Docket #1394 Date Filed: 6/17/2024

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

In re **WESCO AIRCRAFT HOLDINGS, INC.**, *et al.*, Debtors.[1]	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
SSD INVESTMENTS LTD., *et al.*, Counterclaim Plaintiffs, *v.* **WESCO AIRCRAFT HOLDINGS, INC.**, *et al.*, Counterclaim Defendants.	

2024/2026 HOLDERS' POST-TRIAL BRIEF

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

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TABLE OF CONTENTS

PRELIMINARY STATEMENT **1**

SELECT BACKGROUND AND EVIDENCE **2**

I. The "singular," "unified" transaction. 2

II. The single, unified closing. 4

III. The coerced breaches. 6

IV. The facade of negotiating with the 2024/2026 Holders. 8

THE PHANTOM NOTES WERE NOT VALIDLY ISSUED **10**

V. The Phantom Notes were not valid under the Indenture because their issuance lacked supermajority consent. 10

A. The "adverse-effect" protection. 10

B. The "lien-release" protection. 14

C. The "direct/indirect" protection. 15

VI. The 2022 Transaction was a single event as a matter of fact and economic substance. 16

VII. The 2022 Transaction also required but did not have supermajority consent because its purported steps have no effect under the Indenture or New York law. 17

A. The Indentures' Rules of Construction prevent the type of circumvention attempted by Counterclaim Defendants. 17

B. New York law also requires collapsing of the 2022 Transaction. 21

VIII. The Trustee's failure to authenticate the Phantom Notes on March 28, 2022 makes their purported consents invalid and reinforces that they were a sham. 24

A. Most Phantom Notes were not manually signed by the Trustee. 24

B. None of the Phantom Notes were "authenticated" by the Trustee and thus they could not consent to the 2022 Transaction. 26

C. The Counterclaim Defendants cannot rewrite the 2022 Transaction to belatedly comply with the Indenture's authentication requirements. 29

IX. The 2022 Transaction breached other provisions of the Indentures. 33

THE 2024/2026 HOLDERS ARE ENTITLED TO MEANINGFUL REMEDIES 34

X. Counterclaim Defendants cannot escape liability for tortious interference under the economic interest doctrine. 34

XI. The Court can and should grant the 2024/2026 Holders equitable relief in the form of specific performance to restore their position prior to the 2022 Transaction. 38

A. The 2024/2026 Holders are entitled to equitable relief as a matter of state law. .. 39

B. The 2024/2026 Holders' state law equitable remedies are available in bankruptcy. 42

XII. This Court can also equitably apportion distributable value through equitable lien and equitable subordination. 44

A. Relevant procedural history. 45

B. Equitable subordination 45

C. Equitable lien 46

D. The Debtors have unjustifiably refused to pursue equitable subordination and equitable lien, and the 2024/2026 Holders should be given exclusive settlement authority over such claims 47

XIII. The Counterclaim Defendants' last-ditch arguments also fail. 48

CONCLUSION 49

PRELIMINARY STATEMENT

The trial record overwhelmingly establishes that the function of the Additional Secured Notes—a.k.a. Phantom Notes—was to release all existing liens and create new liens in favor of new super-senior debt. The Indentures and New York law are clear, however: the Phantom Notes could not be issued or voted for that purpose, nor were they ever valid. And, in any event, the Counterclaim Defendants could not do through two purported amendments what they could not have done with one. Those purported amendments were a single, integrated, and prohibited transaction. The 2022 Transaction thus violated the Indentures for a host of independent reasons.

The Counterclaim Defendants' objective in breaching—induced by PIMCO, Silver Point, Citadel, Senator, and Platinum for their own direct economic gain—was to take $525 million in security interests from ***excluded*** holders of secured notes and redistribute those security interests to the Favored Noteholders, inclusive of $250 million ***new super-senior*** (not *pari passu*) notes. From this new money, the Company immediately paid out $26 million for professional fees and incurred $16 million in PIK fees going to the Favored Noteholders. Additionally, the Company agreed to extraordinarily expensive and purportedly senior-secured indemnity obligations imposed by PIMCO and Silver Point in anticipation of this very litigation, which now total tens of millions of dollars in addition to the Company's own extensive legal costs.

The 2022 Transaction was an unmitigated disaster. The Company was cash-strapped again just five months after closing, before any litigation commenced. And just a few months later, the Company hired the same advisors it had just paid millions of dollars to arrange the 2022 Transaction—now to plan for this bankruptcy case. Having undertaken such an aggressive and exclusionary transaction a few months earlier, there was no well for the Company to go back to for any out-of-court financing. Instead, the Debtors filed for chapter 11 protection.

As the Debtors acknowledged in their complaint, prompt adjudication of "the propriety of the 2022 Transaction, the legitimacy of the Debtors' capital structure, and all other [related] issues" are "necessary to confirm a plan of reorganization." ECF 63 ¶ 9. As shown at trial, the Debtors' view of the "ranking of certain creditors against others" rests entirely on the wrongful redistribution of the 2024/2026 Holders' Liens. ECF 63 ¶ 16. The Court can and should correct the capital structure.

In addition to the arguments set forth below, the 2024/2026 Holders expressly incorporate by reference their previous written submissions, including their Rule 12(c) Motion, MSJ Objection, Rule 12(c) Reply, Standing Motions, and Standing Motion Replies, as well as their oral and other written submissions.[2] The 2024/2026 Holders also join Langur Maize's post-trial brief except to the extent that its characterization of the 2022 Transaction accepts the Counterclaim Defendants' feigned sequencing or steps. The 2024/2026 Holders further reserve the right to rely on other evidence, authorities, and arguments in response to arguments invited by the Counterclaim Defendants, raised in closing arguments, or as applicable after initial closing arguments on June 24 and 25.[3]

SELECT BACKGROUND AND EVIDENCE

I. The "singular," "unified" transaction.

To begin, the Counterclaim Defendants' own witnesses admitted that the 2022 Transaction was "singular" and "unified." To illustrate:

[2] *See* ECFs 200 ("12(c) Motion"), 299 (2024/2026 Holders Obj.), 326 ("12(c) Reply"), 579 (Standing Argument, Jan. 18 Tr.), 1008 (510(c) Argument, Mar. 13 Tr.); Main Case ECFs 652 ("Supplemental Standing Motion") & 1235 ("Standing Motion Reply"). Capitalized terms not otherwise defined herein shall have the same meaning ascribed to them in the 12(c) Reply.

[3] The 2024/2026 Holders look forward to oral closing arguments and set forth here only a representative selection of evidence and argument. The parties agreed not to brief any issues related to fraudulent transfer claims or any issues related to remedies or damages other than the threshold question of the availability of certain remedies. The 2024/2026 Holders reserve their rights to submit further briefing on those issues in due course.

- The Company's CFO, Ray Carney, who was authorized by the Board to execute the 2022 Transaction on behalf of all Debtors, testified that it was a "***singular transaction that was negotiated in its totality***." ECF 694 (Carney, Jan. 31 Tr.) at 116:24-117:8 (emphasis added); *see also id.* at 48:3-10, 69:6-14 (emphasis added).

- Roopesh Shah, PIMCO's and Silver Point's financial advisor, testified at trial that "the exchange and the new money were all part of ***a single unified transaction***." ECF 939 (Shah, Feb. 27 Tr.) at 179:20-22 (emphasis added).

- The Counterclaim Defendants' contemporaneous documents describing the 2022 Transaction uniformly depict it as one unified commercial event, in the singular, not plural. *See, e.g.*, ECF 536-24 at 1–2 (board minutes referring to the "Proposed Transaction"); ECF 726-3 at 2 (Dec. 2021 Silver Point Draft Transaction Overview); ECF 700-35 at 4 (Sept. 2021 Silver Point internal email proposing "a serta-type transaction").

- The Debtors' and Platinum's own expert viewed the transaction "***as a whole***" to opine on its liquidity benefits to the Company. ECF 1351 (Rule, Jun. 5 Tr.) at 58:10-12 (emphasis added).

The Company undertook this "single," "unified" 2022 Transaction with ***less than*** two-thirds consent of 2026 Notes to bring in $250 million of new money ***on a super-senior***—not *pari passu*—basis.

- Mr. Carney "understood" before executing the 2022 Transaction on behalf of the Company that the "$250 million" in "***new money*** was to be first lien, super-senior debt." ECF 694 (Carney, Jan. 31 Tr.) at 71:18-72:3 (emphasis added).

- Malik Vorderwuelbecke, a Board member, testified that "[he] approved this transaction" (singular) knowing that "the PIMCO Silver Point Group owned less than 2/3's of the 2026 note[s]" and were "***not willing to provide new money on a pari passu basis***." ECF 697 (Vorderwuelbecke, Feb. 1 Tr.) at 103:1-4, 106:14-17 (emphasis added).

- PIMCO and Silver Point "communicated to the Company that they were not willing to do a *pari passu* transaction." ECF 725-47 at 130:5-12 (Shah Dep. Tr.); ECF 939 (Shah, Feb. 27 Tr.) at 202:8-21, 203:18-24. And they "would not have provided that new capital without also receiving super-senior first out debt." ECF 939 (Shah, Feb. 27 Tr.) at 200:7-10.

PIMCO's, Silver Point's, and Citadel's admissions and contemporaneous records likewise establish that Phantom Notes were a mere prop.

- PIMCO's trade ticket and trade log for its ***new money*** investment—which by regulation are required to be accurate—reflect that the new money purchased "**INCORA SUPER SENIOR 10.5% BONDS**," *i.e.* the New 1L Notes, ***not*** the Phantom Notes. *See generally* ECFs 725-28 & 727-3 (PIMCO Trading Reports showing that PIMCO purchased ***only*** New 1L Notes and ***not*** Phantom Notes); ECF 969 (Dostart, Feb. 29 Tr.) at 156:6-157:24, 158:22-25 (confirming the accuracy of PIMCO's Trading Report); ECF 905-6 at 2–3 (Mar. 18, 2022 Email) (emphasis added).

- Silver Point's and Citadel's contemporaneous trade logs and other documents also contradict the feigned sequencing, by showing the supposed purchases of Phantom Notes ***after*** the New 1L Notes. *Compare* ECF 729-53 at rows 2585-3199 (acquiring New 1L Notes), *with* 3200-3208 (acquiring Phantom Notes); ECF 716-38 at 2 (internal Citadel correspondence confirming receipt of New 1L Notes at 7:06:55 p.m. UTC on Mar. 28, 2022, prior to physical receipt of the Phantom Notes); *see also* ECF 1173 (Rochard, Apr. 12 Tr.) at 49:4-20, 51:20-52:1 (testifying that Citadel had to physically receive Phantom Notes before exchanging for New 1L Notes, but Mr. Rochard had no basis to believe that Citadel had physically received Phantom Notes before receiving New 1L Notes).

- There is no record evidence that PIMCO, Silver Point, or Citadel considered ***any risk*** of actually holding *pari passu* debt, reflecting the certainty that the exchange of all their debt into New 1L Notes would occur. *Cf.* ECF 700-58 at 3 (Sept. 2021 PIMCO Deck re Incora); ECF 955 (Dostart, Feb. 28 Tr.) at 198:14-199:16, 199:21-200:4; ECF 734-8 at 2–5 (Sept. 29, 2021 Silver Point Incora Update).

II. The single, unified closing.

The 2022 Transaction's closing was one ten-minute event in which everything was agreed and the exchange into New 1L Notes and New 1.25 Notes was a preordained commercial and legal certainty.

- All of the 2022 Transaction Documents—including the Third and Fourth Supplemental Indentures, the Company's orders both to issue and to cancel the Phantom Notes, the Exchange Agreement, and the multitude of exchange-related documents—were fully executed and circulated before the closing call. *See, e.g.*, ECF 710-56 (Mar. 25-28, 2022 Email correspondence attaching Transaction Documents); 711-10 at 2 (Mar. 26, 2022 Email); ECF 1184 (Osornio, Apr. 18 Tr.) at 220:3-10, 225:9-226:4.

- Counsel for all parties agreed before the closing call: "everything happens ***in order and at the same time***." ECF 733-55 at 2 (Mar. 24, 2022 Email) (emphasis added, all-capitalization removed).

- PIMCO and Silver Point made specific performance a remedy in the Exchange Agreement to ensure that their $250 million of new money would be New 1L Notes, not *pari passu* Phantom Notes; as stated by their counsel in the days leading up to the closing: "***We are funding new money and need to know that*** all consents get delivered and ***the exchange actually happens***. ***Having certainty*** that everyone performs under each document ***once this thing gets started*** has been a fundamental point for us from day 1." ECF 782-11 at 1 (emphasis added). For this reason, counsel implored we are "***not ever going to be ok removing specific performance***." ECF 733-55 at 4 (Mar. 23, 2022 Email) (emphasis added).

- PIMCO and Silver Point authorized their counsel to "release signature pages" at the closing "***concurrent*** with the release of all other parties' signature pages"—*i.e.*, at the same time. ECF 710-9 at 2-4 (Mar. 27, 2022 Email) (emphasis added).

- The parties held a single closing call in the morning of March 28, 2022, beginning at 8:15 a.m. ET. The closing was conducted "***in accordance with the Exchange Agreement***," during which the parties "authorize[d] the release of ***all of their signature pages . . . without any further action by any party***." ECF 1146-5 at 2 (Incora Closing Call Script) (emphasis added); ECF 1184 (Osornio, Apr. 18 Tr.) at 46:13-14, 48:4-5, 206:2-5.

- The "[Exchange] Agreement ***and*** the other Transaction Documents," including all consents, amendments, and the Note Purchase Agreement, "***constitute[d] the entire contract*** between the parties ***with respect to the Exchange***." ECF 1146-4 at 17, 41 (Section 9.08) (emphasis added).

The communications purporting to issue, authenticate, and concurrently cancel the Phantom Notes were a charade. All post-closing acts were a ministerial implementation of what had already been fully agreed upon when all signatures were released ***on the call***.[4]

- The release of the $250 million occurred ***after*** the single closing call, in which ***all*** signature pages had been released:

  - At 8:26 a.m., PIMCO's and Silver Point's counsel emailed their clients to say that the "***signature pages have now been released*** and we have ***confirmed release of the funds*** held in the escrow account." ECF 716-15 at 2 (emphasis added).

