

ICG Global Loan Fund 1 DAC v Boardriders, Inc.

2022 NY Slip Op 33492(U)

October 17, 2022

Supreme Court, New York County

Docket Number: Index No. 655175/2020

Judge: Andrea Masley

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 48

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ICG GLOBAL LOAN FUND 1 DAC, ICG GLOBAL TOTAL CREDIT FUND 1 DAC, ICG US SENIOR LOAN FUND (CAYMAN) MASTER LP, ICG SENIOR DEBT PARTNERS SV 1 - ICG SECURED FINANCE COMPARTMENT, ICG US CLO 2014-1, ICG US CLO 2014-2, ICG US CLO 2015-1, ICG US CLO 2015-2R, ICG US CLO 2016-1, ICG US CLO 2017-1, ICG US CLO 2017-2, ICG US CLO 2018-1, ICG US CLO 2018-2, ICG US CLO 2018- 3, ICG US CLO 2019-1, YORK CLO-1 LTD., YORK CLO-2 LTD., YORK CLO-3 LTD., YORK CLO-4 LTD., YORK CLO-5 LTD., YORK CLO-6 LTD., YORK CLO-7 LTD., BLUEMOUNTAIN CLO 2013-2 LTD., BLUEMOUNTAIN FUJI US CLO I LTD., BLUEMOUNTAIN FUJI US CLO II LTD., BLUEMOUNTAIN CLO 2012-2 LTD., BLUEMOUNTAIN CLO 2013-1 LTD., BLUEMOUNTAIN CLO 2014-2 LTD., BLUEMOUNTAIN CLO 2015- 2 LTD., BLUEMOUNTAIN CLO 2015-3 LTD., BLUEMOUNTAIN CLO 2015-4 LTD., BLUEMOUNTAIN CLO 2016-1 LTD., BLUEMOUNTAIN CLO 2016-2 LTD., BLUEMOUNTAIN CLO 2016- 3 LTD., BLUEMOUNTAIN CLO 2018-1 LTD., BLUEMOUNTAIN CLO 2018-2 LTD., BLUEMOUNTAIN CLO 2018-3 LTD., BLUEMOUNTAIN CLO XXII LTD., BLUEMOUNTAIN CLO XXIII LTD., BLUEMOUNTAIN CLO XXIV LTD., BLUEMOUNTAIN CLO XXV LTD., GREAT ELM CAPITAL CORP., OFSI BSL VIII, LTD., OFSI BSL IX, LTD., Z CAPITAL PARTNERS CLO 2018-1 LTD., and Z CAPITAL PARTNERS CLO 2019-1 LTD.,

INDEX NO. 655175/2020

MOTION DATE N/A

MOTION SEQ. NO. 004 005 006

**DECISION + ORDER ON
MOTION**

Plaintiffs,

- v -

BOARDRIDERS, INC., OAKTREE CAPITAL MANAGEMENT, L.P., OAKTREE FUND GP, LLC, OAKTREE FUND GP I, L.P., CANYON CAPITAL ADVISORS, LLC, CANYON PARTNERS REAL ESTATE LLC, RIVER CANYON FUND MANAGEMENT LLC, MARATHON BLUE GRASS CREDIT FUND, LP, MARATHON CENTRE STREET PARTNERSHIP, L.P., MARATHON SPECIAL OPPORTUNITY MASTER FUND, LTD., AUSTRALIANSUPER, TRS CREDIT FUND LP, BRIGADE CAPITAL MANAGEMENT, LP, MIDOCEAN CREDIT FUND MANAGEMENT L.P., CORBIN CAPITAL PARTNERS, L.P., and PONTUS HOLDINGS LTD., REDWOOD CAPITAL MANAGEMENT, LLC,

Defendants.¹

¹ On consent, Oaktree Principal Fund V (Delaware), L.P., Oaktree Principal V Continuation Fund (Delaware) Holdco, L.P., and Oaktree Principal Fund VI (Delaware) 655175/2020 ICG GLOBAL LOAN FUND 1 DAC vs. BOARDRIDERS, INC. Motion No. 004 005 006 Page 1 of 26

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HON. ANDREA MASLEY:

The following e-filed documents, listed by NYSCEF document number (Motion 004) 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 102, 126, 127, 128, 129, 130, 131, 132, 133, 147, 150, 151, 154, 155, 157

were read on this motion to/for DISMISS.

The following e-filed documents, listed by NYSCEF document number (Motion 005) 56, 57, 58, 59, 60, 61, 104, 134

were read on this motion to/for DISMISS.

The following e-filed documents, listed by NYSCEF document number (Motion 006) 62, 63, 103, 105, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 148, 149, 152

were read on this motion to/for DISMISSAL.

Holdings, L.P. (Oaktree Lenders) substituted defendants Oaktree Fund GP, LLC and Oaktree Fund GP I, L.P. (Prior Oaktree Funds). (NYSCEF Doc. No. [NYSCEF] 153, so ordered stipulation at 1.) All claims against the Prior Oaktree Funds have been dismissed with prejudice. (*Id.*)

In simple terms, this case concerns an uptier transaction² that left plaintiffs' first-lien term loans subordinated without their consent to a group of select lenders, here, defendants, who once held first-lien term loans but now hold super-priority term loans.

Background

The following facts are taken from the complaint (see NYSCEF Doc. No. [NYSCEF] 1, compl.) and presumed as true on these motions to dismiss. (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994] [citations omitted].)

The Syndicated Credit Agreement

Defendant Boardriders, Inc. (Company), a California-based surfing and skateboarding apparel maker, borrowed \$450 million in term loans pursuant to an April 6, 2018 syndicated credit agreement (Credit Agreement) (NYSCEF 1, compl. ¶¶ 49, 51) to finance the acquisition of nonparty Billabong International Limited (Billabong) and to refinance its and Billabong's debt. (*id.* ¶ 2). Nonparty Deutsche Bank AG New York Branch served as Administrative Agent and Collateral Agent under the Credit Agreement. (*id.* ¶ 51.) Plaintiffs are a group of lenders collectively holding

² "There has been a flurry of litigation in recent years over transactions that seem to take advantage of technical constructions of loan documents in ways that some view as breaking with commercial norms. One example of such a transaction is sometimes described as an 'uptier' transaction. . . . [S]uch a transaction is one in which the debtor and a majority (but not all) holders of a syndicated debt issuance agree to enter into a new loan that is supported by a superior lien in the same collateral that secured the original debt. Thereafter, the debtor repurchases the participating lenders' share in the prior (now junior) loan – effectively leaving behind the minority holders in a tranche of debt that is now junior to that held by the majority lenders. While such a transaction would typically require an amendment to the original credit agreement or indenture, those documents are typically drafted to permit a majority (or, in some cases, a supermajority) of the holders to amend the agreement without the consent of the minority." (*In re TPC Group Inc.*, 2022 WL 2498751, US Bankr LEXIS 1856 [Bankr D Del July 6, 2022] [Goldblatt, J.]

approximately \$85 million of first-lien term loans under the Credit Agreement. (*Id.* ¶ 53; see also *id.* ¶¶ 14-19 [enumerating the amount of first-lien term loans held by individual plaintiffs or groups of plaintiffs].) Defendant Oaktree Capital Management LLC (Oaktree Capital) serves as the “Sponsor”³ under the Credit Agreement, is the equity holder of the Company, and, through its affiliated funds, the Oaktree Lenders, held approximately \$35 million in first-lien term loans. (See NYSCEF 1, compl. ¶¶ 52, 74.) Defendants Canyon Capital Advisors, LLC, Canyon Partners Real Estate LLC, River Canyon Fund Management LLC, Marathon Blue Grass Credit Fund, LP, Marathon Centre Street Partnership, L.P., Marathon Special Opportunity Master Fund, Ltd., Australiansuper, TRS Credit Fund LP, Brigade Capital Management, LP, MidOcean Credit Fund Management L.P., Corbin Capital Partners, L.P., Pontus Holdings Ltd., and Redwood Capital Management, LLC are a group of lenders holding approximately \$286 million in first-lien term loan debt (Participating Lenders, and together with the Oaktree Lenders and the Company, defendants). (See *id.* ¶¶ 37, 76.) The Participating Lenders and the Oaktree Lenders collectively held \$321 million in first-lien term loan debt under the Credit Agreement.

Plaintiffs’ Allegations and the Terms of the Credit Agreement

The “hallmark” of the Credit Agreement, in plaintiffs’ view, is equal treatment of all lenders with respect to payment of loan interest and principal amounts. (NYSCEF 1, compl. ¶ 3.) In other words, the Company must pay down its term loans through the administrative agent to each lender pro rata and may not selectively pay down the loans

³ This term is defined in the Credit Agreement. (See NYSCEF 28, redline of Second Amended Credit Agreement at 74.)

of any one particular lender. (*Id.*) Plaintiffs explain that the Credit Agreement is a typical syndicated credit facility where the borrower

“arranges to borrow the amount it needs from a ‘syndicate’ of lenders, all under a single loan agreement. The loan agreement in a syndicated credit facility contains various provisions to ensure that the borrower treats the loans from each lender equally and as part of a ‘single’ loan. Examples of such provisions include pro rata payment requirements mandating that the borrower make payments on the loans equally among all lenders and the requirement that amendments to the pro rata payment provisions can only be effectuated with the consent of all lenders. Without these pro rata protections, the borrower could elect to pay certain favored lenders a greater proportion (or even all) of their loans ahead of the other lenders.”

(*Id.* ¶ 55.) To that end, section 4.01(a)(iii) of the Credit Agreement, which governs voluntary prepayment of the loans, provides that “each prepayment pursuant to this section . . . in respect of any Loans made pursuant to a Borrowing shall be applied pro rata among such loans[.]” (*Id.* ¶ 58.) Section 4.02, titled “Mandatory Repayments,” sets forth in sub-section (h) that “except for repayments made pursuant to Section 2.15, each repayment of any Loans made pursuant to a Borrowing shall be applied pro rata among the Lenders holding such Loans.” (*Id.* at 101.) Another pro rata provision appears in section 12.06 of the Credit Agreement:

“Payments Pro Rata. (a) Except as otherwise provided in this Agreement, the Administrative Agent agrees that promptly after its receipt of each payment from or on behalf of the Borrower in respect of any Obligations hereunder, the Administrative Agent shall distribute such payment to the Lenders entitled thereto (other than any Lender that has consented in writing to waive its pro rata share of any such payment) pro rata based upon their respective shares, if any, of the Obligations with respect to which such payment was received.”

(*Id.* ¶ 56 [emphasis added].) Accordingly, section 12.06(b) requires any lender that receives any amount applicable to the payment of interest or principal of the loan to “purchase for cash without recourse or warranty from the other Lenders an interest in the Obligations of the respective Credit Party so such Lenders in such amount as shall result in a proportional participation by all the Lenders in such amount.” (*Id.* at 58.)

There is one exception under the Credit Agreement with regard to pro rata treatment among lenders at issue here. (*Id.* ¶ 4.) Section 2.15 of the Credit Agreement, titled “Loan Repurchases,” authorizes the Company to repurchase loans on a non-pro rata basis through an “open market” purchase. (*Id.* ¶ 60.)

Generally, pursuant to section 12.12, the Credit Amendment and “Credit Documents”⁴ may be amended or modified by approval of the “Required Lenders” which is defined as “Non-Defaulting Lenders (other than Affiliated Non-Debt Fund Lenders) the sum of whose outstanding Loans at such time represents at least a majority of the sum of all outstanding Loans of Non-Defaulting Lenders that are not Affiliated Non-Debt Fund Lenders at such time.” (NYSCEF 28, redline of Second Amended Credit Agreement at 70, 172). Section 12.12 contains exceptions to amending the Credit Agreement and Credit Documents, commonly known as a “sacred rights” provision (NYSCEF 1, compl. ¶ 59), and provides in relevant part:

“(a) Neither this Agreement nor any other Credit Document nor any terms hereof or thereof may be amended, waived or modified (other than upon payment in full of the Obligations) unless such amendment, waiver or modification is in writing

⁴ Under the Credit Agreement, “Credit Documents” defined as “this Agreement, the Guaranty, each Security Document, the Intercreditor Agreement, the Intercompany Subordination Agreement and, after the execution and delivery thereof pursuant to the terms of this Agreement, each Other Intercreditor Agreement, each Note and each Mortgage.” (NYSCEF 28, redline of second amended credit agreement at 41.)

signed by the respective Credit Parties party hereto or thereto and signed or consented to in writing by the Required Lenders or the Administrative Agent with the consent of the Required Lenders . . . , provided that no such amendment, waiver or modification shall, without the consent of each Lender (with Commitments or Obligations being directly affected in the case of following clauses (i), (iv), (v), (vi) and (vii)), (i) increase the amount of any Commitment, extend the final scheduled maturity of any Loan or Note, or reduce the rate or extend the time of payment of scheduled amortization, interest or Fees thereon . . . , or reduce (or forgive) the principal amount thereof . . . [;] (ii) release all or substantially all of the Collateral under the Security Documents or release all or substantially all of the value of the Guaranty provided by the Guarantors . . . [;] (iii) amend, modify or waive any provision of this Section 12.12(a) . . . [;] (iv) amend, modify or waive any provision of Section 12.04 to the extent such amendment, modification or waiver would further restrict the ability of Lenders to assign or grant participations in their rights hereunder [;] (v) reduce the “majority” voting threshold specified in the definition of Required Lenders . . . [;] (vi) amend, modify or waive any of the order of application provisions contained in Section 10.02[;] or (vii) amend, modify or waive any of the pro rata sharing provisions contained in Section 4.01(a), Section 4.02(h) or Section 12.06[.]”

(NYSCEF 28, redline of Second Amended Credit Agreement at 172-73 [emphasis added].) And, in plaintiffs’ view, the amendment provision underscores the importance of the pro rata sharing provisions as amendments cannot be made without consent of all lenders if any modifications modify or implicate any of the sacred rights enumerated above. (See NYSCEF 1, compl. ¶ 59.)

The Disputed Transaction

Between March 2020 and May 2020, after the onset of the COVID-19 pandemic, plaintiffs, recognizing the financial challenges presented by the pandemic, repeatedly attempted to speak with high-level executives at the Company concerning any financial challenges the Company may be facing in light of the pandemic. (See NYSCEF 1,

compl. ¶¶ 105, 122, 134, 137-38, 146.) They either received conflicting responses or could not reach anyone. (*See id.*)

Sometime in June 2020, the Company, Participating Lenders (who were allegedly hand-selected by the Oaktree Lenders), and the Oaktree Lenders “commenced secret discussions,” amended the Credit Agreement, and entered into a suite of interrelated agreements to effectuate a transaction to “provide[] the Company with up to \$110 million of new money commitments, which were given super-priority lien treatment over the existing term loans” (Transaction) over an excluded group of holders of first-lien term loans of which plaintiffs are a part of (Non-Participating Lenders). (NYSCEF 1, compl. ¶¶ 67-68.) Deutsche Bank resigned as the Administrative and Collateral Agent before the Transaction was publicly announced; thereafter, nonparty Alter Domus (US) LLC (Alter Domus) stepped in as Administrative and Collateral Agent without plaintiffs’ knowledge or consent. (*Id.* 8.) The Transaction went into effect on August 31, 2020, and plaintiffs were informed of the Transaction after it was publicly announced on August 31, 2020. (*See, e.g., id.* ¶¶ 120, 149.)

