of the Collateral."[160] In determining whether the requisite consents and conditions precedent had been met, WSFS was again entitled to conclusively rely on the "Officer's Certificate and an Opinion of Counsel" required to be delivered by the Issuer, stating that all relevant conditions precedent had been satisfied.[161] With the conditions of Section 9.02 satisfied, the Company instructed WSFS to execute and deliver each of the Fourth Supplemental Indentures, which WSFS did.[162]

[156] ECF 601-30; ECF 601-39; ECF 604-18; ECF 604-09; ECF 601-33 at Section 3; ECF 601-34; ECF 604-4; ECF 604-32 § 5.

[157] ECF 1150-18; *see also* ECF 508 at 46.

[158] ECF 1150-16.

[159] *See* ECF 601-8 § 7.02; *id.* § 12.03.

[160] *Id.* § 12.03.

[161] *Id.* § 7.02.

[162] *Id.* § 9.02.

Under New York law, a contract "should be enforced according to its terms." *Beal Sav. Bank v. Sommer*, 865 N.E.2d 1210, 1213 (N.Y. 2007). The bargain struck in the Original Secured Indentures was that Holders assented to the rule that amendments or supplements "become[] effective in accordance with" their terms and "thereafter bind[] every Holder."[163] *See In re Alta Mesa Res., Inc., et al.*, No. 19-35133, Jan. 21, 2020 Tr. at 11:10-12, 19-20 (Isgur, J.) (noting that when an agent acts with authority granted to it by contract, the Court is "allowed to rely on their agency authority, no matter whether they get that by the right vote or not" because the action undertaken "is their exercise of that authority" and rejecting argument that lenders only gave the Agent "the right to exercise that consent if [the lenders] unanimously voted that way," as lenders also "gave them the right to decide whether [the lenders] had unanimously voted that way").

Further, as to the release of liens specifically, the NCA had authority pursuant to the Indentures to release the liens. The Notes Security Agreement granted all security interests to the NCA, and as such, the NCA had the authority to release whatever liens had been granted to it.[164] *See also In re Residential Cap., LLC*, 497 B.R. 403, 407, 417 (Bankr. S.D.N.Y. 2013) (stating that "[t]he Collateral Agent had the authority to release whatever liens the JSNs had been granted under the JSN Pledge Agreement because the agreement granted the security interests at issue 'to the Third Priority Collateral Agent'" and rejecting creditors' effort to undo a lien release on the basis that such lien release "breached the [ ] Indenture," noting that such argument is irrelevant because it would not "somehow render the releases ineffective").

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[163] *Id.* § 9.04.

[164] ECF 601-24 (Note Security Agreement in which "each Grantor does hereby pledge and grant to the Notes Collateral Agent, for the benefit of the Secured Parties, a continuing security interest in" the "Collateral," as defined in the agreement); ECF 604-34 (BNY Assignment of NCA role to WSFS).

WSFS exercised its authority and released the liens securing the 2024 and 2026 Notes pursuant to the Fourth Supplemental Indentures. The release of liens by WSFS, as the party holding the liens, was effective even if such release breached the Indentures upon subsequent determination. Indeed, even if it were later determined that certain Holders (who are not the lienholders themselves) did not intend for the grant of authority in the Security Documents and Indentures to the NCA to cover this particular release, the release is no less effective. *Cf. Off. Comm. of Unsecured Creditors v. JP Morgan Chase Bank, N.A. (In re Motors Liquidation Co.)*, 777 F.3d 100, 104-05 (2d Cir. 2015) (liens in termination statement were released where principal authorized agent to file termination statement releasing more liens than principal had intended); *In re Residential Cap.*, 497 B.R. at 417 (rejecting "case law involving purported releases executed by unauthorized parties who were not the secured parties" because the releases "were executed by the secured party itself," who had authority to execute them).

V. NO RELIEF IS AVAILABLE AS TO 2024 HOLDERS

The 2024/2026 Holders' breach claims are different between the 2024 and 2026 Indentures. Because it is undisputed that the Participating Noteholders held over 66 2/3% of the 2024 Notes, the 2024/2026 Holders' claim of breach of the 2024 Indenture is limited to sections 3.02 and the "sacred rights" provision of 9.02 of the Original 2024 Indenture. ECF 144 (First Am. Countercl.) at ¶ 252 ("The Company, the Guarantor Defendants, and WSFS breached the Governing Indentures, including (i) sections 2.01, 3.02, 4.09, 4.12, and 9.02 of the 2026 Original Secured Note Indenture, and (ii) sections 3.02 and 9.02 of the 2024 Original Secured Note Indenture."). As discussed below, both claims fail.

VI. THE 2022 TRANSACTION DID NOT VIOLATE THE "RIGHT OF PAYMENT" SACRED RIGHT

The Court should reject the 2024/2026 Holders argument that the Fourth Supplemental

Indentures implicated holders' so-called "sacred rights." They argue that those amendments implicated their "ranking in respect of right of payment," and therefore implicated a unanimous consent or "sacred right." And because the Participating Secured Holders at all times held over two-thirds of the 2024 Notes, this is the ***only*** basis on which to find a breach of the 2024 Indenture.

The Court held on summary judgment that the "[t]he term 'right of payment' is ambiguous" because it is "unclear whether right of payment applies to changes in rankings of, or stripping of, liens."[165] The Counterclaim Defendants respectfully submit that the Original Indentures unambiguously provide that an amendment may "have the effect of releasing all or substantially all of the Collateral from the Liens created pursuant to the Security Documents" as long as the amendment is ratified with "the consent of Holders of at least 66⅔% in aggregate principal amount of the [ ] Secured Notes then outstanding."[166] The Original Secured Indentures thus explicitly permit the releasing of liens ***without*** the consent of each holder adversely affected.[167] Any other reading would render the supermajority consent provision of Section 9.02 meaningless, contrary to New York law.[168] Further, the pre-2022 Transaction conduct by the

[165] ECF 508 at 44.

[166] ECF 601-20 § 9.02.

[167] Section 4.09(c) of the Original Indentures further supports this conclusion, as it expressly provides that "no Indebtedness will be deemed to be ***contractually subordinated in right of payment*** to any other Indebtedness of the Issuer . . . ***solely by virtue of being unsecured or by virtue of being secured on a junior priority basis.***" ECF 601-8 §§ 4.09(c); *see* ECF 601-20 § 4.09(c); ECF 601-7 § 4.09(c). Other provisions are in accord. *See, e.g.*, ECF 601-20 § 4.10(b)(2) (proving that if the Company sells property or assets "not consisting of Collateral" in an "Asset Sale," it may use the proceeds of the sale to "repay . . . unsecured Obligations of the Issuer or a Guarantor ***that rank pari passu with the Secured Notes.***"). Cases also make clear the difference between lien and payment subordination. *See Momentive Performance Materials Inc. v. BOKF, NA (In re MPM Silicones, L.L.C.)*, 874 F.3d 787, 795 n.5 (2d Cir. 2017) ("Lien subordination involves two creditors with security interests in the same collateral, one of which has lien priority over the other. . . . By contrast, in payment subordination, the senior lender enjoys the right to be paid first from all assets of the borrower . . . whether or not constituting collateral security for the senior or subordinated lenders.").

[168] *See, e.g.*, *Galli v. Metz*, 973 F.2d 145, 149 (2d Cir. 1992) ("Under New York law an interpretation of a contract that has the effect of rendering at least one clause superfluous or meaningless is not preferred and will be avoided if possible.").

2024/2026 Holders discussed above, demonstrates that they understood full well that less than all noteholders could approve a lien release or the issuance of senior debt.[169]

For example, in a February 14, 2022 letter, then-counsel to the 2024/2026 Holders represented to the Company that the group believed that "a super senior priming transaction," which public reporting had indicated could include not only new senior debt but the release of existing liens, "requires . . . the consent of at least ***two-thirds*** of the aggregate outstanding principal amount of each of the 2024 Notes and the 2026 Notes."[170] The letter stated that, because holders with asserted holdings of "one-third of the outstanding principal amount of the 2026 Notes" did "not support" such a transaction, it "cannot be implemented."[171] This message cannot be reconciled with a belief that unanimous consent would be required for a "priming" transaction. Indeed, their effort to organize a "blocking position" would have been unnecessary if that were the case. But tellingly the 2024/2026 Holders' cooperation agreement only governed the 2026 Notes.

The record is replete with testimony by the 2024/2026 Holders acknowledging that they understood—both in 2019 and 2022—that unanimous consent was not necessary to release liens or issue senior debt,[172] including the corporate deposition testimony of Mr. Yu of BlackRock, who conceded that sacred rights were not implicated by the 2022 Transaction, before recanting

[169] *See Karmely v. Wertheimer*, 737 F.3d 197, 207 (2d Cir. 2013) ("To ascertain the meaning of an ambiguous provision, the Court should heavily weigh this pre-litigation evidence.").

[170] ECF 601-20 § 9.02.

[171] *Id.*

[172] ECF 970 (Seketa) at 86:10-15 (Q "[A]fter reviewing the indenture for whatever you believed were the relevant provisions, your understanding was that Incora could strip out liens with 2/3 consent of holders. Correct? A Yes.") (discussing ECF 704-27 at 2); *see also* ECF 1249 (Cook) at 138:19-139:7 ("THE COURT: . . . And what was your belief back in 2019 about what it meant on the lien stripping with the two-thirds vote of the 2024s and 2026s? . . . . THE WITNESS: I would assume that you could strip the liens under that case."); ECF 1119 (Yu)

that testimony at trial.[173] The parties understood which consent thresholds could be implicated by the 2022 Transaction, and it was not unanimous consent.

Finally, the 2024/2026 Holders are wrong that the contingent springing maturity in the New 1L Notes (which could have moved their maturity date forward in time before the 2024 Notes, but was never triggered) modified holders' "ranking . . . in respect of right of payment." The maturity date of a given obligation (much less when that date is contingent) has no bearing on subordination in respect of the right of payment, which occurs only when "the subordinated creditor's right to payment and collection will be subordinate to the rights of another claimant." *In re Lantana Motel*, 124 B.R. 252, 255-26 (Bankr. S.D. Ohio 1990). To hold otherwise would lead to absurd results. For example, the Company regularly incurs unsecured trade debt that is due in a term of months; no party has ever suggested that such ordinary course conduct would breach the Indentures. Moreover, because the 2024/2026 Holders also contend that secured status bears on payment priority, it is impossible to know under their theory whether an earlier-maturing unsecured debt ranks higher or lower in payment priority than a later-maturing secured obligation. This unsupported reading of the Indentures must be rejected.

VII. THE COUNTERCLAIM DEFENDANTS ACTED IN GOOD FAITH AND THE EQUITABLE AND NON-CONTRACT CLAIMS MUST FAIL

The 2024/2026 Holders' and Langur Maize's equitable and other non-contract theories all rest on the purported narrative that they are the passive victims of parties who acted in bad faith, unfairly targeted with a scheme to deprive them of rights in ways they could not have

at 190:3-10 ("Q It was your commercial understanding that the company could release liens securing notes with the consent of holders of 66-2/3 of the then outstanding notes. Correct? A Correct.").

[173] ECF 1119 (Yu) at 190:11-22 ("Q Okay. At your deposition you testified that your belief at the time was that there were no sacred rights that were violated under the 2022 transaction. Correct? A Yes, that is what I said at the deposition.").

contemplated or mitigated, all for the self-enrichment of bad actors who drew up a sham transaction to harm them. But that story does not hold up.

Leading up to the 2022 Transaction, the Company faced a severe liquidity crisis as a result of the COVID-19 pandemic[174] and needed to act quickly to avoid a downward spiral into a free-fall bankruptcy.[175] This was no secret. By the fall of 2021, PIMCO, Silver Point, JPMorgan, Golden Gate, and BlackRock were all keenly aware of the Company's financial position.[176] As Golden Gate succinctly put it to Golden Gate's investment committee: "The company will be out of liquidity in 2022 . . . . ***The Company will need new money***."[177]

As explained above, in early 2022, the Company was faced with a downturn caused by COVID, not flaws in its business model. The non-Debtor Defendants were all existing stakeholders of Incora and appropriately acted to protect their investments. Their interests also aligned with Incora's. For example, Carlyle's Jesse Hou testified that Incora's "value prop[osition] was still strong" and that "the company would recover" once the pandemic

[174] *See, e.g.*, ECF 664 (Carney) at 34:21-35:4, 43:5-45:4, 48:13-21, 51:4-52:5, 54:14-20, 125:6-12; ECF 630 (Vorderwuelbecke) at 151:17-19, 190:3-15, 195:14-196:11, 197:8-18 (discussing the disruption of one of Incora's key customer contracts creating a sense of urgency to obtain liquidity); ECF 738 (O'Connell) at 11:23-12:5, 13:11-13 (discussing upcoming interest payment).

[175] ECF 630 (Vorderwuelbecke) at 150:12-24 (Company sought to avoid an "unplanned," "chaotic," and "unpredictable" bankruptcy); ECF 738 (O'Connell) at 112:13-113:6 (the 2022 Transaction was "a much better option" than filing Chapter 11 in March 2022); ECF 955 (Dostart) at 52:13-23; ECF 868 (Bartels) at 227:16-25 ("[B]ankruptcy introduces uncertainty, costs and . . . time delays . . . ."); *see also* ECF 1007 (Cesarz) at 172:7-8 ("A near-term filing would likely have been messy and, thus, value-destructive."); *id.* at 170:22-171:5 (noting that in the beginning of March of 2022, Perella Weinberg Partners ("***PWP***"), remarked that the Company would need to get a deal done "in the next 30 to 60 days.").

[176] *See* ECF 700-23 at 1 ("[A] liquidity event is probable in 1H22."), 929-1 at 1 (due to "weakness in the commercial aero hardware business" and the impact of the "global pandemic" on "cost savings and inventory release," the Company would "need further support to be able to bridge to a more robust commercial aero recovery"); ECF 1062 (Wang) at 26:14-24 ("Q And so as of September 2021, you had agreed with other market participants that Incora's liquidity needs would come to a head in 2022, correct? A Yeah, at this point in time."); ECF 1119 (Yu) at 195:9-16 (the Company's "earnings performance was a little bit less than expected").

[177] ECF 700-46 at 12 (emphasis in original).

abated.[178] The Company's largest secured lenders, the PIMCO and Silver Point Noteholders, believed the same;[179] Jason Prager, of Silver Point, testified that Incora could "emerge as a more valuable franchise than it had going into the downturn."[180] PIMCO's Samuel Dostart believed that the company could "capture the opportunity" created by the COVID downturn "instead of suffering from it."[181] Malik Vorderwuelbecke, an Incora board member and a Platinum employee, similarly testified that "we thought the business would be able to get through the rough patch and thrive subsequently."[182]

The Company's and its stakeholders' actions were consistent with these views. When liquidity problems became clear in fall 2021, Incora sprang into action. It expanded its Board of Directors to bring on additional expertise.[183] The Company also retained counsel (Milbank) and financial advisors (PJT and A&M)[184] and added Patrick Bartels as an independent board member.[185]

In December 2021, the Company received an unsolicited proposal from the PIMCO and Silver Point Noteholders—who after the fall earnings call had begun to develop a proposal for a

178 ECF 832 (Hou) at 90:22-91:3.

179 The Silver Point and PIMCO Noteholders each had begun investing in Incora during the height of the pandemic. By the end of September 2021, well before any proposal or negotiations began, they respectively held approximately $380 million and $440 million of Incora's debt. ECF 729-53, 729-54, 729-55, 700-58 at 5.