[4] Despite the 2024/2026 Holders' interrogatories, the Counterclaim Defendants still have not provided a complete account of the supposed sequencing of the 2022 Transaction. *See, e.g.*, ECF 1305-4 at 3 (Debtors' Response to Interrogatory No. 11). As will be discussed further at closing argument—once they settle on a story—the Complaint, closing script, transaction documents, testimony, and emails are inconsistent.

- At the same time, Mr. Rochard from Citadel reported internally that the "***transaction has officially closed***." ECF 1117-15 at 1 (emphasis added).

- At 8:53 a.m. ET, Jesse Hou from Carlyle wrote: "Closed this morning, ***all sig pages released***, wires released . . . ." ECF 723-8 at 2 (emphasis added); ECF 832 (Hou, Feb. 8 Tr.) at 223:1-8.

- There was nothing further to be agreed upon or negotiated after the closing call. ECF 1184 (Osornio, Apr. 18 Tr.) at 206:6-12.

WSFS, moreover, never authenticated the Phantom Notes:

- On or about March 21, 2022, a week before the closing, John McNichol at WSFS manually signed pages in blank that were not appended to notes in any form, let alone ones that had been signed by an Officer of the Company. Three such pages were later, on March 28, 2022, placed by the Company's counsel behind signature pages that had been signed in blank by Ray Carney on or about March 20, 2022. ECF 1350 (Healy, Jun. 3 Tr.) at 72:24-74:17, 284:20-285:6; *see* ECF 1298-4 at 1, 4; ECF 664 (Carney, Jan. 30 Tr.) at 100:14-101:4.

- The other 35 of the 38 Phantom Notes included facsimiles (*i.e.*, photocopies) of one of Mr. McNichol's manual, wet-ink authentication certificate pages. ECF 1350 (Healy, Jun. 3 Tr.) at 289:17-20; ECF 1184 (Osornio, Apr. 18 Tr.) at 170:7-11.

- All WSFS ever provided were a slew of blank signature pages. Mr. Healy executed some of these even before WSFS assumed the role of Trustee, although none were ever used. ECF 1350 (Healy, Jun. 3 Tr.) at 62:1-63:16, 65:14-67:5. Mr. McNichol executed others a week before the 2022 Transaction in a packet that included no instruction or indication that they were to be held in escrow. *See* ECF 1298-8.

III. The coerced breaches.

PIMCO's and Silver Point's objective never changed: an uptier transaction where they would provide $250 million in ***super-senior*** first-out debt financing ***and*** exchange all of their preexisting debt into those New 1L Notes, while stripping all Liens from ***$525 million*** of the excluded Holders' Notes. That was the deal they had planned and that was the deal they did. And they knew they needed a supermajority of existing 2026 Notes to do it.

- In September 2021, Silver Point conceived a possible "Serta-type transaction where two-thirds of the [2024 and 2026 Notes] elevates above the other one-third . . . ."). ECF 700-35 at 4 (Sept. 9, 2021 Email); ECF 1013 (Prager, Feb. 12 Tr.) at 160:25-161:25, 162:8-16.

- Also in September 2021, PIMCO recognized that this uptier would be to the direct "***detriment***" of excluded holders, who would no longer be pari with the claims that were uptiered. ECF 700-58 at 3 (emphasis added); ECF 955 (Dostart, Feb. 28 Tr.) at 198:14-199:16, 199:21-200:4.

- PIMCO and Silver Point set out to increase their holdings to meet the two-thirds consent threshold in anticipation of priming the excluded one-third. ECF 725-28 at 5-15 (PIMCO Trading Report); ECF 729-53 at 26-29 (Silver Point Trading Report).

- PIMCO's and Silver Point's written communications for months thereafter reflected the need for a two-thirds supermajority of ***existing*** 2024 and 2026 Notes. ECF 700-35 at 4 (Sept. 9, 2021 Email); ECF 734-8 at 2-3 (Sept. 29, 2021 Silver Point Incora Update); ECF 782-5 at 1; ECF 782-4 at 1; ECF 955 (Dostart, Feb. 28 Tr.) at 198:14-199:16.

When PIMCO and Silver Point could not amass a supermajority on their own, they brought in other holders to meet the two-thirds threshold even though doing so diminished the returns they expected to receive from the transaction. ECF 700-76 at 2; ECF 955 (Dostart, Feb. 28 Tr.) at 234:17-21; ECF 1013 (Prager, Feb. 12 Tr.) at 188:11-190:2.

- PIMCO and Silver Point recognized that partnering with other investors or exceeding two-thirds by a material amount would erode their own deal economics. ECF 727-24 at 3 (Oct. 18, 2021 Email); ECF 700-76 at 2 (Nov. 3, 2021 Email); ECF 955 (Dostart, Feb. 28 Tr.) at 13:3-14:22, 233:17-21; ECF 1013 (Prager, Feb. 12 Tr.) at 50:16-51:8, 180:4-12, 188:11-190:2.

- By early February 2022, PIMCO and Silver Point thought they had a group that could grant the requisite two-thirds supermajority of the ***existing*** 2026 Notes. ECF 782-3 at 2 (Feb. 9, 2022 Email); ECF 542-8 at 2 (Feb. 16, 2022 Email from Evercore confirming group holdings); ECF 868 (Prager, Feb. 13 Tr.) at 6:18-24, 7:18-9:22.

- Citadel confirmed that it signed the cooperation agreement "to be part of a two-thirds voting transaction" with PIMCO and Silver Point. ECF 1173 (Rochard, April 12 Tr.) at 25:21-25.

- Silver Point's deal team leader, Mr. Prager, repeatedly emphasized the importance of the two-thirds supermajority of existing 2026 Notes, *e.g.*:

"***[w]e're exactly at 67.1 percent***" of the 2026 Notes "with that $25 million" held by Senator. ECF 782-3 at 1 (emphasis added); ECF 868 (Prager, Feb. 13 Tr.) at 7:18-8:15.

When PIMCO and Silver Point began to realize that they might not actually have consents from two-thirds of the 2026 Notes, they panicked.

- PIMCO's deal team leader, Mr. Dostart, was "worried enough where he wants to be a bit over" two-thirds of existing 2026 Notes. ECF 782-5 at 1 (Feb. 10, 2022 Email); ECF 868 (Prager, Feb. 13 Tr.) at 16:11-24, 17:13-18:17.

- Mr. Prager understood Mr. Dostart was "stressed . . . that there would not be the ability of the co-op members to vote 66 and two-thirds of the 2026 bonds." ECF 868 (Prager, Feb. 13 Tr.) at 18:9-15.

- Mr. Prager implored another co-op member "to ***rip back*** borrow," for their group to have two-thirds of existing 2026 Notes. ECF 782-8 at 2-3 (Feb. 15, 2022 Email) (emphasis added); ECF 868 (Prager, Feb. 13 Tr.) at 34:2-36:19.

By the third week of February, the Counterclaim Defendants knew they lacked the requisite supermajority consent.

- As Platinum recounted, Evercore "might have gotten their numbers wrong and there [was] the potential for a blocking stake." ECF 623-4 at 1 (Feb. 16, 2022 Email).

- On February 21, counsel for certain of the 2024/2026 Holders provided the Company's advisors with details regarding its group's position in 2026 Notes, which reflected that they held over 36% of the voting rights of that tranche. ECF 639-5 at 3 (Exhibit A to Feb. 21, 2022 Letter).

- On or about February 22, PIMCO and Silver Point proposed to the Company, for the first time, a supposed way of executing the uptier with a bare majority of 2026 Notes, and the next day Kevin Smith contacted BNY about resigning as Trustee because litigation was anticipated. ECF (O'Connell, Feb. 21 Tr.) at 262:3-21; ECF 827 (Smith, Feb. 9 Tr.) at 183:18-184:15; ECF 725-31 (Bush Dep. Tr.) at 31:5-23, 32:7-10; ECF 538-30 at 2-3 (Feb. 23, 2022 Email).

IV. The facade of negotiating with the 2024/2026 Holders.

By late February, Silver Point was hiding information from PIMCO to keep its "***feet to the fire***," while also knowing that certain of the 2024/2026 Holders ("Akin Group") had proposed a

pro rata deal open to all first-lien debt holders that would provide the Company with ***comparable liquidity*** to the PIMCO and Silver Point proposal. ECF 705-17 at 2 (Feb. 22, 2022 Email); ECF 705-50 at 2-3 (Feb. 26, 2022 Email); ECF 868 (Prager, Feb. 13 Tr.) at 63:7-17, 65:7-14, 66:11-67:19. When the Company's counsel reported to Silver Point that there were 20 days more than previously expected until the Company's "drop dead" date by which it needed liquidity, Mr. Prager was disappointed because he wanted to keep pressuring PIMCO, and he agreed not to tell them for that reason. ECF 705-17 at 2 (Feb. 22, 2022 Email); ECF 868 (Prager, Feb. 13 Tr.) at 53:20-55:2, 55:13-56:10.

The Company agreed to terms with the PIMCO/Silver Point group on February 25, 2022, but kept up a facade of negotiating with the Akin Group for a full month. As one Carlyle deal team member relayed after a call, the "Company and its advisors ***are swearing up and down that they're not talking to the Akin Group***." ECF 723-6 at 7-8 (emphasis added). And, in fact, they never substantively engaged with the Akin group's proposals. No counterproposal was ever made to the Akin group proposals. ECF 1007 (Cesarz Mar. 12 Tr.) at 38:16-18, 58:22-59:3, 78:9-79:16, 81:21-82:23. In fact, no witness could credibly explain why the Company never engaged seriously with the Akin Group, which was willing to provide a similar amount of liquidity as PIMCO and Silver Point through their March 11, 2022 proposals, which would be open to all Holders. ECF 1119 (Bartels, Apr. 5 Trial Tr.) at 75:11-15, 76:23-77:12.

The Company only gave the Akin Group's financial advisor access to the data room on March 27, 2022—the Sunday right before the 2022 Transaction closed—and it never gave access to the members of the Akin Group despite their willingness to get restricted. ECF 879 (O'Connell, Feb. 21 Tr.) at 249:7-13; ECF 1007 (Cesarz, Mar. 12 Tr.) at 8-16.

THE PHANTOM NOTES WERE NOT VALIDLY ISSUED

The Court posed this question for consideration: could the Company validly issue Additional Secured Notes (a.k.a. Phantom Notes) without supermajority consent, if those notes' function was to adversely affect the excluded Holders' Liens on the Collateral? *See* ECF 1247 (May 1 Tr.) at 149:18-21; ECF 1297 (May 16 Tr.) at 164:24-165:1; *see also* ECF 508 at 44 (Memorandum Opinion on Motions for Summary Judgment). The answer to that question is ***no***. The Company needed supermajority consent to issue $250 million of Additional Secured Notes even if they were genuinely *pari passu*, although they were not. That breach alone dooms the 2022 Transaction. But, because the function of the Phantom Notes was not just to adversely affect the excluded Holders' Liens on the Collateral, but to release those Liens altogether and create new liens, the issuance of the Phantom Notes breached other provisions of the Indentures as well.

V. The Phantom Notes were not valid under the Indenture because their issuance lacked supermajority consent.

A. The "adverse-effect" protection.

With less than two-thirds consent of Holders of 2026 Notes, the Third Supplemental Indenture attempted to expand the definition of "Permitted Liens" to add $250 million of otherwise unpermitted Indebtedness secured by otherwise unpermitted Liens. *See* ECF 601-39 at 2 (Third Supplemental Indenture); ECF 601-24 at 26 (Notes Security Agreement). This attempt to "modify the Security Documents ***or*** the provisions of this Indenture dealing with Collateral in ***any*** manner adverse to the Holders of [Original] Secured Notes in ***any*** material respect" violated sub-part (3) of Section 9.02's supermajority consent requirement—the "adverse-effect" protection. ECF 601-8 at 45, 130–132 (Section 9.02) (emphasis added).

Amending the definition of Permitted Liens impermissibly modified Section 4.26's Negative Covenant that prohibited the Company from further pledging any Collateral other than

with "Permitted Liens," and it violated Section 4.12(a)'s direct and indirect prohibition against creating, incurring, assuming or allowing "any" Lien of "any" kind "other than Permitted Liens." ECF 601-8 at 111 (Section 4.26) & 100 (Section 4.12(a)). That is because amending the definition of Permitted Liens modified all provisions of the Indenture with that defined term. *See, e.g.*, *Audax Credit Opportunities Offshore Ltd. v. TMK Hawk Parent, Corp.*, 150 N.Y.S.3d 8945, 12 (N.Y. Sup. Ct. 2021) ("*Trimark*") (change to defined term "effectively modifies" provisions using term).

Under the Indenture, "Collateral" includes "any and all assets" of the Company "with respect to which a ***Lien is*** granted (***or purported*** to be granted) as security for any Obligation under the" Indentures. ECF 601-8 at 14 (Section 1.01, definition of "*Collateral*") (emphasis added). Thus, by purporting to modify the definition of Permitted Liens (itself a provision dealing with Collateral) to allow for $250 million of Additional Secured Notes, the Third Supplemental Indenture also purported to modify all other provisions of the Indenture that reference the defined term Permitted Liens.[5]

In addition, amending the definition of Permitted Liens modified the Notes Security Agreement, which is one of the Security Documents. *Id.* at 45 (Section 1.01, definition of "Security Documents"). Section 2.1 of the Notes Security Agreement warrants and covenants that, "***as of any date on which Additional Secured Notes . . . are issued***," there is a perfected security interest that is "(a) . . . ***subject to no other Liens other than Permitted Liens***" and "(b) . . . ***superior to and prior to all other Liens*** of all other Persons (***other than Permitted Liens***) . . . ." ECF 601-24 at 9 (emphasis added). Since the definition of Permitted Liens in the Notes Security Agreement

[5] Also, the Note Purchase Agreement for the Phantom Notes not only included an indemnity provision at the insistence of PIMCO and Silver Point, ECF 733-55 at 2, but it also purported to make that indemnity a senior secured obligation of the Company, further attempting to encumber the Collateral. ECF 602-24 at 22 (Section 8.02 of Note Purchase Agmt., providing for indemnification in favor of participating noteholders in connection with litigation arising from 2022 Transaction).

cross-references the Indentures' definition of that term, ECF 601-24 at 26, amending the Indenture's definition of Permitted Liens to add $250 million in otherwise unpermitted Liens on Collateral modified that same cross-defined term in the Notes Security Agreement and, therefore, modified the Security Documents.