Second Amended Credit Agreement

To effectuate the Transaction, defendants and Alter Domus entered into the Second Amendment to Term Loan Credit Agreement, Consent and Waiver, dated August 31, 2020 (Second ACA). (NYSCEF 1, compl. ¶¶ 70-71.) The Second ACA permitted the Company to issue “new, super-priority first-lien debt with the rights among the lenders of the new super-priority debt and the existing term loan debt . . . [to be] governed by the . . . Intercreditor Agreement.” (*Id.* ¶ 71.) To incur this new super-priority debt, section 9 of the Credit Agreement was eliminated as these negative

covenants “prohibited the Company from granting liens upon its property or assets, paying dividends and making other restricted payments, and incurring new debt, among other things.” (See *id.* ¶ 64.) Section 9, titled “Negative Covenants” contained “negative covenants beginning on the closing date of the Credit Agreement until the term loans were paid in full. (*Id.* ¶¶ 64, 87; see also NYSCEF 28, redline of Second ACA at 126.) Section 8 of the Credit Agreement was also eliminated. (*Id.* at 116.) Section 8 of the Credit Agreement, titled “Affirmative Covenants” contained provisions requiring the Company to deliver quarterly and annual financial information, maintain its corporate ratings, comply with all applicable laws and regulations, and pay all material taxes imposed upon it. (NYSCEF 1, compl. ¶ 63.) Section 12.23 of the Credit Agreement, originally titled “Lender Action” was amended to provide that “Lenders can only enforce their rights if they have the status of Required Lenders and direct the Administrative Agent . . . to take such action on their behalf.” (See *id.* ¶ 92.) A new provision, 12.01(c) was added, which required a cash indemnity bond equal to commence any action. (See *id.* ¶ 91.) Alter Domus, the new Administrative and Collateral Agent, entered into a new Intercreditor Agreement with the Company. (See *id.* ¶ 93.)

Under section 11.10(a) of the Credit Agreement, all initial term loan lenders authorized and directed the Deutsche Bank, as the Collateral Agent, to enter into certain agreements, including ‘any Other Intercreditor Agreement for the benefit of the Lenders’” (*Id.* ¶ 94.) Under the Credit Agreement, “Other Intercreditor Agreements” is defined as “any Second Lien Intercreditor Agreement, Pari Passu Intercreditor Agreement or other intercreditor in form and substance reasonably satisfactory to the

Borrower and the Administrative Agent and the Collateral Agent.” (NYSCEF 28, redline of Second ACA at 61.) The amended section 11.10(a) “struck the *pari passu* limitation on any Other Intercreditor Agreement from Section 1.02(b) of the Credit Agreement when they executed the Second Amended Credit Agreement.” (NYSCEF 1, compl. ¶ 95.)

Super-Priority Credit Agreement & the Open Market Purchase Agreements

On the same day as the Second ACA, the Company, Participating Lenders, Oaktree Lenders, and nonparty Wilmington Savings Fund Society, FSB, as Administrative and Collateral Agent (Wilmington), entered into the Super-Priority Term Loan Credit Agreement dated August 31, 2020 (SPCA). (NYSCEF 1, compl. ¶ 72.) The SPCA “provides for three new tranches of first-lien term loans . . . with priority status over the loans of the [p]laintiffs and other excluded [non-participating lenders].” (*Id.* ¶¶ 73-74.) First, “\$45 million of super-priority ‘Tranche A’ Priority Loans made by [Participating Lenders and Oaktree Lenders] consisting of new money commitments”; second, “[a]pproximately \$80 million of ‘Tranche B-1’ Priority Loans held by certain affiliates of Oaktree Capital, consisting of \$45 million of new money commitments and a roll-up of \$35 million of Loans held by certain affiliates of Oaktree Capital”; and third, “[a]pproximately \$286 million of ‘Tranche B-2’ Priority Loans held by the [Participating Lenders and Oaktree Lenders], entirely on account of a roll-up of \$286 million in loans held by the [Participating Lenders and Oaktree Lenders] and no new money commitment.” (*Id.* ¶ 74.) The SPCA also provided a \$20 million super-priority delayed draw term loan facility funded by Oaktree Lenders. (*Id.* ¶ 75.)

In order to “effectuate the roll-up of existing *pari passu* term loans into Tranche B-1 and B-2 priority loans on a non-pro rata basis . . . the Company entered into private agreements with Oaktree Capital and/or certain of its affiliates, as well as the Participating Lenders [and Oaktree Lenders], in which the Company agreed to satisfy its obligations on \$321 million of term loans . . . at par in exchange for an equal amount of Tranche B-1 and B-2 Priority Loans” by entering into open market purchases. (NYSCEF 1, compl. ¶ 76.) These private agreements were labeled as “Open Market Purchase Agreements,” but in plaintiffs’ view, did not constitute as true open market purchases under section 2.15 because (i) the Company did not retire the debt, but instead exchanged existing *pari passu* debt for new senior secured debt; (ii) purchases were not at market value; (iii) the Participating Lenders’ and Oaktree Lenders’ term loans were exchanged at par even though the trading value of such debt was at 50-60% of par, and (iv) the purchase were not stand alone transactions but part of the larger scheme to divert value from the plaintiffs and other non-participating lenders. (*Id.* ¶ 77.)

Second Lien Intercreditor Agreement

Alter Domus and the Company entered into a new intercreditor agreement, “Second Lien Intercreditor Agreement,” dated August 31, 2020 (Second ICA) at the direction of defendants. The Second ICA subordinated the first-lien debt of the non-participating lenders in lien priority to the new super-priority debt of the Participating Lenders and pre-authorized the Company to subordinate the lien of the Non-Participating Lenders to any of the Company’s future debts. (See NYSCEF 1, compl. ¶¶ 11, 98.)

Against the Company, Participating Lenders, and Oaktree Lenders, plaintiffs assert causes of action for (i) breach of Sections 4.01 and 12.06 under the Credit Agreement and seek specific performance of Section 12.06 which requires the defendants to purchase for cash without recourse or warranty from the plaintiffs an interest in the obligations of the respective credit party to plaintiffs in an amount that will result in proportional participation by all lenders in the amounts received from The Company as a result of the Transaction (first cause of action), or alternatively, damages; (ii) breach of the implied duty of good faith and fair dealing (second cause of action); and (iii) declaratory judgment that Sections 12.01(c) and 12.23 of the Second Amended Credit Agreement are unenforceable, Section 12.06(b) shall be enforced, that the Transaction Agreement and its associated agreements and amendments be invalidated and unwound, and that votes of the Oaktree entities permitting the Transaction be invalidated (fourth and fifth causes of action).

Against Oaktree Capital, plaintiffs assert a claim of tortious interference with the Credit Agreement (third cause of action). Plaintiffs initially claimed, against all defendants, violations of Sections 273, 276, and 276(a) of the New York Uniform Voidable Transactions Act (NYUVTA), and against the Company and Oaktree Capital, violations of Sections 274, 276, and 276(a) of the NYUVTA (sixth and seventh causes of actions, respectively). However, plaintiffs have voluntarily withdrawn their claims arising from the NYUVTA (sixth and seventh causes of action). (NYSCEF 77, mem of law in opp at 11 n 1.)

In motion sequence number 004, the Company moves to dismiss the complaint pursuant to CPLR 3211(a)(1), (3), and (7). In motion sequence number 005, the

Participating Lenders move to dismiss the complaint pursuant to CPLR 3211 (a)(7). In motion sequence number 006, Oaktree Capital and the Oaktree Lenders move to dismiss the complaint pursuant to CPLR 3211(a)(1), (3), and (7).

Legal Standard

To prevail on a CPLR 3211(a)(1) motion to dismiss, the movant has the “burden of showing that the relied upon documentary evidence ‘resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff’s claim.’” (*Fortis Fin. Servs. v Filmat Futures USA*, 290 AD2d 383, 383 [1st Dept 2002] [citation omitted].) “A cause of action may be dismissed under CPLR 3211(a)(1) ‘only where the documentary evidence utterly refutes [the] plaintiff’s factual allegations, conclusively establishing a defense as a matter of law.’” (*Art and Fashion Group Corp. v Cyclops Prod., Inc.*, 120 AD3d 436, 438 [1st Dept 2014] [citation omitted].) The authenticity of documentary evidence must not be subject to genuine dispute, and it must be enough to “support the ground on which the motion is based.” (*Amsterdam Hosp. Grp., LLC v Marshall-Alan Assocs., Inc.*, 120 AD3d 431, 432 [1st Dept 2014] [citation omitted].)

Under CPLR 3211(a)(3) motion to dismiss, the moving party has the burden to establish a prima facie case that plaintiff lacks standing. (*Brunner v Estate of Lax*, 137 AD3d 553, 553 [1st Dept 2016] [citation omitted].) “[T]he plaintiff has no burden of establishing its standing as a matter of law; rather, the motion will be defeated if the plaintiff’s submissions raise a question of fact as to its standing.” (*Luong v Ha The Luong*, 67 Misc 3d 1210(A), *4 [Sup Ct, NY County 2020] [citation omitted].)

On a motion to dismiss brought under CPLR 3211, the court must “accept the facts as alleged in the complaint as true, accord the plaintiff the benefit of every possible

favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory. (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994].) “[I]f from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law,” the motion will be denied. (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977].) But “allegations consisting of bare legal conclusions ... are not entitled to any such consideration.” (*Connaughton v Chipotle Mexican Grill, Inc.*, 29 NY3d 137, 141 [2017] [internal quotation marks and citation omitted].) In addition, “the court is not required to accept factual allegations that are plainly contradicted by the documentary evidence or legal conclusions that are unsupported based upon the undisputed facts.” (*Robinson v Robinson*, 303 AD2d 234, 235 [1st Dept 2003].)

Discussion

In essence, plaintiffs allege that the amendments to the Credit Agreement implicated the sacred rights provision requiring consent of all lenders prior to any amendment or modification and thus the Second ACA, Second ICA, SPCA, and Open Market Purchase Agreements are in violation of the Credit Agreement. Specifically: (i) the pro rata sharing provisions were breached when the Company exchanged the Participating Lenders and Oaktree Lenders’ initial first-lien term loans at par on a non-pro rata basis without complying with the open market exception; (ii) the amendments to the Credit Agreement reduced the principal amount of the Participating Lenders and Oaktree Lenders’ term loans which negatively affected the obligations owed to plaintiff; and (iii) the amendment to the Credit Agreement authorizing Alter Domus to enter into the Second ICA implicated various sacred right protections under the Credit Agreement.

The Company argues that plaintiffs' complaint should be dismissed in its entirety because plaintiffs failed to comply with the Credit Agreement's amended no-action provision and thus lack standing. The Company argues that, in the alternative, plaintiffs' breach of contract, breach of good faith and fair dealing, and declaratory judgment claims must be dismissed as they are contradicted and defeated by the plain terms of the Credit Agreement which did not prevent defendants from amending the Credit Agreement to enter into the Transaction. As to plaintiffs' claim against Oaktree Capital for tortious interference with the Credit Agreement, Oaktree Capital moves to dismiss under the economic interest defense.

The Participating Lenders and the Oaktree Lenders raise similar arguments in support of dismissal, and, to the extent that the Participating Lenders and/or the Oaktree Lenders pose different arguments from the Company, they will be discussed separately below.

Standing

The Company argues that plaintiffs lack standing as they failed to (i) act through the Administrative Agent with respect to any of plaintiffs' claims pursuant to Section 12.23 of the Amended Credit Agreement, and (ii) post a cash indemnity pursuant to Section 12.01(c) of the Amended Credit Agreement.

To support its contention, the Company principally cites to *Eaton Vance Mgmt. v Wilmington Sav. Fund Soc'y*, a case in which the court dismissed plaintiffs' claim as barred by the no-action clause. (2018 WL 1947405, at *6 [Sup Ct, NY County, Apr. 25, 2018], aff'd 171 AD3d 626 [1st Dept 2019].) In *Eaton Vance*, the defendants argued that plaintiffs' causes of actions were barred by the no-action clauses in their 2014 and 2017

agreements. The similarities end there. The circumstances of *Eaton Vance* and the no-action clause there are quite different in comparison to this action, and therefore inapposite. Critically, no party in *Eaton Vance* challenged the enforceability of the no-action clause which prohibited a lender from taking any legal action “without the prior written consent of the Administrative Agent.” (*Id.* at *1-3.) Moreover, the plaintiffs in *Eaton Vance* sued under their 2014 agreement. (*Id.* at *4.) The dispute in *Eaton Vance* did not require the court to consider whether the no-action clause was unenforceable, rather, the court was presented with the question of whether the plaintiffs’ claims fell into the no-action clause. (*Id.*) Here, the enforceability of the amendments to the no-action clause, which, amended without plaintiffs’ consent, prohibited plaintiffs from taking legal action without the prior authorization of the Administration Agent, is heavily disputed. As the Company primarily relies on *Eaton Vance*, and other authorities that concerned valid no-action clauses, the Company has failed to establish prima facie that plaintiffs lack standing to bring this action.

On the other hand, plaintiffs argue that the pre-amended version of section 12.23 does not prohibit them from bringing claims against these defendants as the pre-amended version only prohibits actions against the Company or any other obligor concerning “any Collateral or any other property of the Borrower.” Plaintiffs contend, and the court agrees, that they are not seeking to enforce any liens against the collateral or any other Company property. Moreover, the court finds an analogous situation in *Audax Credit Opportunities Offshore Ltd. v TMK Hawk Parent, Corp.*, where “Defendants assert that Plaintiffs do not have standing to assert their claims because they failed to comply with the amended no-action provisions requiring Plaintiffs to pre-fund a cash indemnity

and request the Administrative Agent to initiate litigation on their behalf.” (72 Misc 3d 1218[A], *5 [Sup Ct, NY County, Aug. 16, 2021].) After the court in *Audax* considered the purpose of no-action clauses, enforceability of such clauses, and the atypical situation leading to the amendment of the challenged no-action clauses, the court found that “amended no-action provisions are unenforceable and inapplicable to the claims asserted in this action. They were never agreed to by the parties to the Original Agreement, and do not serve the ‘salutary purpose’ that generally supports enforceability of such restrictions on access to the courts and are alleged to be an integral part of Defendants’ breach of contract.” (*Id.* at *7.) Here, plaintiffs have sufficiently alleged that Section 12.23 was amended in bad faith to prevent plaintiffs from suing to enforce their rights under the Credit Agreement (see, e.g., compl. ¶ 92) and their right to bring this action is not barred by the pre-amended version of Section 12.23.

Declaratory Judgment and Breach of Contract⁵

Dismissal under CPLR 3211(a)(1) and (7) is inappropriate if a court finds that a contract is ambiguous and thus cannot be construed as a matter of law. (See *Telerep, LLC v U.S. Intern. Media, LLC*, 74 AD3d 401, 402 [1st Dept 2010].) “Whether a contractual term is ambiguous must be determined by the court as a matter of law, looking solely to the plain language used by the parties within the four corners of the contract to discern its meaning and not to extrinsic sources.” (*Duane Reade, Inc. v Cardtronics, LP*, 54 AD3d 137, 141 [1st Dept 2008] [citation omitted].) “In deciding

⁵ Plaintiffs’ claims for declaratory judgment against defendants and breach of contract are tethered to the threshold question of whether the amendments to the Credit Agreement and resulting agreements to facilitate the Transaction violated plaintiffs’ sacred rights set forth under section 12.12 of the Credit Agreement.

whether an agreement is ambiguous courts ‘should examine the entire contract and consider the relation of the parties and the circumstances under which it was executed. Particular words should be considered, not as if isolated from the context, but in the light of the obligation as a whole and the intention of the parties as manifested thereby. Form should not prevail over substance and a sensible meaning of words should be sought.’” (*Kass v Kass*, 91 NY2d 554, 566-67 [1998], citing *Atwater & Co. v Panama R.R. Co.*, 246 NY 519, 524 [1927].) A contract is ambiguous if it is “susceptible of two reasonable interpretations.” (*Lend Lease U.S. Const. LMB Inc. v Zurich Am. Ins. Co.*, 136 AD3d 52, 56 [1st Dept 2015] [internal quotation marks and citation omitted], *affd* on other grounds, 28 NY3d 675 [2017].)

“[I]nstruments executed at the same time, by the same parties, for the same purpose, and in the course of the same transaction will be read and interpreted together, it being said that they are, in the eye of the law, one instrument.” (*BWA Corp. v Alltrans Express U.S.A., Inc.*, 112 AD2d 850, 852 [1st Dept 1985].) As the Second ACA, Second ICA, SPCA, and Open Market Purchase Agreements were executed on the same day and entered into to effectuate the Transaction (see NYSCEF 1, compl. ¶¶ 6, 70), the court will read the August 31, 2020, agreements as one instrument.

