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June 21, 2024

Hon. Marvin Isgur
U.S. Bankruptcy Court for the Southern District of Texas
515 Rusk Street
Houston, Texas 77002

Re: *Wesco Aircraft Holdings, Inc.* v. *SSD Invs.*, Adv. Pro. No. 23-03091 (MI)

We respectfully submit this letter on behalf of Carlyle and Platinum, in response to this Court's request for "documents, if they exist, from DTC, that describe the procedure to get an authorization to sue," May 16, 2024 Tr. (Rough) at 200-01, and accompanying explanations of the documents, June 14, 2024 Tr. (Rough) at 58. The DTC documents we have proffered show that DTC's authorization process in no way bars prior beneficial owners from bringing tort claims against third parties. There is no constraint on a prior noteholder obtaining an authorization letter from the DTC, nor is there any requirement that such a noteholder do so. The two documents that Langur Maize has proffered are not to the contrary; in fact, absent passing references in one of them, those materials do not mention authorization letters at all.

Documents proffered by Carlyle and Platinum

The materials proffered by Carlyle and Platinum make clear that a prior beneficial owner could, if it wished, obtain an Authorization to Take Action Letter from DTC. Carlyle and Platinum have proffered (1) a webpage entitled "Proxy Services Letters" from DTC's website, which includes hyperlinks to a "Checklist" with the instruction to "Review This Before Submitting Letters," and to a template for a letter from a DTC Participant to DTC instructing DTC to issue an "Authorization to Take Action Letter," ECF 1364-27; (2) the linked checklist, ECF 1364-28; (3) the linked instruction letter template, ECF 1364-29; and (4) a screenshot of the "Proxy Services" webpage from DTC's website, ECF 1407-1.

The checklist (ECF 1364-28)[1] provides detailed logistical instructions to obtain Authorization to take Action Letters from DTC, such as the required formatting, submission procedures, and anticipated turnaround time. The checklist certainly does not state or imply that DTC will issue Authorization to Take Action Letters only to Participants acting on behalf of current beneficial owners. To the contrary, it suggests that prior beneficial owners ***can*** obtain authorization, as it uses the past tense: "Before submission, please ensure that . . . [t]he Instruction Letter and Cede & Co. Letter reflect . . . the date that the position ***was held*** for the benefit of the beneficial owner." ECF 364-27 at 1.

[1] Carlyle and Platinum proffered the "Proxy Services Letters" landing page from DTC's website, ECF 1364-27, for completeness, because it contains the links to the checklist and templates discussed herein.

The template (ECF 1364-29) is a Word document available for download from DTC's website, which includes a template authorization request letter to DTC from a Participant, and a template authorization letter from DTC to such requesting party. As the checklist instructing Participants how to use the template suggests, the touchstone of the inquiry is the "Subject Date" – whether the beneficial owner in question held notes on that date, without regard to whether it continues to hold. The template, like the checklist, employs the past tense; it asks DTC to "sign the attached authorization letter . . . . to authorize our customer Beneficial Owner, on whose behalf we ***held*** the Subject Notes in our Participant's Account on . . . the Subject Date to take—solely with respect to Subject Notes beneficially owned by the Beneficial Owner on the Subject Date—any and all actions and exercise any and all rights and remedies that Cede & Co., as the holder of record of the Subject Notes on the Subject Date, is entitled to take . . . ." The template responsive letter is likewise focused on the "Subject Date" without regard to continued ownership, stating that it "authorizes the Participant, solely with respect to the Subject Notes beneficially owned by the Beneficial Owner on the Subject Date, to take any and all actions and exercise any and all rights and remedies that Cede & Co., as the holder of record of the Subject Notes on the Subject Date, is entitled to take . . . ." ECF 1364-29 at 3.

The final document that we proffer, the "Proxy Services" webpage, likewise does not state or imply that current ownership of a security is required to obtain a letter. It describes, in general terms, the process for obtaining Authorization to Take Action Letters: "In order to exercise such rights through DTC on its own behalf or on behalf of its customers, the Participant must complete and submit to DTC via the MyDTCC portal an instruction letter identifying the issue and the quantity of securities involved, the beneficial owner and the nature of the request, along with the exact form of securityholder letter the Participant is instructing Cede & Co. to sign in order to exercise the relevant rights for the beneficial owner." ECF 1407-1 at 3.

The only fair reading of these DTC-published materials is that DTC's status as Record Holder will not stand in the way of prior beneficial owners asserting claims if they held on the Subject Date. The template for the letter from DTC to the Participant, like the Authorization to Take Action Letters that DTC sent to Bank of New York Mellon in connection with Langur Maize's 2027 Notes, *see* ECF 1075-1, states that DTC "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." ECF 1364-29 at 3. And the checklist for Participants seeking to obtain a letter notes that "DTC and Cede & Co. do not take a position as to the sufficiency of any demand/dissent letter, whether from a legal standpoint or otherwise, for any particular purpose." ECF 1364-28 at 1.