Kevin Smith, the Company's principal advisor for its LBO financing in 2019 and Platinum's head of capital markets, shared the same understanding. Mr. Smith acknowledged at trial on cross examination that:

- The Indentures included "a negative pledge ***against further encumbering the collateral***, ***other than with permitted liens***," absent amendment. ECF 827 (Feb. 9 Tr.) at 154:14-20 (emphasis added);

- Issuing Additional Secured Notes would further encumber the Collateral. ECF 827 (Smith, Feb. 9 Tr.) at 154:14-20; and

- The Third Supplemental Indenture's attempt to "change [] the indenture's definition of 'permitted liens' would also be a change to the note security agreement" which, in turn, he acknowledged was a Security Document as defined in the Indentures. ECF 827 (Smith, Feb. 9 Tr.) at 191:2-10.

The factual record is likewise clear that these modifications were adverse to Holders in "any" manner in "any" material respect—for example:

- In 2019, the Company initially proposed a Permitted Liens basket of "the greater of ***[$]100 million*** and 30 percent of EBITDA," but the market dictated that the Company "***tighten***" that provision to what was ultimately included in the Indentures: the greater of ***$25 million*** and 7.5% EBITDA. ECF 827 (Smith, Feb. 9 Tr.) at 125:23-126:1, 126:13-22. *Compare* ECF 696-16 at 103 *with* ECF 601-8 at 38; *see* ECF 771-9 at 7; ECF 696-26 at 6. The Company also proposed a Permitted Debt incurrence basket of ***$260 million*** or 75% of EBITDA, which the market ***tightened*** to the greater of ***$50 million*** or 15% of EBITDA. ECF 827 (Smith, Feb. 9 Tr.) at 127:20-128:11; *see also* ECF 601-8 at 88 (Section 4.09(b), definition of Permitted Debt, subsection (1)) (emphasis added).

- As of March 2022, the Company had $75 million of total Permitted Liens capacity (*see* ECF 601-8 at 36, 38 (definition of Permitted Liens, subsection (26), along with subsection (1) incorporating Section 4.09(b)(1))), yet the Third Supplemental Indenture purported to add $250 million in Permitted

Liens capacity ***on top of*** that $75 million. ECF 601-39 at 2 (amending Section 1.01 & 4.09(b)(3)).

- Market participants—including BlackRock and JP Morgan—had focused in 2019 on tightening the Permitted Liens basket because it protected against dilution of their security interests in the Collateral. ECF 1247 (Cook, May 1 Tr.) at 20:11-21:24, 113:12-114:9, *see* ECF 696-25 at 3; ECF 1119 (Yu, April 5 Tr.) at 145:18-147:18; 150:11-151:6.

- Subsequent purchasers—including Golden Gate—felt the same way. ECF 1046 (Wang, Mar. 21 Tr.) at 102:10-103:11, 115:15-115:23; ECF 1062 (Wang, Mar. 27 Tr.) at 342:21-343:13; ECF 1025-1 at 4.

- The market further dictated that the Permitted Liens basket capacity could be used for "***pari or junior liens only***" to expressly protect against "***priming***." ECF 771-9 at 7 (Nov. 13, 2019 presentation deck); ECF 827 (Smith, Feb. 9 Tr.) at 126:23-127:13, 132:17-135:12, 190:6-191-7 (emphasis added).

- Mr. Vorderwuelbecke knew the 2022 Transaction "would ***harm*** the excluded holders' ***security interest in the collateral***." ECF 697 (Vorderwuelbecke, Feb. 1 Tr.) at 106:1-4.

The Third Supplemental Indenture thus violated the "adverse-effect" protection in the 2026 Indenture by purporting to dilute Holders' security interests, even if the 2022 Transaction as a whole could be ignored, which it cannot. *See* ECF 299 at 44 & n.6 (discussing standard for materiality); *Fletcher Int'l, Ltd. v. Ion Geophysical Corp.*, No. CV 5109-CS, 2013 WL 6327997, at *9, *24 (Del. Ch. Dec. 4, 2013) (Strine, C.) (observing that "to add more than the $40 million that could be added under the accordion feature of the Credit Facility . . . ***would dilute the collateral*** that secured the loans already outstanding" (emphasis added))).[6]

[6] The Debtors previously pointed to the phrase "other than in accordance with the terms of this Indenture, the Security Documents or the Intercreditor Agreements" contained in Section 9.02(3), but that phrase adds nothing for them. The 2022 Transaction violated multiple provisions in the Indentures, as discussed throughout this brief. Furthermore, Section 10.2 of the Notes Security Agreement—which is among the Security Documents—prohibits amendments or modifications except "with the consent required pursuant to each Indenture," which the Company did not have. ECF 601-24 at 28. The only Intercreditor Agreement associated with the 2026 Indenture governs respective rights between the ABL lenders' first liens on current assets and the 2026 Notes Holders' first Liens on fixed assets, not between holders of the senior secured Notes. ECF 602-29 at 1 (Amended and Restated ABL Intercreditor Agreement); *see also* ECF 601-18 at 1 (ABL Intercreditor Agreement).

B. The "lien-release" protection.

The Indenture required supermajority consent for any amendment, supplement or waiver that "may . . . ***have the effect*** of releasing all or substantially all of the Collateral from the Liens created pursuant to the Security Documents . . . ." ECF 601-8 at 131 (Section 9.02) (emphasis added). The breadth of this provision is evident from the plain meaning of its terms. The operative verb—have—means to "beget" or "allow" something,[7] and the operative noun—effect—means "[s]omething produced by an agent or cause; a result, outcome, or consequence."[8] As aptly illustrated by Collins English Dictionary, "***[t]he effect of one thing on another is the change that the first thing causes in the second thing***."[9] That is, if the first thing causes the second thing, it has the effect.

Here, the function of the Third Supplemental Indenture and the Phantom Notes that it authorized—indeed their purpose—was to cause the release of the Liens and create new unpermitted liens in favor of the New 1L and New 1.25L Notes. The purported allowance of those Phantom Notes with less than two-thirds' consent was ***both*** a but-for ***and*** a proximate cause of releasing the Liens. *See, e.g.*, *Burrage v. United States*, 571 U.S. 204, 210–16 (2014) (holding that terms reflecting causation should consider "but-for" causation); *see also Mazella v. Beals*, 27 N.Y.3d 694, 706 (2016) (explaining proximate cause as "a substantial cause of the events which produced the injury," typically associated with foreseeability) (citation omitted); ECF 299 at 45–47 (discussing causation). Issuance of the Phantom Notes via the Third Supplemental Indenture, which had only simple majority consent, therefore violated the Indenture.

[7] *Effect*, Dictionary.com, https://www.dictionary.com/browse/have (last visited June 2, 2024).
[8] *Effect*, Black's Law Dictionary (11th ed. 2019).
[9] *Effect*, Collinsdictionary.com, https://www.collinsdictionary.com/dictionary/english/effect (last visited Jun. 14, 2024) (emphasis added).

The Counterclaim Defendants would nonetheless have the Court rewrite the Indenture to change the broad protection, "have the effect of releasing," to just say "release." But the Court cannot rewrite the parties' contract. *See Riverside S. Plan. Corp. v. CRP/Extell Riverside, L.P.*, 13 N.Y.3d 398, 404 (2009). New York law dictates that the Court ascribe meaning to the Indenture's inclusion of broad lien-release protection as compared with the narrow variant included in other indentures. *See Quadrant Structured Prods. Co. v. Vertin*, 23 N.Y.3d 549, 560 (2014); ECF 1249 at 27:23-28:2 (Morrison, May 2 Tr.) (finding that just 41% of Benchmark Indentures with lien-release protection contain a broad variant, thus reflecting a drafting choice).

C. The "direct/indirect" protection.

Section 4.12(a) of the Indenture broadly dictates that the Company "will not ***directly or indirectly***, create, incur, assume or suffer to exist [*i.e.*, allow[10]] ***any*** Lien of ***any*** kind (***other than Permitted Liens***), securing Indebtedness of the Issuer." ECF 601-8 § 4.12(a) (emphasis added). The Company's "ability" to issue Additional Secured Notes "ranking *pari passu* with the Initial Secured Notes" under Section 2.01(e), and to "further pledge the Collateral" to secure any such notes under Section 4.26, are expressly "subject to" to compliance with Section 4.12. ECF 601-8 § 4.12(a); *see Hellenic Lines, Ltd. v. Embassy of Pakistan*, 467 F.2d 1150, 1154 (2d Cir. 1972) ("subject to" indicates that one provision "prevail[s] over" another).

Thus, the Indenture prohibits issuing Additional Secured Notes if their function, whether direct or indirect, is to create, incur, or allow any Lien of any kind other than Permitted Liens. Here, the Phantom Notes' function was to release all Collateral from the Liens and create new unpermitted Liens securing New 1L and 1.25L Notes. *See, e.g.*, ECF 630 (Debtors' Opening, Jan. 25 Tr.) at 25:16-22, 29:6-11. The Phantom Notes could not be issued to gin-up a purported

[10] "Suffer to exist" means "allow." *See* ECF 601-8 § 4.12; ECF 200 at 24 & n.9 (Rule 12(c) Motion).

supermajority for those purposes, since issuances under Section 2.01(e) are expressly subject to Section 4.12.

Under New York law, the "term '***indirectly***'" used in Section 4.12(a) "signifies the doing by an obscure, circuitous method something which is prohibited from being done directly, and ***includes all methods of doing the thing prohibited*** except the direct one." *People v. Carillo*, 246 N.Y.S.2d 692, 699–700 (N.Y. App. Term 1964) (emphasis added). The reach of Section 4.12(a)'s phrase "directly or indirectly" is "all-inclusive" and "very broad," particularly when coupled with its explicit superiority over Sections 2.01(e) and 4.26. *See Klein Coat Corp. v. Peretz*, 4 Misc. 2d 341, 344 (Sup. Ct., N.Y. Cnty. 1956); *see also* ECF 200 at 25-26 (Rule 12(c) Motion).

VI. The 2022 Transaction was a single event as a matter of fact and economic substance.

The 2022 Transaction was a "single" transaction, negotiated "in its totality," for one "unified" purpose, with one closing. *See* Background §§ I, II, & III.[11] And, while the Indenture's plain terms require the Court to see through it for a variety of reasons, the 2022 Transaction was one thing as a factual matter, independent of the breaches outlined above.

In re BankAtlantic Bancorp Litig., a Delaware Chancery case involving a bond indenture dispute governed by New York law, is instructive. 39 A.3d 824, 837–40 (Del. Ch. 2012). There, the court permanently enjoined a sale transaction by both seeing through it as "a factual matter" and rejecting its supposed sequencing "as a matter of economic substance." *Id.* The court observed that, "during the lifespan of a decaying muon, three interrelated transactions will happen sequentially." *Id.* at 840. This, it concluded, was a "single, integrated transaction." *Id.*

[11] Additionally, the acts of PIMCO, Silver Point, Senator, and Citadel in working towards a coop group to achieve "67.1 percent" of the 2026 Notes, and only pivoting to purportedly issue Phantom Notes ***after*** a blocking position emerged, underscores the singular intent as well as their practical interpretation of the Indenture. *See* Background §§ III & IV. *See also New Windsor Volunteer Ambulance Corps., Inc. v. Meyers*, 442 F.3d 101, 112 (2d Cir. 2006) (finding that "practical interpretation of a contract by the parties to it for any considerable period of time before it comes to be the subject of controversy" is of "great significance" because "there is no surer way to find out what parties meant") (cleaned up).

So too here. The evidence overwhelmingly establishes that the 2022 Transaction was a single event with a unified purpose. Thus, for this separate reason, it was a single, integrated transaction that breached the Indenture. It required but did not have supermajority consent from Holders of the 2026 Notes at its outset.

VII. The 2022 Transaction also required but did not have supermajority consent because its purported steps have no effect under the Indenture or New York law.

The Indenture's plain terms broadly protect the 2024/2026 Holders' Liens on Collateral with phrases like "adverse . . . in any manner . . . in any material respect," "have the effect of releasing," and "directly or indirectly." As explained by Professor Morrison, the Indenture is unusually protective in these respects, corresponding to just 8% of the Benchmark Indentures. ECF 1289 ¶ 4. Those provisions were each independently breached by the Company. But this Indenture goes even further. It provides additional protection against the subversion attempted here. New York law does so as well. The 2022 Transaction thus required supermajority consent from its outset for these separate reasons.

A. The Indentures' Rules of Construction prevent the type of circumvention attempted by Counterclaim Defendants.

The Indentures' Rules of Construction require that "provisions apply to successive events and transactions" and "words in the singular include the plural, and in the plural include the singular," unless "the context otherwise requires." ECF 601-8 §§ 1.03(7) & (5). Nothing about the context of Section 9.02 requires otherwise; rather, the opposite is true.