The Company argues that the Credit Agreement did not prohibit the amendments at issue—i.e., amendments having the effect of subordinating liens, removing affirmative and negative covenants, or modifying the no-action clause—because none of the amendments implicated a sacred right. Therefore, the consent of all lenders was not necessary. The Company posits two arguments as to why there was no breach of the Credit Agreement in opposition to plaintiffs’ allegations. First, as to the Second ICA,

the Company argues that there was no breach because the Second ICA, on its face, does not amend the plaintiffs' pro rata distribution provisions under the Credit Agreement. The Company concedes that the Second ICA does, however, subordinate the liens securing plaintiffs' term loans. Plaintiffs argue that by allowing Alter Domus to enter into the Second ICA and subordinating plaintiffs' original first-lien behind the new super-priority debt and future debt, the defendants improperly altered the pro rata rights under the Credit Agreement.

Thus, the question is whether the Credit Agreement utterly refutes plaintiffs' claims that the amendments to the Credit Agreement implicated a sacred right requiring the consent of all lenders prior to effectuating any amendment and resulting agreements. The answer is in the negative. Plaintiffs allege that they cannot be repaid until the lenders holding the super-senior loans, and any future Company debt, are repaid. (NYSCEF 1, compl. ¶ 179.) While there is nothing in the sacred rights provision that expressly prohibits the subordination of any lenders' liens, the court rejects the Company's narrow reading of the sacred rights provision. Accepting the Company's argument would essentially vitiate the equal repayment provisions set forth in sections 4.01, 4.02, and 12.12 and be contrary to the court's obligation to consider the context of the entire contract and not in isolation of particular words—or in this case, the absence of particular words. (*Kass*, 91 NY2d at 566, citing *Atwater*, 264 NY at 524.) Therefore, plaintiffs have adequately alleged a breach of their rights under the sacred rights provision in the Credit Agreement.

The Participating Defendants similarly argue that the amendment to section 11.10 under the Credit Agreement does not fall within the ambit of the sacred rights

provision and thus plaintiffs fail to allege an amendment to the Credit Agreement that would require the consent of all lenders. It is clear that amended section 11.10, titled "Collateral Matters" now provides and refers to the second ICA, in that "Each Lender authorizes and directs the Collateral Agent to enter into the Security Documents and the Intercreditor Agreement, the First Lien/Second Lien Intercreditor Agreement and any Other Intercreditor Agreement for the benefit of the Lenders and the Secured Creditors" (NYSCEF 28, redline of Second ACA at 158.) The Second ICA purports to dictate relative rights between the term lenders and the now priority term lenders under the Second ACA. However, for the same reasons as above, the court rejects the Participating Lenders' arguments and denies dismissal on this ground.

Reduction of Principal Loan Amounts

Second, the Company contends that the Second ACA did not reduce or forgive the principal amount of any term loans and thus does not implicate any sacred right. According to the Company, the new loans acquired through the open market purchases were expressly permitted by the Credit Agreement and did not affect any of the Company's obligations to plaintiffs, especially so since plaintiff retains the same principal amount of term loans at the same interest rate with the same maturity date they held prior to the Second ACA.

Here, the Company has failed to meet its burden to show that the Second ACA clearly forecloses plaintiffs' claim that the Transaction impermissibly reduced the principal amount of loans. Section 12.12(a)(i) does not specify whose term loans may not be reduced or forgiven. The Company's view is that plaintiffs' term loans were not affected but plaintiffs have posited a reasonable interpretation and alleged that the

Open Market Purchase Agreements, construed together with the Second ACA, extinguished the Participating Lenders and Oaktree Lenders' initial \$321 million worth of *pari passu* debt, reducing the principal amount of their debt to zero. As two reasonable interpretations exist, the court declines to dismiss plaintiffs' claim.

Open Market Exception

Plaintiffs also allege that the "roll-up" of defendants' initial *pari passu* term loans into Tranche B-1 and B-2 loans did not comport with section 2.15 and thus breaches the pro rata sharing provisions of the Credit Agreement. The Company contends that there was no breach of the pro rata sharing provisions because the "open market" exception contained within the Credit Agreement does not impose the requirements plaintiffs claim. Specifically, the Company argues that the open market exception does not require, as plaintiffs argue, that term loans must be retired and not exchanged, the purchases to be at market value or for cash, the purchases be standalone transactions, and that the transaction be offered to all initial term lenders.

Plaintiffs argue that they have adequately alleged claims for breach of sections 4.01 and 12.06, the pro-rata sharing provisions, when the Company exchanged the Participating Lenders' and Oaktree Lenders' initial first-lien term loans at par on a non-pro rata basis without satisfying the Open Market exception in section 2.15. Specifically, plaintiffs argue that the court should accord the open market exception the plain and ordinary meaning of "open market," which, according to Black's Law Dictionary, means a market in which any buyer or seller may trade in and which prices and product availability are determined by free competition. Plaintiffs argue that they have met their pleading burden because they allege that the Transaction was not

available to all buyers and sellers in the marketplace, and that in fact, the Transaction was made available to select first-lien lenders; free competition did not determine the market price, no third-party advisor or broker was hired to canvass the market for first-lien debt to purchase at a discount, and, the Company did not purchase the loans at market value but rather it exchanged the Participating Lenders and Oaktree Lenders' loans at par value despite the trading value at 40-50% discount to par. And in opposition to defendants' interpretation of the "Dutch Auction Purchase Offer" which is also used in section 2.15 of the Credit Agreement, plaintiffs argue that there was no need to specify that an open market purchase must be open to all lenders because it is obvious in name. Alternatively, plaintiffs argue that the open market exception is ambiguous and thus the claim should not be dismissed at this stage.

Section 2.15, titled Loan Repurchases, states that either the sponsor, the borrower, or their affiliates "may from time to time, at its discretion, conduct modified Dutch auctions in order to purchase Loans (Each, a "Dutch Auction Purchase Offer"), each such Dutch Auction Purchase Offer to be managed by DBNY or another financial institution or advisor selected by the Borrower" and "may from time to time purchase Loans on the open market (each, an "Open Market Purchase Offer" and together with a Dutch Auction Purchase Offer, the "Purchase Offers"), so long as in each case the following conditions [stated in (i)—(vii)] (to the extent applicable) are satisfied[.]" The condition stated in (iii) provides that "each Dutch Auction Purchase Offer shall be open and offered to all Lenders (or all Lenders of a particular Class) on a pro rata basis[.]" The provision provides for purchases of loans on the open market but critically fails to define what constitutes an open market. The Company's interpretation of the open

market transaction is supported by the omission of the express condition that loan repurchase transaction be “open and offered to all Lenders,” a condition that is clearly ascribed to Dutch Auction Purchase Offers. (See NYSCEF 28, Second Amended CA at 91-92 [section 2.15 (iii)].) However, just as reasonable is plaintiffs’ proffered interpretation that the ordinary and plain meaning of “open market” implies “open and offered to all Lenders.” Therefore, as the term is undefined and the contractual language is reasonably susceptible of more than one interpretation, an ambiguity exists. Thus, the Credit Agreement does not unequivocally foreclose the allegations in the complaint, and the motion to dismiss plaintiffs’ breach of contract claim is denied.

Breach of the Implied Covenant of Good Faith and Fair Dealing

“In New York, all contracts imply a covenant of good faith and fair dealing in the course of performance.” (*511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 153 [2002] [citations omitted].) “This covenant embraces a pledge that ‘neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract.’” (*Id.* [citations omitted].) A claim for breach of the implied covenant of good faith and fair dealing will be dismissed as duplicative of its contract if both claims arise from the same facts and seek the identical damages for each alleged breach. (See *Amcan Holdings, Inc. v Can. Imperial Bank of Commerce*, 70 AD3d 423 [1st Dept 2010] [citations omitted], *lv to appeal denied*, 1 NY3d 704 [2010].) However, an explicitly discretionary contract right cannot be exercised in such bad faith as to deprive the other party of the benefit of the bargain. (*Shatz v Chertok*, 180 AD3d 609, 609-10 [1st Dept 2020], citing *Richbell Info. Services, Inc. v Jupiter Partners, L.P.*, 309 AD2d 288 [1st Dept 2003].)

The Company contends that plaintiffs' claims are duplicative of their breach of contract claims, however, the court disagrees and denies defendants' motion to dismiss the implied covenant claim. Here, plaintiffs allege that the Transaction was carried out in secret and while plaintiffs made multiple attempts to gauge whether the Company needed additional capital, which plaintiffs allege they were willing to provide. (See, e.g., NYSCEf 1, compl. ¶¶ 105-120.) Plaintiffs further allege that defendants, who constitute "majority lenders" under the Credit Agreement, abused their ability to amend the Credit Agreement to effectuate the Transaction (see *id.* ¶ 10), going so far as to amend the no-action provisions to hinder plaintiffs' ability to sue and eliminating every affirmative and negative covenants set out in sections 8 and 9 (see *id.* ¶ 9). These allegations are sufficient to show that defendants worked in concert and in secret to deprive plaintiffs of the benefit of their bargain, i.e., pro rata distribution of loan repayments, in bad faith. (See *Shatz*, 180 AD3d at 609-10.)

Tortious Interference against Oaktree Capital

Oaktree Capital raises the economic interest defense in support of their motion to dismiss plaintiffs' tortious interference claim. "[D]efendant may raise the economic interest defense—that it acted to protect its own legal or financial stake in the breaching party's business." (*White Plains Coat & Apron Co., Inc. v Cintas Corp.*, 8 NY3d 422, 426 [2007].) For example, the defense applies where "defendants were significant stockholders in the breaching party's business; where defendant and the breaching party had a parent-subsiary relationship; where defendant was the breaching party's creditor; and where the defendant had a managerial contract with the breaching party at the time defendant induced the breach of contract with plaintiff." (*Id.*)

Here, plaintiffs concede throughout their complaint that Oaktree Capital was the ultimate equity holder of the Company and uses its relationships in the retail sector and its expertise to help the Company grow. (See, eg., NYSCEF 1, compl. ¶ 52.) The defense applies. Thus, unless plaintiffs can make a showing of malice, fraud, or illegality to defeat Oaktree Capital's invocation of the economic interest defense, plaintiffs' tortious interference claim will be dismissed. (*Foster v Churchill*, 87 NY2d 744, 750-51 [1996] ["The imposition of liability in spite of a defense of economic interest requires a showing of either malice on the one hand, or fraudulent or illegal means on the other."].) However, plaintiffs have failed to make such a showing of malice, fraud, or illegality to preclude the application of the economic interest defense. Although Oaktree Capital may not have acted in good faith in their actions, specifically with regard to shutting down avenues of communication (see NYSCEF 1, compl. ¶¶ 105, 122, 134, 137-38, 146), plaintiff fails to allege that the actions were fraudulent or illegal.

All other arguments have been considered and the court finds them unavailing.

Accordingly, it is

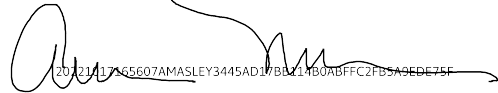
ORDERED that motion sequence number 004 is denied; and it is further

ORDERED that motion sequence number 005 is denied; and it is further

ORDERED that motion sequence number 006 is denied in part and granted in part with respect to plaintiffs' claim for tortious interference (count III) which is dismissed; and it is further

ORDERED that defendants are directed to serve their answers within 20 days after service of a copy of this order with notice of entry; and it is further

ORDERED that the parties shall file in NYSCEF and email to the court a proposed PC order to which all parties agree or competing PC orders if the parties cannot agree to a discovery schedule by November 4, 2022 at 4 pm.



10/17/2022
DATE

ANDREA MASLEY, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input checked="" type="checkbox"/>	GRANTED IN PART
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	SUBMIT ORDER
			<input type="checkbox"/>	FIDUCIARY APPOINTMENT
			<input type="checkbox"/>	REFERENCE
			<input type="checkbox"/>	OTHER

NCBJ – Recent Trends in Liability Management Transactions – Outline

1. **The rise of liability management transactions** [John Singh, PJT]
 - a. Brief explanation of liability management transactions
 - b. Recent history of LMT transactions
 - i. How they came about
 - ii. Discussion of COVID transactions and trends
 - c. Stressed/Distressed Companies that need (1) liquidity or (2) maturity extension and can't get them from the market
 - d. Board decision-making: faced with two alternatives, companies often evaluate two alternatives: file for chapter 11 bankruptcy or seek a life line through an LMT
2. **What are LMTs?** [Billy Clareman, Paul, Weiss]
 - a. Overview of LMTs
 - b. Key agreements and terms
 - i. Key documents
 - ii. Covenants (affirmative and negative covenants, debt/lien baskets, permitted investments)
 - iii. Key parties (guarantor restricted subsidiaries, non-guarantor subsidiaries, unrestricted subsidiaries)
 - iv. "Sacred rights" provisions
 - v. Amendment provisions
3. **LMT Types** [John Singh, PJT]
 - a. Key transaction types
 - i. Priming/Uptier transactions (and important considerations)
 - ii. Unrestricted subsidiary transactions/"Drop Down" transactions (and important considerations)
 - b. Some transactions include various components of different transactions types
 - c. Lender organization (majority lender/minority lender groups; opposition group cooperation agreements)
 - i. In response to LMTs, lenders are increasingly organizing and contractually agreeing to support the actions of the group
4. **Hypothetical Transactions**
 - a. **Hypo #1:** Hypothetical priming transaction based on *Serta*, highlights priming issues, lender organization, and contractual ambiguities ("open market purchase")
 - b. **Hypo #2:** Hypothetical drop down transaction based on *Revlon*, highlights issuance of new notes to majority group to get over voting threshold, lien release, remedies
 - c. Remedies in bankruptcy:
 - i. Money damages are always "calculable" but if plaintiff ultimately has only an unsecured claim against the debtor, that claim may be deeply out of the money.
 - ii. [Are equitable remedies seeking to reconfigure the Debtors' capital structure direct or derivative claims? Does the Court have the power to reconfigure the debtors capital structure?]

5. **Judicial Perspective** [Judge Lopez]

6. **The future of liability management transactions**

- a. Recent transactions showcase the increasingly creative ways that lenders are organizing through cooperation agreements and NDA
 - i. Market perspectives on LMTs are changing—when used appropriately they help companies weather difficult financial conditions
 - ii. At the same time, costs of LMT litigation are very high
- b. Debt documents are evolving in direct response to LMT (Chewy, Serta, J. Crew protections)

2024 WL 3200467

Only the Westlaw citation is currently available.

United States Bankruptcy Court, S.D. Texas, Houston Division.

IN RE: ROBERTSHAW US HOLDING CORP., et al., Debtors.

ROBERTSHAW US HOLDING CORP., et al.,

v.

INVESCO SENIOR SECURED MANAGEMENT INC., et al.,

CASE NO: 24-90052

|

ADVERSARY NO. 24-03024

|

June 20, 2024

CHAPTER 11

MEMORANDUM DECISION AND ORDER

Christopher Lopez United States Bankruptcy Judge

*1 This case is about a dispute involving liability management transactions between the Debtor, its equity sponsor, and some of its secured creditors. It is also about the desire of some lenders to obtain majority status under a credit agreement and then aggressively exercise related rights. Some lenders believe majority status gives them unfettered power to control when a debtor starts a bankruptcy case and what will happen during that case. This Court does not know whether this case is in or out of step with the norm. Parties engage in liability management transactions to try and unlock value in credit agreements. Lenders are sometimes plaintiffs in one case and defendants in another. This decision is limited to the unique facts of this case.

In late 2022, Robertshaw experienced financial difficulty, so it engaged in liability management transactions with Invesco Senior Secured Management, Inc. and certain related funds (“**Invesco**”) and the “**Lender Plaintiffs**” in this case: Bain Capital Credit, LP on behalf of certain of its managed funds (“**Bain Capital**”), Canyon Capital Advisors LLC on behalf of certain of its managed funds (“**Canyon Capital**”), and Eaton Vance Management on behalf of certain of its managed funds (“**Eaton Vance**”).

Robertshaw faced another liquidity challenge later that year. What followed is a series of events ending in a bitter dispute between lenders.

In the fall of 2023, Invesco became the “Required Lender” under a superpriority credit agreement and aggressively exercised its rights. It had Robertshaw enter into four amendments to the agreement without informing the other lenders. Even the administrative agent was directed to stay silent. Invesco waived Robertshaw payment defaults and extended runways in exchange for additional liquidity and more benefits. The last amendment included milestones: Robertshaw had to file bankruptcy by January 2, 2024, agree on who would be the stalking horse in a chapter 11 case, and appoint an “independent director”—who had sole authority to work on Invesco's milestones.