180 ECF 1013 (Prager) at 86:14-87:19; *see also id.* at 16:18-17:8, 18:11-19:24 ("[W]hen the COVID-19 pandemic was over, Incora would once again be a valuable enterprise . . . ."); ECF 734-5.

181 ECF 955 (Dostart) at 72:1-16; *see also id.* at 18:3-19:8, 19:16-22 (Incora was a real "value add" for its customers); ECF 700-58.

182 ECF 697 (Vorderwuelbecke) at 229:5-10.

183 *See* ECF 630 (Vorderwuelbecke) at 128:15-129:12, 130:14-23.

184 *See* ECF 630 (Vorderwuelbecke) at 130:6-13 (Company hired Milbank and PJT "to be ready in case additional actions needed to be taken to generate liquidity" in Fall 2021).

185 *See* ECF 659-8 at 1; *see also* ECF 659-1.

new money transaction.[186] As outside investors, they reached out through their advisors, Davis Polk and Evercore, and proposed a potential "uptier" transaction to make use of flexibility in the debt documents to secure a minimum of $200 million in new money financing while lowering near-term interest payment pressure through debt service relief and maturity extensions.[187] They believed their proposal offered a "substantial opportunity" for the Company and would protect their economic stakes in it.[188]

PJT and Milbank evaluated the proposal and began arm's-length negotiations with Davis Polk and Evercore, with oversight from Incora's Board, in which the PIMCO and Silver Point Noteholders made meaningful concessions.[189] Although several of Incora's board members worked for Platinum, their role as board member was distinct from their role at Platinum. And "Platinum," as a shareholder and noteholder, had almost no role in the 2022 Transaction. After all, the negotiations were led by Incora's advisors, who described Platinum as nothing more than a "price taker," and all Platinum-affiliated Board members recused themselves from the vote on Platinum's participation in the deal.[190]

One factor guiding the negotiations and the Company's evaluation of the PIMCO and

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[186] *See* ECF 659-8, 610-3, ECF 639-1.

[187] ECF 639-1 at 2; ECF 1013 (Prager) at 107:23-108:8 ("[T]he purpose of doing an uptier transaction [is] to lower the interest rate to the company, which is something we were focused on that would make the best offer for the company itself."); ECF 955 (Dostart) at 80:1-8 (an uptier would be "economically advantageous to the company" because of "[n]ew money, liquidity coming in on an economically attractive rate, cash interest relief on the rest of the money that was uptiered, [and the] maturity extension"); ECF 1142 (Rochard) at 165:12-18 (explaining that Citadel participated in the March 2022 Transaction "because our view was that Incora required additional capital. And we viewed this as a way to inject additional capital into the company in a manner that was commensurate, in terms of value, for the capital that was being provided to Incora.").

[188] ECF 955 (Dostart) at 71:19-72:16; *see also id.* at 75:15-76:1; ECF 1013 (Prager) at 144:23-145:25; ECF 955 (Dostart) at 57:21-58:6.

[189] *See* ECF 536-24 at 4-18; ECF 738 (O'Connell) at 31:1-9; ECF 955 (Dostart) at 111:11-18.

[190] *See* ECF 868 (Bartels) at 247:25-249:21; ECF 630 (Vorderwuelbecke) at 139:20-140:18; ECF 879 (O'Connell) at 330:19-331:4.

Silver Point Noteholder proposal was PJT's analysis that $250 million was likely to bridge the Company through the expected remainder of the COVID downturn. The PIMCO and Silver Point Noteholders' proposal provided $250 million in gross new money, as well as numerous other liquidity benefits. The Company and its advisors believed that the transaction would be in the Company's best interest and ultimately agreed to it after months of negotiations.[191] Both the Company and the holders who exchanged notes believed that each of the amendments were permissible under the Indentures. Milbank shared with the Trustee, WSFS, its opinion for the Company that the proposed 2022 Transaction complied with the Indentures.[192] The Company, for its part, represented in the Exchange Agreement that the 2022 Transaction documents did not conflict with any other "indenture."[193] Representatives of Silver Point and PIMCO testified to their commercial understandings that releasing liens required consent of two-thirds of noteholders,[194] but that a "simple majority" was all that was required to amend the debt baskets,[195] and that the "issuance of additional 2026 notes" would permit them to clear the two-thirds threshold to release liens.[196] Kevin Smith, an advisor to the Company and a Platinum employee who helped negotiate the indentures, testified that he reviewed the 2022 Transaction documents to form his own commercial view, and concluded that "amending the permitted lien

[191] ECF 630 (Vorderwuelbecke) at 209:17-19; ECF 738 (O'Connell) at 35:3-12; ECF 664 (Carney) at 65:3-14; ECF 868 (Bartels) at 234:6-9, 236:8-13, 238:15-239:5.

[192] *See* ECF 707-76.

[193] ECF 604-19 at 27-28.

[194] ECF 1013 (Prager) at 16:10-13; ECF 955 (Dostart) at 15:25-16:8.

[195] ECF 1013 (Prager)at 16:14-17; *see also* ECF 955 (Dostart) at 15:15-24.

[196] ECF 1013 (Prager) at 57:13-58:6. At the time the PIMCO and Silver Point Noteholders reached out, they had over 50% of the 2026 Notes and over 2/3 of the 2024 Notes then outstanding. *Id.* at 106:8-12; ECF 955 (Dostart) at 78:13-20. Given the PIMCO and Silver Point Noteholders' intent to provide substantial new money (at least $200 million), they understood they would be able to achieve the requisite thresholds either through (1) the issuance of new 2026 notes, (2) cooperating with other noteholders, or (3) purchasing additional bonds on the open market. ECF 1013 (Prager) at 57:13-17, 59:19-23, 62:3-16; ECF 969 (Dostart) at 29:24-31:24.

definition and the indenture . . . required a majority consent to do," and that "there was a majority that was . . . willing to amend that definition."[197] He believed the transaction worked "within the four corners of the document,"[198] and he shared his views with the Board, through Michael Fabiano, who had commissioned him to review the Transaction.[199]

While the Company and its advisors, and the Participating Noteholders and their advisors, were hard at work hammering out a deal to save the Company, the 2024/2026 Holders chose not to engage.[200] Despite recognizing the Company's liquidity needs in the Fall of 2021, they "took no actions to organize any creditors committees, or engage counsel, or financial advisors,"[201] and did not reach out to the Company for months to how they might be able to help.[202] It was not until the month of the closing of the 2022 Transaction that the 2024/2026 Holders retained a financial advisor and offered (belated and half-baked) proposals to the Company.[203] The Company engaged with the minority group, reviewed and considered the latter's March 6 and March 11 proposals,[204] and communicated regarding the minority group's

[197] ECF 827 (Smith) at 88:16-89:11.

[198] *Id.* at 90:5-10; *id*. at 89:18-21.

[199] *Id.* at 93:24-94:25; *see also* ECF 630 (Vorderwuelbecke) at 143:5-8 (did not believe the Company was violating the indentures).

[200] The 2024/2026 Holders' inaction did not reflect any disagreement over the Company's need for liquidity, but rather respective tactical choices. *See* ECF 1247 (Cook) at 88:23-89:4 (agreeing it was "a fair assessment" that JPM's "choice in how to behave in the fall of 2021 was a tactical one"). Golden Gate wanted to "drive the restructuring" by "acquiring ~20% of the tranche," but did not buy in the Fall of 2021, when prices were above their "price target in the mid-eighties." ECF 700-46 at 12; ECF 1062 (Wang) at 36:2-6; *see* ECF 725-26 (Golden Gate trade log reflecting no purchases between September 14, 2021, and January 31, 2022). In 2021, BlackRock's actively managed funds conducted a "substantial sell off," leaving mostly passively managed funds holding Incora bonds. ECF 1119 (Yu) at 197:19-198:20 (specifying that selling occurred in "the actively managed high yield funds"); *id*. at 199:10 ("We did sell most of our position by January 2022, yes."); ECF 1072-10.

[201] ECF 970 (Seketa) at 151:18-24.

[202] *See* ECF 738 (O'Connell) at 72:13-19.

[203] *See* ECF 706-11 at 2 (Perella communicating to JPMorgan on March 2, 2022, the day before its retention, that a transaction would "need to happen in the next 30-60 days").

[204] *See* ECF 536-21 at 1-2 (Board engaged in comprehensive comparison of the PIMCO/Silver Point proposal and first Akin Group proposal on March 8), 536-22 (same, but considering both Plaintiffs' first, second, and

drop-down concept over the course of March. The Company also provided due diligence to advisors to the 2024/2026 Holders when asked.[205]

The problem was therefore not that the Company failed to engage; it was that the 2024/2026 Holders' counterproposals were nascent and unworkable. And their primary proposals, if accepted, would have substantially increased the Company's debt load while transferring assets from guarantor subsidiaries to non-guarantor subsidiaries (moving collateral outside the reach of Incora's preexisting secured noteholders without their consent).[206] And trial further exposed the 2024/2026 Holders' alternative "Letter of Credit" proposal as nothing but a walk down a primrose path. The 2024/2026 Holders never reached out to banks who could issue a letter of credit; never explained why a bank would have issued such a letter of credit; never offered any testimony that any of them would have provided funding to the Company to "backstop" a new unsecured loan; and none of them obtained approval for the "Letter of Credit" proposal from their respective investment committees.[207] This was just a thought experiment.

In fact, none of the 2024/2026 Holders' proposals was actionable. There is no evidence that the 2024/2026 Holders could have secured the requisite approval of other Noteholders. And Incora's board members held understandable doubts that the minority group's proposals could

first Akin Group proposal on March 8), 536-22 (same, but considering both Plaintiffs' first, second, and alternative proposals); ECF 536-24 (same, on March 24).

[205] *See* ECF 706-75, 707-8; *see also* ECF 738 (O'Connell) at 64:10-17 ("[W]e were negotiating both concurrently, and that's something we often do is have as many financing options as possible that we would be negotiating.").

[206] *See* ECF 1007 (Cesarz) at 185:18-23 ("THE COURT: You're going to take their collateral and move it to another entity. What was your intention about their preexisting lien on that collateral? What would happen to that nonparticipating lender? THE WITNESS: They would no--they would no longer have a first lien on that collateral."); *see also id.* at 184:16-21 (acknowledging that nonparticipants in 2024/2026 proposed transactions would be "involuntarily subordinated").

[207] ECF 1007 (Cesarz) at 203:20-204:3 (group would need to obtain internal approval); *id.* at 199:12-20 (group had not approached any banks); ECF 970 (Seketa) at 244:19-245:23 (had no idea how long LOC concept would take).

close on a timeline to solve the Company's upcoming audit deadline (if at all), as they were subject to "satisfactory legal and financial diligence" and carried "significantly more execution risks" than the 2022 Transaction.[208] Moreover, the 2024/2026 Holders conceded the limits of their proposals (and the benefits of the 2022 Transaction). Most importantly, John Cesarz of PWP acknowledged that the 2024 maturity problem was "front and center for the company" and that the minority group "***did not have a solution for [it]***."[209] Mr. Seketa of JPM conceded that there was execution risk on the primary transaction that the minority group was proposing, noting that "it was hard to judge" when, if ever, his group's proposals could close.[210] Conversely, the 2024/2026 Holders were aware of potential benefits of the 2022 Transaction.[211]

Despite these glaring defects, the Company considered all proposals and picked the one it judged to be the best: the 2022 Transaction.[212] Important to the Company was that the 2022 Transaction provided a "material injection of liquidity" in the amount of $250 million, extended "maturities in [a] material way," and "furnish[ed] the company with tools" in the form of increased debt basket capacity "to address" any remaining maturities coming due in 2024.[213] Another factor was that the 2022 Transaction could be closed in time to address the March audit

[208] ECF 868 (Bartels) at 185:14-19, 210:15-20; *see also id.* at 205:5-25.

[209] ECF 1007 (Cesarz) at 149:24, 151:13-18.

[210] ECF 970 (Seketa) at 185:14-19.

[211] *See* ECF 536-24 at 7; 718-19 at 2 (JPMorgan: "[T]his recent transaction does provide the Company with significant, much needed liquidity."); 718-24 at 2 (JPMorgan: "[T]here is a path whereby the company can recover."); 716-43 (Golden Gate: "All of this is good for the Company's liquidity."); *cf.* ECF 1119 (Yu) at 172:2-7 (William Yu of BlackRock agreed that in the TriMark transaction, while BlackRock's "pre-existing position bec[a]me higher in the capital structure," the transaction "benefitted [BlackRock's] position, but we also extended new monies to the company.").

[212] ECF 738 (O'Connell) at 11:23-12:17, 13:22-14:10, 15:5-8, 32:14-33:2, 35:3-16, 112:9-113:6. Thereafter, the Exchange provided the additional benefits of cash interest savings, and deferred maturity on hundreds of millions of dollars of 2024 Notes. *See* ECF 536-24 at 5-6.

[213] ECF 630 (Vorderwuelbecke) at 201:3-12.

deadline.[214]

Any criticisms from the 2024/2026 Holders about the Company's judgment in selecting a transaction from the majority holders are just hindsight-infused posturing. For example, when the minority group was making proposals to the Company in March 2022, none was "file for bankruptcy." Mr. Cesarz of PWP acknowledged that a near-term bankruptcy filing would have been "messy" and "thus, value-destructive."[215] The Company, its advisors, and all participating noteholders agreed: everyone was working to solve the Company's near-term liquidity problems based on a belief that it could not only avoid default and bankruptcy but thrive in the future.[216] So deeply held was this belief about the Company's prospects that Silver Point subsequently bought over $39 million worth of Incora's 2027 *unsecured* bonds, beginning on the first unrestricted trading day, believing "that all of the company's debts would likely [] be paid in full . . . [a]nd that the company had liquidity to last for years."[217] The 2024/2026 Holders' made-for-litigation arguments about the reasonableness of the participants' projections about the duration of COVID and beliefs in the 2022 Transaction as a solution for the Company are just hindsight and cannot show that the transaction was not executed in good faith.

Unrebutted expert testimony confirms that the Participating Noteholders' proposal was superior. Mark Rule of AlixPartners, an expert in solvency and valuation, reviewed the

[214] ECF 697 (Vorderwuelbecke) at 227:10-228:7.

[215] ECF 1007 (Cesarz) at 172:7-8.

[216] ECF 664 (Carney) at 34:21-35:17 (summarizing the Company's attempts to solve its liquidity problems); ECF 738 (O'Connell) at 27:1-10 (the Company's "goal" was "getting some liquidity relief"); ECF 630 (Vorderwuelbecke) at 188:14-189:15 (by "mid-March," solving the liquidity problem "was getting very pressing" for the Company's management "because outside of even these immediate liquidity concerns . . . we were also running up to . . . the deadline of the audits").