The "successive events and transactions" Rule of Construction came about after the Second Circuit's seminal decision: *Sharon Steel Corp. v. Chase Manhattan Bank, N.A.*, 691 F.2d 1039 (2d Cir. 1982), *cited by Revised Model Simplified Indenture*, 55 Bus. Law. 1115, 1186–87 (2000). As *Sharon Steel* found in considering whether a company had sold "all or substantially all" of its assets, "piecemeal" transactions that are "part of an overall scheme" are considered together for

purposes of determining compliance with an indenture. *Sharon Steel*, 691 F.2d at 1050–51. The Second Circuit thus rejected a "literalist approach" to its application of the indenture's terms. *Id.* at 1049. And, in the decades since, courts have applied *Sharon Steel* to elevate ***substance over form***, including in one case the Debtors raised repeatedly in their cross-examinations. *See, e.g.*, *U.S. Bank Nat'l Ass'n v. Windstream Servs., LLC*, No. 17-CV-7857 (JMF), 2019 WL 948120, at *17 (S.D.N.Y. Feb. 15, 2019) (citing *Sharon Steel* and rejecting a literalist approach to sale-and-leaseback provision that would have "elevate[d] form over substance").

The Second Circuit also observed in *Sharon Steel* that "[a]n interpretation which sacrifices a major interest of one of the parties while furthering only a marginal interest of the other should be rejected in favor of an interpretation which sacrifices marginal interests of both parties in order to protect their major concerns." 691 F.2d at 1051. Here, Section 9.02's supermajority requirements protecting ***senior secured*** Holders' Liens on Collateral against release and adverse effects are undoubtedly major interests of such Holders. And those interests are of far greater and more fundamental importance than the Company's interest in circumventing those very protections with purported "successive . . . transactions."[12] Thus, context dictates application of the Rules of Construction to Section 9.02, and it certainly does not "require" otherwise.

Additionally, as the commentary to the Model Indenture explains when citing *Sharon Steel*, "serious consideration must be given to the possibility of accomplishing piecemeal, in a series of transactions, what is specifically precluded if attempted as a single transaction." 55 Bus. Law.

[12] New York law generally protects against circumvention of contractual rights, often by applying the implied covenant of good faith and fair dealing. *See, e.g.*, *Empresas Cablevision, S.A.B. de C.V. v. JPMorgan Chase Bank, N.A.*, 680 F. Supp. 2d 625, 631–-632 (S.D.N.Y. 2010) (enjoining transaction that was "in substance [] forbidden" and "purposely undercut what [defendants] knew the [governing agreement] was designed to prevent"), *aff'd and remanded*, 381 F. App'x 117 (2d Cir. 2010). Here, irrespective of any implied covenant, this Indenture expressly codifies against circumvention through successive events and transactions as a principle of construction. *See also Bank of New York Mellon Tr. Co. v. Liberty Media Corp.*, 29 A.3d 225, 237–38, 243–44 (Del. 2011) (endorsing applicability of *Sharon Steel* aggregation for sale transactions proven to be "part of an overall scheme").

at 1186–87 (discussing Section 5.01). The commentary also explains that the "series of events and transactions" Rule of Construction "underscore[s] the intended application" to provisions "***like*** 5.01." Section 9.02 of the Indenture, which governs the consent thresholds for amendments, including, among others, those that "have the effect of releasing all or substantially all the Collateral from the Liens," is thus plainly an operative provision covered by this Rule of Construction.

To be sure, however, the 2022 Transaction was ***not*** a series of transactions. It was a single, unified event. And, regardless, the lien-release variant in this Indenture "have the effect of releasing" is ***broader*** than the phrase "series of transactions" paired with an otherwise narrow lien-release variant. ECF 1249 (Morrison, May 2 Tr.) at 67:15-22, 177:13-23; ECF 601-8 at 131 (Section 9.02). The cause-and-effect language in this Indenture captures any number of reasons that an amendment could lead to the release of all or substantially all Liens, one of which would be a series of transactions. This explains why the four Benchmark Indentures with "series of transactions" language use the narrow, not the broad, lien-release variant.

The general applicability of this Rule of Construction is nonetheless demonstrated by the phrase "***provisions*** apply to." Yet the Counterclaim Defendants seem to argue that the Rule does not apply to provisions unless they already include "series of transactions" or similar language. That argument would not only rewrite the word "provisions," which is impermissible, but it also would render the Rule superfluous, which is likewise contrary to New York law. The Rule provides added protection against the type of circumvention attempted here. And it is particularly relevant to a first-of-its-kind attempt to end-run supermajority Lien and Collateral protection, like this one. *See* ECFs 782-19 at 5, 783-1 at 2, 783-2 at 4, 783-3 at 3, 783-4 at 2, 783-5 at 3, 783-6 at

2, and 783-7 at 3 (admissions by all Counterclaim Defendants that they are aware of no other transaction involving the purported issuance, vote, and cancellation of notes on the same day).

Furthermore, if the absence of "series of transactions" language in Section 9.02 were significant simply because that phrase appears in other unrelated provisions of the Indenture, then Additional Secured Notes must be ignored ***entirely*** for supermajority voting purposes. The portion of Section 9.02 addressing simple majority consent expressly refers to consents of "Additional Secured Notes" while the portion of that ***same provision*** addressing supermajority consent refers only to consents of "Secured Notes." *Compare* Section 9.02 at 130, *with id.* at 131; *Ambac Assur. Corp. v. EMC Mortg. LLC*, 121 A.D.3d 514, 518 (N.Y. App. Div. 1st Dep't 2014) (finding omission of "term [] used multiple times in the same paragraph" reflects an "intentional choice"); *see also* ECF 299 at 57–60.[13]

Finally, the handful of other Benchmark Indentures that include "series of transactions" language accompanying lien-release protection underscore the wide breadth of this Indenture's protections. All four such indentures include that language as part of the otherwise narrow lien-release variant, ***not*** the broad variant found in this Indenture, and ***none*** contain the adverse-effect protection.[14] Further buttressing this already unusual combination of protections—found in only 8% of Benchmark Indentures—this Indenture ***also*** contains the "successive events and transactions" Rule of Construction, which is found in a minority of available Benchmark Indentures. *See* ECF 1249 (Morrison, May 2. Tr.) at 178:14-19.[15]

[13] Notably, the indenture in *Sharon Steel* did not include "series of transactions" language in the operative provision, *see* 691 F.2d at 1043–44 nn.4-8, nor did the indenture 30 years later in *BankAtlantic*, *see* 39 A.3d at 828–29, which was of no moment to either court in refusing to elevate form over substance.

[14] Whether the inclusion of the "series of transactions" in an otherwise narrow lien-release provision means that such an indenture should be reclassified as broad is immaterial to the benchmarking prevalence ratios given the marginal change, however considered. *See* ECF 1289-1 (tallying indentures); *see* ECF 1289 ¶ 4 (reclassifying all four, *arguendo*, would change prevalence from 41% to 45% for broad variants, and from 59% to 55% for narrow variants).

[15] The prevalence of this Rule of Construction can be ascertained considering the full set of Benchmark Indentures, which the 2024/2026 Holders will show in closing arguments.

B. New York law also requires collapsing of the 2022 Transaction.

The New York Court of Appeals has held for decades that documents "executed at substantially the same time, related to the same subject-matter, [and that] were contemporaneous writings [] must be read together as one." *Nau v. Vulcan Rail & Constr. Co.*, 286 N.Y. 188, 197 (1941). Such is the case here, and the Debtors even acknowledge that "the agreements signed to implement the 2022 Transaction" should "be read and analyzed together." ECF 199 at 61 (Debtors Summary Judgment Brief).

New York courts thus collapse agreements in numerous circumstances. *See* ECF 299 at 49-52 (collecting cases). As the Second Circuit explained, the "legally operative question" is "whether the contracts were part of a single transaction intended to effectuate the same purpose." *TVT Recs. v. Island Def Jam Music Grp.*, 412 F.3d 82, 90 (2d Cir. 2005). Bankruptcy courts likewise collapse agreements, and where parties enter into a transaction through multiple documents; a court "need not adhere to labels assigned by [such] parties, but rather can consider the intent of the parties in structuring the transaction." *In re Waterford Wedgwood SA, Inc*., 500 B.R. 371, 380 (Bankr. S.D.N.Y. 2013).

Courts have repeatedly applied this principle to disregard illusory sequencing when used as a tactic to circumvent contracts governed by New York law. *See Noddings Inv. Grp., Inc. v. Capstar Commc'ns, Inc.*, No. CIV. A. 16538, 1999 WL 182568, at *7 (Del. Ch. Mar. 24, 1999), *aff'd*, 741 A.2d 16 (Del. 1999) (collapsing purportedly separate transactions to a single transaction that therefore triggered adjustment provision of warrant agreement); *Orr v. Kinderhill Corp.*, 991 F.2d 31, 36 (2d Cir. 1993) (applying the doctrine under New York law in the fraudulent conveyance context); *Sharon Steel*, 691 F.2d at 1049–51.

While courts refer to this doctrine by several different names, they all mean the same thing: purpose governs over labels. *See, e.g.*, *Waterford Wedgwood*, 500 B.R. at 379 (noting that the

"integrated transaction doctrine" is "also referred to as the step transaction doctrine"); ECF 299 at 52 (collecting additional cases). The principles underlying "the step-transaction doctrine, the collapsing transactions doctrine, the integrated transaction doctrine, or, the economic substance doctrine," are all "the same." *In re Servicom, LLC*, No. 18-31722, 2021 WL 825155, at *14 (Bankr. D. Conn. Feb. 24, 2021); *see also PICCIRC, LLC v. Comm'r of Internal Revenue*, T.C.M. (RIA) 2024-050 (T.C. 2024) (doctrines of "economic substance, sham transaction, business purpose, and step transaction" all use similar analysis).

Under any of the tests for determining whether to collapse integrated agreements, the 2022 Transaction is a single event. *See, e.g.*, *True v. United States*, 190 F.3d 1165, 1175 (10th Cir. 1999) (discussing the "end result test," "interdependence test," and the seldom-used "binding commitment test"). The end-result test looks to whether the pieces of the 2022 Transaction are "prearranged parts of what was a single transaction," and here they were "cast from the outset to achieve the ultimate result." *Greene v. United States*, 13 F.3d 577, 583 (2d Cir. 1994). The Debtors hardly dispute that this was the case here, nor could they. *See* Background § I.

Likewise, under the interdependence test, the 2022 Transaction Documents "had meaning only as part of the larger transaction." *Greene*, 13 F.3d at 584 (citation omitted). Indeed, the intent of PIMCO, Silver Point, the Company, and all of the other Counterclaim Defendants was to enter into the entirety of the 2022 Transaction not individual components, *see* Background §§ I, II, III, and each such purported component was "in contemplation of the other integrating acts." *True*, 190 F.3d at 1175 (citation omitted).

There is another test, the "binding commitment test" but it is "seldom utilized" and "only applicable where a substantial period of time has passed between the steps that are subject to scrutiny." *True*, 190 F.3d at 1175 n.8 (citation omitted). Here, of course, all of the purported steps

were undertaken together. But if this test were applied, it too is met here. "[P]arties bind themselves to a contract when they manifest an intent to be bound by the contract's essential terms." *Mountbatten Sur. Co. v. Brunswick Ins. Agency*, No. CIV.A. 00-CV-1255, 2001 WL 34371699, at *10–12 (E.D. Pa. Nov. 13, 2001) (applying New York law). The exchange was legally binding no later than 8:26 a.m. ET on March 28, 2022, when signatures were released.[16] 13 Williston on Contracts § 38:4 (4th ed.).

It is the parties' intent to accomplish the end that matters, not their desire to make it look like something else. The reason the doctrine exists is to prevent use of labels to elevate form over substance. The Court should not credit the Company's self-serving assertions of sequencing. *See* ECF 1349 ¶¶ 6, 26 (collecting cases addressing importance of contemporaneous evidence). The evidentiary record shows overwhelmingly that Counterclaim Defendants undertook the 2022 Transaction in its totality with a single pre-determined end-result. As here, agreements are considered "together if 'the parties assented to all the promises as a whole, so that there would have been no bargain whatever if any promise or set of promises had been stricken.'" *Commander Oil Corp. v. Advance Food Serv. Equip.*, 991 F.2d 49, 52–53 (2d Cir. 1993) (citation omitted). *See also* 12(c) Reply at 18–19 (distinguishing cases where events spanned of several years); *In re Residential Cap., LLC*, 533 B.R. 379, 397 (Bankr. S.D.N.Y. 2015) (declining to place "too much" emphasis on purported sequencing).

Also, contrary to Counterclaim Defendants' prior arguments, the 2022 Transaction did not involve a so-called "exit consent," where participating holders possess the requisite voting

[16] For example, PIMCO and Silver Point authorized their counsel before closing to release their signature pages "***concurrent*** with the release of all other parties' signature pages;" all parties "authorize[d] the ***release of all of their signature pages*** . . . ***without any further action by any party***" at closing; and PIMCO's and Silver Point's counsel emailed them immediately after the closing to report that "signature pages have now been released." *See* Background § II. This contemporaneous evidence "is significantly more probative than evidence of the parties' after-the-fact machinations . . . ." *Offshore Marine Contractors, Inc. v. Palm Energy Offshore, LLC*, No. CIV.A. 10-4151, 2013 WL 5530273, at *12 (E.D. La. Oct. 7, 2013) (subsequent history omitted).

threshold ***before*** the transaction and exchange their notes as a result of it. *See* ECF 299 at 59 (responding to this argument). None of the cases previously cited by Counterclaim Defendants involve the issuance of new debt to circumvent a consent threshold. In *Trimark*, for instance, the court looked at the transaction as a single agreement. It also found that the consent thresholds were satisfied because the favored lenders had the requisite support ***before*** the start of the transaction. 150 N.Y.S.3d 894, 3–4, 8. Not so here, where the Favored Noteholders lacked supermajority consent at the outset of the 2022 Transaction. *See* ECF 326 at 16–17 (12(c) Reply). Indeed, a New York court recently rejected a similar maneuver where the company issued new notes to try to waive a default. *See Antara Cap. Master Fund LP v. Bombardier Inc.*, 78 Misc.3d 1212(A), 12 (N.Y. Sup. Ct. 2023) (excluding new debt from calculation of consent thresholds for default waiver).

VIII. The Trustee's failure to authenticate the Phantom Notes on March 28, 2022 makes their purported consents invalid and reinforces that they were a sham.