But the Lender Plaintiffs found out by chance about the amendments and quickly organized. Lawyers and advisors for Robertshaw and the Lender Plaintiffs formulated their own liability management transactions late in December 2023 (“**December Transactions**”). One Rock Capital Partners, LLC on behalf of certain of its managed funds (“**One Rock**”), the

equity sponsor, participated in the December Transactions. The December Transactions paid Invesco over \$90 million and had the effect of shifting Required Lender status from Invesco to the Lender Plaintiffs.

Invesco sued the Lender Plaintiffs and One Rock in New York State Court in December 2023. It believes that the December Transactions are a sham and that Invesco remains the Required Lender and the primary secured creditor in control. Robertshaw started these chapter 11 cases in February 2024. On the same day, Robertshaw, One Rock, and the Lender Plaintiffs started this Adversary against Invesco.¹

*2 This Court held a six-day trial. For the reasons stated below, the Court finds that Robertshaw breached the credit agreement. The Lender Plaintiffs are entitled to a declaration that they did not breach the credit agreement and are the Required Lenders. One Rock is entitled to a declaration that it did not tortiously interfere with the credit agreement under New York law. Finally, Robertshaw, the Lender Plaintiffs, and One Rock are entitled to a declaration that they did not breach the implied covenant of good faith and fair dealing under New York law.

New York law gives Invesco the right to assert money damages against Robertshaw for the prepetition breach of contract. Rescission of an amendment entered during the December Transactions is not required under New York law or warranted on this record. And this Court declines to exercise any equitable remedies.

BACKGROUND²

In 2018, an affiliate of One Rock acquired Robertshaw from its prior sponsor.³ The purchase was financed with \$510 million in first-lien term loans under a First-Lien Credit Agreement, \$110 million in second-lien term loans under a Second-Lien Credit Agreement (together, the “**Original Credit Agreements**”), and about \$260 million of equity.⁴ To finance operations, Robertshaw entered a separate asset-based revolving facility maturing in December 2023 (“**ABL Facility**”).⁵

I. The May 2023 Uptier Transaction

In May 2023, Robertshaw negotiated a liability management transaction with the Lender Plaintiffs and Invesco under the Original Credit Agreements.⁶ Invesco and the Lender Plaintiffs formed an ad hoc group to reach Required Lender status. The lenders proposed a transaction through which the parties would amend the Original Credit Agreements to (i) execute a new Super-Priority Credit Agreement (“**SPCA**”), (ii) provide \$95 million of new First-Out New Money Term Loans, and (iii) allow participating lenders to exchange their existing first- and second-lien loans under the Original Credit Agreements for Second-Out and Third-Out Term Loans under the SPCA (“**May Transactions**”).⁷ This type of liability management transaction is often called an uptier. It was realized through a series of transactions in a short time span, the steps of which were laid out in advance.⁸ The SPCA is governed by New York law.⁹

The SPCA adopted much of the same (or similar) language as the Original Credit Agreements, while making some changes thought prudent by the participating lenders at the time to try to protect their position.¹⁰ This included adding blockers to protect against some future lender-on-lender type actions, but not all.¹¹ Matthew Brooks from Invesco testified that they “*limited* the ability to do another uptier” but outright “*eliminated* the ability to do any sort of dropdown transactions.”¹² The SPCA did not materially change the definition of “Required Lender.” Required Lender status, as the parties understood it, was designed to be fungible—the status may fluctuate from time to time as debt is bought or traded or ad hoc groups form and dissemble.¹³ The dispositive authority on which party or group holds enough debt to be Required Lender is a register maintained by an Administrative Agent.¹⁴

*3 The SPCA defines “Required Lender” to mean “[l]enders having Loans representing more than 50.0% of the sum of the total First-Out New Money Term Loans and Second-Out Term Loans at such time.”¹⁵ Section 9.02 of the SPCA allows Required Lenders to amend the SPCA, subject to enumerated exceptions (commonly referred to as “sacred rights”).¹⁶ Required Lender status gives lenders the right to, among other things, (i) agree with Robertshaw, as “Borrower,” to incur additional “Indebtedness,” including, but not limited to, the issuance of more term loans under the SPCA, (ii) consent to or waive any breaches, defaults, or “Events of Default,” and (iii) direct the Administrative Agent to pursue remedies in the event of a breach, default, or Event of Default.¹⁷

Around July 2023, Invesco acquired more than 50% of the total First-Out and Second-Out Term Loans and obtained Required Lender status.¹⁸ The Lender Plaintiffs did not know about this change.¹⁹ Invesco met the Required Lender criteria because it owned a majority of the First-Out Term Loans but not the Second-Out Loans.²⁰ So the status was arguably fragile. Another lender (or group of lenders) could buy up more Second-Out Term Loans and Robertshaw could pay down some of the First-Out Term Loans. In that case, Invesco would cease to be a Required Lender.

II. Invesco-led Amendment Nos. 1-4

Robertshaw faced another liquidity crunch in the fall of 2023, despite its efforts to implement a turnaround plan supported by its advisors and One Rock.²¹ A key component of this plan involved improving its customer relationships and contracts.²² To address its liquidity issues and continue forward, it was close to entering into a certain “**Brigade Deal**,” which would have refinanced the ABL Facility set to mature in December 2023 and provided a cash infusion to Robertshaw to make interest payments due under the SPCA.²³

Invesco found it troubling that, though it was the Required Lender, Robertshaw sought financing from an outside source Invesco believed to be a historically “difficult counterparty.”²⁴ Invesco reached out through joint counsel to the ad hoc group that participated in the May Transactions to inform Robertshaw that it would not support the Brigade Deal.²⁵ Invesco also believed the ad hoc group of lenders disbanded once the SPCA was effective.²⁶ So it did not inform the other lenders that it had retained separate counsel to start working on amendments to the SPCA because Robertshaw had missed an interest payment, and the grace period was almost up.²⁷

Invesco and Robertshaw entered into Amendment No. 1 on October 5, 2023.²⁸ It extended Robertshaw's grace period to make the missed interest payment (originally due at the end of September) to October 13.²⁹ Without this amendment, failure to make the payment by October 6, 2023 would have resulted in an Event of Default.³⁰

*4 At the same time, the parties discussed a proposal for Robertshaw to enter into a new ABL facility. Invesco offered Robertshaw a bridge loan of \$17 million in the form of additional First-Out Term Loans in exchange for Robertshaw's agreement to negotiate two other financing transactions with Invesco, including (i) a new \$40 million “delayed draw term loan facility” conditioned upon Robertshaw's agreement to “repurchase” (i.e., uptier)³¹ “100% of the Invesco owned Third-Out Term Loans at par” through “open market purchases” and (ii) a new \$73.4 million ABL facility under which Invesco would exchange its Third-Out Term Loans for “New ABL Loans.”³² The Lender Plaintiffs were not informed about this Amendment, the missed interest payment which necessitated the Amendment, or the financing proposal.³³

Invesco and Robertshaw failed to negotiate the terms of Invesco's financing proposal. On October 13, 2023, Invesco and Robertshaw executed Amendment No. 2.³⁴ Invesco agreed to provide Robertshaw the \$17 million bridge loan in the form of new incremental First-Out Term Loans to make the missed interest payment. Mr. Brooks testified that Invesco understood the Required Lenders could amend Section 6.01 of the SPCA to allow for additional “Indebtedness”—which is permitted in

Amendment No. 2.³⁵ To the extent, however, this new “Indebtedness” could breach the terms of the SPCA, Invesco waived all potential defaults.³⁶ Invesco also committed to provide an additional \$40 million term loan if certain conditions were met, but it set a November 8 deadline for Robertshaw to refinance the ABL Facility. It also included the potential for a new liability management transaction for Invesco's Third-Out Loans. The Lender Plaintiffs were not informed about this Amendment.

Robertshaw and Invesco failed to reach agreement on the terms of a new ABL facility, and the December 2023 existing ABL Facility maturity loomed. So the parties executed Amendment No. 3, which extended the November 8 deadline to refinance the ABL Facility to November 10.³⁷ The Lender Plaintiffs were not informed about this Amendment.

Invesco and Robertshaw then signed Amendment No. 4 in November 2023. In exchange primarily for an extension of the time to declare an Event of Default under the SPCA until December 13, Robertshaw would start a chapter 11 bankruptcy case by no later than January 2, 2024 and would:

- negotiate, in good faith, a DIP facility, an RSA, and a stalking horse purchase agreement with Invesco;³⁸
- confirm that the board of its parent had directed their professionals to begin the above negotiations;³⁹ and
- deliver to Invesco a wind-down budget following the close of the stalking-horse sale, a list of critical vendors to be paid by the DIP along with justifications for those payments, and a summary of Robertshaw's executory contracts along with recommendations regarding their treatment.⁴⁰

Amendment No. 4 also required Robertshaw to appoint an “Independent Director” to the Board of Directors of Robertshaw's parent company. It gave the “Independent Director” sole authority to negotiate the terms of the bankruptcy milestones laid out in the Amendment.⁴¹ Invesco selected Neal Goldman.⁴² The Lender Plaintiffs were not informed about this Amendment.

*5 Invesco was aware of Robertshaw's aversion to filing on January 2, which would have interfered with its existing turnaround plan—particularly the customer relations component.⁴³ There were discussions of a non-bankruptcy path.⁴⁴ Invesco ultimately declined to discuss out-of-court alternatives until Robertshaw signed Amendment No. 4.⁴⁵ But, taking his fiduciary duty as independent director seriously, Mr. Goldman instructed Robertshaw's advisors to look for alternative solutions.⁴⁶

Invesco directed the Administrative Agent in writing not to post any of these amendments.⁴⁷ Based on conversations with Mr. Brooks, advisors for Robertshaw believed posting the amendments would jeopardize negotiations around an out-of-court deal with Invesco.⁴⁸ Around November 15, the Lender Plaintiffs learned about the amendments when a third party casually mentioned them to an employee at Bain Capital.⁴⁹ Counsel for the Lender Plaintiffs then reached out to the Administrative Agent on November 16 demanding that the amendments be posted. Amendment Nos. 1–4 were posted later that day.⁵⁰

III. The December Transactions and Amendment No. 5

After discovering the Invesco-led Amendments and looming bankruptcy, the Lender Plaintiffs started working with Robertshaw and One Rock on alternative financing solutions and ultimately submitted a proposal.⁵¹ The board's advisors presented an analysis of the relative benefits of the December Transactions compared to filing for bankruptcy on January 2. The record is undisputed that the company needed additional liquidity. Based on that analysis, the board, including Mr. Goldman, voted to approve the transactions.⁵² The December Transactions consisted of six sequential steps:

First, Range Parent's ("Holdings")⁵³ parent, Range Investor LLC, formed RS Funding Holdings, LLC ("RS Funding").⁵⁴ Holdings is Robertshaw's parent. Range Investor holds 100% of the voting interest in RS Funding.⁵⁵ Robertshaw holds 100% of the economic interest in RS Funding.⁵⁶

Second, on December 11, the Lender Plaintiffs and One Rock loaned \$228.3 million to RS Funding ("RS Funding Credit Agreement").⁵⁷

Third, exercising its power as 100% voting interest owner, Holdings instructed RS Funding to distribute the proceeds of the \$228.3 million loan to Robertshaw.⁵⁸

Fourth, Robertshaw used the funds from RS Funding to (i) pay off the outstanding \$30 million ABL Facility in full, (ii) voluntarily prepay \$117.6 million of the outstanding First-Out Term Loans, and (iii) pay an additional \$30.7 million in required make-whole payments to the holders of First-Out Term Loans.⁵⁹ The prepayment was made to the Administrative Agent, who, in turn, disbursed the funds to the appropriate First-Out Term Loan Lenders and recorded the prepayment in the register.⁶⁰ After the prepayment, the register maintained by the Administrative Agent reflected that the Invesco no longer owned more than 50% of the combined First- and Second-Out Term Loans needed to maintain Required Lender status.⁶¹ The Lender Plaintiffs now held Required Lender status.⁶²

Fifth, the Lender Plaintiffs, as Required Lenders, executed Amendment No. 5 to the SPCA.⁶³ This Amendment authorized Robertshaw to issue \$228 million in incremental debt.⁶⁴

**6 Sixth*, once the conditions precedent to Amendment No. 5 were either met or waived, Robertshaw issued \$218 million in new First-Out and Second-Out Loans.⁶⁵ Robertshaw returned an equivalent amount to RS Funding, which repaid the loan under the RS Funding Credit Agreement.⁶⁶

Invesco received over \$90 million. It tried to reject the prepayment (and now holds the funds in protest in escrow).⁶⁷ But the Administrative Agent, tasked with disbursing funds in accordance with the register, disbursed the funds to Invesco.⁶⁸ Invesco sent notice of an Event of Default under the SPCA to Robertshaw based on this allegation on December 11, 2023.⁶⁹

Invesco challenges the prepayment as violating the SPCA because not all the proceeds were used to pay off existing indebtedness, and they were not distributed pro rata among all tranches of debt. Instead, a portion of the RS Funding cash distribution was added to Robertshaw's balance sheet, and some was used to pay off the ABL Facility. Only the First-Out Term Loans received a prepayment. This allegedly violated Sections 2.11(b)(iii) and (vi) of the SPCA. Invesco believes, had the funds been distributed pro rata across all tranches, it would not have lost Required Lender status.

Invesco also argues the Administrative Agent resigned in protest of the December Transactions.⁷⁰ And that Amendment No. 5 contained conditions precedent to its effectiveness.⁷¹ These included several items related to the Administrative Agent concerning receipt of compliance certifications, opinions of counsel, and a funds flow memorandum.⁷² Invesco claims the Administrative Agent did not receive the transaction documents until December 14, 2023, several days after they were signed.⁷³ So, according to Invesco, Agent consent was required but never obtained.

IV. Invesco Files Suit In New York State Court

Less than two weeks after the execution of Amendment No. 5, Invesco filed a complaint in the Supreme Court of the State of New York, asserting claims for (i) breach of the SPCA against Robertshaw and the Lender Plaintiffs, (ii) breach of the covenant

of good faith and fair dealing against Robertshaw and the Lender Plaintiffs, (iii) tortious interference with contract against One Rock, and (iv) intentional and constructive fraudulent transfer against the Lender Plaintiffs and One Rock. Invesco also sought a preliminary injunction “(i) enjoining any transactions or arrangements purportedly requiring only the consent or direction of the Lender Plaintiffs and/or One Rock, including but not limited to those in Amendment No. 5, (ii) enjoining the execution of Amendment No. 5 by the Administrative Agent, and (iii) reinstating of Amendment No. 4.”⁷⁴

*7 The New York State Court did not rule on Invesco's motion before the petition date in these bankruptcy cases.

V. Robertshaw Starts Bankruptcy Cases and This Adversary

The Robertshaw debtors started these bankruptcy cases on February 15, 2024. Robertshaw, One Rock, and the Lender Plaintiffs started this Adversary on the same day. Invesco filed two counterclaims seeking declaratory judgment against Robertshaw that it breached the SPCA, and Invesco is still the Required Lender.⁷⁵

In April 2024, this Court entered an order staying the New York litigation until July 15, 2024.

JURISDICTION AND VENUE

The Court has jurisdiction under 28 U.S.C. § 1334(b). Venue is proper in this District under 28 U.S.C. §§ 1408 and 1409. This is a core proceeding under 28 U.S.C. §§ 157(b)(2)(A), (K), and (O). The Court has constitutional authority to enter final orders and judgments. *Stern v. Marshall*, 564 U.S. 462, 486–87 (2011).

Resolving the matters before the Court are integral to the administration of these cases and the determination and adjustment of the debtor/creditor relationship. These chapter 11 cases are at a standstill and cannot proceed until this Court declares who the current Required Lenders under the SPCA are or, relatedly, if One Rock tortiously interfered with the SPCA. Required Lender status determines who the fulcrum secured creditors are and how they will credit bid at a Court approved auction for the sale of Robertshaw's assets. Making this determination also involves matters inextricable from Robertshaw's chapter 11 plan.

To the extent that the Court does not have the requisite constitutional authority to enter a final judgment on any issue in this Adversary, then this Memorandum Decision will constitute the Court's report and recommendation to the District Court.