All of this is completely consistent with the legal position advanced by Carlyle and Platinum in this matter, which is that DTC authorization is not required for tort claims against third parties. *See* ECF 1398 at 84. Even if it were required, DTC's procedures permit prior beneficial owners to obtain such authorization as reflected above.

Documents proffered by Langur Maize

Nothing Langur Maize has proffered changes this conclusion. It has filed (1) the DTCC Asset Services Reorganizations Service Guide and (2) the DTC's Rules, By-Laws, and Organization Certificate. *See* ECF 1361-1 and -2.

The Asset Services Reorganizations Service Guide is relevant only insofar as it contains (1) a general description of the fact that Participants can request Authorization to Take Action Letters; and (2) a link to the "Proxy Services" webpage on DTC's website that Carlyle and Platinum proffered. ECF 1361-2 at 25. It otherwise sheds no light on the Court's questions.

The DTC Rules (ECF 1361-1) are even less probative. ***The Rules nowhere mention Authorization to Take Action Letters***. Langur Maize evidently seeks to offer the Rules into evidence to make two baroque and demonstrably wrong arguments about DTC Rule 9(B), which pertains to "Transactions in Eligible Securities." *See* Langur Maize Post-Trial Br. (ECF 1395) at 35-38.

First, Langur Maize cites DTC Rule 9(B)(1): "The Corporation shall not act on an instruction received by the Corporation from an Instructor to effect a Delivery, Pledge, Release or Withdrawal, or any other transaction affecting the Account of the Instructor or another Participant or Pledgee (other than a transaction classified in the Procedures as exempt from this Section), unless the Securities (if the transaction involves Securities) are, prior to the transaction, Deposited Securities or Pledged Securities reflected in the Account of the Instructor." According to Langur Maize, this language "provides that Participant may only give instructions concerning transactions (*e.g.*, that DTC sign an authorization to Take Action Letter) if that Participant holds Deposited Securities at the time it gives the instruction to DTC." ECF 1395 at 35. This is nonsense. DTC Rule 9(B) is about "Transactions in Eligible Securities," not furnishing Authorization to Take Action Letters. Of course DTC will not consummate a securities ***transaction*** without proof of current ownership. Langur Maize offers no support for the notion that the same restriction applies to Authorization to Take Action Letters, which would contradict the use of past tense in the Authorization to Take Action Letter template and checklist. Nor does Langur Maize address DTC's general statements that it will (i) ensure that beneficial owners can assert rights they held on the Subject Date; and (ii) take no other legal position on the effectiveness of Authorization to Take Action Letters.

Second, Langur Maize cites DTC Rule 9(B)(2) as one step in a chain of (faulty) inferences leading to the purported conclusion that the 2027 Indenture itself somehow effected a transfer from the prior beneficial owners to Langur Maize of tort claims against third parties. *See* ECF 1395 at 36-38. While Langur Maize's argument is difficult to understand, it seems to proceed as follows:

Langur Maize starts with unrelated provisions in two documents: Source 1: DTC Rule 9(B)(2) provides that DTC "shall hold the entire interest in, and shall have the authority of a holder of Securities to act, in its sole discretion, with respect to any Securities Delivered Versus Payment, which are the subject of an Incomplete Transaction, to issue or transfer the entire

interest in such Securities, including the authority to sell, Pledge or otherwise dispose of such Securities." Source 2: Section 2.06(b) of the 2027 Indenture (ECF 601-7) states: "The transfer and exchange of beneficial interests in the Global Notes will be effected through [DTC], in accordance with the provisions of this Indenture and the Applicable Procedures."

Langur Maize then connects these two sources in a wholly illogical way. Notwithstanding that DTC Rule 9(B)(2) on its face applies ***only*** to "Incomplete Transactions," and thus is not applicable here, Langur Maize contends that it somehow governs ***all*** transfers of 2027 Notes because Section 2.06(b) of the Indenture refers to DTC's Rules, and Rule 9(B)(2) is one of those Rules. Therefore, according to Langur Maize, because DTC Rule 9(B)(2) includes the phrase "transfer the entire interest in such Securities," even though that rule pertains to Incomplete Transactions, all transfers of beneficial interests in 2027 Notes include a transfer of the "entire interest" in the 2027 Notes.

It is difficult to imagine a more attenuated argument. Langur Maize's failure to cite ***a single case, rule, contractual clause, or scintilla of evidence in this case*** stating that the 2027 Indenture (or an indenture like it) effects a transfer of tort claims is reason enough to dismiss Langur Maize's argument about assignment. Instead of offering actual legal authority or evidence, Langur Maize asks the Court to conclude that because one of DTC's numerous rules—which has nothing to do with Authorization to Take Action Letters or the circumstances of this case—includes the phrase "transfer the entire interest," and because the 2027 Indenture generally incorporates the DTC Rules, it must be the case that the prior beneficial owners transferred tort claims to Langur Maize. The mere restatement of this argument underscores its absurdity.