Apart from the independent breaches set forth above, the Phantom Notes were never valid or authenticated, and thus they could not consent to the purported Fourth Supplemental Indenture under Section 9.02 for this additional reason. *See* ECF 601-8 § 9.02; *id.* at 130 (Section 2.08 "determine[s] which [notes] are . . . 'outstanding' for purposes of [] Section 9.02").

A. Most Phantom Notes were not manually signed by the Trustee.

Section 2.02 of the Indenture provides that a 2026 Secured Note "will ***not be valid*** until ***authenticated*** by the ***manual signature*** of an authorized signatory of the trustee." ECF 601-8 § 2.02 (emphasis added). Here, however, 35 of the 38 Phantom Notes failed to meet this requirement because they had a photocopied signature page instead of a handwritten signature by the Trustee's authorized signatory, John McNichol, who was not even in the same room as the Phantom Notes during the closing. Those Phantom Notes were not outstanding under Section 2.08

of the Indenture when they purported to consent to the 2022 Transaction, irrespective of the many other reasons that they were not validly issued.

The Indenture requires authentication by the Trustee's "manual" signature, which is one "used or performed by hand" and refers to "one's handwritten name . . . ." *Manual, Signature*, Black's Law Dictionary (11th ed. 2019). Context further confirms that meaning. In the very same Section, the Indenture provides that the Issuer—unlike the Trustee—can "sign" the notes "by manual ***or facsimile*** signature." ECF 601-8 § 2.02 (emphasis added). And, unlike a handwritten signature, a "facsimile signature" is one "that has been prepared and reproduced by mechanical or photographic means." *Signature*, Black's Law Dictionary (11th ed. 2019).

For over 140 years, New York law has strictly construed trustees' bond authentication requirements. In 1880, the New York Court of Appeals explained: "upon the face of each instrument was written a declaration that 'this bond shall not become obligatory until it shall have been ***authenticated by a certificate indorsed thereon, duly signed*** by the trustee aforesaid,' and that those in question are not so authenticated." *Maas v. Missouri, K. & T. Ry. Co.*, 83 N.Y. 223, 228 (1880) (emphasis added). The court continued that, "it cannot be denied that the [parties] when arranging the terms of [their indenture], had an unqualified right to determine upon what condition" bonds would become valid. *Mass*, 83 N.Y. at 228. So too here, the Indenture states plainly what was required for any Note to be "valid"—authentication by the Trustee with a manual signature—and that requirement was not met. At least thirty-five of the Phantom Notes, thus, could never have been valid.

A photocopy of a manual signature (*i.e.*, a facsimile) is ***not*** a manual signature. As one court explained, facsimile signatures are ones that have "been prepared and reproduced by mechanical or photographic means . . . ." *BancInsure, Inc. v. Marshall Bank, N.A.*, 400 F. Supp.

2d 1140, 1143–44 (D. Minn. 2005), *aff'd*, 453 F.3d 1073 (8th Cir. 2006). To conflate the two would render meaningless the distinction in that contract between "handwritten" and "facsimile" which, like here, were referenced in the same provision. *Id.* Section 2.02 likewise distinguishes manual and facsimile signatures, which would not make any sense if "manual" signature meant anything but a signature written by hand on a document. Indeed, all involved in the 2022 Transaction recognized that wet-ink signatures were required. ECF 716-6 (referring to "wet-ink signature packet" and "wet-ink pages"); *see also* ECF 1184 (Osornio, Apr. 18 Tr.) at 168:3-170:11.

Because 35 of the 38 Phantom Notes thus were never valid, the Fourth Supplemental Indenture lacked supermajority consent for this additional reason.[17]

B. None of the Phantom Notes were "authenticated" by the Trustee and thus they could not consent to the 2022 Transaction.

Irrespective of the form of signature required, the Phantom Notes also were not outstanding for purposes of Section 2.08 and thus calculating consents under Section 9.02, because they were never authenticated. ECF 601-8 at 63 (outstanding notes are those "authenticated by the Trustee except," *inter alia*, "those delivered to the Issuer for cancellation") & 130 (Section 2.08 "determine[s] which [notes] are . . . 'outstanding' for purposes of [] Section 9.02"). To "authenticate" means "to determine as real and true" (*Maas*, 83 N.Y. at 230) or "to prove or serve to prove to be real, true, or genuine" (*Chanel, Inc. v. RealReal, Inc.*, 449 F. Supp. 3d 422, 444 n.21 (S.D.N.Y. 2020) (citing Merriam-Webster Dictionary)).

Unlike the requirement that a Company Officer "***sign***" a note by hand or copy, the Indenture requires that the Trustee "***authenticate***" a note only by hand. If "authenticate" simply meant "sign," the Indenture would not have used different words. *See Kolbe v. Tibbetts*, 3 N.E.3d

[17] *See* ECFs 1155-2 at 66 & 1155-7 at 30, 42 (face value of notes with wet-ink trustee signatures was $29,472,000). Assuming that amount could be added to the Favored Noteholders' authorizations of approximately $525 million (and to the outstanding principal amount of $882 million), they would still have only 61% of the outstanding notes.

1151, 1156 (2013) (applying rule of contract construction). Indeed, Section 2.01(a) specifies that the form of the "[t]he 2026 Secured Notes and the Trustee's certificate of authentication will be substantially in the form of Exhibit A" to the Indenture. *See* ECF 601-8 § 2.01(a). That form unsurprisingly places the Trustee's authentication certificate immediately below the space for the Issuer's signature block on the same page, reflecting that the trustee must certify to the authenticity of a note signed by an Officer (manual or facsimile) with a signature of its own (manual only). *See* ECF 601-8 at 154 (page A-3). The Phantom Notes did not follow this form.

A writing cannot be authenticated before it exists. For instance, under the New York Uniform Commercial Code, an "authenticating trustee" signing a security certificate needs to confirm that the certificate is genuine or "at least regular on its face." N.Y. U.C.C. § 8-208. That cannot be ascertained until there is a certificate to review. This leads to an "insuperable difficulty" in pre-authentication because "[a]t the time the signature is made, ***it does not authenticate the memorandum*** . . . ." 10 Williston on Contracts § 29:37 (4th ed.) (emphasis added). That also accords with the plain meaning of "authenticate" as "[t]o prove the genuineness of (a thing); to show (something) to be true or real" or "[t]o render authoritative or authentic, as by attestation or other legal formality." *Authenticate*, Black's Law Dictionary (11th ed. 2019).

Here, the Trustee manually signed pages in blank—appended to nothing and authenticating nothing—a week before closing. *See* ECF 1350 (Healy, Jun. 3 Tr.) at 72:24-74:17, 284:20-285:6; *see* ECF 1298-4 at 1. Three pages with wet ink signatures, and 35 photocopies of one of them, were later placed behind Mr. Carney's signature, which had also been signed in blank a week before closing. This was done by the Company's counsel, in its office, without any representative from the Trustee or the Trustee's counsel present. *See, e.g.*, ECF 1184 (Osornio, Apr. 18 Tr.) at 87:14-88:10, 90:24-91:8; ECF 1350 (Healy, Jun. 3 Tr.) at 285:7-9. No one from

WSFS ever saw physical notes or signed anything on March 28, 2022 relating to authentication. ECF 1350 (Healy, Jun. 3 Tr.) at 285:20-24, 287:17-18, 288:15-18.

Furthermore, despite the Indenture's requirement that the "Trustee ***and no one else*** will cancel all 2026 Secured Notes surrendered for registration of transfer, exchange, payment, replacement or cancellation," ECF 601-8 § 2.11 (emphasis added), it was the Company's counsel that purportedly cancelled the Phantom Notes. ECF 1350 (Healy, Jun. 3 Tr.) at 130:9-16. Since the Phantom Notes were only ever in the possession of the Company's counsel, and all signature pages to all 2022 Transaction Documents—including the cancellation order—were released on the closing call with no further action by any party, the Phantom Notes were at all times "delivered to the Issuer for cancellation." ECF 1184 (Osornio, Apr. 18 Tr.) at 197:5-24; ECF 711-10 at 2, 13-16; ECF 601-8 § 2.08 (notes "delivered to the Issuer for cancellation" are not outstanding). Thus, they were never outstanding for voting purposes for this additional reason. The reliance on a pre-signed cancellation order for notes that had not yet been issued, moreover, is yet another example of the sham sequence of the 2022 Transaction.

Ultimately, to argue that WSFS nonetheless ***intended*** to authenticate the Notes is like saying a lifeguard napping on duty complied with his obligations because he punched his timecard and ***intended*** to watch the waterslide, even though he failed to. The process for issuing, authenticating, and cancelling Notes is spelled out in the authentication order, authentication and delivery letter, and cancellation orders, but these were all signed and circulated days before the Phantom Notes were even assembled by the Company's counsel, and the process described in those documents bears no resemblance to what actually happened on March 28, 2022. These serial

inconsistencies further underscore that the Phantom Notes were not—and were never intended to be—bona fide obligations of the Company. They were, rather, a sham.[18]

C. The Counterclaim Defendants cannot rewrite the 2022 Transaction to belatedly comply with the Indenture's authentication requirements.

Recognizing that the Phantom Notes were not "physically signed" by WSFS "[o]n March 28, 2022" as previously asserted, *see* ECF 325 (Debtors CSOF Response) at 49; ECF 1350 (Healy, Jun. 3 Tr.) at 287:19-288-18, Counterclaim Defendants will now apparently argue somehow that, if WSFS intended to authenticate the Phantom Notes, their noncompliance with the Indenture can be excused. It cannot for the reasons outlined above. And, in any event, this will be a remarkable reversal of the Counterclaim Defendants' previous emphasis on their supposed "technical compliance" with the Indentures. ECF 1008 (Colloquy, Mar. 13 Tr.) at 35:16-36:19.

It would have undoubtedly been easier for the Counterclaim Defendants to have closed the 2022 Transaction without assembling physical notes, obtaining wet-ink signature pages, having PIMCO's and Silver Point's counsel in the closing room to review the physical notes, and so forth, but they chose to subvert the supermajority requirements of the Indenture to do the 2022 Transaction they wanted, not a transaction that complied with the contract. They cannot now credibly claim that these formalities were unnecessary or can somehow be cured after the fact.

[18] Among many examples showing the illusory sequencing is that WSFS never sent an authentication and delivery letter on March 28, 2022. Rather, on March 26, 2022—***two days before the purported issuance*** of the Phantom Notes—WSFS transmitted a pre-signed authentication letter. Inexplicably, Mr. Healy testified that WSFS would not have signed an authentication and delivery letter if it believed the notes were not already authenticated, but WSFS could not have authenticated Phantom Notes that it had not seen and, in fact, did not even exist when the letters were signed. ECF 1350 (Healy, June 3 Tr.) at 102:3-5; *see also* ECF 711-10 at 3-4 (circulating pre-signed letter on March 23, 2022). Further illustrating the sham, on the afternoon of March 28, Debtors' counsel instructed WSFS to "move forward with the issuance and authentication" of the Phantom Notes that WSFS did not have (and scans of which were not attached). ECF 1151-11 at 1. Even though WSFS never responded to authenticate the Phantom Notes, the Debtors' counsel promptly emailed WSFS and PIMCO's and Silver Point's counsel copies of "executed" versions of the Phantom Notes. ECFs 716-34 at 2, 1155-1 at 1; ECF 1184 (Osornio, Apr. 18 Tr.) at 190:1-192:12, 193:15-194:22. Further illustrating the absurdity of the purported authentication, the Phantom Notes would have been "outstanding" under Section 2.08 ***before*** the closing call if WSFS had somehow authenticated them on March 26. If that were so, the Third Supplemental Indenture—which lacked consents from those Phantom Notes—would have had the consent of less than half of the $1.132 billion outstanding 2026 Notes.

Purported *ex post* intent cannot overcome "positive[] agree[ment]" that Notes "will ***not be valid*** until authenticated by the ***manual signature***" of the trustee in accordance with Section 2.02. *14 St. Med., P.C. v. Khan*, 81 Misc. 3d 1203 at *6 (A) (N.Y. Sup. Ct. 2023) (citation omitted); ECF 601-8 § 2.02.

Even if WSFS' intent to authenticate were relevant rather than its actions—it is not—the Counterclaim Defendants cannot establish WSFS's contemporaneous "intention" to authenticate the Phantom Notes as they existed on March 28, 2022. The Company's counsel circulated scanned copies by email and mimecast, but there is no evidence in the record that anyone from the Trustee or its counsel confirmed them to be authentic, conveyed that determination of authenticity to the Company, or even so much as looked at the documents.[19]

Had WSFS looked at the Phantom Notes on March 28, 2022—and there is no evidence in the record that it did—it could not have vouched for the Phantom Notes as genuine or even regular on their face. "To authenticate does not mean . . . to merely guarantee that each item . . . has gone through [the] authentication process," but to actually "prove or serve to prove to be real, true, or genuine." *See Chanel*, 449 F. Supp. 3d at 444 n.21 (cleaned up). Yet the only version of the Phantom Notes circulated to WSFS that day was a scan of the already (purportedly) "executed" notes, which had a mix of blue-ink and photocopied signatures on internally inconsistent certificate pages. ECFs 1155-1 to 1155-7. While the second page of each note contained a footer reading "*[Wesco Aircraft Holdings, Inc. - 2026 Definitive Note]*," ECF 1184 (Osornio, Apr. 18 Tr.) at 195:4-9, the signature pages signed by WSFS instead said "*[Wesco Aircraft Holdings, Inc. - 2026 144A Notes]*," *see, e.g.*, ECF 1155-1 at 5; *see also* ECF 1184 (Osornio, Apr. 18 Tr.) at 195:10-

[19] To the extent the Counterclaim Defendants argue that it was the *Company*'s intent, this makes even less sense, as it was WSFS's duty to authenticate the notes. In any event, the Company's counsel drove the transaction, but the Debtors have withheld their counsel's communications and thus any arguments about their intent are foreclosed. *See* ECF 1352 (Colloquy, June 6 Tr.) at 153:1-4.

24.[20] These facial irregularities were apparent on March 28, 2022, but WSFS had already signed an authentication and delivery letter days earlier, before these documents were assembled, meaning that WSFS authenticated nothing.