ANALYSIS

Federal courts may declare the rights and other legal relations of a party seeking declaration under 28 U.S.C. § 2201(a). New York law also permits courts to “render a declaratory judgment having the effect of a final judgment as to the rights and other legal relations of the parties to a justiciable controversy whether or not further relief is or could be claimed.” N.Y. C.P.L.R. § 3001 (*McKinney* 2009).

Robertshaw and the Lender Plaintiffs seek declaratory judgment that the December 2023 Transactions did not breach the SPCA and that Amendment No. 5 is valid and enforceable. They also seek a declaration that they did not breach a duty of good faith and fair dealing. One Rock also seeks a declaration that it did not tortiously interfere with the SPCA. Invesco disagrees with the relief sought by Robertshaw, the Lender Plaintiffs, and One Rock. So there are controversies here.

I. A Subsidiary Incurred Indebtedness in Violation of Section 6.01 of the SPCA.

Under New York law, there are four elements for a breach of contract claim: (i) the existence of a contract, (ii) plaintiff's performance under the contract, (iii) the defendant's breach of contractual obligations, and (iv) damages caused by the defendant's breach. *See 34–06 73, LLC v. Seneca Ins.*, 39 N.Y.3d 44, 52 (N.Y. 2022). Only the last two elements are disputed.

*8 In New York, “[t]he fundamental, neutral precept of contract interpretation is that agreements are construed in accord with the parties’ intent” and “[t]he best evidence of what parties to a written agreement intend is what they say in their writing.” *Greenfield v. Philles Records*, 98 N.Y.2d 562, 569 (N.Y. 2002) (internal quotation marks and citation omitted). Any “unambiguous provision” of a contract is given its “plain and ordinary meaning.” *Roberts v. Weight Watchers Int’l, Inc.*, 217 F. Supp. 3d 742, 749 (S.D.N.Y. 2016), *aff’d*, 712 F. App’x 57 (2d Cir. 2017) (quoting *White v. Cont’l Cas. Co.*, 9 N.Y.3d 264, 267 (N.Y. 2007)) (internal quotations omitted). Courts interpret contracts to give “full meaning and effect to the material provisions” and avoid interpretations that render certain provisions meaningless. *AEA Middle Mkt. Debt Funding LLC v. Marblegate Asset Mgmt., LLC*, 185 N.Y.S.3d 73, 84 (App. Div. 2023) (quoting *Excess Ins. Co. v. Factory Mut. Ins.*, 3 N.Y.3d 577, 582 (N.Y. 2004)).

Section 6.01 of the SPCA restricts the incurrence of Indebtedness: “Holdings, the Borrowers and each Subsidiary shall not, directly or indirectly, create, incur, assume or otherwise become or remain liable with respect to any Indebtedness” subject to exceptions not relevant here.⁷⁶ “Holdings” means Robertshaw's parent, Range Parent, Inc.⁷⁷ Robertshaw is a “Borrower.”⁷⁸ The parties dispute whether RS Funding is a “Subsidiary.”

The SPCA defines “Subsidiary” to mean one of two things:

- “with respect to any Person, any corporation, partnership, limited liability company, association, joint venture or other business entity of which more than 50.0% of the total voting power of shares of stock or other ownership interests entitled (without regard to the occurrence of any contingency) to vote in the election of the Person or Persons (whether directors, managers, trustees or other Persons performing similar functions) having the power to direct or cause the direction of the management and policies thereof is at the time owned or controlled, directly or indirectly, by that Person or one or more of the other subsidiaries of that Person or a combination thereof; provided that in determining the percentage of ownership interests of any Person controlled by another Person, no ownership interest in the nature of a ‘qualifying share’ of the former Person shall be deemed to be outstanding;” or
- “any subsidiary of Holdings other than an Unrestricted Subsidiary.”⁷⁹

Robertshaw argues the capitalization of the first definition of “Subsidiary” was a scrivener's error. It alleges that in the Original Credit Agreements (before the May Transactions), the first definition of subsidiary was not capitalized, and the second definition was capitalized. So the first definition of Subsidiary should be similarly read as if it were not capitalized.

Under the Original Credit Agreements, a “Subsidiary” is defined as “any *subsidiary* of Holdings ... ” and “subsidiary” was a separately defined term focused on entities for which Holdings held voting control (the first definition). In that context, RS Funding would not be a “subsidiary” because Holdings and Robertshaw do not own voting interests in it. If it could not be a “subsidiary,” it also could not be a “Subsidiary” because the definition of the latter incorporated the former.

*9 But in the SPCA, that analysis changes because both definitions of Subsidiary are capitalized. And “subsidiary” in the definition “any *subsidiary* of Holdings” is not a defined term. An undefined term must be read according to its plain, ordinary meaning. That renders the second definition of “Subsidiary” much broader than it was in the Original Credit Agreements—no longer limited to certain types of subsidiaries. Applying the plain meaning, RS Funding is a “subsidiary of Holdings.”

To establish a scrivener's error, Robertshaw must show “obvious error by clear and convincing evidence.” *NCCMI, Inc. v. Bersin Props., LLC*, 208 N.Y.S.3d 27, 32 (App. Div. 2024) (citing *Warberg Opportunistic Trading Fund, L.P. v. GeoResources, Inc.*, 973 N.Y.S.2d 187, 194 (App. Div. 2013)). Outside an actual claim for reformation of contract, “a court may correct a scrivener's error in ‘those limited circumstances where some absurdity has been identified or the contract would be otherwise

unenforceable.’ ” *Id.* at 32 (quoting *Matter of Wallace v. 600 Partners Co.*, 86 N.Y.2d 543, 547–48 (N.Y. 1995)); see also *PNC Cap. Recovery v. Mech. Parking Sys., Inc.*, 726 N.Y.S.2d 394, 397 (App. Div. 2001) (reforming a scrivener's error when the court found it would otherwise produce the illogical result that a company could guaranty its own indebtedness). This imposes an intentionally high bar on the party arguing there is an error. *Id.*

Robertshaw's counsel argued the capitalization was an overlooked typo never intended by the parties. But according to Invesco's witness, Mr. Brooks, the definition of subsidiary was capitalized in the first draft of the SPCA.⁸⁰ He relied on this broader definition because it provided him more protection as a lender under the SPCA.⁸¹ Mr. Brooks “took it that the definition of subsidiary was as it was presented in the definition section.”⁸² Based on the record, there is not sufficient evidence of a scrivener's error.

Enforcing the SPCA on its own terms also does not lead to illogical or absurd interpretations of the text. The Court must interpret the text to give each part meaning and not render the decision to capitalize the first definition meaningless. See *AEA Middle Mkt. Debt Funding LLC*, 185 N.Y.S.3d at 84. It is not absurd or illogical to read the SPCA as expanding the second definition to include more subsidiaries of Holdings. The SPCA was negotiated between sophisticated parties. Without clear evidence to the contrary, the Court must enforce the SPCA as written. RS Funding is a “Subsidiary” that incurred “Indebtedness” in violation of Section 6.01.

II. The Prepayment and Section 2.11(b) of the SPCA.

The SPCA contemplates that a Subsidiary may incur Indebtedness that violates Section 6.01, and that Robertshaw may receive proceeds on account of that Indebtedness. It provides the remedy for that violation in Section 2.11.

Section 2.11 of the SPCA governs prepayments.⁸³ There are two relevant pathways under this section: voluntary and mandatory prepayments. Under the voluntary prepayment provision, Robertshaw has the right to “at any time and from time to time to prepay any Class of Loans in whole or in part.”⁸⁴ Robertshaw and the Lender Plaintiffs believe Robertshaw made a voluntary prepayment, so a partial payment was allowed. The Court disagrees because RS Funding is a “Subsidiary.” And because Robertshaw received the proceeds of Indebtedness not allowed under Section 6.01, the mandatory prepayment provision applies.

*10 Section 2.11(b)(iii) says:

In the event that ... any Subsidiaries ... receive Net Proceeds from the issuance or incurrence of Indebtedness of ... any Subsidiaries (other than with respect to Indebtedness permitted under Section 6.01), the Borrowers shall, substantially simultaneously with ... the receipt of such Net Proceeds by such Borrower or such Subsidiary, apply an amount equal to 100% of such Net Proceeds to prepay outstanding Term Loans.⁸⁵

Section 2.11(b)(vi) further provides that, as to mandatory prepayments:

[a]ll accepted prepayments under this Section 2.11(b) shall be applied against the remaining scheduled installments of principal due in respect of the Initial Term Loans to the remaining scheduled amortization

payments in respect of the Term Loans in direct order of maturity, and each such prepayment shall be paid to the Lenders in accordance with their respective Applicable Percentage.⁸⁶

The language “in accordance with their respective Applicable Percentage” means that within a class, if the Net Proceeds⁸⁷ are insufficient for the prepayment to pay out the class, the prepayment is distributed according to the Lenders’ relative holdings within that class.⁸⁸ Invesco argues that the prepayment constituted a breach because the prepayment had to be pro rata across all tranches based on its reading of Section 2.11(b)(vi).⁸⁹ Such a reading is inconsistent with the plain language of this Section and eviscerates the function of holding First-Out Term Loan debt. The plain language of the mandatory prepayment provisions in Section 2.11(b) does not justify upsetting that construction, and the language must be read in the context of the SPCA.

Because Robertshaw failed to pay 100% of the Net Proceeds as a mandatory prepayment, it breached Section 2.11(b)(iii) of the SPCA only by not paying all the proceeds.

III. Invesco is Not Entitled to a Restored Required Lender Status.

Invesco wants to be restored to Required Lender status because of Robertshaw's breach. The SPCA does not mandate that result, and the Court declines to diverge from the precise terms of the agreement. The mandatory payment provisions are how the SPCA specifically deals with unauthorized incurrence of Indebtedness. Had the prepayment been made in full, the result would still be that Invesco was no longer Required Lender. There is no need to look for remedies outside the four corners of the SPCA. Under New York law and the plain terms of the SPCA, Invesco's remedy for any loss is direct (money) damages, not any of the number of equitable remedies Invesco argues for: rescinding Amendment No. 5, permitting Invesco to return the prepayment, or rescission.⁹⁰ New York courts consistently hold “the equitable remedy of rescission is not available where there is an adequate legal remedy, and [when] plaintiff does not explain why damages – a legal remedy – would be insufficient.” *Empire Outlet Builders LLC v. Constr. Res. Corp. of New York*, 97 N.Y.S.3d 68, 69 (App. Div. 2019); *Romanoff v. Romanoff*, 51 N.Y.S.3d 36, 40 (App. Div. 2017) (“The remedy of rescission is unavailable [when] money damages are available and will make plaintiff whole.”).⁹¹

*11 At trial, Invesco introduced a novel theory of damages to argue the prepayment mandated by the SPCA is not an adequate remedy: *if* it were the Required Lender in December 2023, Robertshaw *would* have started a bankruptcy case in January 2024, Invesco *would* have been selected as a Debtor In Possession financing lender entitled to fees and senior liens, and Invesco *would* have been selected as the stalking horse bidder. All of this is based on pure speculation.

There is nothing in the record suggesting that Robertshaw's board was sure to approve a January 2 filing even if it was a milestone in Amendment No. 4. The record showed that the independent director, Mr. Goldman, and the company's advisors thought it could harm the company.⁹² A lender cannot force a company to sign bankruptcy petitions. And, assuming a filing, no one can be certain what would have happened in a bankruptcy case filed on January 2. All requests for relief are subject to bankruptcy court approval after the presentation of sufficient evidence to warrant relief and consideration of applicable law. Invesco presumes, for example, that it would automatically be the stalking horse, and that no party (either the Lender Plaintiffs or a third party) would propose better terms for DIP financing. Detailed demonstratives and financial projections about what recoveries Invesco may have expected to achieve by acting as DIP Lender and credit bidding the DIP through up to Invesco's third-out position prove nothing.⁹³ It is all based on speculation and a perception of total control because of Required Lender status.

Whatever additional damage Invesco purports to have suffered because of the avoidance of the January 2 bankruptcy case would also constitute indirect or consequential damages. And Section 9.04 of the SPCA says the parties, and any related parties, waive claims against each other based on special, indirect, consequential, or punitive damages arising out of the SPCA, and any Loan or the proceeds of it.⁹⁴

New York law also does not recognize damages for lost profits that require “the court to accept too many speculative assumptions.” *Wathne Imports, Ltd. v. PRL USA, Inc.*, 953 N.Y.S.2d 7, 11 (App. Div. 2012) (citing *Ashland Mgt. v. Janien*, 82 N.Y.2d 395, 405–06 (N.Y. 1993)). “A party may only recover damages for loss of future profits if it ‘demonstrate[s] with certainty that such damages have been caused by the breach ..., the alleged loss must be capable of proof with reasonable certainty ... not [] merely speculative, possible or imaginary ... and the particular damages [must have been] fairly within the contemplation of the parties.’ ” *Id.* at 10 (citing *Kenford Co. v. Erie County*, 67 N.Y.2d 257, 261 (N.Y. 1986)).

IV. The Lender Plaintiffs are Entitled to Declaratory Judgment that They Did Not Breach the SPCA and Amendment No. 5 is Valid.

The fact that the prepayment did not fully comply does not mean the Lender Plaintiffs breached Section 2.11. This Section only obligates Robertshaw to prepay.⁹⁵ The SPCA also imposes no obligations on the Lender Plaintiffs under Sections 6.01(a), 9.02,⁹⁶ or 7(g) relevant here—which are other Sections that Invesco alleges the Lender Plaintiffs breached. The Lender Plaintiffs are entitled to a declaration that they did not breach the SPCA. Declaratory judgment here is supported by bedrock New York contract law. *See, e.g., Kranze v. Cinecolor Corp.*, 96 F. Supp. 728, 729 (S.D.N.Y. 1951) (Even in a multi-party contract, “each party is bound only for the performance he promised.”).

*12 There is no language in the SPCA to support Invesco's stance that because the prepayment was not properly applied under Section 2.11, the new Required Lenders were barred from entering Amendment No. 5. There is language in other sections of the SPCA declaring that certain actions taken in contravention of the terms of the contract will be “null and void,” but no such provision applies to the mandatory prepayment provision or Section 6.01.⁹⁷ There is also “default blocker” language in other parts of the SPCA that prevent parties from taking certain actions after an Event of Default, which is absent in Section 2.11.⁹⁸ Nulling and voiding the December Transactions is not a remedy provided by the SPCA or under New York Law.

Invesco alternatively argues that Amendment No. 4 placed a blanket restriction on the incurrence of Indebtedness. It says, “[a]fter the Amendment No. 4 Effective Date, (i) neither the Company nor any other Loan Party shall create, issue, incur, assume or permit to exist any Indebtedness for borrowed money.” The plain language of the Amendment does not restrict Subsidiaries as the SPCA does. RS Funding is not a Loan Party. It is also not a Lender Plaintiff. Thus, the Lender Plaintiffs did not breach this covenant of Amendment No. 4.

Invesco next argues that the Lender Plaintiffs failed to meet the conditions precedent (delivery of a funds flow statement, receipt of consents, etc.) in Amendment No. 5, which it argues means the Amendment was never effective. The prefatory language of Section 7 states that the “Amendment shall be effective upon the date ... on which the following conditions shall have been satisfied (or waived by the Consenting Lenders).”⁹⁹ Section 9.02 of the SPCA provides that “no such agreement shall amend, modify or otherwise affect the rights or duties of the Administrative Agent hereunder or under any other Loan Document without the prior written consent of the Administrative Agent.”¹⁰⁰

The evidence shows that the Administrative Agent did consent to the transaction and recognized the Lender Plaintiffs as Required Lenders.¹⁰¹ The Administrative Agent also dispelled Invesco's claim that it “resigned in protest” because it thought the amendment was somehow unlawful.¹⁰² The Agent made the prepayment and changed the register to reflect the Lender Plaintiffs were the Required Lenders.¹⁰³

Invesco was no longer Required Lender by the time Amendment No. 5 was entered. If any other SPCA section were potentially breached (including the restrictions on Indebtedness Invesco added into Amendment No. 4 without informing other lenders), Amendment No. 5 waived all such defaults, just like prior Invesco-driven Amendment Nos. 1-4 did.