As noted, Langur Maize's argument is predicated on the applicability of DTC Rule 9(B)(2), which applies to "Incomplete Transactions." It is therefore not relevant to the transfers of the 2027 Notes that Langur Maize now owns, because there is no Incomplete Transaction at issue here. Langur Maize's argument that DTC Rule 9(B)(2) applies universally because "[t]here is . . . a point in any Delivery Versus Payment transaction where the transaction is an 'Incomplete Transaction,'" ECF 1395 at 37 n. 128, is frivolous. It is analogous to arguing that a curfew on teenagers applies to adults, because all adults were once teenagers.

Langur Maize nevertheless goes on to cite Second Circuit caselaw which, while irrelevant, also does not say what Langur Maize suggests. It first cites *Pennsylvania Public School. Employees' Retirement System* v. *Morgan Stanley & Co. ("PSERS I")*, 772 F.3d 111 (2d Cir.), *as amended* (Nov. 12, 2014), to argue that "the entire interest" in a security is a legal term of art that includes tort claims against third parties, but *PSERS* in fact ***refutes*** Langur Maize's argument. In *PSERS I*, the Second Circuit certified to the New York Court of Appeals the question of "whether the intent of parties to transfer a whole interest, combined with the absence of limiting language, suffices to transfer an assignor's tort claims, or whether an additional, more specific statement of an intent to transfer tort claims is required." *Id.* at 123. The Court of Appeals answered definitively that "proof of a subjective, uncommunicated intent to transfer a whole interest in a note—in the absence of limiting language," did not "suffice[] to transfer an assignor's tort claims related to such note under New York law." *Commonwealth of Pennsylvania Pub. Sch. Emps.' Ret. Sys.* v. *Morgan Stanley & Co. ("PSERS II")*, 25 N.Y.3d 543,

549 (2015). "Because DAF's sale of the notes, in the conceded absence of any expression of a contemporaneous intent to transfer related tort claims to Dresdner, did not, under New York law, effectuate an assignment of the fraud claim Commerzbank now seeks to pursue, Commerzbank ha[d] failed to raise a question of fact concerning standing." *Id.* at 553. The *PSERS* cases thus do not support Langur Maize's argument; they foreclose it. Langur Maize attempts to distinguish this controlling New York Court of Appeals authority by arguing that here, the indenture provisions and DTC Rules they have cited demonstrate "a clear intent to assign and transfer" tort claims that was absent in *PSERS*. ECF 1395 at 37 n.130. This is wrong. The debt instrument at issue in the *PSERS* case—just like the 2027 Indenture in this case—included a transfer provision that incorporated the DTC Rules by reference. *See* Cheyne Finance Capital Notes LLC, U.S. $3,000,000,000 Capital Note Program at 138, *Abu Dhabi Commercial Bank et al.* v. *Morgan Stanley & Co.*, No. 8 Civ. 7508 (SAS), ECF 464-6 (S.D.N.Y. July 2, 2012) ("Transfers of any interests in Capital Notes represented by a Global Capital Note within DTC will be effected in accordance with the customary rules and operating procedures.").

Langur Maize also misinterprets *Cortlandt St. Recovery Corp.* v. *Hellas Telecommunications*, 790 F.3d 411 (2d Cir. 2015), which it cites for a similar proposition. Langur Maize simply misreads *Cortlandt*. The case holds that "[t]o assign a claim effectively," the assignor must "manifest[] [his or her] intention to . . . accomplish a completed transfer of the entire interest of the assignor in the particular subject of assignment." *Id.* at 418 (cleaned up). In context, the "subject of assignment" is the claim, ***not*** the underlying security. The next paragraph of the opinion confirms this reading: "Cortlandt has not carried its burden of showing a valid ***assignment of a claim***. First, Cortlandt's complaint does not allege ***'a completed transfer' of the noteholders' 'entire interest' in any claim*** arising under the Sub Notes." *Id.* (emphasis added). There is no dispute that if the prior beneficial owners had manifested their intent to transfer their entire interest in tort claims against third parties to Langur Maize, Langur Maize would have standing. But that did not happen. Langur Maize has adduced no evidence of any such intent, nor could it, given that it does not even know the identity of the prior beneficial owner. And under *PSERS II* and *Cortlandt*, the transfer of an "entire interest" in the 2027 Notes did not accomplish an assignment of tort claims in the absence of a contemporaneous manifestation of intent to assign such claims.

The publicly available DTC documents in no way state or imply that a prior beneficial owner could not obtain an Authorization to Take Action Letter; to the contrary, their plain language, together with DTC's other statements, suggests that DTC would not bar a prior beneficial owner from obtaining such an authorization letter. The materials submitted by Langur Maize are largely irrelevant, and its convoluted theory of standing should be rejected. For the reasons set forth above, and in the prior briefing, ECF 1398 at 81-85, the Court should take comfort from the fact that prior beneficial owners have the ability both to obtain DTC authorization to sue and to bring tort claims (even without DTC authorization). Thus, a holding that Langur Maize lacks standing to assert third-party tort claims will not result in an absurd result. The prior holders retain standing to assert claims, and nothing in the DTC materials suggests otherwise—those prior holders simply failed to expressly assign the tort claims to Langur Maize, thereby precluding standing under applicable New York law and Article III.

Respectfully submitted,

/s/ William A. Clareman

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