[217] ECF 1013 (Prager) at 147:24-148:9; ECF 727-3. Similarly, Mr. Dostart recommended to PIMCO portfolio managers that "all accounts . . . maintain exposure going forward," ECF 925-1 at 1, because he "was excited about the opportunities that this transaction was presenting in enabling Incora to pursue." ECF 969 (Dostart) at 140:10-18.

Company's contemporaneous assessments of its liquidity needs and compared the various alternatives. Mr. Rule opined that the 2022 Transaction best addressed the Company's challenges, as it "provided the most liquidity for the longest period of time" relative to the alternatives.[218] It provided Incora with $250 million in gross new money and scored higher than the alternatives on the following metrics: (1) ***debt basket capacity***, by increasing the Company's debt basket capacity to $777 million while there was "not any explicit capacity contemplated" by any of the alternatives;[219] (2) ***maturity extensions***, by extending the most 2024 maturities relative to the 2024/2026 Holders' alternatives;[220] (3) ***amortization reductions***, by reducing company's amortization payments by $56 million (an over 62% reduction) relative to the status quo while the reduction by the 2024/2026 Holders' alternatives was "not as significant";[221] (4) ***cash interest reductions***, by reducing Incora's cash interest obligations by $72 million, a 33% decrease.[222] Even the UCC's expert, Boris Steffen, agreed that the 2022 Transaction had "material cash flow benefits" in "2022, 2023, and the first part of 2024."[223]

The suggestion that anyone attempted to wrong the 2024/2026 Holders or acted maliciously or fraudulently toward them was not established at trial. Without actual evidence of fraud or malice, the 2024/2026 Holders assert that it is intrinsically malicious or inequitable to engage in an uptier or other liability management transaction. But multiple 2024/2026 Holders acknowledged that they themselves had participated in non-pro rata uptier transactions and that

[218] ECF 1351 (Rule) at 12:9-13; ECF 1317-4.

[219] ECF 1351 (Rule) at 20:11-20.

[220] *Id.* at 22:4-21, 23:21-23.

[221] *Id.* at 32:1-3.

[222] *Id.* at 33:1-10; ECF 1317-4 at 7.

[223] ECF 1352 (Steffen) at 25:17-20.

there is nothing inherently objectionable about them.[224] JPMorgan acknowledged its participation in the Windstream transaction, where "the goal was . . . for the company to issue notes as a technique to change the math" with respect to the threshold for declaring an event of default.[225] And the 2024/2026 Holders' own proposals to Incora would have also required moving collateral out of the reach of nonparticipating noteholders.[226]

The 2024/2026 Holders thus acknowledged that fairness is not the question here. Mr. Seketa of JPMorgan testified that he "never liked the word fair" in situations like this one where one noteholder may improve its position at the (possible future) expense of another, because contractual permissibility, not fairness, is the relevant consideration.[227] In his words, everyone is "looking out for [their] interests . . . not balancing [others'] interest against [their] interest."[228]

The 2024/2026 Holders' own conduct reflects exactly that: they each acted based on their assessments of their own best interests, managing, accepting, and even taking intentional risks; that they are displeased with the consequences of this strategic conduct does nothing to justify being rescued by equities or tort liability.[229] BlackRock saw this risk of an uptier coming,

224 ECF 1008 (Seketa) at 110:23-111:13; ECF 970 (Seketa) at 176:24-177:2; ECF 1119 (Yu) at 167:22-168:1, 173:19-21, 176:1-10, 178:1–17 (Yu acknowledging BlackRock's participation in multiple such transactions).

225 ECF 970 (Seketa) at 70:2-15.

226 ECF 1007 (Cesarz) at 145:25-146:17 ("Q So I want to go back to this subject, the unsub financing. . . . When that approximately 100 million of assets would be transferred per this unrestricted subsidiary financing idea, any liens that had been attached to those assets when they were part of the restricted borrower, or guarantor group, would no[ ] longer attach to those assets, right? A That would . . . be correct. Q Isn't that the whole point of moving it, so that you can free up . . . the collateral to . . . have someone else lend against it now? A That's correct.").

227 ECF 970 (Seketa) at 177:1-6.

228 *Id.* at 176:24-177:11, 178:2-14; *see also* ECF 1007 (Cesarz) at 245:21-25 ("If [an uptier is] allowed under the documents, it's allowed under the documents. And those are documents that lenders either bought into or helped create.").

229 *See, e.g.*, ECF 1062 (Wang) at 147:19-148:10.

and the managers of their active funds chose to mitigate that risk by selling out of *90%* of Incora note positions, leaving behind deliberately passive funds left with exposure to risk of lien release.[230] JPMorgan preferred that Platinum offer the Company new money or that creditors "tak[e] over the company" in bankruptcy, and so selected its path to "block[] any deal that lets value leak to the sponsor" and push the Company towards bankruptcy, going so far as to reject a proposal for partial participation in the transaction.[231] Golden Gate inexplicably went on a buying spree[232] in the hope of speculative gain, without having a cooperation agreement in place and without even retaining counsel to review the indentures.[233] That these sophisticated investors' strategies did not pay off is the consequence of the choices they made, and not the responsibility of other parties to remedy.

VIII. THE 2024/2026 HOLDERS ARE NOT ENTITLED TO EQUITABLE REMEDIES

This is a breach of contract case and the appropriate remedy for a breach of contract is money damages—even if that claim may be impaired by the Debtors' bankruptcy filing. The 2024/2026 Holders, however, have sought equitable relief in various forms, none of which is proper.[234] As the Court already determined, the 2024/2026 Holders' equitable claims are estate

[230] ECF 1119 (Yu) at 197:14-198:11; ECF 725-55.

[231] ECF 703-81 at 2; ECF 970 (Seketa) at 22:19-21 ("It's not our preference to be involved in those sorts of situations. We prefer to get our recoveries from the company or from assistance to the company through the equity sponsor.").

[232] ECF 1062 (Wang) at 316:23-317:4 (asked whether Golden Gate "went on a buying spree of secured 2026 notes in the first two weeks of February 2022," Wang acknowledged that he "bought a lot of notes"); *see also id*. at 50:16-21 (Golden Gate increased its holdings from $11.7 million to $208.48 million).

[233] ECF 1062 (Wang) at 97:15-24; 317:5-8, 319:16-320:23, 321:7-322:12; *see also id.* at 322:13-16 (Wang expressing uncertainty as to whether Golden Gate even sent counsel a copy of the indentures).

[234] To the extent that the Court determines an equitable remedy may be proper, the Counterclaim Defendants reserve all rights to conduct further submission of evidence, briefing, and argument regarding the effect of any equitable remedy on the indemnities provided for in the 2022 Transaction and in the *Final Order (I) Authorizing the Debtors to (A) Obtain Postpetition Financing (B) Use Case Collateral* [Main Case ECF 396].

claims because they are "impermissible disguised avoidance actions."[235] Each of these are subject to a pending settlement, and the 2024/2026 Holders should not be granted derivative standing on those claims because they are not colorable.[236] The same is true of the equitable contract remedy to unwind the transaction for which the 2024/2026 Holders sought standing.[237]

A. The 2024/2026 Holders Are Not Entitled To An Equitable Contract Remedy

The 2024/2026 Holders sought standing to pursue equitable contract remedies, including a declaration that the Third and Fourth Supplemental Indentures are "invalid and void ab initio" and "requiring that Counterclaim Defendants take all actions necessary to restore the 2024/2026 Holders' Liens to the same position as if" the 2022 Transaction "were never undertaken."[238] This effectively seeks the same relief as the 2024/2026 Holders' equitable lien claim and is likewise an "impermissible disguised avoidance action" that is property of the estate.[239] Regardless, this equitable contract relief is not available to the 2024/2026 Holders.

[235] *See* ECF 508 at 7; ECF 509.

[236] Counterclaim Defendants incorporate by reference herein their oppositions to the 2024/2026 Holders' Amended and Supplemental Standing Motion. *See* Main Case ECF 1121 (Platinum Objection); ECF 1123 (PIMCO and Silver Point Noteholders Objection); ECF 1124 (Senator Objection); ECF 1125 (Carlyle and Spring Creek Objection); ECF 1126 (Debtors Objection); ECF 1129 (Bartels Objection). In addition, the parties agreed that the putative TUFTA claims contained in the 2024/2026 Holders' Proposed Second Amended Counterclaim Complaint [Main Case ECF 652-1] will not be briefed or otherwise argued during the first phase of the trial's closing. The proposed TUFTA claims will be argued later, including in connection with confirmation.

[237] To the extent the 2024/2026 Holders still seek standing to bring equitable claims against Carlyle and Spring Creek, those claims are not colorable: both are non-insiders against whom the 2024/2026 Holders have no claims. They have never even asserted breaches of the Unsecured Indenture, despite owning tens of millions worth of those bonds in March 2022. And, like Platinum, they have nothing to subordinate under the proposed plan.

[238] Main Case ECF 652-1 ¶ 262.

[239] *See* ECF 508 at 7; ECF 1126 ¶ 37 & n. 10. *In re Sanchez Energy Corp.*, 2023 WL 4986394, at *15 (Isgur, J.) (Bankr. S.D. Tex. Aug. 3, 2023) ("Section 550 permits the Trustee to recover the property or value of property transferred and avoided under various sections of the Bankruptcy Code."); *see also In re Revlon, Inc.*, 2023 WL 2229352, at *16 (Bankr. S.D.N.Y. Feb. 24, 2023) ("claims and theories" including a contract remedy are property of the estate where they "all seek the 'undoing' of those transactions or other measures to replicate as closely as possible the pre-transaction state of affairs," including "making estate property subject to liens that benefit Plaintiffs while subordinating or invalidating liens of others").

The Bankruptcy Code considers any "right to an equitable remedy for breach of performance" as nothing more than a "claim." *See* 11 U.S.C. §§ 101(5)(B), 502(c)(2). It is settled law that a party "essentially seeking to obtain a money payment" from a debtor cannot pursue equitable relief in bankruptcy, *Ohio v. Kovacs (In re Kovacs)*, 717 F.2d 984, 988 (6th Cir. 1983), *aff'd*, 469 U.S. 274 (1985), and that where a "breach gives rise to a right of payment," 11 U.S.C. § 101(5)(B), a creditor that is also entitled to equitable remedies may not enforce those remedies in bankruptcy, *Ades & Berg Grp. Invs. v. Breeden (In re Ades & Berg Grp. Invs.)*, 550 F.3d 240, 244-45 (2d Cir. 2008) (rejecting constructive trust), even when a debtor is unable to pay a creditor in full.[240]

As such, any request by the 2024/2026 Holders for an equitable remedy must be rejected because monetary damages are available.[241] "[I]t is basic that equitable relief will not be granted where an ***adequate remedy at law exists***." *SCM Corp. v. Xerox Corp.*, 507 F.2d 358, 363 (2d Cir. 1974) (emphasis added); *see also In re RONFIN Series C Bonds Sec. Interest Litig.*, 182 F.3d 366, 373 (5th Cir. 1999) (same).[242] This is true even if the remedy at law is imperfect because it is constrained by bankruptcy.[243] *See Superintendent of Ins. for State of N.Y. v. Ochs*

[240] *See also* ECF 199 at 84-86 (explaining unavailability of equitable relief); ECF 315 at 50-51; Main Case ECF 1126 ¶¶ 102-03.

[241] Applying "the choice of law rules of Texas" to the breach of contract claim, *In re iHeartMedia, Inc.*, 597 B.R. 339, 350 (Bankr. S.D. Tex. 2019), New York law determines the availability of remedies for breach of contract. Texas applies the Restatement (Second) of Conflict of Laws, which states that the "measure of recovery for a breach of contract is determined" by the law selected in a contract's choice of law clause governing the rights and duties of the parties under the contract. Restatement (Second) at §§ 187, 207. The Indentures contain a New York choice of law clause. *See, e.g.*, ECF 601-8 § 13.06. Texas law also provides the same result as New York law.

[242] *See also Lucente v. Int'l Bus. Machs. Corp.*, 310 F.3d 243, 262 (2d Cir. 2002); *Holt v. Robertson*, 2008 WL 2130420, at *6 (Tex. App. May 21, 2008); *cf. In re Cowin*, 492 B.R. 858, 903 (Bankr. S.D. Tex. 2013), *aff'd*, 538 B.R. 721 (S.D. Tex. 2015), *aff'd*, 864 F.3d 344 (5th Cir. 2017) (determining "monetary damages are the appropriate remedy" for defrauded lienholders).

[243] *See* ECF 199 at 71-81, 84-87; ECF 215 ¶¶ 69-73; ECF 318 at 50-59; ECF 321 ¶¶ 33-35; Main Case ECF 1123 ¶ 24; Main Case ECF 1126 ¶¶ 37 n. 10, 102-03.

(In re First Cent. Fin. Corp.), 377 F.3d 209, 216 (2d Cir. 2004) (where a creditor will not be "made whole in the [bankruptcy] proceedings," that "does not mean its remedy is legally inadequate, simply that it is imperfect"). Here, money damages are available; indeed, the 2024/2026 Holders seek them.[244]

Nor is it possible to restore the parties to the status quo prior to the 2022 Transaction.[245] For one, the 2022 Transaction and the Participating Noteholders afforded the Company substantial benefits, including new money, debt service relief, and maturity extensions that allowed it to avoid bankruptcy and which cannot be "unwound." And since the 2022 Transaction, the Company has paid interest on its debt, including to third parties. Simply put "[t]here are no obvious means to undo the entire restructuring transaction." *FMC Corp. v. Boesky*, 825 F. Supp. 623, 637 (S.D.N.Y. 1993) (denying rescission remedy), *aff'd*, 36 F.3d 255 (2d Cir. 1994). This thus underscores that the request for equitable contract relief is ultimately simply a disguised request for imposition of an equitable lien. *In re Revlon*, 2023 WL 2229352, at *16.

Lastly, the extraordinary circumstances necessary for a voiding remedy are also not met here. Courts find contracts to be void *ab initio* only in extreme circumstances, such as where a contract was forged, is usurious or illegal, or was procured through fraudulent inducement, facts not present here. *See supra* Section VII; *Adar Bays, LLC v. GeneSYS ID, Inc.*, 179 N.E.3d 612,

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[244] *See* ECF 199 at 86-87; ECF 652-1 (Prayer for Relief xii); *see also* ECF 207 at 8; ECF 213 at ¶¶ 37-42; ECF 214 ¶ 14; ECF 215 ¶¶ 69-72; Main Case ECF 1123 ¶ 26.