Thus, the Lender Plaintiffs are entitled to a declaration that (i) they did not breach the SPCA, and (ii) Amendment No. 5 is valid and enforceable. Invesco will be entitled to file a proof of claim for any alleged prepetition money damages. The Lender Plaintiffs and One Rock remain the Required Lenders.

V. One Rock Did Not Tortiously Interfere with the SPCA.

One Rock, through some of its managed funds, indirectly holds a majority equity interest in Robertshaw.¹⁰⁴ Kurt Beyer, a partner at One Rock, serves on Robertshaw's board of directors.¹⁰⁵ One Rock did not participate in the May Transactions.¹⁰⁶ It is also not a party to the SPCA. One Rock did, however, participate in the December 2023 Transactions with the other Lender Plaintiffs.¹⁰⁷ Invesco alleges One Rock tortiously interfered with the SPCA by colluding and conspiring with the Lender Plaintiffs and participating in the December Transactions. One Rock disagrees and seeks a declaration that it did not tortiously interfere with the SPCA under New York law.

*13 There are five elements in a tortious interference with contract claim under New York law: “(1) ‘the existence of a valid contract between the plaintiff and a third party;’ (2) ‘the defendant’s knowledge of the contract;’ (3) the ‘defendant’s intentional procurement of the third-party’s breach of the contract without justification;’ (4) ‘actual breach of the contract;’ and (5) ‘damages resulting therefrom.’” *Kirch v. Liberty Media Corp.*, 449 F.3d 388, 401–02 (2d Cir. 2006) (quoting *Lama Holding Co. v. Smith Barney Inc.*, 88 N.Y.2d 413, 424 (N.Y. 1996)). To prove intentional procurement without justification, a plaintiff must prove (i) “that the *target* of a defendant’s conduct was the third party’s contractual arrangements with the plaintiff” and (ii) “that ‘the defendant’s *objective* was to procure such a breach.’” *Better HoldCo., Inc. v. Beeline Loans, Inc.*, 666 F. Supp.3d 328, 399 (S.D.N.Y. 2023) (internal citations omitted). The interference “must be intentional, not merely negligent or incidental to some other, lawful purpose.” *Id.* A plaintiff must also allege that “the contract would not have been breached ‘but for’ the defendant’s conduct.” See *Burrowes v. Combs*, 808 N.Y.S.2d 50, 53 (App. Div. 2006).

In response to a tortious interference claim, a creditor or equity holder may raise an “economic interest defense—that it acted to protect its own legal or financial stake in the breaching party’s business” *Abele Tractor & Equip. Co. v. Schaeffer*, 91 N.Y.S.3d 548, 551 (App. Div. 2018) (quoting *White Plains Coat & Apron Co. v. Cintas Corp.*, 867 N.E.2d 381, 384 (N.Y. 2007)). The defense is raised when “defendants were significant stockholders in the breaching party’s business; where defendant and the breaching party had a parent-subsidiary relationship; where defendant was the breaching party’s creditor; and where the defendant had a managerial contract with the breaching party at the time defendant induced the breach of contract with plaintiff.” *White Plains*, 867 N.E.2d at 384 (collecting cases). “[I]mposition of liability in spite of a defense of economic interest requires a showing of either malice on the one hand, or fraudulent or illegal means on the other.” *WMW Mach. Co. v. Koerber AG*, 658 N.Y.S.2d 385, 386 (App. Div. 1997) (citing *Foster v Churchill*, 665 N.E.2d 153, 156 (N.Y. 1996)).

Based on the record, this Court has no doubt that One Rock did not tortiously interfere with the SPCA. One Rock did not intentionally procure any breach of the SPCA, and One Rock was not the but for cause of any such breach by Robertshaw or the Lender Plaintiffs—and that does not even account for the economic interest defense.

Mr. Beyer testified that One Rock’s goal was to help Robertshaw finance its turnaround plan by providing it necessary liquidity and avoiding the harm caused by a January 2, 2024 bankruptcy filing.¹⁰⁸ One Rock did not structure the December Transactions or influence the Lender Plaintiffs or Robertshaw to do it.¹⁰⁹ It also did not vote on the December Transactions.¹¹⁰

Invesco’s arguments that One Rock conspired or colluded with the Lender Plaintiffs fail to establish but for causation, necessary to establish tortious interference with a contract. See, e.g., *Granite Partners, L.P. v. Bear, Sterns & Co.*, 17 F. Supp. 2d 275, 294 (S.D.N.Y. 1998) (“[C]ollusion involving a party to the contract indicates as a matter of law that the party involved was predisposed to breach its contractual obligations; thus, the allegedly interfering party cannot be the ‘but for’ cause of the breach.”); *Sharma v. Skaarup Ship Mgmt. Corp.*, 699 F. Supp. 440, 447 (S.D.N.Y. 1988), *aff’d*, 916 F.2d 820 (2d Cir. 1990) (dismissing tortious interference with contract claim based on allegation that “by conspiring and acting with” a party to the

contract and “in no way ... allege[d] that defendants were the motivating force behind [the party's] breach”). Robertshaw's actions were informed by its advisors and its independent director.¹¹¹ The Lender Plaintiffs also independently decided to enter into the December Transactions.¹¹² Lenders had their own reasons for entering into the December Transactions, including concerns from Robertshaw management that Invesco intended to up-tier its Third-Out debt and their belief that it would prevent an unnecessary bankruptcy filing.¹¹³

*14 Declaratory judgment is warranted for these reasons alone. But even if a prima facie showing of tortious interference could be established by Invesco, the economic interest defense would overcome any such claim. One Rock supported Robertshaw's turnaround plan and efforts to increase liquidity and believed a January 2024 filing would harm Robertshaw.¹¹⁴ Mr. Beyer's testimony was supported by the facts in the record. One Rock had a right under New York law to protect its economic interest in Robertshaw by entering into the December Transactions and not allowing what it believed to be a value-destructive bankruptcy filing. That Robertshaw ended up filing bankruptcy (in part because additional liquidity Robertshaw received is tied up in litigation with Invesco) or that parties understood Robertshaw could potentially file does not change the answer. There is no meaningful evidence that One Rock acted for any reason other than to protect its economic interest, and there is no evidence of malice or fraudulent or illegal means that would overcome the defense.

Declaratory relief for One Rock is granted.

VI. Robertshaw and the Lender Plaintiffs Did Not Breach the Duty of Good Faith and Fair Dealing.

Robertshaw and the Lender Plaintiffs seek a declaratory judgment that the December Transactions did not breach the duty of good faith and fair dealing under New York law.

New York law implies a duty of good faith and fair dealing in every contract. The duty comprises “any promises which a reasonable person in the position of the promisee would be justified in understanding were included [in the contract].” *Dalton v. Educ. Testing. Serv.*, 663 N.E.2d 289, 291 (N.Y. 1995). The implied covenant prevents parties from “do[ing] anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract.” *Brown v. Erie Ins.*, 172 N.Y.S.3d 299, 301 (App. Div. 2022). “Absent a connection to an express or presumed contractual right or obligation, the doctrine ‘does not import a generalized code of good conduct into the law of contracts.’ ” *Cambridge Cap. LLC v. Ruby Has LLC*, 565 F. Supp. 3d 420, 456 (S.D.N.Y. 2021) (quoting *Scottsdale Ins. v. McGrath*, 549 F. Supp. 3d 334, 353 n.6 (S.D.N.Y. 2021)). It also cannot be used to create new and independent contractual rights. *Fesseha v. TD Waterhouse Inv. Servs., Inc.*, 761 N.Y.S.2d 22, 23 (App. Div. 2003).

Declaratory relief for the Lender Plaintiffs is warranted. First, as noted above, there is nothing in the SPCA specifically imposing duties between lender parties based on payment of debts or incurring new debt. Second, Invesco, Robertshaw, and the Lender Plaintiffs established a baseline of conduct between themselves by engaging in liability management transactions. They conducted the May 2023 Transaction as a unified group and defended that up-tier in a resulting dispute with non-participating lenders. The SPCA itself is full of blockers and clauses named for other liability management cases.

Invesco engaged in acts it now calls bad faith. It engaged in lender-on-lender acts through Amendment Nos. 1-4. This involved instructing the Agent not to post Amendments and planning an Invesco controlled bankruptcy filing right after New Year's Day—all without informing other lenders. Invesco also contemplated a liability management transaction of its own in Amendment No. 2. Upon discovering Invesco's actions, Robertshaw's board and the Lender Plaintiffs agreed to the December Transactions as an alternative route. Robertshaw's advisors and the Lender Plaintiffs testified that they believed the December Transactions would help the company achieve its turnaround plan, infuse \$40 million in the company, and prevent what they reasonably perceived to be a financially harmful January 2024 bankruptcy filing.¹¹⁵ Based on the record before the Court, no one may claim a breach of the implied duty of good faith and fair dealing.¹¹⁶

ORDER

*15 For the reasons stated above, the Court declares that:

1. Bain Capital, Eaton Vance, Canyon Capital, and One Rock are the Required Lenders under the SPCA;
2. Bain Capital, Eaton Vance, and Canyon Capital did not breach the SPCA;
3. Robertshaw, Bain Capital, Eaton Vance, and Canyon Capital did not breach any implied duty of good faith and fair dealing under New York law with respect to any matters relating to the December Transactions; and
4. One Rock did not tortiously interfere with the SPCA under New York law; and

It is further ORDERED that Invesco may file a proof of claim on or before July 18, 2024 for any alleged monetary damages arising from Robertshaw's prepetition breach of the SPCA; and it is further

ORDERED that the Court retains jurisdiction to interpret and enforce this Order.

All Citations

--- B.R. ----, 2024 WL 3200467

Footnotes

- 1 A complete list of the Invesco defendants is found in the Complaint at ECF No. 1.
- 2 Trial transcripts are referenced throughout this decision as Tr.2 (ECF No. 325), Tr.3 (ECF No. 340), Tr.4 (ECF No. 336), Tr.5 (ECF No. 339), and Tr.6 (ECF No. 346). Some of the conclusions listed here are factual determinations, and others are legal conclusions. Factual and legal conclusions shall be treated as such, regardless of how they are labeled.
- 3 Tr.3 10:2–11.
- 4 Tr.3 10:2–11.
- 5 ABL Credit Agreement, Joint Exhibit 11, ECF No. 250-11.
- 6 Tr.4 65:4–22, 407:2–14.
- 7 Super-Priority Credit Agreement at Recitals, Joint Exhibit 1, ECF No. 250-1.
- 8 Tr.4 306:3–307:18.
- 9 Super-Priority Credit Agreement, § 9.10 Joint Exhibit 1, ECF No. 250-1.
- 10 Tr.4 256:13–258:21, 409:22–410:15.
- 11 Tr.4 409:22–410:15.
- 12 Tr.4 409:22–410:15.

- 13 Tr.4 256:13–260:15.
- 14 Super-Priority Credit Agreement, § 9.05(b)(iv), Joint Exhibit 1, ECF No. 250-1; Tr.4 25:22–25.
- 15 Super-Priority Credit Agreement, § 1.01 “Required Lender”, Joint Exhibit 1, ECF No. 250-1.
- 16 Super-Priority Credit Agreement, § 9.02(b)(A), Joint Exhibit 1, ECF No. 250-1.
- 17 Super-Priority Credit Agreement, § 9.02, Joint Exhibit 1, ECF No. 250-1.
- 18 Tr.4 321:6–10.
- 19 Tr.4 167:5–23, 322:1–23.
- 20 Tr.4 15:19–16:3, 322:1–23; Plaintiff Exhibit 78 at 2786, ECF No. 243-29.
- 21 Tr.3 32:22–34:23.
- 22 Tr.3 32:22–34:23.
- 23 Tr.6 10:1–11:25, 12:6–19.
- 24 Tr.4 54:8–55:21, 335:7–336:13.
- 25 Tr.4 336:22–347:5.
- 26 Tr.4 68:6–69:22, 320:3–16.
- 27 Tr.4 74:22–75:4, 77:1–17, 164:24–165:7, 168:20–169:8.
- 28 Amendment No. 1 To Super-Priority Credit Agreement at Preamble, Plaintiff Exhibit 1, ECF No. 242-1.
- 29 Amendment No. 1 To Super-Priority Credit Agreement, § 3, Plaintiff Exhibit 1, ECF No. 242-1.
- 30 Amendment No. 1 To Super-Priority Credit Agreement at Preamble, Plaintiff Exhibit 1, ECF No. 242-1.
- 31 Plaintiff Exhibit 323 at 3, ECF No. 248-35; Tr.4 283:9–284:21.
- 32 Plaintiff Exhibit 61, ECF No. 243-11.
- 33 Plaintiff Exhibit 64, ECF No. 243-14; Plaintiff Exhibit 62, ECF No. 243-12; Tr.4 348:16–351:21; Tr.4 359:3–361:23.
- 34 Tr.4 362:5–363:8.
- 35 Tr.4 268:5–22.
- 36 Amendment No. 2 To Super-Priority Credit Agreement, § 7, Plaintiff Exhibit 2, ECF No. 242-2.
- 37 Amendment No. 3 To Super-Priority Credit Agreement, Plaintiff Exhibit 2, ECF No. 242-3.
- 38 Amendment No. 4 To Super-Priority Credit Agreement, § 7(e), Plaintiff Exhibit 4, ECF No. 242-4.
- 39 Amendment No. 4 To Super-Priority Credit Agreement, § 7(f)(i), Plaintiff Exhibit 4, ECF No. 242-4.
- 40 Amendment No. 4 To Super-Priority Credit Agreement, § 7(f)(v), Plaintiff Exhibit 4, ECF No. 242-4.

41 Amendment No. 4 To Super-Priority Credit Agreement, § 7(f)(iv)(2), Plaintiff Exhibit 4, ECF No. 242-4.
42 Tr.2 10:11–12:12.
43 Tr.2 20:20–21:19; Tr.3 37:1–41:14.
44 Tr.3 37:1–41:14; Joint Exhibit 25, ECF No. 250-29; Plaintiff Exhibit 91, ECF No. 243-43.
45 Plaintiff Exhibit 91, ECF No. 243-43.
46 Tr.2 11:3–12, 14:2–15:17.
47 Tr.5 246:23–247:7; Deposition Testimony of Administrative Agent (Jennifer Anderson), ECF No. 312-1 at 4.
48 Tr.6 63:6–24.
49 Tr.4 172:2–173:3, 378:20–379:25.
50 Plaintiff Exhibit 94, ECF No. 243-46.
51 Plaintiff Exhibit 148, ECF No. 244-51.
52 Tr.2 15:25–20:14, 166:8–23; Plaintiff Exhibit 247, ECF No. 246-47.
53 Super-Priority Credit Agreement at Preamble, Joint Exhibit 1, ECF No. 250-1.
54 Plaintiff Exhibit 148 at 7, ECF No. 244-51.
55 Plaintiff Exhibit 148 at 7, ECF No. 244-51.
56 Plaintiff Exhibit 148 at 7, ECF No. 244-51.
57 Plaintiff Exhibit 148 at 5, ECF No. 244-51.
58 Plaintiff Exhibit 148 at 7, ECF No. 244-51.
59 Plaintiff Exhibit 148 at 7, ECF No. 244-51.
60 Tr.4 315:17–317:1.
61 Plaintiff Exhibit 16, ECF No. 242-20.
62 Plaintiff Exhibit 16, ECF No. 242-20.
63 Plaintiff Exhibit 148 at 7, ECF No. 244-51.
64 Amendment No. 5 To Super-Priority Credit Agreement, Plaintiff Exhibit 5, ECF No. 242-5.
65 Plaintiff Exhibit 148 at 7, ECF No. 244-51.
66 Plaintiff Exhibit 148 at 7, ECF No. 244-51.
67 Tr.4 315:17–317:1; Tr.5 15:16–21.
68 Tr.4 315:17–317:1.