These failures also cannot be excused through doctrines such as reformation, ratification, or waiver. *See George Backer Mgmt. Corp. v. Acme Quilting Co.*, 46 N.Y.2d 211, 219 (1978) (discussing high bar for reformation of "show[ing] in no uncertain terms, not only that mistake . . . exists, but exactly what was really agreed upon between the parties"); *Holm v. C.M.P. Sheet Metal, Inc.*, 89 A.D.2d 229, 233 (N.Y. App. Div. 4th Dep't 1982) (ratification "must be performed with full knowledge of the material facts relating to the transaction, and the assent must be clearly established and may not be inferred from doubtful or equivocal acts or language"). Having failed to comply with the Indenture in 2022, they cannot do so now. 12 Williston on Contracts § 35:23 (4th ed.) (ratification requires the *same formalities* as required initially).

Furthermore, ratification also would not be available since the writings at issue have been canceled and destroyed. *See, e.g.*, *Commer v. Dist. Council 37*, 96 F. App'x 777 (2d Cir. 2004) (It is "no longer possible" to ratify "contracts that have already expired"). Because WSFS is not a party and no longer serves as Indenture trustee, reformation would likewise be unavailable even if Counterclaim Defendants could overcome the many other barriers to these defenses. *See, e.g.*, *Jerusalem Ave. Taxpayer, LLC v. Liberty Mut. Ins. Co.*, 137 A.D.3d 600, 600 (N.Y. App. Div. 1st Dep't 2016) (reformation is not proper without joinder of party to the agreement that is not a party to the litigation and may be adversely affected). And, finally, reformation principles cannot be

[20] The Trustee testified that he did not realize that some of the signature pages were blue ink and some were black photocopies until 2024—well after the transaction closed. ECF 1350 (Healy, Jun. 3 Tr.) at 289:21-290:10. The Company's counsel likewise testified that he did not realize that some pages had blue ink signatures and some were photocopies until after his deposition, even though he testified to checking the Phantom Notes for irregularities on March 28, 2022. ECF 1184 (Osornio, Apr. 18 Tr.) at 95:17-96:13, 99:8-25, 170:7-11.

invoked where doing so would "unfairly affect[]" "innocent third persons" such as the 2024/2026 Holders here. 27 Williston on Contracts § 70:19 (4th ed.); *Portugal v. Reisman*, 192 A.D. 492, 498 (N.Y. App. Div. 1st Dep't 1920) (same).

To the extent the Counterclaim Defendants wish to rely on New York's Uniform Commercial Code to correct their errors, that endeavor will fail as well. *See, e.g.*, N.Y. U.C.C. Law § 1-302 (Variation by Agreement) ("Except as otherwise provided . . . the effect of provisions of this act may be varied by agreement."); *Gramercy Holdings I, LLC v. Matec S.R.L.*, No. 20 CIV. 3937 (JPC), 2023 WL 5917624, at *44 n.40 (S.D.N.Y. Sept. 11, 2023) (same). And while Counterclaim Defendants may refer to provisions in Article 8 of the Uniform Commercial Code addressing signatures, those apply only to disputes between a "purchaser for value without notice" and either the issuer or the trustee. *See, e.g.*, N.Y. U.C.C. Law § 8-202(b) (limiting application to where "***issuer*** asserts that a security is *not* valid" (emphasis added)). These provisions have no bearing here, particularly since PIMCO's and Silver Point's counsel knew wet-ink signatures were required and were in the closing room to examine the Phantom Notes. *See* N.Y. U.C.C. § 1-202 (describing what it means to have notice of a fact); *Mfrs. & Traders Tr. Co. v. Sapowitch*, 296 N.Y. 226, 230 (1947) (clarifying constructive notice standard).

The 2024/2026 Holders also have standing on this issue. The 2024/2026 Holders asserted in their counterclaims that the Phantom Notes could not validly consent to the 2022 Transaction and, relatedly, that the Company breached Section 9.02's supermajority requirements. ECF 144 ¶¶ 3-4, 6-8, 128, 154-158, 174-178 (2024/2026 Holders First Amended Counterclaims); *see* ECF 177 ¶¶ 3-4, 6-8, 128, 154-158, 174-178 (Debtors Answer to 2024/2026 Holders First Amended Counterclaims). The Debtors assert, in their complaint, that the Phantom Notes were validly issued, such that they could vote as part of a purported supermajority under Section 9.02. ECF 63

¶ 160 (Debtors First Amended Complaint and Counterclaim Answer); *see* ECF 178 ¶ 160 (2024/2026 Holders Answer to Debtors First Amended Complaint). But the evidence at trial has shown they were not and could not. Now, the Debtors, who denied the 2024/2026 Holders' assertions and sought declaratory judgment of their own on the basis of complying with Section 9.02 cannot credibly contend that the 2024/2026 Holders, the very same group harmed by the 2022 Transaction, lack standing to assert breaches of that provision on the basis that the Phantom Notes could not grant the requisite consent. *See* ECF 141 ¶¶ 2-3 (stipulating to waiver of defenses related to no-action clause). *See also U.S. Bank Nat'l Ass'n v. Windstream Servs., LLC*, 2019 WL 948120, at *22 (holders excluded from a new issuance had standing to assert that notes did "not qualify as 'Additional Notes' within the meaning of the Indenture because they were not validly issued . . . .").

IX. The 2022 Transaction breached other provisions of the Indentures.

For the reasons set forth in Langur Maize's post-trial brief and the 2024/2026 Holders' previous written submissions, the 2022 Transaction breached Sections 3.02 and 9.02(10) of the Indentures. *See* ECF 299 at 62 (2024/2026 Holders Obj.) (Section I.E). As to the so-called springing maturity of the New 1L Notes, contemporaneous documents and corresponding testimony show that PIMCO and Silver Point structured the 2022 Transaction to prevent cash from "leaving the system" to pay the $182 million of excluded 2024 Notes at their maturity. ECF 939 (Shah, Feb. 27 Tr.) at 240:5-19; ECF 883-3 at 1. This springing maturity thus changed the ranking of the excluded Holders in respect of right of payment by stacking the New 1L Notes ahead of the 2024/2026 Holders. The 2022 Transaction did not reduce the amount of debt that would come due in 2024 but rather, if anything, ***increased*** it by ensuring that more than one billion dollars of New 1L Notes would come due three months before the maturity date of the excluded 2024 Notes.

THE 2024/2026 HOLDERS ARE ENTITLED TO MEANINGFUL REMEDIES

X. Counterclaim Defendants cannot escape liability for tortious interference under the economic interest doctrine.

Platinum, PIMCO, Silver Point, Senator, and Citadel induced the Company's breach; that breach was foreseeable and their conduct was intentional; and the 2024/2026 Holders were harmed. These Counterclaim Defendants were playing a game of high-stakes poker: if the extremely aggressive, first-of-its-kind transaction they induced had worked, they planned to get outsized returns by taking value from excluded Holders. But because it failed, they must pay for the harm they caused. The economic interest doctrine does not protect them in this circumstance, nor should it. *See, e.g.*, *Hudson Bay Master Fund v. Patriot Nat'l Inc.*, No. 16 Civ. 2767, 2019 WL 1649983, at *16 (S.D.N.Y. Mar. 28, 2019) ("[A]n interferer acting to protect ***its own*** direct interests, rather than its interests in the breaching party, may not raise the economic interest defense.") (emphasis in original).

To escape liability for tortious interference, each such Counterclaim Defendant needed to prove an economic interest defense. None did.

Most importantly:

- PIMCO, Silver Point, Citadel, and Senator acted ***not*** to protect their existing economic interest in the Company but to gain outsized returns at the expense of co-noteholders. For example, PIMCO's investment thesis was premised on taking value from—and to the "detriment" of—excluded noteholders through an uptier transaction. ECF 700-58 at 3 (Sept. 28, 2021 PIMCO deck on Incora); *see also* ECF 955 (Dostart, Feb. 28 Tr.) at 198:14-199:16, 199:21-200:4. Indeed, PIMCO projected a 64% internal rate of return as a consequence of the 2022 Transaction. ECF 710-54 at 2; ECF 955 (Dostart, Feb. 28 Tr.) at 226:14-227:5. And Silver Point likewise admitted that uptier was predicated on taking security interests from excluded holders. ECF 1013 (Prager, Feb. 12 Tr.) at 81:1-83:6. *See, e.g.*, ECF 623-5 at 15 ("Non-AHG Secured Noteholder net attach increased from 2.4x to 12.8x"); ECF 700-58 at 3 ("attach remains at ~15% LTV").
- Platinum sought to improve its own position in the Company's capital structure by placing itself in a fulcrum position, ***above the excluded***

2024/2026 Holders, in a future bankruptcy case. ECF 623-5 at 15 ("Non-AHG Secured Noteholder net attach increased from 2.4x to 12.8x"); *see* ECF 595-2 at 2; ECF 697 (Vorderwuelbecke, Feb. 1 Trial Tr.) at 126:1-8, 144:4-8, 179:9-16.

- PIMCO, Silver Point, Senator, Citadel, and Platinum did not protect an existing economic interest but rather obtained ***new*** economic interests by exchanging preexisting Notes for New 1L Notes and 1.25L Notes.

The Counterclaim Defendants overstate the breadth of the economic interest defense. ECF 630 (Platinum Opening, Jan. 25 Tr.) at 75:2-6 (arguing economic interest defense is "*an absolute end* to the tortious interference claim") (emphasis added). As one New York state court recently recognized, however, "[t]he Appellate Division in recent years has limited the application of that defense" in cases involving existing contracts. *See Tri-City ValleyCats, Inc. v. Houston Astros Inc*., 72 Misc. 3d 1219(A), 7 (N.Y. Sup. Ct. 2021) ("*Tri-City*") ("Since the cause of action is for interference with an existing contract, rather than a prospective economic relationship, the defense of economic justification is inapplicable and it is not necessary to allege that defendant used improper means or that its conduct was for the sole purpose of harming plaintiff[.]"); *see, e.g.*, *Kronish Lieb Weiner & Hellman LLP v. Tahari, Ltd*., 35 A.D.3d 317, 318 (N.Y. App. Div. 1st Dep't 2006) (cited by *Tri-City*). The Indenture is, of course, an ***existing*** contract, not a prospective business relationship, and thus the 2024/2026 Holders are entitled to greater protection. *White Plains Coat & Apron Co. v. Cintas Corp.*, 8 N.Y.3d 422, 426–27 (2007) (according "greater protection" to interest "existing contract[s] . . . than to the less substantive, more speculative interest in a prospective relationship . . . .") (internal quotations and citations omitted).

Moreover, the economic interest defense has been applied to creditors only rarely and narrowly, such as where they are exercising a bona fide contractual right that nonetheless causes their obligor to breach with someone else. *See, e.g., Ultramar Energy Ltd. v. Chase Manhattan Bank*, 179 A.D.2d 592, 593 (N.Y. App. Div. 1st Dep't 1992) (holding that, ***unlike here***, a secured

creditor exercising a preexisting security interest that causes its contractual counterparty to breach with a third-party can assert the economic interest defense).[21]

None of the Favored Noteholders has met its burden of proof for the economic interest defense. Indeed, the evidentiary record shows that each acted for its own direct self-interest, not in the interests of the Company:

- The Company admitted that it would have achieved ***more liquidity*** benefits with ***more senior secured participants*** in the 2022 Transaction, because more 2024 and 2026 Notes would have PIK'd. ECF 697 (Vorderwuelbecke, Feb. 1 Tr.) at 104:9-16. *See also* ECF 832 (Hou, Feb. 8 Tr.) at 181:13-20; ECF 694 (Carney, Jan. 31 Tr.) at 158:5-159:5.

- The Company never meaningfully engaged with the Akin Group, who was willing to provide the same amount of liquidity as the PIMCO/Silver Point group. ECF 1119 (Bartels April 5 Tr.) at 27:21-28:18, 31:13-32:4, 35:20-24; *see also* ECF 536-21 at 5 and ECF 536-22 at 2 and 14; ECF 697 (Vorderwuelbecke, Feb. 1 Tr.) at 107:24-108:7.

- PIMCO and Silver Point would block ***any*** transaction that was open to additional holders. ECF 697 (Vorderwuelbecke, Feb. 1 Trial Tr.) at 104:25-105:4, 106:14-21; ECF 538-53 at 2 (March 3 Board Meeting Minutes) ("the Majority Group had declined to provide financing on a pari passu basis with existing notes"); ECF 1119 (Bartels, Apr. 5 Tr.) at 14:21-15:9; ECF 536-24 at 5 (Mar. 24, 2022 Wolverine Intermediate Holding Corporation Board Minutes) ("Majority Secured Group has the ability to prevent incurrence of debt and liens beyond existing baskets"). This was quintessential self-interest by PIMCO and Silver Point.

- The Company's likelihood of filing for bankruptcy did not decrease as a result of the 2022 Transaction and, if anything, it slightly increased. ECF 1173 (Morrison, Apr. 12 Tr.) at 116:2-17, 118:19-119:17. And the Company's Caa credit rating—signifying its debt was "of poor standing" and "subject to very high credit risk"—did not change after the 2022 Transaction. ECF 1249 (Morrison, May 2 Tr.) at 52:3-15; ECF 1124-3 (Moody's Rating Symbols and Definitions) at 6, 11. Nor did its CCC+ credit rating change either. ECF 1249 (Morrison, May 2 Tr.) at 48:18-49:9.

[21] Counterclaim Defendants have relied on *U.S. Bank Nat'l Ass'n v. Triaxx Asset Mgmt. LLC*, No. 18-cv-04044 (VM), 2019 WL 4744220 (S.D.N.Y. Aug. 26, 2019) ("*Triaxx*"), but courts have declined to follow this trial court decision on the economic interest defense where a party procures a breach "in order to increase its own profits." *See, e.g.*, *RBG Mgmt. Corp. v. Vill. Super Mkt., Inc.*, No. 1:22-CV-07996 (JLR), 2023 WL 5976273, at *5 (S.D.N.Y. Sept. 14, 2023) (citing *Triaxx*). Unlike here, the *Triaxx* plaintiff argued that the interferer had *no* financial stake in the breach, and the decision never addressed the question of the interferer's direct interest. *See id.*, 2019 WL 4744220, at *3, *9.