[245] ECF 215 ¶ 73; *see Sahu v. Union Carbide Corp.*, 418 F. Supp. 2d 407, 411 (S.D.N.Y. 2005) ("[A] court will not grant equitable relief where it appears to be impossible or impracticable" to do so); *Sokolow, Dunaud, Mercadier & Carreras LLP v. Lacher*, 747 N.Y.S.2d 441, 446-47 (N.Y. App. Div. 1st Dep't 2002); *see also Holt*, 2008 WL 2130420, at *5 ("rescission remains a viable option, so long as the status quo of the parties prior to entry of the contract can be restored . . ."); *Deutsche Bank Nat'l Tr. Co. for Morgan Stanley Structured Tr. I 2007-1 v. Morgan Stanley Mortg. Cap. Holdings LLC*, 289 F. Supp. 3d 484, 496 (S.D.N.Y. 2018) (specific performance not available where it "appears to be impossible or impracticable."); *United Coin Meter Co. v. Johnson-Campbell Lumber Co.*, 493 S.W.2d 882, 888 (Tex. Civ. App. 1973).

621 (N.Y. 2021) (determining that "loans proven to violate the criminal usury statute" are void ab initio); *Knight v. New York & Presbyterian Hosp.*, 194 N.Y.S.3d 218, 223 (N.Y. App. Div. 1st Dep't 2023) ("[A] forged signature renders a contract void ab initio."); *Friedman v. Otsego Mut. Fire Ins. Co.*, 114 N.Y.S.3d 686, 688 (N.Y. App. Div. 2d Dep't 2020) (contract formed on "material misrepresentation" may be void ab initio); *Hetchkop v. Woodlawn at Grassmere, Inc.*, 116 F.3d 28 (2d Cir. 1997) (fraud in the execution may void an alleged agreement); *Swain v. Wiley Coll.*, 74 S.W.3d 143, 146 (Tex. App. 2002) ("A contract is only void if it violates a specific statute or is against public policy."); *Associated Recovery v. Does 1-44*, 2018 WL 1517863, at *14 (N.D. Tex. Mar. 28, 2018), *aff'd sub nom. Associated Recovery L.L.C. v. Does 1- 44*, 769 F. App'x 160 (5th Cir. 2019) ("A contract is void ab initio if it seriously offends law or public policy.").

B. Equitable Subordination Is Not Colorable In Light Of The Trial Evidence

The 2024/2026 Holders' equitable subordination claim is also not colorable. Equitable subordination is an "extraordinary" and "unusual remedy which should be applied only in limited circumstances." *In re SI Restructuring, Inc.*, 532 F.3d 355, 359 & n.2 (5th Cir. 2008) (cleaned up); *see also In re Life Partners Holdings, Inc.*, 926 F.3d 103, 122 (5th Cir. 2019). The Fifth Circuit has "largely confined equitable subordination to three general paradigms: (1) when a fiduciary of the debtor misuses his position to the disadvantage of other creditors; (2) when a third party controls the debtor to the disadvantage of other creditors; and (3) when a third party actually defrauds other creditors." *Id.*; *see* ECF 199 at 82-83, 87-88. Under this standard, even an intentional breach of contract *cannot* justify equitable subordination. *See In re U.S. Abatement Corp.*, 39 F.3d 556, 561-62 (5th Cir. 1994); *Kham & Nate's Shoes No. 2, Inc. v. First*

Bank of Whiting, 908 F.2d 1351, 1357 (7th Cir. 1990) (reversing subordination of claim, holding that "'[i]nequitable conduct' in commercial life means breach plus some advantage-taking").[246]

Claims held by ***non-insiders*** can be equitably subordinated only if they engaged in fraud, spoliation, or overreaching (akin to abuse of the corporate form). *Matter of Fabricators, Inc.*, 926 F.2d 1458, 1465 (5th Cir. 1991).[247] ***No evidence*** supports such a finding. The cases the 2024/2026 Holders provided to the Court,[248] are unrelated to equitable subordination or easily distinguishable. For example, *In re Model Imperial, Inc.*, involved fraud and other crimes that were knowingly aided by outside lenders. 250 B.R. 776 (Bankr. S.D. Fla. 2000). ***No evidence*** of that sort was adduced at trial. As outsiders to the Company, the majority holders had no fiduciary relationship that could be "misuse[d] . . . to the disadvantage of other creditors," *Matter of CTS Truss, Inc.*, 868 F.2d 146, 148 (5th Cir. 1989), and the 2022 Transaction was the product of robust, arm's length negotiations between the parties' respective financial advisors and counsel.[249] There is likewise no evidence that the 2022 Transaction involved fraud or was in any way a "sham." *See, e.g.*, *In re Equip. Equity Holdings, Inc.*, 491 B.R. 792, 843 (Bankr. N.D. Tex. 2013) (rejecting "sham" allegations as part of request for § 510(c) subordination).[250] To the

[246] "Absent more, 'a simple breach of contract is insufficient to support a claim of equitable subordination.'" *In re Vetter Assets Serv., LLC*, 609 B.R. 279, 287 (Bankr. W.D. Okla. 2019) (collecting cases).

[247] *See* also *Life Partners Creditors' Tr. v. Black Diamond Lifeplan Fund*, 2018 WL 4076491, at *5 (N.D. Tex. June 22, 2018); *Tilton v. MBIA, Inc. (In re Zohar III, Corp.)*, 639 B.R. 73, 91 (Bankr. D. Del. 2022), *aff'd*, 620 F. Supp. 3d 147 (D. Del. 2022) ("[T]he most important factor in determining if a claimant has engaged in inequitable conduct for the purposes of equitable subordination is whether the claimant was an insider or outsider in relation to the debtor at the time of the act.").

[248] *See* ECF 744.

[249] *See infra* Section X.B; ECF 610-3; ECF 610-6; ECF 610-30; ECF 610-27; ECF 610-9; ECF 610-10; ECF 610-12; ECF 610-11 (reflecting numerous proposals and counterproposals exchanged by the advisors); ECF 738 (O'Connell) at 127:6-19 (Company's board followed PJT's recommendation and was not controlled by other parties); *see also supra* Section VII.

[250] S*ee also In re Lehman Bros. Holdings Inc.*, 541 B.R. 551, 576 (S.D.N.Y. 2015) (suggesting "sham" would involve an "intent to defraud"); *In re Zohar III, Corp.*, 639 B.R. 73, 99 (Bankr. D. Del.) (rejecting equitable subordination claim based on sham allegations), *aff'd*, 620 F. Supp. 3d 147 (D. Del. 2022), *appeal dismissed*, 2022 WL 19038638 (3d Cir. Nov. 10, 2022).

contrary, the $250 million in new money provided through the Note Purchase was sized in early February 2022, before the 2024/2026 Holders even surfaced, based on the Company's critical business needs—it was not some sham purchase with no economic substance. And the exchange provided separate and independent benefits in the form of debt service relief and maturity extensions.

Equitable subordination should also be denied because the 2022 Transaction was not unfair to the 2024/2026 Holders. They understood that the liens could be released, and made tactical choices that they hoped would generate profit at the Company's expense, and have themselves engaged in non-pro rata uptier transactions, agreeing there is nothing inherently improper about them. *See supra* Section II.E; *In re Mir*, 2021 WL 1081405, at *4 n.28 (Bankr. S.D. Tex. Mar. 19, 2021).[251] This is not the sort of conduct that section 510(c) is meant to redress.

Moreover, even assuming *arguendo* that equitable subordination could apply, the Court would need to consider myriad factors established at trial, including (without limitation): (i) no 2024 holder has cause to complain whatsoever; (ii) the largest 2026 holder (Golden Gate) self-inflicted most of its loss by borrowing money to buy over $200 million in 2026 Notes, including at above-market prices, after learning of the rumored financing; (iii) the participating creditors capitalized their past due interest payments and reduced the cash-portion of subsequent interest payments, and also extended maturities on their 2024 Notes; (iv) the PIMCO and Silver Point Noteholders advanced $250 million in new money for the Company's benefit, causing

[251] Nor is 11 U.S.C. § 105 a mechanism through which the Court may modify the Company's capital structure. While Section 105 has been used to recharacterize certain debt transactions as equity, its powers are narrower than those of Section 510(c). *See In re Entrust Energy, Inc.*, 2023 WL 3855817, at *13 (Bankr. S.D. Tex. June 6, 2023) (Isgur, J.); *see also Law v. Siegel*, 571 U.S. 415, 421 (2014) ("It is hornbook law that § 105(a) 'does not allow the bankruptcy court to override explicit mandates of other sections of the Bankruptcy Code.'" (quoting 2 Collier on Bankruptcy ¶ 105.01[2], p. 105-06 (16th ed. 2013)).

them losses that other holders did not suffer; and (v) the 2024/2026 Holders entered into a cooperation agreement instead of selling their bonds in the open market, as to which the only record evidence is that the debt was trading at or close to par at the time. Furthermore, the Court would need to conduct an inquiry into what the Company would have faced (and the resulting recoveries) in the absence of the rescue financing, which would include a free-fall bankruptcy. It would be inappropriate for the Court to simply rewire the rights of parties as they exist now without considering these equitable factors.

Finally, if the UCC (and the 2024/2026 Holders) argue that "Platinum," presumably as controlling shareholder, allegedly breached its fiduciary duties to Incora, this argument fails. *First*, there is no reason to address the merits of any equitable subordination claim against Platinum. There is nothing to subordinate: there is no evidence that the 1.25L Notes have any value and, removing all doubt, the 1.25L holders (including Platinum) have already agreed to give up any distribution on account of those notes pursuant to a settlement embodied in the pending plan of reorganization. *See Life Partners Creditors Tr. v. Black Diamond Lifeplan Fund*, 2018 WL 4076491, *4 (N.D. Tex. June 22, 2018) (equitable subordination proper only to the extent it can "offset the harm" caused). *Second*, the UCC and the 2024/2026 Holders cannot prove breach of any fiduciary duty. Platinum, as controlling shareholder, can only be held liable if it "actually use[s] its power to control to its own advantage or to the other creditors' detriment." *Matter of Fabricators*, 926 F.2d at 1467. Here, "Platinum" took no formal actions as a shareholder to compel any aspect of the 2022 Transaction. Nor is there any evidence that Platinum (again, as distinct from any employees that were also directors) improperly directed or influenced the negotiations.[252] In any event, there can be no breach of fiduciary duty or equitable

[252] ECF 879 (O'Connell) at 330:19-25 (testifying that Platinum was a "price taker").

subordination because "the good faith of the [2022 Transaction] and its inherent fairness" has been clearly established. *Matter of Herby's Foods, Inc.*, 2 F.3d 128, 131 (5th Cir. 1993). The 2022 Transaction was plainly Incora's best option.[253] Nor is there any genuine dispute that Platinum's participation in the transaction was good for the company.[254]

C. There Is No Basis To Grant An Equitable Lien

The 2024/2026 Holders are also foreclosed from obtaining derivative standing to pursue an equitable lien. As the Court already held, the equitable lien claim is simply an improperly "disguised avoidance action[] belonging to Wesco's estate."[255] And even if the 2024/2026 Holders could pursue an equitable lien claim, any such claim is not colorable. To establish an equitable lien, a party must prove "(1) that there exists an express or implied agreement between the parties demonstrating a clear intent to create a security interest in order to secure an obligation between them; (2) that the parties intended specific property to secure the payment; (3) and that there is no adequate remedy at law." *In re RONFIN*, 182 F.3d at 371; *In re iHeartMedia, Inc.*, 597 B.R. 339, 360-61 (Bankr. S.D. Tex. 2019) (Isgur, J.) (denying equitable lien); *see also* ECF 199 at 84-87; ECF 215 at 40-43. This standard cannot be satisfied by the trial evidence.

The 2024/2026 Holders have not proven the requisite "express or implied agreement" to create a security interest in their favor, as the governing agreements expressly permitted the removal of the security interest and were amended to eliminate such an interest. Even if there were such an agreement, they have a remedy at law, damages.[256]

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[253] *See supra* Section VII.

[254] *See* ECF 738 (O'Connell) at 132:11-17:2; ECF 868 (Bartels) at 233:1-234:22.

[255] ECF 508 at 14. Under the Court's summary judgment decision, then, the 2024/2026 Holders can only seek a claim under 11 U.S.C. 544(b)(1), and they would need derivative standing to do so. The parties reserve all arguments on such standing for future briefing and argument.

[256] *See supra* Section VIII.A. To the extent that the 2024/2026 Holders contend that an equitable lien may be granted to remedy a general "injustice," derivative standing should also be denied as not colorable for the same

D. The Equitable Subordination And Equitable Lien Claims Do Not Present A Live Article III Case Or Controversy As Against Citadel

Citadel no longer owns any of the 1L Notes or 2026 Notes. Citadel shut down the credit strategy that had led to its investment in Incora and sold out its entire position in August 2022, well before the Debtors' bankruptcy.[257] Thus, even if the equitable subordination and equitable lien claims were colorable, Citadel simply does not possess claims or liens against the Debtors' estate that the Court could subordinate in favor of the 2024/2026 Holders. Whether analyzed as Article III standing or mootness, the Court can no longer grant the 2024/2026 Holders meaningful relief on their equitable lien and equitable subordination claims against Citadel and there is no live case or controversy with Citadel with respect to these claims. The Court thus lacks subject matter jurisdiction to adjudicate them. *See Bayou Liberty Ass'n, Inc. v. U.S. Army Corps of Eng'rs*, 217 F.3d 393, 398 (5th Cir. 2000) (claims for declaratory and injunctive relief became moot upon completion of construction of the retail facility sought to be enjoined).[258]

IX. THE 2024/2026 HOLDERS' TORTIOUS INTERFERENCE CLAIMS FAIL

A. The 2022 Transaction Did Not Breach The Indentures

A plaintiff alleging tortious interference "must show the existence of its valid contract with a third party, defendant's knowledge of that contract, defendant's ***intentional and improper***

granted to remedy a general "injustice," derivative standing should also be denied as not colorable for the same reasons that the equitable subordination claim must be denied: there is no evidence in the record of any such injustice. *See In re Pasquariello*, 16 F.3d 525, 531 (3d Cir. 1994) (affirming dismissal of a "plethora of equitable remedies," including equitable subordination and equitable lien claims, on the same grounds); Debtors' Motion for Summary Judgment at 84-86; PIMCO and Silver Point Noteholders' Motion for Summary Judgment at 40-43.

[257] ECF 1142 (Rochard) at 162:21-163:15.

[258] *See also Shemwell v. City of McKinney*, 63 F.4th 480, 483-84 (5th Cir. 2023) (challenge to municipality's recall procedures became moot once the plaintiff lost the election); *Ctr. for Biological Diversity, Inc. v. BP Am. Prod. Co.*, 704 F.3d 413, 426 (5th Cir. 2013) (action for injunctive relief against oil well discharge became moot once well was plugged and no meaningful relief could be granted by injunction); *Placid Oil Co. v. C.C. Abbitt Farms, LLC*, 561 B.R. 60, 65-67 (N.D. Tex. 2016) (suit for violation of a bankruptcy discharge injunction moot once the defendant removed the offending claims from its state court complaint).

procuring of a breach, and damages." *White Plains Coat & Apron Co. v. Cintas Corp.*, 8 N.Y.3d 422, 426 (2007). The 2024/2026 Holders cannot meet this standard.