- 69 Plaintiff Exhibit 348, ECF No. 248-67.
- 70 Invesco's Answer, Affirmative Defenses, and Counterclaims at 16, ECF No. 45.
- 71 Amendment No. 5 To Super-Priority Credit Agreement, § 7(e), (g), Plaintiff Exhibit 5, ECF No. 242-5.
- 72 Amendment No. 5 To Super-Priority Credit Agreement, § 7(e), (g), Plaintiff Exhibit 5, ECF No. 242-5.
- 73 Invesco's Answer, Affirmative Defenses, and Counterclaims at 32, ECF No. 45.
- 74 Plaintiff Exhibit 170, ECF No. 245-20.
- 75 Invesco's Answer, Affirmative Defenses, and Counterclaims at 39, ECF No. 45.
- 76 Super-Priority Credit Agreement, § 6.01, Joint Exhibit 1, ECF No. 250-1.
- 77 Super-Priority Credit Agreement at Preamble, Joint Exhibit 1, ECF No. 250-1.
- 78 Super-Priority Credit Agreement at Preamble, Joint Exhibit 1, ECF No. 250-1.
- 79 Super-Priority Credit Agreement, § 1.01 “Subsidiary”, Joint Exhibit 1, ECF No. 250-1.
- 80 Tr.5 24:5–8.
- 81 Tr.5 24:10–12.
- 82 Tr.5 24:13–15.
- 83 Super-Priority Credit Agreement, § 2.11, Joint Exhibit 1, ECF No. 250-1.
- 84 Super-Priority Credit Agreement, § 2.11(a)(i), Joint Exhibit 1, ECF No. 250-1.
- 85 Super-Priority Credit Agreement, § 2.11(b)(iii), Joint Exhibit 1, ECF No. 250-1.
- 86 Super-Priority Credit Agreement, § 2.11(b)(vi), Joint Exhibit 1, ECF No. 250-1.
- 87 Net Proceeds means “with respect to any issuance or incurrence of Indebtedness, the Cash proceeds thereof, net of” things like taxes and attorneys’ fees. Super-Priority Credit Agreement, § 1.01 “Net Proceeds”, Joint Exhibit 1, ECF No. 250-1.
- 88 Super-Priority Credit Agreement, § 1.01 “Applicable Percentage,” Joint Exhibit 1, ECF No. 250-1.
- 89 The Court also notes that Invesco, despite its assertion that it holds the funds in protest in escrow, does not have the right to reject prepayment made under Section 2.11(b)(iii). Super-Priority Credit Agreement, § 2.11(b)(v), Joint Exhibit 1, ECF No. 250-1.
- 90 Because the issue of the scrivener's error and resulting mandatory prepayment is dispositive, it is not necessary to determine whether to collapse the steps of the December Transactions. Or how Invesco argues the steps in the December Transactions are a sham, but similar steps in the May Transactions (which Invesco participated in) are not a sham.
- 91 The Bankruptcy Code also provides that “after notice and a hearing, the court may—(1) under principles of equitable subordination, subordinate for purposes of distribution all or part of an allowed claim to all or part of another allowed claim. ...” 11 U.S.C. § 510(c). Equitable subordination is remedial in nature and is “rarely granted.” *Official Comm. of Unsecured Creditors v. Cajun Elec. Power Coop., Inc. (In re Cajun Elec. Power Coop., Inc.)*, 119 F.3d 349, 357 (5th Cir. 1997). “As a practical matter, we generally have found equitable subordination in only three typical cases: ‘(1) when a

fiduciary of the debtor misuses his position to the disadvantage of other creditors; (2) when a third party controls the debtor to the disadvantage of other creditors; and (3) when a third party actually defrauds other creditors.’ ” *Id.* These facts do not warrant even consideration of an equitable remedy like subordination.

- 92 Tr.2 19:24–22:20; Plaintiff Exhibit 247, ECF No. 246-47.
- 93 Tr.5 9:1–11:17, 26:17–27:13; Joint Exhibit 24, ECF No. 250-28; Invesco Demonstratives 1-3, ECF No. 306.
- 94 Super-Priority Credit Agreement, § 9.04, Joint Exhibit 1, ECF No. 250-1. “Loan” means any Term Loan under the SPCA.
- 95 Super-Priority Credit Agreement at Article 6 Preamble, Joint Exhibit 1, ECF No. 250-1.
- 96 Section 9.02(b)(A)(9) is the “Incora Blocker” (named for another bankruptcy case pending in this District) or “vote rigging protection” (as the parties referred to it from time to time). It prevents Borrowers and Required Lenders from amending the SPCA to “authorize additional Indebtedness *that would be issued under the Loan Documents* for the purpose of influencing voting threshold.”⁹⁶ It does not prevent incurring Indebtedness from another source, which instead triggers the mandatory prepayment mechanism in Section 2.11. Amendment No. 5 did not influence the voting threshold; the prepayment did. The prepayment remedy explicitly provided under Section 2.11 does not violate the “sacred right” in Section 9.02(b)(A)(9). Moreover, as stated herein, the purpose of the December Transactions was to increase the company's liquidity and prevent what the company and its advisors viewed as a value-destroying bankruptcy filing at a time when the company was trying to implement a turnaround plan. *See, e.g.*, Tr.4 194:21–195:2, 207:8–13.
- 97 *See, e.g.*, Super-Priority Credit Agreement, § 9.05, Joint Exhibit 1, ECF No. 250-1.
- 98 Super-Priority Credit Agreement, § 5.10, Joint Exhibit 1, ECF No. 250-1.
- 99 Amendment No. 5 To Super-Priority Credit Agreement, § 7, Plaintiff Exhibit 5, ECF No. 242-5.
- 100 Super-Priority Credit Agreement, § 9.02, Joint Exhibit 1, ECF No. 250-1.
- 101 Tr.4 61:4–62:8.
- 102 Tr.4 61:4–62:8.
- 103 Plaintiff Exhibit 16, ECF No. 242-20.
- 104 Beyer Demonstrative I; Tr.3 12:2–15.
- 105 Beyer Demonstrative I; Tr.3 12:2–15.
- 106 Tr.3 28:22–25.
- 107 Tr.3 64:16–18.
- 108 Tr.3 66:20–25, 75:4–21.
- 109 Tr.3 58:13–16, 69:11–13.
- 110 Tr.3 72:13–19.
- 111 Tr.3 55:25–56:8, 59:4–11, 62:6–11, 64:19–25.
- 112 *See, e.g.*, Tr.4 188:4–207:13.

113 See, e.g., Tr.2 173:8–180:6, 189:8–191:4; Tr.3 72:5–12; Tr.4 188:4–207:13.

114 Tr.3 66:20–67:3, 75:4–21.

115 See, e.g., Tr.4 207:11–13; Tr.2 178:4–15.

116 The facts and actions of the lenders in this case are distinguishable from other New York law cases. See, e.g., *In re LightSquared Inc.*, 511 B.R. 253, 333–34 (Bankr. S.D.N.Y. 2014) (breaching party wore multiple hats in an effort to disguise or insulate a company from responsibility and achieve an end-run around the substance of restrictions in a credit agreement); *Empresas Cablevision, S.A.B. de C.V. v. JPMorgan Chase Bank, N.A.*, 680 F. Supp.2d 625, 631 (S.D.N.Y. 2010) (cited in *LightSquared* and based on similar reasoning); *Medacis Sols Grp., LLV v. CareFusion Sols., LLC*, No. 19-CV-1309, 2021 WL 293568, *12 (S.D.N.Y. Jan. 28, 2021) (breaching party purposefully delayed sales so it could terminate a contract and then sell its own product).

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2022 WL 2498751

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United States Bankruptcy Court, D. Delaware.

IN RE: [TPC GROUP INC.](#), et al., Debtors.
[Bayside Capital Inc.](#) and [Cerberus Capital
Management, L.P.](#), Plaintiffs/Counterclaim Defendants,
v.
[TPC Group Inc.](#), Defendant/Counterclaim Plaintiff,
and
The Ad Hoc Noteholder Group, Intervenor Defendant.

Case No. 22-10493 (CTG)

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Adv. Proc. No. 22-50372 (CTG)

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Signed 07/06/2022

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Chapter 11

Related Docket Nos. 4, 16, 18, 43, 48, 49

MEMORANDUM OPINION

CRAIG T. GOLDBLATT, UNITED STATES
BANKRUPTCY JUDGE

*1 There has been a flurry of litigation in recent years over transactions that seem to take advantage of technical constructions of loan documents in ways that some view as breaking with commercial norms.¹ One example of such a transaction is sometimes described as an “uptier” transaction. In its most aggressive form, such a transaction is one in which the debtor and a majority (but not all) holders of a syndicated debt issuance agree to enter into a new loan that is supported by a superior lien in the same collateral that secured the original debt. Thereafter, the debtor repurchases the participating lenders’ share in the prior (now junior) loan – effectively leaving behind the minority holders in a tranche of debt that is now junior to that held by the majority lenders. While such a transaction would typically require an amendment to the original credit agreement or indenture, those documents are typically drafted to permit a majority (or, in some cases, a supermajority) of the holders to amend the agreement without the consent of the minority.

The transaction at issue in the motions now before the Court is somewhat less aggressive than the paradigmatic “uptier” transaction described above. While the transaction at issue did involve the issuance of new debt that would be senior to the old, unlike the more aggressive “uptier” transactions, the majority holders here retained their positions in the old (now junior) loan, rather than selling those loans back to the debtors and thus exiting the junior tranche.²

The pending motions for summary judgment raise the question whether the transactions at issue comported with the terms of the applicable loan documents. If they did not, the minority holders contend, the consequence would be that the new loans would be subject to the prior liens, making the new debt junior rather than senior to the old debt. For the reasons described below, the Court concludes that the original loan documents did permit the majority holders to amend the loan documents to provide for the subordination of the old debt to the new. As a result, the debt now held by the majority holders is senior to that of the minority lenders.

Factual and Procedural Background

Debtor TPC Group is a Texas-based petrochemical company. Because this dispute turns primarily on the language of

various agreements related to TPC's financing, the applicable contractual provisions of the relevant agreements are set forth in some detail, below.

1. The 2019 10.5 Percent Notes

*2 In August 2019, TPC raised \$930 million by issuing senior secured notes that matured in 2024, bearing interest at 10.5 percent.³ Bayside Capital and Cerberus collectively hold approximately 10 percent of the 10.5% Notes.⁴ The Notes are governed by New York law.⁵ They are secured by a first lien on substantially all of the debtors' assets (but excluding assets held by certain bankruptcy-remote non-debtor subsidiaries) and a second lien on the assets (such as inventory and receivables) on which various asset-based lenders hold a first lien.

Syndicated loan agreements are commonly structured to permit a majority of the holders to make decisions designed to maximize the lenders' recoveries on the loans, and thus prohibit individual holders from insisting on strict compliance with the loan terms in circumstances in which a majority believes it more appropriate to afford the borrower greater flexibility. The 2019 Indenture is no exception.

Accordingly, § 6.05 of the indenture states that the holders "of a majority in aggregate principal amount of the then outstanding Notes may direct the time, place and method of conducting any proceeding for exercising any remedy available to the Trustee or exercising any trust or power conferred on it."⁶ And perhaps more importantly for present purposes, § 9.02(a) allows, subject to specified exceptions described below, a majority of the holders to amend the indenture itself. Subject to those exceptions (about which more will be said below), "the Issuer, the Guarantors and the Trustee ... may amend or supplement this Indenture ... and the Notes ... with the consent of the Holders of at least a majority in the aggregate principal amount of the then outstanding Notes voting as a single class."⁷ In addition, again subject to certain exceptions, "any existing Default or Event of Default ... or compliance with any provision of this Indenture ... may be waived with the consent of the Holders of a majority in aggregate principal amount of the then outstanding Notes voting as a single class."⁸

As noted, however, the indenture sets out certain exceptions to the right of the majority of holders to agree to an amendment. Section 9.02(e), for example, states that any "amendment to,

or waiver of, the provisions of this Indenture ... that has the effect of releasing all or substantially all of the Collateral from the Liens securing the Notes ... will require the consent of the holders of at least 66-2/3% in aggregate principal amount of the Notes."⁹ (The necessary implication, then, is that releasing collateral that is less than "all or substantially all" can be accomplished by an ordinary majority.) Similarly, an amendment that "otherwise modifies the Intercreditor Agreement [described below] or other Security Document in any manner adverse in any material respect to the Holders" also requires the 66-2/3 percent supermajority.¹⁰

*3 The indenture also specifies, however, certain amendments that cannot be made "without the consent of each Holder affected thereby."¹¹ Section 9.02(d) thus sets forth certain rights, described by the parties and the caselaw as "sacred rights" (and sometimes referred to as "consent rights"), that may not be vitiated without the consent of each affected party. The "sacred right" at issue here is set forth in Section 9.02(d)(10), which provides that without such consent "an amendment, supplement or waiver under this Section 9.02 may not ... (10) make any change in the provisions in the Intercreditor Agreement or this Indenture dealing with the application of proceeds of Collateral that would adversely affect the Holders."¹²

While the intercreditor agreement is described further below, the provision of the indenture that, on its face, most directly "deal[s] with the application of proceeds of Collateral" is § 6.10(a), which sets out the "waterfall" for the trustee to pay out the funds it collects under the indenture. Those funds shall be paid out, *first*, to pay the fees of the trustee or the collateral agent; *second*, "to Holders for amounts due and unpaid on the Notes for principal, premium and interest, ratably, without preference or priority of any kind, according to the amounts due and payable on the Notes for principal, premium and interest, respectively"; and *third* to the "Issuer or to such party as a court of competent jurisdiction shall direct in writing."¹³ At the very least, any change to this provision of the indenture (such as a change to the requirement that any proceeds of collateral recovered by the trustee be paid to the holders on a "ratable" basis, meaning "in equal proportion to one's holdings") would require the consent of every adversely affected holder.

*4 Finally, § 6.06 of the indenture, commonly referred to as a "no-action clause," imposes limitations on the ability of an individual holder to bring suit to enforce the indenture's

terms. While the full text of the no-action clause is set forth in the margin,¹⁴ the most critical provision for current purposes is § 6.06(a)(2), which on its face would preclude any lawsuit in the absence of a decision by the holders of 25 percent of the outstanding notes to pursue the claim. As noted above, the plaintiffs who have initiated this action collectively hold approximately 10 percent of the applicable notes.

2. The 2019 Intercreditor Agreement

At the same time that TPC issued the 10.5% Notes, it also entered into an asset-based revolving loan facility (referred to as the “ABL facility”) with an availability of up to \$200 million (subject to a borrowing base), under which Bank of America served as administrative agent and collateral agent.¹⁵ This facility was secured by a first lien on the debtors’ accounts receivable, deposit accounts, inventory, and other assets, and a second lien on those assets that secure the 10.5% Notes.¹⁶ Because the holders of the 10.5% Notes also took a security interest in the same collateral – though, with respect to the accounts receivable, deposit accounts, etc., one that was junior to that held by the lenders under the ABL facility – the parties also entered into an intercreditor agreement setting forth the parties’ respective rights.¹⁷

Section 4.1(a) of the 2019 Intercreditor Agreement thus explains that the holders of the 10.5% Notes are paid first out of the proceeds of the collateral as to which those holders have a senior lien, with the lenders of the ABL facility being paid second. The priority of payment is reversed with respect to accounts receivable, deposit accounts, inventory, and other assets as to which the lenders under the ABL facility have a first lien. For that collateral, the proceeds are paid first to the lenders under the ABL facility, with the holders of the 10.5% Notes being paid second.