- Among the most important deal points negotiated in March 2022 were those related to the "real legal and [chapter] 11 considerations." ECF 733-56 at 1; ECF 832 (Hou, Feb. 8 Tr.) at 210:10-14, 211:19-22; ECF 723-7 at 3.
- The Company entered a liquidity crisis just five months after the 2022 Transaction closed, and, in fact, the Company filed for bankruptcy months later. ECF 694 (Carney, Jan. 31 Tr.) at 96:9-19.

Moreover, PIMCO and Silver Point chose to withhold from discovery their internal financial analyses, and they should not be allowed to use that very analysis to argue that they acted in the Company's, rather than "act[ing] in their self-interest" as they admitted in opposing discovery. ECF 392 at 11 (emphasis added). Accordingly, any cherry-picked evidence that they acted in the Company's interest should be precluded or, at least, given minimal weight. *See, e.g.*, ECF 620 (motion to limit evidence) (citing, *e.g.*, *United States v. Medshares Mgmt. Grp., Inc.*, 400 F.3d 428, 440-41 (6th Cir. 2005)).

Accordingly, these Counterclaim Defendants did not meet their burden of proof for the economic interest defense, and thus they are liable for tortious interference even without a showing of malice, fraud, or illegality. Yet, even were such a showing required, the wrongful stripping from the 2024/2026 Holders' Liens qualifies. *See, e.g.*, *138-77 Queens Blvd LLC v. Silver*, 682 F. Supp. 3d 271, 286 (E.D.N.Y. 2023). Were a showing of "malice" required—though here it is not—"a well-recognized definition of 'malice' is '[t]he intent, without justification or excuse, to commit a wrongful act.'" *Franklin Techs., Inc. v. Encite, Inc.*, No. CV-16-1603, 2017 WL 722008, at *2 (E.D.N.Y. Feb. 22, 2017) (emphasis omitted) (citing Black's Law Dictionary); *see also* Restatement (Second) of Torts § 766 (1979) ("what is meant is not malice in the sense of ill will but merely 'intentional interference without justification.'").

For these reasons, as well as those set forth in Langur Maize's brief and the 2024/2026 Holders' prior written submissions, *see* ECF 620, a declaration of liability should be granted for tortious interference.

XI. The Court can and should grant the 2024/2026 Holders equitable relief in the form of specific performance to restore their position prior to the 2022 Transaction.

The breaches at issue in this case changed the very nature of the 2024/2026 Holders' underlying secured claims—by purporting to render those claims unsecured. Prior to the petition date, equitable relief, not monetary damages, would have restored the 2024/2026 Holders to their position vis-à-vis the Debtors before the breach occurred. Because the 2024/2026 Holders continue to lack an adequate remedy at law, they are entitled to equitable relief in the Debtors' bankruptcy case as well.

Yet, the Counterclaim Defendants brazenly contend that the 2024/2026 Holders should be left without a remedy for the breaches. This is a remarkable position by the Debtors, in particular, who should show no favoritism in how distributable value is apportioned as long as it is distributed equitably and in accordance with the Bankruptcy Code. And worse yet, the Debtors claim that holders of New 1L Notes should retain the benefit of the Debtors' breaches to the direct detriment of the non-breaching holders. *See, e.g.*, Main Case, ECF 1126 ¶¶ 101-108 (Debtors Objection to Supplemental Standing Motion); *see also* Main Case ECF 1123 ¶ 26 (PIMCO and Silver Point Opposition to Supplemental Standing Motion arguing same).

Under binding Fifth Circuit precedent, creditors ***cannot be*** forced to accept money damages in bankruptcy when such damages would be worse than equitable alternatives available under applicable law. Here, the 2024/2026 Holders are entitled to equitable relief for their breach of contract claims that will restore their secured status and place them in the position they would have been in had the breaches not occurred. This is the fundamental purpose of remedies. The 2026/2026 Holders cannot, therefore, be forced to accept mere unsecured claims.[22]

[22] The 2024/2026 Holders reserve all rights to further brief the applicable standards for equitable relief and how such relief should be applied, following rulings on liability.

A. The 2024/2026 Holders are entitled to equitable relief as a matter of state law.

As a threshold matter, while New York and Texas law are effectively the same in this respect, Texas law governs the remedies available to the 2024/2026 Holders. *See In re iHeartMedia, Inc.*, 597 B.R. 339, 350 (Bankr. S.D. Tex. 2019) ("[W]here the parties contractually choose the law of a state other than the forum state, matters of remedy and procedure are nonetheless governed by the law of the forum state.")

Under Texas law, it is well established that specific performance and other equitable remedies—which are ***not*** separate causes of action—are available as "a substitute for monetary damages when such damages would not be adequate." *See Cent. Jurisdictional Conf. of United Methodist Church v. S. Methodist Univ.*, 674 S.W.3d 334, 368 (Tex. App.—Dallas 2023). The mere existence of a legal remedy is insufficient to preclude a party from seeking an equitable remedy, rather the legal remedy must be "***as complete and as practical and efficient to the ends of justice and its prompt administration as is equitable relief***." *Surko Enters., Inc. v. Borg-Warner Acceptance Corp.*, 782 S.W.2d 223, 225 (Tex. App.—Houston [1st Dist.] 1989) (emphasis added). "No adequate remedy at law exists if damages are incapable of calculation or," as here, "***if defendant is incapable of responding in damages***." *See Loye v. Travelhost, Inc.*, 156 S.W.3d 615, 621 (Tex. App.—Dallas 2004, no pet.) (emphasis added). And specifically, no adequate remedy at law exists if "title and possession of its collateral, stock, and assets" are lost. *See Frontera Generation Ltd. P'ship v. Mission Pipeline Co.*, 400 S.W.3d 102, 107 (Tex. App.—Corpus Christi-Edinburg 2012).

New York law is no different.[23] And consistent with these principles, bondholders like the 2024/2026 Holders are entitled to equitable relief for breach of an indenture where, like here, a legal remedy from the issuer would be inadequate. For example, in *In re BankAtlantic Bancorp, Inc. Litig.*, the Delaware Chancery Court considered remedies upon finding that an issuer had agreed to sell substantially all of its assets in breach of a successor obligor provision that would have required the issuer's debt securities to be assumed in the sale. 39 A.3d at 843, 847 (applying New York law). In granting a permanent injunction enjoining the sale, the *BankAtlantic* court found that such equitable relief was appropriate for a number of reasons relevant here. For example, the court explained that:

> [A] shift in bargained-for risk may constitute irreparable harm where the lender's only recourse is against the borrower . . . . A lender under New York law will be entitled to injunctive relief when the borrower agrees to a transaction that would shift the risk that the parties contracted to assume.

Id. (internal quotations and citations omitted).

In making this finding, the court relied upon a long line of New York jurisprudence holding that a lender is irreparably harmed when it loses its security and that an agreement to give security is specifically enforceable. *Id.* at n.8 (citing cases spanning from 1940 to 2010). As one New York court explained, "[a]n agreement to give security for the performance of another promise is specifically enforceable." *Nat'l Sur. Corp. v. Titan Constr. Corp.*, 26 N.Y.S.2d 227, 230 (N.Y. Sup.Ct. 1940), *aff'd*, 260 A.D. 911 (N.Y. App. Div. 1st Dep't 1940). Texas courts have likewise

[23] *See, e.g.*, *New York TRW Title Ins. v. Wade's Canadian Inn & Cocktail Lounge, Inc.*, 199 A.D.2d 661, 663 (N.Y. App. Div. 3rd Dep't 1993) (threshold issue for equitable relief is whether plaintiff has adequate remedy at law)*; Erie R. Co. v. City of Buffalo*, 180 N.Y. 192, 201 (1904) ("The real question . . . is not whether a party is utterly without remedy at law, but whether the legal remedy, if any, is inadequate in the sense *that it will not place the parties to the contract in the same positions which they occupied before the attempted breach of the contract*.") (emphasis added).

found both irreparable harm and no adequate remedy at law under circumstances where a lender would lose its bargained-for collateral.[24]

Additionally, in granting equitable relief by permanently enjoining the sale, the *BankAtlantic* court reasoned that the breach would have the effect of violating the "absolute priority rule" because it would result in a portion of the deal consideration going to senior-level executives, essentially "vaulting them over the Debt Securities and other corporate consistencies." *BankAtlantic*, 39 A.3d at 844.[25]

Here, merely providing the 2024/2026 Holders with a claim for monetary damages against bankrupt Debtors is not a remedy at all, let alone an adequate one. Moreover, as in *BankAtlantic*, the 2022 Transaction improperly elevated Favored Noteholders over the 2024/2026 Holders, running afoul of the absolute priority rule. Finally, the 2022 Transaction fundamentally altered the Company's risk profile by placing approximately $1.2 billion of debt ahead of the 2024/2026 Holders rightfully ***senior secured*** Notes and stripping away their bargained-for security interests, thereby shifting substantial risk to the 2024/2026 Holders that they did not contract to assume.

For these reasons, the 2024/2026 Holders are entitled to equitable remedies as a matter of state law.[26]

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[24] *See, e.g., 31 Holdings I, LLC v. Argonaut Ins. Co.*, 640 S.W.3d 915, 926 (Tex. App.—Dallas 2022) (surety lacked adequate remedy at law where indemnitors failed to deposit money or other collateral security upon surety's demand pursuant to obligations in indemnity agreement); *Hartwell v. Lone Star, PCA*, 528 S.W.3d 750, 769 (Tex. App.—Texarkana 2017) (affirming trial court decision finding irreparable injury due to "further dissipation and loss of the collateral secured by [Appellants'] loans . . . .").

[25] Consistent with there being no adequate remedy at law for noteholders who lose their security, the ABL Intercreditor Agreement provides that the collateral agent, on its behalf and on behalf of noteholders, "irrevocably waive[s] any defense based on the adequacy of a remedy at law and any other defense which might be asserted to bar the remedy of specific performance in any action which may be brought by . . . [the agent or secured noteholders]." ECF 601-18 at 54 (ABL Intercreditor Agreement, Section 8.11). The Company acknowledged and agreed to this provision. *Id.* at 1.

[26] Both Texas and New York law recognize many forms of equitable relief for breach of contract, including specific performance and equitable lien, both of which were pleaded by the 2024/2026 Holders. And, in both states, courts have granted specific performance in respect of consummated transaction where those transaction were found to have violated a plaintiff's contract rights. *Jarvis v. Peltier*, 400 S.W.3d 644, 653 (Tex. App.—Tyler 2013) (granting specific performance to right-of-first-refusal holder); *Scarborough v. Arrant*, 25 Tex. 129, 130 (Tex. 1860) ("A subsequent

B. The 2024/2026 Holders' state law equitable remedies are available in bankruptcy.

Under Fifth Circuit precedent, the Bankruptcy Code does not divest a creditor of its entitlement to state-law equitable relief, despite the Counterclaim Defendants' hopes to the contrary. *See Matter of Davis*, 3 F.3d 113, 116 (5th Cir. 1993). In *Davis*, the Fifth Circuit held that "section 101(5)(B) . . . does not require creditors entitled to an equitable remedy to select a suboptimal remedy of money damages." *Id.* at 116.[27]

Other courts, within the Fifth Circuit and elsewhere, have followed this approach and allowed an aggrieved creditor to seek available state law equitable remedies rather than money damages. *See In re Baerg Real Prop. Tr.* 585 B.R. 373, 390 (Bankr. N.D. Tex. 2018) (awarding remedy of specific performance noting "[c]ourts within the Fifth Circuit have not limited remedies for [contract] claims solely to monetary damages"); *In re Am. Standard Energy, Corp.*, No. 15-70104-TMD, 2017 WL 3405511, at *6 (Bankr. W.D. Tex. Aug. 8, 2017) (finding that a "non-monetary obligation that attaches to a property interest is not a 'claim' under the Bankruptcy Code" and "could also be characterized as a right to specific performance, which is also not a claim because damages are not an adequate alternative."); *In re Indian River Ests., Inc.*, 293 B.R. 429, 434 (Bankr. N.D. Ohio 2003) ("101(5)(B) does not require that a party accept a monetary alternative if it is clearly not in proportion to the equitable remedy."); *see also In re Bennett Enters.*,

purchaser from the obligor, with notice of the rights of the obligee of the bond, can oppose no valid objection to the specific performance."); *Morrocoy Marina, Inc. v. Altengarten*, 120 A.D.2d 500, 500 (N.Y. App. Div. 2d Dep't 1986) (holding plaintiff was entitled to specific performance over property that had already been conveyed to a third-party purchaser where that purchaser was aware of plaintiff's preexisting rights); *Mofsky v. Goldman*, 3 A.D. 2d 311, 312–13, 316 (N.Y. App. Div. 4th Dep't 1957) (permitting claim for specific performance of agreement to leave plaintiff stock in will against the estate's executrix even though the defendant who held the stock was not a party to the agreement).

[27] Counterclaim Defendants' argument that the 2024/2026 Holders' breach of contract claims must be treated as unsecured claims administered pursuant to the claim reconciliation process ignores not only *Davis*, but also Rule 7001(7) of the Federal Rules of Bankruptcy Procedure, which provides that "a proceeding to obtain an injunction or other equitable relief" is an adversary proceeding.

Inc., 628 B.R. 481, 494 (Bankr. D.N.J. 2021) (finding that the equities prevented the debtor from converting the creditor's specific performance remedy into a claim for rejection damages).