B. The Defendants Did Not *Intend* To Procure A Breach

A defendant intentionally interferes with a contract when it is his "goal" to "cause a breach of contractual relations between [plaintiff] and [the breaching party]." *In re Refco Inc. Sec. Litig.*, 826 F. Supp. 2d 478, 521 (S.D.N.Y. 2011). "[I]t is not enough that a defendant engaged in conduct with a third-party that happened to constitute a breach . . . instead, the evidence must show that the defendant's ***objective*** was to procure such a breach." *Roche Diagnostics GmbH v. Enzo Biochem, Inc.*, 992 F. Supp. 2d 213, 221 (S.D.N.Y. 2013) (emphasis added).

No Defendants intended to procure a breach of the Indentures. The Participating Noteholders made an economic offer regarding the terms on which they would provide financing and other relief under their understanding of the Indentures' flexibility, and then consented to amendments proposed by the Company, and which the Company represented in various documents were permitted under the Indentures.[259] As outsiders they did not and could not have caused the Company to amend the Indentures or enter into any agreement; indeed, the Company witnesses uniformly testified that they independently determined that the deal was in the Company's best interest.[260] The resulting deal reflected a robust, arm's length negotiation between the Company and the Participating Noteholders. *See supra* Section VII.

[259] *See* ECF 1013 (Prager) at 13:15-14:13, 51:17-52:1; ECF 955 (Dostart) at 14:17-16:8, 66:11-20. The Company and its advisors represented that the 2022 Transaction was permitted. *See, e.g.*, ECF 604-19 at 7 (Exchange Agreement stating parties to the Fourth Supplemental Indentures were "authorized to execute and deliver" those amendments); ECF 1150-11 (Officer's Certificate and Opinion of Counsel for issuance of Additional 2026 Notes sent to counsel for the PIMCO and Silver Point Noteholders on March 28, 2022); ECF 710-56 (Officer's Certificates sent to counsel for PIMCO and Silver Point Noteholders).

[260] ECF 630 (Vorderwuelbecke) at 209:15-19; ECF 738 (O'Connell) at 35:3-12, 112:9-113:17; ECF 664 (Carney) at 57:2-7, 65:5-14.

Citadel and Senator were even further removed from the Debtors' decision to enter into the deal. After being invited by PIMCO to join its group in mid-February of 2022, Citadel had no role in the negotiations with the Company and no meaningful input into the transaction's terms.[261] Ultimately, Citadel contributed only approximately 1% of the $250 million in new money provided to the Company.[262] Citadel could not possibly have induced the Company to do anything it did not decide on its own to do. Similarly, Senator understood that the material terms of the deal were already negotiated when it was approached in February 2022; it never even hired a financial advisor.[263] As Mr. O'Connell testified, Senator had no material influence on any of the terms.[264]

For their part, Platinum also did not engage in any of the actions that Plaintiffs allege procured a breach. Counterclaim Plaintiffs' theory of tortious interference as to Platinum hinges on conflating the actions of Incora's board of directors with Platinum. *See infra* Section X.E (discussing no inducement by Platinum as to Langur Maize's claims). In fact, corporate formalities were diligently observed, including that the transaction was approved by Incora's board of directors acting in their capacity as such, and that Platinum did not vote on, or participate in board meeting discussions concerning, the inclusion of its own debt in the transaction. *See infra id.* The meager facts they may cite to suggest that corporate formalities were ignored do not show what they want them to show. For instance, they may contend that there was something improper about the fact that Ms. Sigler signed the $25 million promissory note issued to Platinum in November 2020 for both Incora and TopCo. But, as Counterclaim

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[261] ECF 1142 (Rochard) at 143:14-144:21, 145:2-4; ECF 955 (Dostart) at 91:24-92:4, 92:13-93:3.

[262] ECF 1142 (Rochard) at 147:4-13.

[263] ECF 1384-1 (Bharadwa Dep. Tr.) at 74:14-75:8, 77:15-78:17,111:10-112:6, 121:10-22.

[264] ECF 738 (O'Connell) at 157:16-20.

Plaintiffs have acknowledged, a single individual acting in multiple roles in this way is not uncommon,[265] and in fact they themselves engage in the practice of a single person signing for both counterparties to an agreement.[266] Or, Counterclaim Plaintiffs may suggest that Platinum should have negotiated the $25 million unsecured promissory note at arms' length with the Debtors rather than simply taking the note on similar terms to the Unsecured Notes. But this ignores that new money in November 2020 was not otherwise available to the Debtors on ***any*** terms—much less better terms.[267] The suggestion that there was anything untoward about Platinum's relationship to Incora is unfounded.

C. The Economic Interest Doctrine Protects The Defendants

Even if this Court finds that the Defendants intentionally procured a breach of the Indentures, they are protected under New York's economic interest doctrine. Tortious interference requires an "intentional *and improper* procuring" of a breach. *White Plains*, 8 N.Y.3d at 426. Under black-letter New York law, a defendant does not act improperly when it "act[s] to protect its own legal or financial stake in the breaching party's business," including when that defendant is "the breaching party's creditor." *Id.*[268] "The imposition of liability in spite of a defense of economic interest requires a showing of either malice on the one hand, or fraudulent or illegal means on the other." *Foster v. Churchill*, 87 N.Y.2d 744, 750 (1996). The doctrine goes so far as to protect creditors who *knowingly* cause the companies in which they invest to violate existing financial obligations to others.[269]

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[265] ECF 970 (Seketa) at 226:1-14.

[266] *See* ECF 1017-2 (Assignment and Assumption Agreement).

[267] *See* ECF 694 (Carney) at 163:1-6 ("Q: [W]as anybody else, at that time, willing to—willing to put in additional money into the company in November of 2020 to your knowledge? A: Not to my knowledge.").

[268] *See also* ECF 215 ¶¶ 56-58 ; ECF 321 ¶¶ 23-26; ECF 702.

[269] *See, e.g.*, *Bank of N.Y. Mellon v. Cart 1, Ltd.*, 2021 WL 2358695, at *4 (S.D.N.Y. June 9, 2021) (bondholder acted to protect "a legal and a financial interest," and was "justified" since the creditor increased its own

In at least three recent cases challenging uptier transactions like the one challenged here, courts have dismissed tortious interference claims at the pleading stage—even when confronted with allegations of bad faith conduct. In *Audax Credit Opportunities Offshore Ltd. v. TMK Hawk Parent, Corp.*, 72 Misc.3d 1218(A) (N.Y. Sup. Ct. 2021) ("***TriMark***"), the court held that "[o]ne who has a financial interest in the business of another possesses a ***privilege to interfere*** with the contract between the other and someone else ***if his purpose is to protect his own interests***"—even where that defendant's actions "left one group of First Lien lenders . . . subordinated, without their consent, to the interests of another group." *Id.* at *1-2, *11; *see also ICG Glob. Loan Fund 1 DAC v. Boardriders, Inc.*, 2022 WL 10085886, at *9-10 (N.Y. Sup. Ct. Oct. 17, 2022) (finding economic interest defense applied given defendant's financial interest in the breaching party and holding that "[a]lthough [defendant] may not have acted in good faith in [its] actions, specifically with regard to shutting down avenues of communication, . . . plaintiff fails to allege that the actions were fraudulent or illegal"). And in *Ocean Trails CLO VII v. MLN TopCo Ltd.*, Index No. 651327/2023 (N.Y. Sup. Ct. 2023) ("*Mitel*"), the New York Supreme Court dismissed a plaintiff's tortious interference claim against a creditor that had participated in a liability-management transaction.[270]

There is no reason to deviate from the New York courts' decisions. PIMCO and Silver

acted to protect "a legal and a financial interest," and was "justified" since the creditor increased its own payout); *U.S. Bank Nat'l Ass'n v. Triaxx Asset Mgmt. LLC*, 2019 WL 4744220, at *9 (S.D.N.Y. Aug. 26, 2019) ("Because PIMCO, as a senior noteholder, is alleged to have an economic interest in the CDOs . . . the Court finds that PIMCO is entitled to the economic interest defense."); *Ultramar Energy v. Chase Manhattan Bank*, 179 A.D.2d 592, 592-93 (N.Y. App. Div. 1st Dep't 1992) (creditor protected because it was acting to increase the collateral available to cover its own security interests); *White Plains*, 8 N.Y.3d at 426 n.9 (creditor may raise defense citing *Ultramar*); *Abele Tractor & Equip. Co. v. Schaeffer*, 167 A.D.3d 1256, 1258-59 (N.Y. App. Div. 3d Dep't 2018).

[270] ECF 701-2 at 56:7-57:10 (dismissing claim against Credit Suisse on the basis that "case law recognizes a creditor has an interest in repayment of a loan that it has"); *see also id.* at 54:8-22.

Point invested hundreds of millions of dollars in Incora and acted to provide financing and other relief to help the Company.[271] Citadel invested approximately $2.5 million for the same reason. Senator provided necessary consents under the Holdco PIK Notes.[272] And Platinum—as parent, sole equity holder, and debt holder—likewise possesses the type of interests in Incora that courts routinely recognize as the sort of economic interest that supports application of the defense.[273]

The 2024/2026 Holders have asserted that the defense is unavailable because the Defendants acted for their "own, direct" interests.[274] But the cases the 2024/2026 Holders have cited stand only for the proposition that the defense does not apply when the defendant is acting in furtherance of some interest ***independent*** of that in the breaching party, or to the ***detriment*** of the breaching party.[275] The defense applies even when the defendant furthers its interest

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[271] *See supra* Section VII.

[272] ECF 738 (O'Connell) at 45:2-6, 89:22-90:5.

[273] *See* ECF 702 at ¶¶ 10-14; *see also White Plains Coat & Apron*, 8 N.Y.3d at 426 & n. 8 (holding that the defense necessarily applies "where defendant and the breaching party had a parent-subsidiary relationship"); *Vinas v. Chubb Corp*., 499 F. Supp. 2d 427, 433 (S.D.N.Y. 2007) (recognizing that "many of the cases involving [successful deployment of the] economic interest defense in the context of a tortious interference with contract claim have involved parent-subsidiary relationships"); *MDC Corp., Inc. v. John H. Harland Co*., 228 F. Supp. 2d 387, 398 (S.D.N.Y. 2002) (a parent having "malice" as to a subsidiary's interests is economically irrational and "improbable . . . where the parent is said to be meddling in its own subsidiary[']s affairs" (citing *Foster*, 87 N.Y.2d at 750)). As discussed in greater detail in the Langur Maize section, below, and omitted here to avoid duplication, Section 13.05 of the Secured Indenture also forecloses tortious interference claims against Platinum.

[274] ECF 291 at 60.

[275] *See Bausch & Lomb Inc. v. Mimetogen Pharms., Inc*., 2016 WL 2622013, at *12 (W.D.N.Y. May 5, 2016) (plaintiff plausibly alleged malice and where defendant acted to protect its interest in competitor, not in the breaching company); *Hudson Bay Master Fund Ltd. v. Patriot Nat'l, Inc*., 2019 WL 1649983, at *16 (S.D.N.Y. Mar. 28, 2019) (defense inappropriate where "only" the director defendant, not the company, "could benefit" by his action because he was "pursuing a personal, and not corporate, interest"); *Dell's Maraschino Cherries Co. v. Shoreline Fruit Growers, Inc*., 887 F. Supp. 2d 459, 484 (E.D.N.Y. 2012) (economic interest defense unavailable where defendants conceded "that any alleged interference would be in their own interests, not those of [the breaching party]"); *Wells Fargo Bank, N.A. v. ADF Operating Corp*., 50 A.D.3d 280, 280-81 (N.Y. App. Div. 1st Dep't 2008) (defense inapplicable where "defendants were not acting to protect their financial interests in [the breaching party] . . . but rather . . . to profit themselves to the detriment of [the breaching party's business]").

"directly."[276] A party need not be an altruist to benefit from the defense. *See Don King Prods., Inc. v. Smith*, 47 F. App'x 12, 15 (2d Cir. 2002); *Imtrac Indus., Inc. v. Glassexport Co.,* 1996 WL 39294, at *8 (S.D.N.Y. Feb. 1, 1996) (the defense is "the self-interest privilege"); *Mitel*, ECF 701-2 at 57:2-4 (creditors always "ha[ve] an interest in repayment").

Similarly, there is no merit to the 2024/2026 Holders' argument that the Participating Noteholders are not entitled to the defense because they acted "to further an investment thesis premised on taking value from . . . excluded noteholders in an uptier transaction."[277] Such an argument would completely eliminate the economic interest doctrine, because the very premise of a tortious interference claim is that one person has interfered with a contract that has value to a contracting party, which value has thereby been "taken" from them. The economic interest doctrine provides a "privilege to interfere." *TriMark*, 72 Misc.3d 1218(A), at *11.[278] In any event, the Participating Noteholders infused $250 million of new money, provided cash interest relief, and extended maturities. They were not obligated to offer these benefits for free. Any argument against Platinum fails for similar reasons. Further, Patrick Bartels was the board member who approved the Platinum portion of the transaction, which he approved following a review of Platinum's concessions with respect to interest, maturities, and the monitoring fee that Incora owed it annually.[279] Again, these concessions had real, positive liquidity benefits for

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[276] *See, e.g.*, *Ultramar*, 179 A.D.2d at 593 (tortious interference failed because defendant, "in attempting to protect ***its security interest,*** cannot be construed as malicious or carried out with intent to harm the plaintiff").

[277] ECF 620 ¶ 11.

[278] Debt investors do not bear a heavier burden in asserting the defense than equity investors. *See White Plains*, 8 N.Y.3d at 426 (drawing no distinction between the defense as applied to "significant stockholders," "parent-subsidiary relationship[s]," "the breaching party's creditor," and defendants with "a managerial contract with the breaching party"); *Don King Prods.*, 47 F. App'x at 15 n.4 (rejecting plaintiff's argument that the defense "only applies where the defendant has an ownership interest in the breaching party"); *Cart 1, Ltd.*, 2021 WL 2358695, at *4 ("Even if [a bondholder] procured [the Trustee's] breach of the Indenture, it was justified in any good-faith attempt to enforce its rights."); *Ultramar*, 179 A.D.2d at 592-93.

[279] ECF 868 (Bartels) at 234:3-17, 252:20-253:14; ECF 536-24 at 19-20.

Incora, *see supra* Section VII, and Platinum, too, was not obligated to provide them for free.

D. The 2024/2026 Holders Cannot Overcome The Economic Interest Defense

The 2024/2026 Holders failed to meet their burden of establishing any malice (*i.e.*, that any Defendant acted with the "***sole purpose*** of inflicting intentional harm"), fraud, or illegality that could overcome the economic interest defense. *Triaxx*, 2019 WL 4744220, at *10 (quoting *Carvel Corp. v. Noonan*, 3 N.Y.3d 182, 190 (2004) (emphasis in *Triaxx*)).[280]

There is simply no evidence that any Defendant acted to cause harm to the 2024/2026 Holders or that there was any fraud or illegality.[281] *See supra* Section VIII.B; *Ruha v. Guior*, 277 A.D.2d 116, 116 (N.Y. App. Div. 1st Dep't 2000) ("[P]laintiffs' bare allegations of malice do not suffice . . . [and] are contradicted by plaintiffs' own claims that defendants' actions were financially motivated."); *see also IMG Fragrance Brands, LLC v. Houbigant, Inc.*, 679 F. Supp. 2d 395, 406-09 (S.D.N.Y. 2009) (rejecting illegality and fraud where the "illegal means" complained of was a "mere breach of contract").

X. LANGUR MAIZE'S CLAIMS FAIL

A. The Unsecured Exchange Benefited Wesco And Was A Losing Bet For The Participants

Platinum, Carlyle, and Senator (together, the "***Participating Unsecured Noteholders***") separately transacted with the Company to provide additional liquidity (the "***Unsecured Exchange***").[282] For the Unsecured Exchange, WSFS and Wesco amended the Unsecured

280 *See also TriMark*, 72 Misc. 3d 1218(A), at *1 (citing *Foster*, 87 N.Y.2d at 750). Foreseeability of harm is not malice or "bad faith." *See id.* at *11 ("[E]ven bad faith, without more, does not satisfy the malice requirement."); *E.F. Hutton Int'l Assoc. v. Shearson Lehman Bros. Holdings*, 281 A.D.2d 362, 362-63 (N.Y. App. Div. 1st Dep't 2001) (that defendant "may have known that this would negatively affect [plaintiffs] does not raise an issue of fact as to whether the breach was motivated by malice"); *Ultramar*, 179 A.D.2d at 592-93 (economic interest defense covered creditor's actions which foreseeably deprived a breaching party's customer of their contractual right); *see also Boardriders*, 2022 WL 10085886; *Mitel*, Index No. 651327/2023, ECF 701-2.

281 *See supra* Sections VII; VIII; *infra* Section X.E.

282 Carlyle, along with its co-investor Spring Creek, owned $269 million of Unsecured Notes at the time of the transaction. ECF 603-06 at 5; ECF 832 (Hou) 77:13-18. Senator owned $35 million of Unsecured Notes and

Indenture via the Third Supplemental Unsecured Indenture, which allowed Wesco to incur additional secured debt and removed a restriction on affiliate transactions.[283] WSFS and Wesco then entered into the Fourth Supplemental Unsecured Indenture, which removed additional covenants from the Unsecured Indenture.[284] These amendments were executed with the requisite majority noteholder consents.[285] Finally, the Company purchased and retired the participating debt in exchange for newly issued 1.25L Notes pursuant to the Exchange Agreement.[286]

Participating Unsecured Holders received a second lien security interest and a PIK/Amendment fee of 1.125% payable in 1.25L Notes.[287] In return, they (i) PIK'd all accrued interest as of the Exchange Date (~$22 million); (ii) accepted 4% cash prorated for 2022, and 6% cash from 2023–2027, and PIK'd the balance of the 13.125% interest they were otherwise owed; and (iii) consented to a $1.05 billion basket for additional 1.25L debt (~$580 million remained post-Exchange).[288] The PIK benefit alone provided $43 million in immediate liquidity savings for the Company in 2022 and promised over $100 million in 2023-2027. The deal also immediately extended the 2023 Promissory Note maturity. No consents necessary to do this transaction required the Additional 2026 Secured Notes or placed formerly unsecured holdings

transaction. ECF 603-06 at 5; ECF 832 (Hou) 77:13-18. Senator owned $35 million of Unsecured Notes and $29.8 million of secured 2024 and 2026 notes, 603-06 at 1-2, 5; ECF 602-37 at 4, and alone participated in the Secured ***and*** Unsecured exchanges. Senator also owned $38.4 million of the Holdco PIK Notes. ECF 604-2 at 4. Platinum owned $141.8 million Unsecured Notes, the 2023 maturing $25 million Promissory Note, and $120 million in Holdco PIK notes. ECF 603-6 at 5; ECF 827 (Smith) 70:2-4; ECF 738 (O'Connell) 13:2-6. No Holdco PIK Notes were exchanged in the Transaction.

[283] ECF 604-18 at 1-2; ECF 1184 (Osornio) 35:5-12.

[284] ECF No. 601-33 at 2-3; ECF 1184 (Osornio) 35:15-16.

[285] ECF 603-16; ECF 603-13; ECF 602-37.

[286] ECF 604-19; ECF 604-20; ECF 604-22.

[287] ECF 601-32; ECF 604-39; ECF 602-14.

[288] ECF 603-28 § 4.09(b)(3)(b); ECF 1352 (Steffen) at 95:3-12, 96:9-23; ECF 536-24 at 6.

into a first lien.[289] The Unsecured Exchange was a fair risk-adjusted bet on Wesco: participants forfeited material cash interest expecting Wesco's value to improve. In light of the June 2023 bankruptcy filing, the bet was lost: non-participating 2027 holders ***did better*** economically than participating holders, who are out of the money under the proposed plan.[290]

B. Langur Maize Lacks Article III Standing To Assert Its Claims

Because Langur Maize has not suffered a direct injury, its Article III standing requires an assignment from an injured party. It received no such assignment.

Section 13-107 Did Not Automatically Transfer Claims to Langur Maize. As the Court held on summary judgment, New York General Obligations Law § 13-107 did not assign third-party claims to Langur Maize; it also reflects a legislative choice not to assign such claims that is entitled to deference.[291]

No Assignment from DTC. Assignment of litigation claims outside of § 13-107 must be express and does not occur automatically upon assignment of a contract. *Fox v. Hirschfeld*, 157 A.D. 364, 366, 368 (N.Y. App. Div. 1st Dep't 1913) (home purchase contract stating, "I hereby sell, assign, transfer, and set over unto [my wife] all my right, title, and interest in and to the within contract," did not assign claims for fraud in the sale). Langur Maize has admitted that no prior holder has assigned it any claims.[292]

Langur Maize instead posits that it received third party claims from DTC. But DTC does not have any claims, because—as this Court has already held—it was not directly injured.[293]

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[289] *See* ECF 601-30 at 2; ECF 601-39 at 2.

[290] ECF 508 at 20-21.

[291] ECF 832 (Hou) at 143:6-17, 144:2-6, 144:21-145:14.

[292] Langur Maize Resp. to Platinum RFA No. 11 ("Langur Maize admits . . . it did not seek or receive from the prior beneficial owners in writing expressly assigning claims . . . .").

Nor has DTC been assigned those claims from an entity that *was* injured.[294] DTC has nothing relevant to assign.[295]

Nor does the Unsecured Indenture or Global Note structure result in the automatic assignment of claims to DTC. An assignment of claims must clearly manifest an intention to transfer ownership of those claims.[296] Langur Maize points to two DTC letters, neither of which purports to *transfer* claims.[297] Those letters document that Langur Maize may bring any lawsuit *Langur Maize* has Article III standing to bring, notwithstanding that DTC is the record holder.[298] *See W.R. Huff Asset Mgmt. Co. v. Deloitte & Touche LLP*, 549 F.3d 100, 107 (2d Cir. 2008); *see also Pyramid Transp., Inc. v. Greatwide Dallas Mavis, LLC*, 2013 WL 840664, at *5 (N.D. Tex. Mar. 7, 2013). The letters expressly state that "***Cede & Co. has no interest in this matter*** other than to take those steps which are necessary to ensure that ***the Beneficial Owner is not denied its rights and remedies as the beneficial owner*** of the Subject Notes on the Subject Date."[299]

Langur Maize's previous citations to state-court cases regarding beneficial owners' *capacity* or *right to sue* have no bearing on *Article III standing*. *Springwell* concerns "capacity" to sue under "an indenture agreement that reserved" the "right to sue" to "the registered holder," not injury-in-fact. *Springwell Navigation Corp. v. Sanluis Corporacion, S.A.*, 46 A.D.3d 377, 377 (N.Y. App. Div. 1st Dep't 2007); *Springwell Navigation Corp. v. Sanluis Corporacion, S.A.*, 81 A.D.3d 557, 558 (N.Y. App. Div. 1st Dep't 2011). Capacity and the right to sue are entirely

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293 ECF 508 at 20-21.

294 *See* ECF 1375 (Cimala Depo. Tr.) at 78:23-79:12.

295 *See id.*

296 *See* Platinum Opp'n to Langur Maize Mot. Summ. J., ECF 280, at 13-15.

297 *See* ECF 1075-3, Ex. 2.

298 *See id.*; *see also* ECF 1375 (Cimala Depo. Tr.) at 193:7-11; 195:8-21.

299 *See* ECF 1075-3, Ex. 2.

distinct from Article III standing. *Norris v. Causey*, 869 F.3d 360, 367 (5th Cir. 2017) (capacity); *Maxim Crane Works, L.P. v. Zurich Am. Life Ins. Co.*, 11 F.4th 345, 350-51 (5th Cir. 2021) (right to sue).

The Indenture Did Not Effect an Automatic Assignment of Claims. Langur Maize's theory that an indenture may effect an automatic assignment of claims is contrary to New York law and to the plain text of the Unsecured Indenture. *See Fox*, 157 A.D. at 366, 368. Langur Maize points to sections 2.06(b) and 2.06(b)(1) of the Unsecured Indenture, which permit transfers of "[b]eneficial interests" in the Unsecured Notes to be effected through DTC rather than the trustee, and impose certain restrictions under the securities laws and the private placement legend for the Notes. The leap in logic that this is tantamount to an assignment of third-party claims is contrary to § 13-107 and without any authority.

And even if Langur Maize's general theory of "assignment via global notes" were correct, which it is not, it still could not have acquired claims against *Platinum,* because the Global Note expressly disclaims the existence of such claims even for prior holders. Section 13.05 of the Unsecured Indenture and Section 15 of the Global Note provide that Incora's direct and indirect owners shall have no liability for any claim "based on" obligations created by the Unsecured Notes.[300] The Holder of the Global Note "waives and releases all such liability" by an equity owner.[301] The Global Note cannot effectuate a transfer of claims it expressly disclaimed.

Prior Beneficial Owners of the Unsecured Notes Retain Standing. The Court previously expressed concern that if Langur Maize lacked standing, but the prior beneficial

[300] ECF 538-3 ¶ 15.

[301] *Id.*

owners of the Unsecured Notes were contractually barred from filing suit, then "sellers to Langur Maize could 'own' claims, but could never prosecute them"—which the Court called "an absurd result."[302]

But that Catch-22 will not arise because prior beneficial owners retain their Article III standing to assert claims based on their beneficial interests at the time of the 2022 Transaction. *See, e.g.*, *Lovati v. Petroleos de Venez., S.A.*, 2021 WL 5908953, at *2 (S.D.N.Y. Dec. 14, 2021). When there is no express assignment of litigation claims by the seller of a security to the purchaser, the seller retains standing to sue on those claims. *See, e.g.*, *Dexia SA/NV, Dexia Holdings, Inc. v. Morgan Stanley*, 41 Misc. 3d 1214(A), at *3 (N.Y. Sup. Ct. 2013), *aff'd*, 135 A.D.3d 497 (N.Y. App. Div. 1st Dep't 2016).

Nothing in the Unsecured Indenture (or DTC policy) limits the prior beneficial owners' ability to file suit against third parties for damages. The DTC authorization requirement applies only to suits to vindicate "rights *under the Indenture*."[303] "Rights under the Indenture" concern events of "Default," and are limited to suits "to collect the payment of principal of, premium on, if any, or interest on, the Unsecured Notes or to enforce the performance of any provision of the Unsecured Notes or th[e] [Unsecured] Indenture."[304] That language does not encompass tort claims against third parties; it appears to include claims against parties expressly covered by § 13-107. Further, the Unsecured Indenture's limitations on suit apply only to current beneficial owners, not prior owners, since the indenture is silent on the topic of such *prior* beneficial owners' rights. *See Quadrant Structured Prods. Co., Ltd. v. Vertin*, 23 N.Y.3d 549, 560 (2014)

[302] ECF 553 at 2.

[303] *Id.*, Ex. A, § 11; ECF 601-7 § 2.08.

[304] ECF 601-7 § 6.03.

("[N]o-action clauses are to be construed strictly and thus read narrowly.").

Langur Maize's argument that Article 8 (specifically, § 8-506) of the UCC forecloses suit by a prior beneficial owner is wrong.[305] That section provides, "A securities intermediary shall exercise rights with respect to a financial asset if directed to do so by an entitlement holder." Section 8-506 says what an intermediary is supposed to do when directed; it says nothing about whether a prior beneficial holder needs to direct DTC to do anything, much less seek the intermediary's permission before bringing a third-party tort claim. It "deals with the aspects of securities holding that are related to investment decisions," such as "forward[ing] proxy materials" or "exercis[ing] a conversion right." N.Y. U.C.C. § 8-506 cmts. 2-3.

C. Claims For Breach Of Contract Against Non-Parties Fail

As an initial matter, Langur Maize is purporting to sue the Participating Unsecured Holders for breach of the Unsecured Indenture—and tortious interference as an alternative theory. The Participating Unsecured Holders cannot have breached the Unsecured Indenture or the Global Note because they are not parties to either instrument.[306] While the Court, on summary judgment, applied this principle to dismiss contract claims under the Secured Indentures, it did not address a parallel argument raised by the Langur Maize counterclaim defendants.[307] But the Secured and Unsecured Indentures are the same in this regard, and thus Langur Maize's claims fail. *See, e.g.*, *A & V 425 LLC Contracting Co. v. RFD 55th St. LLC*, 15 Misc. 3d 196, 204 (N.Y. Sup. Ct. 2007) ("[T]o be liable for a breach of contract, that person must be a party to the contract.").

[305] *See* Langur Maize Suppl. Br. Regarding Standing ("***Langur Maize Suppl. Standing Br.***"), ECF 524 at 4.

[306] *See, e.g.*, ECF 601-7 at 1 (issuer, trustee, and guarantors are only parties).

[307] *See* ECF 508 at 53 ("Because the Silver Point Noteholders, the PIMCO Noteholders, the Senator Noteholder, and the Citadel Noteholder are not parties to the Secured indentures, they cannot be obligated under the Secured Indentures.").

Langur Maize may seek to circumvent its lack of privity with Platinum specifically by arguing that Platinum "dominated and controlled" the Debtors, but it cannot. Holding a parent corporation liable for a breach of contract committed by its subsidiary requires proof both that the parent "exercised complete domination of [the subsidiary] corporation," *IMG*, 679 F. Supp. 2d at 403-04, and that "such domination was the instrument of fraud or otherwise resulted in wrongful or inequitable consequences," *Sheridan Broad. Corp. v. Small*, 19 A.D.3d 331, 332 (N.Y. App. Div. 1st Dep't 2005). The most Langur Maize can show is that Platinum-affiliated individuals also played roles at Incora. *See supra* Section VII. In any event, Section 13.05 forecloses this theory.

D. Langur Maize Has Failed To Prove A Breach Of The Unsecured Indenture

Langur Maize has failed to prove any breach of the Unsecured Indenture, whether styled as a contract claim or a predicate for a tortious interference claim. It called no witnesses and offered no evidence to sustain its burden on the meaning of any contractual provision at issue. The trial evidence, including the plain language of the Indenture, disproves its claims.