Monetary damages from the Debtors are woefully inadequate here—essentially nonexistent. Thus, under prevailing Fifth Circuit precedent, the 2024/2026 Holders need not (and will not) accept a claim for money damages and are instead entitled to equitable relief, including specific performance, or, alternatively, equitable lien.[28]

Any argument that the 2024/2026 Holders' remedies for breach of contract belong to the Debtors' estate—as opposed to the 2024/2026 Holders—would undo bedrock principles of law and equity. This Court has already held that the 2024/2026 Holders have direct standing to assert their contract claims because of the distinct harm they suffered as a result of the 2022 Transaction. *See* ECF 508 at 9 (Summary Judgement Memorandum Opinion). The Court likewise found that the Debtors' estates could not have asserted a breach of contract claim as of the Petition Date. *Id*. at 11. It necessarily follows that the Debtors could not have asserted remedies for breach of contract as of the Petition Date either. *See In re Seven Seas Petroleum, Inc.*, 522 F.3d 575, 588 (5th Cir. 2008) ("[The trustee] has ***no right to enforce entitlements of a creditor***.") (emphasis added) (citing *Steinberg v. Buczynski*, 40 F.3d 890, 893 (7th Cir.1994) (Posner, J.)); *Hill v. Opus Corp.*, 464 B.R. 361, 393 (C.D. Cal. 2011) (stating that, "[w]hen a creditor suffers injury that is independent of the firm's fate, his injury is direct and ***he may pursue his own remedy***[.]") (internal quotation marks omitted) (emphasis added). Indeed, it is long-standing principle of this nation's jurisprudence that "equity will not suffer a wrong without a remedy." *Indep. Wireless Tel. Co. v.*

[28] In this way, the equitable lien remedy is not a "disguised" avoidance action, as this Court previously found at summary judgment. ECF 508 at 14-16. Rather, it is an equitable remedy attendant to a breach of contract claim and may be imposed in this bankruptcy case. To the extent necessary to impose equitable lien as a remedy for breach of contract, the 2024/2026 Holders respectfully request that the Court reconsider its interlocutory dismissal of the equitable lien claim at summary judgment. *See* Fed. R. Civ. P. 54(b).

Radio Corp. of Am., 269 U.S. 459, 472 (1926); *accord Texas Co. v. Miller*, 165 F.2d 111, 117 (5th Cir. 1947) (recognizing the maxim that "equity will not suffer a wrong without a remedy"); *E.J. Brooks Co. v. Cambridge Sec. Seals*, 31 N.Y.3d 441, 458 (2018) ("[T]here is no wrong without a remedy." (quoting *Gen. Rubber Co. v. Benedict*, 215 N.Y. 18, 23 (1915) (Cardozo, J.))).

XII. This Court can also equitably apportion distributable value through equitable lien and equitable subordination.

This Court can and should fashion a remedy for the 2024/2026 Holders that would right the wrongs perpetrated on them, including by apportioning distributable value among the Favored Noteholders and the 2024/2026 Noteholders to reflect the but-for world had there been no breaches. Doing so would be consistent with the injury-focused inquiry into whether a claim belongs to the estate or individual creditors, and it would avoid the absurd result of separating the 2024/2026 Holders' breach claims and remedies. Alternatively, equitable subordination and equitable lien claims can remediate (in whole or part) the 2024/2026 Holders' injuries.

The 2024/2026 Holders have asserted previously—and maintain now—that they were uniquely injured by having their Liens stripped and, consequently, they should have direct standing to pursue equitable lien and equitable subordination as remedies. In the alternative, the 2024/2026 Holders sought derivative standing for equitable lien and equitable subordination, to the extent the Court determines that the remedies for the Debtors' breaches constitutes estate property. In that circumstance, derivative standing would be appropriate because the 2024/2026 Holders seek to bring colorable claims, the Debtors have unjustifiably refused to pursue such claims, and the 2024/2026 Holders seek leave from the bankruptcy court. *See Louisiana World Exposition v. Federal Ins. Co.*, 858 F.2d 233 (5th Cir. 1988).

A. Relevant procedural history.

Shortly after the commencement of these chapter 11 cases, the Debtors took the extraordinary position that nearly all claims and remedies arising out of the 2022 Transaction were property of their estates. As a result, on August 15, 2023, the 2024/2026 Holders filed their Supplemental Standing Motion. On January 12, 2024, the 2024/2026 Holders filed their Standing Motion Reply.

On January 14, 2024, the Court entered the *Memorandum Opinion* on the parties' summary judgment motions. *See generally* ECF 508. Among other things, the Court held that the contract and tort claims asserted by the 2024/2026 Holders are direct claims, but that claims for equitable subordination and equitable lien belonged to the Debtors' estates. ECF 508 at 16 (Summary Judgment Memorandum Opinion). The Court did not rule on whether the 2024/2026 Holders should be granted derivative standing to pursue equitable subordination and equitable lien.

Before trial, the parties stipulated that the Court could hear evidence relating to equitable lien and equitable subordination, and that "[t]o the extent the Court determines [any such claims] are property of the estate and are colorable, the Court may consider the propriety of granting derivative standing to the 2024/2026 Holders at that time, or grant such other relief as is appropriate[.]" ECF 541 ¶¶ 3(b), 4.

B. Equitable subordination

As set forth in the Supplemental Standing Motion and Standing Reply, equitable subordination of the Favored Noteholders' claims would be entirely consistent with the Bankruptcy Code. Main Case ECFs 652 ¶ 144 & 1235 ¶¶ 71–74. Indeed, absent the Favored Noteholders' misconduct, including their tortious interference, the 2024/2026 Holders would have been secured creditors in these chapter 11 cases entitled to equal treatment with other secured creditors holding the 2024 and 2026 Notes. Thus, equitable subordination of the Favored

Noteholders' claims would help to ensure equality of distribution among similarly situated creditors, a bedrock principle of bankruptcy law.

As explained above and in Langur Maize's and the Official Committee of Unsecured Creditors' post-trial briefs, and as will be addressed in closing arguments and further briefing as appropriate, the Favored Noteholders engaged in inequitable conduct in connection with the 2022 Transaction that conferred on them an unfair advantage and caused injury to the 2024/2026 Holders. *See also* Background §§ III & IV.

C. Equitable lien

The 2024/2026 Holders have established each element of an equitable lien claim. *See In re iHeartMedia, Inc.*, 597 B.R. at 360 (identifying elements of claim for equitable lien); *see also* Supplemental Standing Mot. ¶¶ 136-141; Standing Reply ¶¶ 54-63.

First, as the record evidence shows, the Indentures and accompanying Security Documents were express agreements that demonstrate a clear intent to create a security interest to secure obligations arising under the Indentures. *See generally* ECF 601-8 (2026 Indenture); ECF 601-24 (Notes Security Agreement).

Second, the Indentures and the Notes Security Agreement specifically identified the Collateral as the property intended to secure the Original Secured Notes. *See* ECF 601-8 at 14 (Section 1.01, definition of "Collateral"); ECF 601-24 at 5 (Section 1.1(a)).

Third, the 2024/2026 Holders have no adequate remedy at law, as discussed above in Section XI. Before the commencement of these chapter 11 cases, the 2024/2026 Holders lacked an adequate remedy at law given that they had lost their security interests. Monetary damages—which would take the form of a general unsecured claim against the Debtors—would certainly be beyond "suboptimal" as an alternative to restoring the 2024/2026 Holders' secured status through

the imposition of an equitable lien, a remedy to which the 2024/2026 Holders were entitled as of the Petition Date.[29]

Finally, equitable lien is appropriate to remedy the injustice inflicted on the 2024/2026 Holders by reason of the 2022 Transaction. Indeed, absent the Counterclaim Defendants' breaches of the Indentures and other inequitable conduct, the 2024/2026 Holders would be treated as secured creditors in these Bankruptcy Cases entitled to various protections, including those found in sections 363(e), 363(f), 1111(b) and 1129(b)(2) of the Bankruptcy Code, among others. An equitable lien—and certainly not monetary damages—can restore these statutory protections to the 2024/2026 Holders.

Bankruptcy courts have thus imposed equitable liens to right wrongs to a plaintiff's secured status, and the Court should do the same here. *See, e.g.*, *In re Lexi Dev. Co., Inc.*, 453 B.R. 440, 445 (Bankr. S.D. Fla. 2011) (holding that "damages will not restore [the junior lender] to the status quo" and denying the senior creditor's motion to dismiss equitable lien claim); *In re Rama Grp. of Cos., Inc.*, 264 B.R. 267, 271 (Bankr. W.D.Y. 2001) ("Day in and day out this Court grants encumbrances of various sorts to various parties upon property of the estate."), *aff'd on other grounds*, No. 00-BK-12654K, 2002 WL 1012974 (W.D.N.Y. May 6, 2002); *In re Smith*, 72 B.R. 344 (Bankr. S.D. Ohio 1987), *aff'd*, 119 B.R. 558 (S.D. Ohio 1989) (granting equitable lien).

D. The Debtors have unjustifiably refused to pursue equitable subordination and equitable lien, and the 2024/2026 Holders should be given exclusive settlement authority over such claims

As set forth in the Supplemental Standing Motion and Standing Reply, the Debtors have unjustifiably refused to pursue equitable subordination and equitable lien. *See* Standing Reply

[29] Indeed, under the Debtors' proposed First Amended Joint Chapter 11 Plan, the 2024/2026 Holders' money damages claims would be classified as a general unsecured claims, which will receive only 3.5% of the new common equity of the reorganized Debtors saddled by the Debtors' post-petition financing facility (which will convert into new "exit notes") and over $400 million of takeback debt provided to holders of New 1L Notes (who are also receiving 95% of new common equity). *See* ECF 1364-26 at 113-118 (Art. III.B.).

¶¶ 121-124. If the court were to grant the 2024/2026 Holders standing to pursue the equitable lien and equitable subordination claims derivatively—though the 2024/2026 Holders maintain their injuries are direct—the Court should also grant the 2024/2026 Holders exclusive authority to settle them, subject to Bankruptcy Rule 9019. *See, e.g.*, *In re Evergreen Solar, Inc.*, 463 B.R. 289, Docket No. 382 (Bankr. D. Del. Oct. 28, 2011) (derivative standing granted included "exclusive right and authority to negotiate and enter into settlements on behalf of the Debtor's estate" with respect to certain causes of action).

XIII. The Counterclaim Defendants' last-ditch arguments also fail.

The Counterclaim Defendants identified an assortment of last-ditch defenses on their list of issues for post-trial briefing, but none carry any weight. Platinum's belated invocation of Section 13.05 of the Indentures, for example, does not exempt Platinum or its designees from tort liability or equitable remedies for misconduct occurring long after the issuance of the Notes, as explained in Langur Maize's post-trial brief. Nor can the Counterclaim Defendants rely on Section 9.04 to somehow make enforceable their unenforceable amendments that breached Section 9.02.

JP Morgan, BlackRock, Golden Gate, and PSAM all owned their 2024 and 2026 Notes prior to the 2022 Transaction. ECF 978-5 at 3-4 (JPMorgan Trading Report); ECF 1095-1 (BlackRock Trading Report); ECF 725-26 (Golden Gate Trading Report); ECF 725-27 (PSAM Trading Report). And while Golden Gate assigned its 2026 Notes from one wholly owned entity to another shortly after the 2022 Transaction, SSD Investments Limited (the operative Counterclaim Plaintiff) received a mutually agreed-upon, express assignment of all claims arising from or relating to those Notes against all pertinent parties or third-parties (including tort claims). ECF 1017-2; ECF 1049 at 49:7-50:12 (Wang, Mar. 21 Tr.). The 2024/2026 Holders also received authorization letters from DTC that establish standing as explained in Langur Maize's post-trial brief. *See* ECF 1362 at 9-11 (listing DTC authorizations for Counterclaim Plaintiffs).

As the Court concluded after supplemental briefing on the issue, *see* ECF 483 (*Order Requesting Briefing on Subject Matter Jurisdiction*), it has subject matter jurisdiction over the parties and claims in this adversary proceeding. *See* ECF 508 at 5, 7 (Summary Judgment Opinion) (stating that "the Court has jurisdiction over the 2024/2026 Noteholders' and Langur Maize's claims asserted against Wesco" and "Wesco's indemnification obligation under these agreements is sufficient to give rise to 'related to' jurisdiction with respect to the claims against the Participating Noteholders"). Although Citadel has asserted that it no longer holds any Notes issued by the Debtors, its trading records and Mr. Rochard's testimony do not establish that fact. *See* ECF 716-38 at 2 (Mar. 28, 2022 Citadel internal slack); ECF 1142 (Rochard, Apr. 11 Tr.) at 152:7-9; ECF 1173 (Rochard, Apr. 12 Tr.) at 58:16-59:20.

CONCLUSION

Accordingly, for the reasons set forth above, the 2024/2026 Holders respectfully request that the Court enter a report and recommendation that declaratory judgment be entered that the Debtors breached the Indentures, that the Counterclaim Defendants tortiously interfered with the Indentures, and that the 2024/2026 Holders have standing to seek equitable remedies. The 2024/2026 Holders further respectfully request that the Court set a deadline for further briefing on the issue of whether the 2024/2026 Holders have standing to pursue the fraudulent transfer claims in the proposed Second Amended Counterclaims.

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Dated: June 17, 2024
New York, New York

Respectfully submitted,

KOBRE & KIM LLP

By: *<u>/s/ Zachary D. Rosenbaum</u>*

Zachary D. Rosenbaum
Adam M. Lavine
Darryl G. Stein
Igor Margulyan
Udi Karklinsky
Michael S. Brasky
John G. Conte
Vincent C. Yiu
800 Third Avenue
New York, NY 10022
Tel: 212-488-1200
zachary.rosenbaum@kobrekim.com
adam.lavine@kobrekim.com
darryl.stein@kobrekim.com
igor.margulyan@kobrekim.com
udi.karklinsky@kobrekim.com
michael.brasky@kobrekim.com
john.conte@kobrekim.com
vincent.yiu@kobrekim.com

-and-

FOLEY & LARDNER LLP

John P. Melko
1000 Louisiana Street, Suite 2000
Houston, TX 77002
Tel: 713-276-5500
JMelko@foley.com

Counsel to the 2024/2026 Holders

CERTIFICATE OF SERVICE

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

/s/ Zachary D. Rosenbaum
Zachary D. Rosenbaum