3.02 and 3.07(h) Were Not Breached. Langur Maize has failed to establish a breach of Section 3.02 because the Unsecured Exchange was not a "redemption." The Unsecured Exchange was effected via Section 3.07(h) of the Indenture, which governs "purchases," and the Court has already held that Section 3.02 applies only to redemptions, not purchases.[308]

Transactions that qualify as "redemptions" are set forth in Sections 3.07(a)-(c) & (e)-(g). Those provisions describe types of redemptions and each uses the words "redeem" or

[308] *See* ECF 508 at 42-43. Whatever Langur Maize argues in its post-trial submissions, it consistently maintained prior to the Court's summary judgment decision that the 2022 Transaction was ***not*** a redemption. *See, e.g.*, ECF No. 202 at 12 ("[N]o 2027 Notes[ ] were redeemed in the Selective Exchange."); ECF No. 328 at 2 ("[S]ome of the 2027 Notes were purchased in the Selective Exchange, but none were redeemed."); ECF No. 281 at 7 ("Langur Maize has never asserted that the Selective Exchange should be recharacterized as a 'redemption.'"); ECF No. 362 at 23 ("No notes were redeemed in the Selective Exchange.").

"redemption" to describe specific, pre-negotiated terms on which the issuer is permitted, at its option, to prepay some or all of the outstanding principal and must under those circumstances pay a specified "make-whole" premium, in cash. None applies here. Section 3.07(h) is the only subsection of 3.07 that does not use the terms "redeem" or "redemption." The Unsecured Exchange plainly meets the terms of that provision—it was a "purchase [of] Unsecured Notes" by "[t]he Issuer" through "open market or privately negotiated transactions . . . or otherwise," and the purchased Notes were cancelled. Because Section 3.02 governs only redemptions, ECF 508 at 42-43, a Section 3.07(h) transaction cannot breach Section 3.02.

The unrebutted evidence at trial further confirmed that the Unsecured Exchange was not a redemption. No term sheet or other document talked about "redeeming" notes or "redemptions."[309] All witnesses who testified on this point said that they did not understand the transaction to be a redemption, and that the transaction was *not* consistent with their commercial understanding of what a redemption would be, and no one contradicted them.[310]

Even if the Unsecured Exchange were a redemption (it was not), Langur Maize cannot prove that, had WSFS conducted a Section 3.02 lottery, it would have selected Notes held by Langur Maize's predecessor for exchange or that Langur Maize's predecessor would have accepted any exchange offer (which involved sacrificing cash interest payments).

Langur Maize's belatedly asserted claim that Section 3.07(h) was breached, because

[309] ECF 610-7; ECF 610-9; ECF 610-10; ECF 610-13; ECF 610-14; ECF 610-15; ECF 610-27; ECF 610-35.

[310] ECF 832 (Hou) at 157:6-10; 157:20-158:1 ("[A] redemption is a situation where the company can pay down [an] instrument without [creditors'] consent . . . in a pre-negotiated manner."); ECF 827 (Smith) at 104:16-18, 106:8-10 (to his "commercial understanding," the transaction did not effectuate a redemption" because "an optional redemption is something that's done at the issuer's election when they are at their option, calling bonds and redeeming them"; ECF 738 (O'Connell) at 138:16-19 (no one at PJT "ever refer[red] to the March 2022 exchange as a 'redemption' of bonds."); ECF 1350 (Healy) at 197:23-24 (WSFS "didn't consider . . . any part of the [2022] transaction to be a redemption.").

Platinum was not a "third party" from whom notes could be purchased, also lacks merit. First, because Langur Maize never put Defendants on notice of such a theory through its pleadings, it is forfeited. *See Portis v. First Nat'l Bank of New Albany*, 34 F.3d 325, 332 (5th Cir. 1994). In any event, Langur Maize's interpretation is plainly wrong: its reading ignores language in the sentence that says Section 3.07(h) transactions can be from third parties, "or otherwise." Moreover, Platinum *is* a "third party" because it is not a party to the Indenture. When the Unsecured Indenture precludes transactions with third parties who are affiliates, it does so explicitly, and uses the defined term "Affiliates."[311] Section 3.07(h) does not prohibit transactions with Affiliates, and the use of the separate phrase "third party" permits transactions with Platinum.

6.05 Was Not Breached. Section 6.05 allows majority owners of the Notes to "direct . . . the Trustee," WSFS. As the Court already held, it imposes no obligations on beneficial owners, ECF 508 at 49 ("Reading 'may' in the first sentence of § 6.05 to obligate the noteholders would be an unreasonable interpretation of the contract."). Moreover, the Unsecured Exchange was not effected through Section 6.05 or any directive from beneficial owners. WSFS acted pursuant to Section 13.02, which applies to "any request . . . *by the Issuer* . . . to take any action under th[e] Indenture," provided that an officer's certificate and opinion of counsel are furnished to the Trustee, which materials were provided.[312]

Section 9.02(10)'s Sacred Rights Provision Was Not Breached. Langur Maize's "sacred rights" argument is based on the same "sacred rights" language discussed in connection with the 2024/2026 Holders' claims, *supra* Section VI. Langur Maize's argument lacks merit for

[311] *See* ECF 601-7 § 1.01, at 3; *id.* § 4.11.

[312] ECF 1350 (Healy) at 106:10-108:1; 129:15-17; 151:13-155:11.

the same reasons as set forth above, as well as the additional reasons set forth below.

The Unsecured Exchange did not implicate any unsecured holders' ranking in respect of "right of payment." Section 9.02(10) prevents "any amendment, supplement, or waiver" to or of, *inter alia*, Sections 4.01 (guaranteeing payment of principal and interest), 6.11 (setting order of payments), or similar express contractual provisions governing payment terms without the consent of any "adversely affected" Holder. This is consistent with the Trust Indenture Act, which dictates that "the right of any holder of any indenture security to receive ***payment of the principal of and interest*** on such indenture security" is a fundamental right that "shall not be impaired or affected without the consent of such holder." 15 U.S.C. § 77ppp(b) ("Prohibition of impairment of holder's ***right to payment***"). The Unsecured Exchange did not entail an amendment of any such provision. Most of the other, more specific sacred rights in the Indenture similarly deal with protections for principal and interest payments.[313] *See, e.g.*, *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 106 (2001) (generic clause "controlled and defined by reference to" specific preceding terms); *see also In re TPC Grp. Inc.*, 2022 WL 2498751, at *3 n.12 (Bankr. D. Del. July 6, 2022) (applying same rule to interpretation of sacred rights provision under New York law). Section 9.02(10) is a more general provision protecting against changes to similar payment terms that would cause some holders to become "lower ranked" by withholding their payments until after other holders are paid.

Langur Maize confuses the "right of payment" (which governs the distribution of principal and interest) with the "right of security" (which governs access to collateral in a

[313] *See, e.g.*, Sections 9.02(1) (amount of principal); 9.02(2) ("Stated Maturity," which is defined in terms of "payment of interest or principal"), 9.02(3) (rate of interest), 9.02(4) (current defaults in "payment of principal"), 9.02(5) (currency of payment), 9.02(6) (past defaults in "payments of principal"), amendments to the foregoing (9.02(9)).

liquidation). Numerous cases recognize that "right of payment" concerns and protects against "payment subordination," a distinct concept from "lien subordination." *See, e.g.*, *U.S. Bank Nat'l Ass'n v. Wilmington Sav. Fund Soc'y, FSB (In re MPM Silicones, LLC)*, 531 B.R. 321, 328-30 (S.D.N.Y. 2015) ("The words 'in right of payment' clearly refer only to payment subordination . . . ."), *aff'd in relevant part and rev'd in part on other grounds*, 874 F.3d 787 (2d Cir. 2017); *Diversified Realty Servs., Inc. v. Meyers Law Grp., P.C.*, 2014 WL 547034, at *3 (N.D. Cal. Feb. 7, 2014), *aff'd*, 647 F. App'x 736 (9th Cir. 2016); *In re Lantana Motel*, 124 B.R. at 255-56. Lien subordination "involves two senior creditors with security interests in the same collateral, one of which has lien priority over the other." *Diversified*, 2014 WL 547034, at *3. Protections against changes adversely affecting holders "in respect of right of payment" prevent "payment subordination."

What occurred in the Unsecured Exchange, however, was lien subordination. It gave the 1.25L Notes priority over the Unsecured Notes "with respect to the debtor's assets . . . when a . . . distribution of the debtor's assets is made to creditors." *Standard Brands Inc. v. Straile*, 260 N.Y.S.2d 913, 916 (N.Y. App. Div. 1st Dep't 1965). Section 4.09(c) also confirms that "no Indebtedness will be deemed to be contractually subordinated in right of payment to any other Indebtedness of the Issuer or any Restricted Subsidiary solely by virtue of being unsecured or by virtue of being secured on a junior priority basis."[314] As Langur Maize concedes, "Section 9.02(10) is implicated only when "***the time and amount [beneficial owners] will be paid on their notes*** is changed."[315] That did not occur here. Thus, the incurrence of the 1.25L Notes, senior only by virtue of being secured, did not implicate Section 9.02(10).

[314] ECF 601-7 § 4.09(c).

[315] ECF 603-28 at 53.

Moreover, the Unsecured Indenture elsewhere uses the term "Subordinated Indebtedness," which refers, in relevant part, to "any Indebtedness of the Issuer which is by its terms expressly subordinated in ***right of payment*** to the Unsecured Notes."[316] Section 4.12 imposed a covenant that "in the case of Liens securing Subordinated Indebtedness, the Unsecured Notes [must be] secured by a Lien on such [shared collateral] that is senior in priority to such Liens." This covenant would have been superfluous if debt that is "subordinated in right of payment" meant, by definition, debt that had a lower priority claim to collateral than the Unsecured Notes—if that were the case, it would have been impossible for Subordinated Indebtedness to have senior lien priority. This confirms that "right of payment" is unrelated to security. *See, e.g.*, *Suffolk Cty. Water Auth. v. Vill. of Greenport*, 800 N.Y.S.2d 767, 768 (N.Y. App. Div. 2d Dep't 2005) ("[A]n interpretation which renders language in the contract superfluous is unsupportable.") (citing *Laws.' Fund for Client Prot. v. Bank Leumi Tr. Co.*, 94 N.Y.2d 398, 404 (N.Y. 2000)).[317]

In the Alternative, Any Subordination Was Not Caused by an Amendment, Supplement, or Waiver. Section 9.02(10) applies only to "amendment[s], supplement[s] or waiver[s]"; some credit documents—including in *TriMark*—contain sacred rights provisions that more broadly cover any "agreements." *See TriMark*, 72 Misc. 3d 1218(A), at *11; *see generally Quadrant*, 23 N.Y.3d at 560. Langur Maize has argued that entry into the Exchange Agreement breached Section 9.02(10),[318] but the Exchange Agreement is not an amendment, supplement, or

[316] ECF 1350 (Healy) at 106:10-108:1; 129:15-17; 151:13-155:11.

[317] Other New York law governed indentures similarly refer to debt that ranks "senior in right of payment" but is "unsecured." *MPM Silicones*, 531 B.R. at 325. This would be impossible if ranking senior in right of payment meant having a senior lien.

[318] ECF 142 at 34.

waiver of any terms of the Unsecured Indenture. It is a separate contract among different parties, and that separate agreement cannot be a breach of Section 9.02(10).

In the Alternative, Non-Participating Holders Were Not "Adversely Affected." Section 9.02(10) requires consent only for amendments, supplements, or waivers that "*adversely* affect the" holders in respect of their right of payment (emphasis added). Because no holders of 2027 Unsecured Notes were adversely affected, their consent was not required.

First, the Unsecured Exchange did not deprive the Unsecured 2027 Noteholders of any coupon payments—rather, it enabled them to receive coupon payments in full on May 15 and November 15, 2022, totaling 13.125% in cash that the Company otherwise would have missed.[319]

Second, Langur Maize has failed to show that the Unsecured Exchange adversely affected the trading price of the Unsecured Notes. FINRA trading data, which reflect actual trades,[320] show that prices of the Unsecured Notes *increased* after the announcement of the transaction.[321] On March 30, the price of the unsecured notes traded up by over 10 cents, from 28.67 to 41.46, and stayed at approximately that level for several days.[322] Silver Point's trading data show the same thing: Silver Point internally commented on March 14, 2022 that the Unsecured Notes were trading "in the 20s" and then bought over $3 million of those notes at

319 ECF 664 (Carney) at 61:6-11; ECF 832 (Hou) 142:5-12.

320 *See* ECF 1238-9.

321 *See id.* (showing average prices of 28.67 cents on March 29—the date on which the March 2022 Transaction was disclosed and cleansed, in the afternoon—increasing to 41.46 cents on March 30, 41.89 cents Transaction was disclosed and cleansed, in the afternoon—increasing to 41.46 cents on March 30, 41.89 cents on March 31, and 43.19 cents on April 1); ECF 1016-7; ECF 1016-8; ECF 1016-9 (cleansing materials released on March 29, 022); ECF 1297 (Denham) at 95:15-96:3; 100:24-101:3.

322 ECF 1297 (Denham) at 112:3-10; ECF 1238-9; ECF 1016-7; ECF 1016-8; ECF 1016-9 (cleansing materials released on March 29, 2022).

41.25 cents on March 30, its first unrestricted trading day.[323] It purchased $39 million in Unsecured Notes from March 30, through June 7, 2022, all at prices higher than the "20s" discussed on March 14.[324] The 1.25L Notes, by contrast, were illiquid and never traded.[325] The 2022 Transaction thus benefited non-participating unsecured holders—not one of whom has ever surfaced to complain about the Unsecured Exchange.[326] It has utterly failed to show "adversity" to the non-participating 2027 holders.[327]

6.11 Was Not Breached, and That Claim Is Waived. Because Langur Maize never pleaded a breach of 6.11, it is waived. *See Portis v. First Nat'l Bank of New Albany*, 34 F.3d 325, 332 (5th Cir. 1994). In any event, it was not breached. It applies only when "the Trustee collects any money . . . distributable in respect of the Issuer's obligations under this Indenture." It then specifies the order in which such money shall be distributed. Langur Maize has neither alleged nor shown that the Trustee collected any money under the Unsecured Indenture nor that the Trustee has paid out any such money other than pursuant to the specified order. Moreover, an expressly permitted transaction, such as a voluntary purchase under Section 3.07(h), cannot result in a prohibited "distribution" under Section 6.11.

Section 13.05 Bars Langur Maize's Claims Against Platinum.

Langur Maize's breach of contract ~~claim~~and tortious interference claims against

323 ECF 563-1 (internal comment); ECF 729-53 at 62 (trading activity).

324 ECF 729-53 at 62.

325 ECF 832 (Hou) at 147:4-8.

326 ECF 978-5 at 7; ECF 725-55.

327 Langur Maize may argue that the Unsecured Exchange was adverse to non-participating holders, based on the same Silver Point email described above which stated Silver Points "desk value[d] the notes at ~70." ECF 563-1. That purported valuation was never explained or substantiated; unlike the unsecured notes "trading in the 20s" at the time, the "~70" cannot be based on trading prices—the 1.25L Notes did not exist on March 14, were not even the subject of rumors in the trade press, and that speculative valuation was disproved by testimony from Mr. Hou, who was unable to sell 1.25L Notes at prices even lower than that. ECF 832 (Hou) at 147:4-8.

Platinum should be dismissed because Section 13.05 of the indenture unambiguously provides that equity owners like Platinum will not be subject to recourse or liability under the Unsecured Indenture or the unsecured notes, and that Unsecured noteholders waive and release all such claims.[328]

E. There Was No Tortious Interference with the Unsecured Indenture

Langur Maize has not proved a breach of contract, so its tortious interference claims fail. As independent grounds to defeat its tortious interference claims, Langur Maize has not proven an "intentional and unjustified" breach by any defendant, each of whom acted in its economic interest. *Wilson v. Dantas*, 2013 WL 92999, at *7 (S.D.N.Y. Jan. 7, 2013), *aff'd*, 746 F.3d 530 (2d Cir. 2014). In addition, for the same reasons Langur Maize cannot show any holders were "adversely affected," *supra* Section X.D, it has failed to prove any harm.

1. *The Langur Maize Defendants Did Not Induce a Breach of the Indentures*

Platinum did not induce a breach. Langur Maize has not shown that *Platinum* took any action that induced a breach. Instead, Langur Maize conflates the actions of the Company's directors with Platinum itself. Acting in dual roles is common in the industry,[329] and courts respect corporate formalities. *See, e.g.*, *United States v. Bestfoods*, 524 U.S. 51, 61 (1998) ("[A] parent corporation . . . is not liable for the acts of its subsidiaries."). Corporate formalities were observed, and the 2022 Transaction was approved by the Company's board.[330] Platinum also did not induce a breach for similar reasons identified by Carlyle, below: it did not solicit the 2022 Transaction; it was a price-taker in connection with the transaction, and it did not believe its

[328] *See* ECF 601-7 § 13.05; ECF 538-3 § 15.

[329] *See* ECF 970 (Seketa) at 226:1-14.

[330] *See* ECF 536-24 at 2 (March 24, 2024, Board minutes); ECF 630 (Vorderwuelbecke) at 140:15-18 ("Q: Where was the decision made to approve the transaction? A: At the board. Q: At—at Incora's board? A: Yes.").

actions would result in a breach.[331]

Carlyle did not induce a breach. Carlyle did not solicit a role in the 2022 Transaction. The Company approached Carlyle on February 16, 2022 and asked Carlyle and Platinum to PIK all of their interest for a year.[332] Carlyle rejected that proposal.[333] On February 27, the Company advanced a new proposal, previously agreed with the Ad Hoc Group, for $250 million of new money, which required amendments to (and consents from a majority of holders under) the Unsecured Indenture. It also proposed that Carlyle, Senator, and Platinum would "exchange into a super senior second-out tranche" with PIK'd interest—the genesis of the 2022 Transaction.[334] Carlyle negotiated the terms of that exchange with the Company, and generally "lost" most "point[s]" in the negotiations, other than a small cash interest concession.[335]

Senator did not induce a breach. Similarly, when the Company approached Senator in February 2022 about participating "the terms [of the 2022 Transaction] were already baked."[336] Senator had no material influence on the negotiations at all, and thus, was not involved in procuring any alleged breach.[337]

2. *The Economic Interest Doctrine Forecloses Tortious Interference Claims*

As set forth above, the economic interest defense forecloses Langur Maize's claims. *See*

[331] *See* ECF 659-8; ECF 639-1; ECF 879 (O'Connell) at 330:19-25; ECF 827 (Smith) at 90:5-10, 93:24-25; *see also* ECF 630 (Vorderwuelbecke) at 143:5-8.

[332] ECF 610-7 at 63; ECF 832 (Hou) 105:21-106:9.

[333] *See* ECF 832 (Hou); ECF 106:2-9 (the proposal was "very much" not attractive to Carlyle); ECF 610-7 at 63; 610-13 at 4; ECF 832 (Hou) at 110:1-24. .

[334] *See* ECF 832 (Hou) at 113:15-122:3; 123:23-124:5; *see also* ECF 610-14.

[335] ECF 610-35; ECF 832 (Hou) at 125:3–18 (basket capacity), 126:20-127:12 (consultation right for use of basket); 130:7-22 (veto right for use of basket); ECF 738 (O'Connell Day 1) 36:22-23; ECF 879 (O'Connell Day 2) 126:1-13, 345:18-22.

[336] ECF 1384-1 (Bharadwa Dep. Tr.) at 74:14-75:8; 121:10-22.

[337] ECF 738 (O'Connell) at 157:16-20.

supra Section IX. Every New York case involving an uptier transaction has recognized the economic interest defense and dismissed tortious interference claims. *Id.* (discussing *TriMark*, *Boardriders*, *Mitel*).

The 2022 Transaction Protected Platinum's Economic Interests in Wesco. As mentioned above, Platinum was the Company's parent, sole equity holder, as well as a debt holder.[338] *See supra* Section IX. The 2022 Transaction both protected those interests and provided Incora with significant liquidity benefits. *Id.*

The 2022 Transaction Protected Carlyle's Economic Interests in Wesco. Carlyle and Spring Creek owned $269 million at the time of the 2022 Transaction.[339] They participated in the Unsecured Exchange to protect their investments in unsecured debt that would be badly harmed by Wesco's potential bankruptcy in 2022.[340] Jesse Hou testified that "Carlyle provided consent for the company to raise $250 million of new money" to provide "balance sheet liquidity for the business to improve its runway," and thought the business would recover to pre-COVID EBITDA by 2024.[341] The alternative of a bankruptcy filing was bad for Carlyle, Spring Creek, and all unsecured creditors.

The 2022 Transaction Protected Senator's Economic Interests in Wesco. At the time of the 2022 Transaction, Senator held multiple tranches of Wesco's debt.[342] Mr. Bharadwa, Senator's co-CIO, testified that participating in the transaction seemed like a "good economic

[338] ECF 630 (Vorderwuelbecke) at 112:25-113:22, 125:11-23, 126:7-127:9.

[339] ECF 832 (Hou) at 77:14-77:18.

[340] *Id.* at 78:7-9.

[341] *Id.* at 137:14-138:6 ("[T]here were so many positives that came out of this—the runway, the ability to kind of right the ship, and get the Company back on track.").

[342] ECF 1363-22; ECF 1384-1 (Bharadwa Dep. Tr.) at 15:22-16:20.

outcome" and that "from an investment case standpoint, [it was] a no-brainer.[343] Indeed, given the prominence of Senator's holdings of Holdco PIK Notes, it was in Senator's economic interest for the Company's financial position to improve so that the Company would have the ability to repay all structural senior debt in full. At all points in time, this tied Senator's economic best interest with the best interest of the Company.

Langur Maize contends that the requisite economic interests are of no import because it has cleverly premised its theory of breach on WSFS, not the Debtors. This argument fails for two reasons. *First*, the record demonstrates that WSFS acted solely on instructions and information from the Debtor.[344] WSFS engaged in the allegedly breaching conduct (*e.g.*, not inviting Langur Maize's predecessor to participate in the Unsecured Exchange) only because the Debtors' counsel and CFO supplied opinions and certificates to WSFS that the transaction complied with the indenture.[345] There is no evidence that the noteholders did anything to induce WSFS to breach.[346] The conduct that "induced" WSFS came from the Debtors, in whom Defendants had an economic interest. Nor is there evidence that anyone but the Debtors—not WSFS—could have decided to issue such additional notes. There is no escaping that Langur Maize's theory is premised upon the Debtors' conduct, not WSFS's.

Second, even if Langur Maize's tortious interference claim were based solely on an alleged breach by WSFS, the economic interest defense would still apply. Defendants' interest in the unsecured notes they held before the 2022 Transaction, for which WSFS indisputably

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343 ECF 1384-1 (Bharadwa Dep. Tr.) at 26:23-27:11, 65:25-66:8, 71:14-72:12, 88:17-89:17.

344 *See* ECF 216-2; ECF 216-9; ECF 216-10; ECF 276-1; ECF 276-2; ECF 276-3; ECF 602-20; ECF 604-28; ECF 603-27.

345 ECF 1350 (Healy) at 151:13-152:20.

346 *Id.* at 154:10-155:74.

served as trustee, gave them an economic interest in WSFS sufficient to invoke the defense. *See, e.g.*, *Bank of N.Y. Mellon v. Cart 1, Ltd.*, 2021 WL 2358695, at *4 (S.D.N.Y. June 9, 2021) (defendant with financial stake in asset held by trustee had an economic interest in trustee that triggered defense).

Langur Maize also argues that the economic interest doctrine is unavailable to the defendants, based on a theory that the 2022 Transaction "harmed Wesco" because it did not permit all unsecured creditors to participate, which would have been better for the Company by PIK'ing more interest. That argument correctly failed in *TriMark*, where plaintiffs advanced the same argument and the court found "no authority holding that the economic interest defense turns on whether the challenged transaction was 'the best deal [the breaching party] could secure at the time." *TriMark*, 2021 WL 3671541, at *15. The court declined to "license[] judicial second-guessing of rational actors' economic decisions" in that manner, noting that the allegation that a better deal could have been negotiated only "***serve[d] to highlight***" the "***shared economic interests between [the company] and the Equity Sponsors.***" *Id.*

The claim that Participating Unsecured Holders, including Carlyle, "excluded" non-participating 2027 holders is also inaccurate,[347] but in any case also does not overcome the economic interest doctrine. Carlyle *attempted* to limit the basket available for issuing 1.25L Notes to only Carlyle and Senator, but the Company rejected that proposal and successfully negotiated for $1.05 billion in basket capacity for 1.25L Notes, as well as Platinum's participation. Carlyle had no ability to prevent Wesco from launching an exchange of 1.25L Notes for outstanding Unsecured Notes using the remaining ~$580 million basket capacity.[348]

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[347] *See* ECF 832 (Hou) 139:6-25.

[348] *See* ECF 603-28 § 4.09(b)(3)(b); ECF 536-24 at 6; ECF 832 (Hou) 130:7–22.

Carlyle lost that negotiation point. Regardless, Carlyle only *attempted* to limit the basket because doing so was in its *economic interest*: limiting participants in the Unsecured Exchange would avoid jeopardizing an already complex negotiation,[349] and diluting Carlyle's liens.[350] Carlyle agreed to the 1.25L basket, and the Company could at any time exchange additional 2027 unsecured notes if the Company decided it was in its economic interest to do so.

The economic interest defense applies, and Langur Maize cannot satisfy the test for overcoming it, as described above. Langur Maize has never claimed fraud or illegality. Nor has it adduced any evidence that any participant in the 2022 Transaction acted with the specific intent to harm Langur Maize's predecessor holders of the Unsecured Notes. The intent was to save the Company.[351] The transaction participants did not even know the identity of the non-participating noteholders, much less act with malice (or worse) towards them.[352]

F. There Was No Conspiracy To Commit Tortious Interference

Langur Maize has also brought a boilerplate civil conspiracy claim against the Participating Unsecured Holders, premised on the claim that "Carlyle and Senator expressly agreed to include Unsecured Notes held by Platinum in the Selective Exchange, and acted in furtherance of Platinum's tortious interference with the Indenture by virtue of such agreement."[353] Not so.

"New York courts do not recognize an independent tort of civil conspiracy." *Briarpatch Ltd., L.P. v. Geisler Roberdeau, Inc.*, 2007 WL 1040809, at *25 (S.D.N.Y. Apr. 4, 2007), *aff'd*

[349] ECF 832 (Hou) at 139:4-21; *see also id.* at 179:16-180:1.

[350] *Id.* at 140:13-20.

[351] *See, e.g.*, ECF 630 (Vorderwuelbecke) at 141:18-21, 143:16–20.

[352] *See* ECF 832 (Hou) at 179:14-17.

[353] ECF 275 at 26 (footnote omitted).

sub nom. Briarpatch Ltd. LP v. Phoenix Pictures, Inc., 312 F. App'x 433 (2d Cir. 2009). Civil conspiracy requires proof of "the underlying tort . . . , plus . . . : (1) an agreement between two or more parties; (2) an overt act in furtherance of the agreement; (3) the parties' intentional participation in the furtherance of a common purpose or plan; and, (4) resulting damage or injury." *De Sole v. Knoedler Gallery, LLC*, 139 F. Supp. 3d 618, 659 (S.D.N.Y. 2015) (quotation omitted). A conspiracy claim—such as Langur Maize's—that "add[s] no new allegations" to a substantive tort claim, other than stating defendants "conspired to commit the acts [elsewhere] described," must be rejected as duplicative. *Durante Bros. & Sons v. Flushing Nat'l Bank*, 755 F.2d 239, 251 (2d Cir. 1985).[354]

In any event, the fact that Carlyle, Senator, and Platinum ultimately participated in the 2022 Transaction does not prove a conspiracy. Conspiracy requires "an *agreement* between two or more persons to participate in an unlawful act," with a "unity of purpose or a common design." *Freeman v. HSBC Holdings PLC*, 57 F.4th 66, 79-80 (2d Cir. 2023) (cleaned up). Because the Participating Unsecured Holders acted only to protect their financial interests in Wesco and did not share a common purpose to commit a tort, there was no conspiratorial agreement. *See Freeman*, 57 F.4th at 80; *Wegman v. Dairylea Co-op., Inc.*, 50 A.D.2d 108, 114 (N.Y. App. Div. 4th Dep't 1975). The only evidence of agreement that Langur Maize can cite is that Senator, Carlyle, and Platinum signed the Exchange Agreement. This is insufficient; "agreement" to a contract is not the same as "agreement" to commit a tort. *See Arlinghaus v. Ritenour*, 622 F.2d 629, 639-40 (2d Cir. 1980) (Friendly, J.). There is no evidence of interactions between Senator, Carlyle, and Platinum in negotiating the 2022 Transaction; negotiations occurred independently by each one of them solely with the Company and its

[354] ECF 275 at 26.

representatives.[355] Carlyle repeatedly took negotiating positions opposing the inclusion of Platinum.[356] Langur Maize's conspiracy claims thus fail as both duplicative of their other tort claims, and because it adduced not facts to support the conspiracy that it posits.

XI. CONCLUSION

For the reasons set forth above, the Court should reject the 2024/2026 Holders' and Langur Maize's claims.

[355] ECF 832 (Hou) 226:21-24.

[356] ECF 610-13, at 3-4 (Carlyle counter-proposing adverse treatment for Platinum); ECF 832 (Hou) 112:19-22 (treatment of Platinum was "worse" than all other unsecured holders); ECF 610-15, at 6 (Carlyle counterproposal under which "Platinum shall not participate in exchange and all Platinum debt shall be PIK'd for life").

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I, Christopher D. Porter, hereby certify that on June 18, 2024, a copy of the foregoing Brief was served via the Electronic Case Filing System for the United States Bankruptcy Court for the Southern District of Texas.

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