3. The 2021 10.875 Percent Notes

As the first-day declaration explains, after the issuance of the 2019 Notes, the debtors’ financial condition deteriorated. Many factors contributed to this, including an explosion at a TPC chemical plant in Port Neches, Texas, which caused the evacuation of tens of thousands of nearby residents; a decrease in the demand of the debtors’ products at the outset of the pandemic; and outages in the company’s boilers following Winter Storm Uri that curtailed the debtors’ manufacturing capacity.¹⁸

*5 To address its need for greater liquidity, in February 2021, TPC issued \$153 million in new notes, maturing in 2024 and bearing interest at 10.875 percent.¹⁹ The 10.875% Notes are governed by New York law.²⁰ In 2022, TPC issued an additional tranche of \$51.5 million in 10.875 percent notes, on substantially the same term as those issued in 2021.²¹ The parties intended for these tranches of 10.875% Notes to be secured by the same collateral as the 10.5% Notes, but with a lien that would become senior to the lien securing the 10.5% Notes, thus necessitating various amendments to the 2019 Indenture and the 2019 Intercreditor Agreement.²² Because, however, at the time of the 2021 transactions, the holders under the 10.875% Notes also held a majority (indeed, a super-majority of more than 67 percent) of the then-outstanding 10.5% Notes, they had the authority to amend the 2019 Indenture in any way that did not violate a holder’s “sacred rights” set out in § 9.02(d) of that indenture.²³

4. The Supplemental Indenture and 2021 Intercreditor Agreement

The Supplemental Indenture contains amendments to the 2019 Indenture intended to permit the issuance of the 10.875% Notes.²⁴ The parties also entered into a new intercreditor agreement.²⁵ That agreement operates to subordinate the 10.5% Notes to the 10.875% Notes with respect to the common collateral securing both sets of notes.²⁶ The consents executed by more than 67% of the holders of the 10.5% Notes expressly authorized the entry into both the Supplemental Indenture and the 2021 Intercreditor Agreement.²⁷

5. TPC Group's bankruptcy filing and the initiation of this adversary proceeding

TPC Group and various of its affiliates filed voluntary chapter 11 petitions in this Court on June 1, 2022. The debtors seek to enter into a debtor-in-possession loan with the same ad hoc group of noteholders that are the holders of the 10.875% Notes. That DIP Loan would provide \$85 million in new money but would also roll up \$238 million that was outstanding on the petition date under 10.875% Notes. The economic impact of that rollup depends heavily on whether the 10.875% Notes are truly senior to the now almost \$1.1 billion due under the 10.5% Notes. To the extent the 10.875% Notes are senior and thus sit at the “top” of the debtors’ “capital stack,” then rolling up that debt (and thereby granting it administrative claim status in the bankruptcy case) has

relatively little effect on other creditors. If the value of the collateral would, in any event, go first to pay the 10.875% Notes, then as long as the value of the collateral exceeds the outstanding amount under those notes, granting those holders administrative claim status should operate only as “belt-and-suspenders” assurance that the holders of that debt are entitled to be paid in full under a plan.

*6 On the other hand, if (as the objecting noteholders contend) the legal consequences of the 2021 transaction was that the 10.875% Notes come in as junior to the 10.5% Notes, then rolling up \$238 million of debt that might (depending on the ultimate value of the collateral) otherwise be treated as unsecured would make the DIP loan very expensive money indeed. Accordingly, the Court agreed to consider the present summary judgment motions on an expedited basis such that the priority issue can be resolved before the Court considers whether to grant final approval to the DIP loan, a matter that is scheduled to be heard on July 15, 2022.²⁸ The Court thus entered a scheduling order providing for this summary judgment motion to be fully briefed by June 28, 2022 and set argument for the next day, June 29, 2022, with a view towards issuing this decision as promptly as possible thereafter to permit the parties to prepare for the July 15 hearing on final approval of the DIP loan.

6. Procedural posture of this adversary proceeding

This adversary proceeding was initiated by the filing of a complaint by the objecting creditors seeking a declaratory judgment that, in effect, the 10.875% Notes would be junior to the 10.5% Notes.²⁹ Along with the complaint, the objecting noteholders filed a motion seeking the entry of summary judgment.³⁰




Debtor responded to this with a flurry of pleadings.³¹ *First*, it filed a counterclaim against the objecting noteholders seeking a declaration that the lawsuit is barred by the no-action clause.³² *Second*, the debtor sought summary judgment with respect to that counterclaim.³³ *Third*, the debtor moved to dismiss the objecting noteholders’ lawsuit, also on the ground that it violated the no-action clause.³⁴ *Fourth*, the debtor opposed the objecting noteholders’ motion for summary judgment.³⁵ And *fifth*, the debtor answered the objecting noteholders’ complaint, which answer it combined with a counterclaim that was materially identical to the stand-alone counterclaim it filed previously.³⁶

In addition, the ad hoc group of noteholders who are the holders of a supermajority of both the 10.5% Notes and the 10.875% Notes moved to intervene as a defendant.³⁷ After that motion was granted on a consensual basis,³⁸ the ad hoc group answered the complaint³⁹ and filed an opposition to the objecting noteholders’ motion for summary judgment that they combined with their own cross-motion for summary judgment on the claim as to which they intervened as defendants.⁴⁰

The objecting noteholders then moved to strike TPC’s initial counterclaim⁴¹ on the ground that it needed to be filed along with an answer rather than on a standalone basis. The objecting noteholders also moved to dismiss the counterclaim that the debtor subsequently filed along with its answer on the ground that the counterclaim fails on the merits.⁴²

All of these motions have now been fully briefed. As the Court noted at the June 29 argument, it is by no means clear that this plethora of motions was entirely necessary. The Court intends, in this Memorandum Opinion, to resolve the merits of the various summary judgment motions before it regarding the construction of the applicable agreements (D.I. 4, 16 and 43) – which all parties agree are now properly before the Court for disposition on a summary judgment record. The Court believes that the entry of summary judgment, consistent with this Memorandum Opinion, should largely, if not entirely, moot the remaining procedural disputes among the parties.

Jurisdiction

*7 This Court has jurisdiction over this matter under  28 U.S.C. § 1334(b), as a dispute falling within the district court’s “related to” jurisdiction, which has been referred to this Court under  28 U.S.C. § 157(a) and the district court’s standing order of February 29, 2012. This action, which relates to the relative priority of various creditors’ claims against the bankruptcy estate, is a core matter under  28 U.S.C. § 157(b).

Analysis

The parties' motions for summary judgment are brought under [Rule 56 of the Federal Rules of Civil Procedure](#), as made applicable to this proceeding by [Federal Rule of Bankruptcy Procedure 7056](#). A party seeking summary judgment is entitled to the entry of judgment if the movant can show "that there is no genuine dispute as to any material fact and that the movant is entitled to judgment as a matter of law."⁴³ A moving party may rely on any material included in the summary judgment record, including documents, declarations, and other material.⁴⁴ A party opposing a summary judgment motion on the ground that a material fact is genuinely disputed may point to the same kinds of record evidence in its opposition.⁴⁵

Here, no party contends that there is a disputed question of fact requiring a trial. Indeed, all parties agree that the question before the Court is a pure question of contractual interpretation that can be resolved on the undisputed factual record before the Court.

All of the various agreements are governed by New York law. Under New York law, a contract's "words should be given the meanings ordinarily ascribed to them."⁴⁶ Contractual language "should be examined in light of the business purposes sought to be achieved by the parties and the plain meaning of the words chosen by them to effect those purposes."⁴⁷ Moreover, New York law is clear that "especially in the context of a commercial contract negotiated at arm's length by [] sophisticated [parties]," the role of the court, when confronted with a written contract that is "clear" and "complete," is simply to "enforce[] [the writing] according to its terms."⁴⁸

The Court accordingly does not credit the various assertions that the objecting noteholders acquired their interests after the 2021 transaction and therefore should not be heard to complain that the transaction was an unlawful one. New York law is clear that "an assignee stands in the shoes of its assignor."⁴⁹ The objecting creditors thus have the same legal rights – the right to insist that the 2019 Indenture be enforced according to its plain terms – as did the original holder. The current dispute therefore does not turn at all on whether one or another party might be cast as sympathetic or opportunistic. It simply calls for the Court to read and enforce the parties' agreements in accordance with their terms. Indeed, the robust secondary market for distressed syndicated debt, one that benefits buyers and sellers alike, depends on courts respecting

the fact that the buyer of such debt acquires the same bundle of legal rights as were held by its predecessor.

I. The no-action clause does not bar the objecting noteholders' challenge.

*8 The debtor argues that the objecting noteholders' lawsuit for declaratory judgment fails on account of their failure to comply with the no-action clause contained in the 10.5% Notes.⁵⁰ In response, the objecting noteholders contend that New York law will enforce a no-action clause against an effort by an individual holder to enforce rights held by holders generally, but that a no-action clause should not be construed, under New York law, to apply to efforts to enforce rights afforded to an individual holder (such as an alleged violations of a holder's "sacred rights").

No one disputes that, as a general matter, no-action clauses serve a salutary purpose and are properly enforceable. The New York Court of Appeals decision in *Beal Savings Bank*,⁵¹ for example, pointed to the reasons parties might agree that any action to enforce the collective rights of holders generally be enforceable only by a trustee or other agent of the collective group. Such a provision would permit the majority to decide whether to waive a default or otherwise make an accommodation to the borrower with a view towards maximizing the holders' ultimate recoveries. A contractual provision mandating collective rather than individual action "is meant to protect all Lenders in the consortium from a disaffected Lender seeking financial benefit perhaps at the expense of other debtholders."⁵²

But the caselaw expresses a strong skepticism towards reading a no-action clause to preclude the enforcement of rights that an agreement expressly grants to individual holders. A decision by the Delaware Court of Chancery construing Utah law, *Cypress Associates, LLC v. Sunnyside Cogeneration Associates Project*,⁵³ pointed out the obvious "lack of fit" between a contractual provision that expressly granted a right to a minority group of holders and a separate provision that required the consent of the majority to enforce that right. "A provision ... that is designed to limit suits on behalf of all holders unless a majority supports the suit arguably does not speak at all to claims under provisions ... which are brought only for the benefit of the dissenting minority."⁵⁴

New York courts, applying New York law, have expressly adopted the *Cypress Associates* analysis. For example, the court in *Eaton Vance*⁵⁵ relied on *Cypress* (although in a passage that may not have been necessary to the court's holding) for the proposition that “a no-action clause does not bar a claim by a minority lender to enforce its consent rights.”⁵⁶ Indeed, the court went on to explain that “it is undisputed that the plaintiffs in this action do not lack standing to sue [by virtue of the no-action clause] for the alleged violation of their consent rights.”⁵⁷

*9 That construction of the no-action clause makes sense. *Cypress* and some of the other cases to which the parties cite⁵⁸ draw on an analogy to the doctrine of demand-futility as applicable to shareholder derivative suits. Whether or not one views that analogy as instructive, those courts' reading of the no-action clause is well grounded in ordinary principles of contract construction. In *Beal*, the New York Court of Appeals pointed to the familiar proposition that in cases involving the construction of commercial agreements, courts “should construe the agreements so as to give full meaning and effect to the material provisions”⁵⁹ and avoid constructions that would “render any portion meaningless.”⁶⁰

That principle is sufficient to resolve this question. The 2019 Indenture contains, in § 9.02(d), an express grant of “sacred rights” to every individual holder. The obvious purpose of this provision is to ensure that these rights of individual holders cannot be taken away by an amendment to the indenture, regardless of how large or small those individual holders' share of the total outstanding indebtedness may be. Such a provision would be rendered meaningless, however, if any action to enforce the right were subject to the provisions of the no-action clause, which (under § 6.06) would require 25 percent of the holders to demand that the trustee initiate such a lawsuit and even then could be defeated if the holders of a majority so instructed the trustee. This is what *Eaton Vance* presumably means when it states that the no-action clause should not be construed to apply to an effort by a minority holder to enforce its consent rights.

In the end, counsel for the debtor acknowledges this much. At argument on the motion, counsel recognized that to the extent the amendments to the indenture violated the rights of the objecting noteholders under § 9.02(d)(10) – which is the objecting noteholders' principal merits argument – then “the no action clause would not bar it.”⁶¹ Accordingly, it does not appear that any party contends that the no-action

clause operates to preclude the objecting noteholders from advancing their principal argument – that the amendments to the 2019 Indenture effected by the Supplemental Indenture and the 2021 Intercreditor Agreement violated their rights under § 9.02(d)(10). The Court will accordingly turn to that argument.

II. The challenged transactions comport with the language of the applicable agreements.

A. Section 9.02(d)(10) does not prohibit subordination.

The central merits question is whether the adoption of the Supplemental Indenture or the 2021 Intercreditor agreement violates § 9.02(d)(10) of the 2019 Indenture, which provides that “an amendment, supplement or waiver under this Section 9.02 may not (with respect to any Notes held by a non-consenting Holder) ... make any change in the provisions of the Intercreditor Agreement or this Indenture dealing with the application of proceeds of Collateral that would adversely affect the Holders.”

The basic dispute between the parties is over how broadly or narrowly to read the term “dealing with the application of the proceeds of Collateral,” and whether the amendments to the 2019 Indenture made by the Supplemental Indenture (including subjecting the 2019 Indenture to the 2021 Intercreditor Agreement) were covered by that language. The objecting noteholders read the language fairly broadly, saying that a change that would put new debt ahead of them with respect to the right to recover out of the collateral “deals with the application of proceeds of Collateral.”⁶²

*10 The debtor and the ad hoc group of noteholders read the applicable language more narrowly. As the ad hoc group of noteholders explain, the only provision of the 2019 Indenture that “deals with the application of proceeds of collateral” is § 6.10, which addresses the waterfall for how the trustee should distribute monies it receives under the indenture (including the distribution of proceeds of collateral).⁶³ That provision states that, after the payment of the trustee's fees, such funds are to be distributed “ratably” among holders.⁶⁴ The ad hoc group of noteholders explains that if the agreement were amended so that certain holders would be paid ahead of others out of the proceeds of collateral, such an amendment could not be effective, under § 9.02(d)(10), as against an adversely affected objecting holder. But the ad hoc group of noteholders argues that so long as the proceeds of the collateral that comes into the hands of the trustee are to be distributed ratably

among the noteholders, as remains the case after the adoption of the Supplemental Indenture, then the indenture has not been amended in any way that deals with the application of the proceeds of collateral.⁶⁵

If one were simply looking at the words in isolation, reasonable arguments could be made on either side. Consider the following directive: “[1] Amy will deliver four ice cream cones to Bob; [2] Bob will distribute the ice cream cones he receives equally to Charlie and Diane.” Would an amendment to the directive so that it instead provides “[1] Amy will deliver two ice cream cones to Bob,” but otherwise left directive [2] unchanged be one that “deals with the allocation of ice cream”? Again, if all one had to go on were the snippet of language itself, it seems that plausible arguments could be advanced on both sides. Perhaps any change that affects how much ice cream either Charlie or Diane receives from Bob is one that “deals with the allocation of ice cream.” Alternatively, one might read the language “deals with the allocation of ice cream” to cover only the rules governing how Bob is to divide the ice cream he receives between Charlie and Diane.

On the objecting noteholders’ side of this argument, the court in *Trimark*⁶⁶ expressed an openness to the former reading of such a clause. That case involved a paradigmatic “uptier” transaction that was challenged by the holders who were “left behind.” They contended that the amendments to the agreement to authorize that transaction required their consent, under a clause that provided that an amendment could not revise certain provisions of the agreement “in a manner that would by its terms alter the application of proceeds” without “the written consent of each Lender directly and adversely affected thereby.”⁶⁷

The court noted that one “reasonable way” to read the provision is as a prohibition on subordination – to prohibit the parties “from placing any tranche of debt above Plaintiffs’ place in the waterfall, even if the order of distribution” is not affected.⁶⁸ After the uptier transaction, the objecting holders “do not have the right to receive a dollar of collateral upon default until \$427 million is paid back to the new cadre of super-senior lenders.”⁶⁹ Even if the objectors’ rights were not affected vis-à-vis the other holders in their same tranche, the objectors still “have a plausible argument that the [transaction] required their consent ... because it altered the application of proceeds by subordinating Plaintiffs’

priority interest to the new Super-Priority Intercreditor Agreement.”⁷⁰

*11 On the other hand, the *Trimark* court noted that an argument could also be made that “application of proceeds” refers “only to the Administrative Agent’s application of proceeds among the categories covered by the agreement.”⁷¹ The court explained that on this view, “the Administrative Agent’s task remains the same before and after the amendment – it still applies the ‘proceeds’ (whatever is left of them) in the order specified” in the agreement.⁷²

Because the court found that the objectors’ reading to be a plausible one, it denied a motion to dismiss the objectors’ complaint and allowed the litigation to proceed.⁷³ The case ultimately settled, such that the Court did not reach a definitive construction of the language.

The *Trimark* court was certainly right that both constructions of the language at issue there were plausible based on the language in isolation. But there are perhaps tools of construction, beyond the words themselves, that could provide guidance in choosing between them. Specifically, New York law provides that contractual language must be understood through the lens of “the customs, practices, usages and terminology as generally understood in the particular trade or business.”⁷⁴

In the context of an indenture, the Court believes that the inclusion of express anti-subordination clauses are sufficiently commonplace that, under the customs and usages that are common in the trade, a provision providing for ratable distribution (in the absence of an express anti-subordination clause) would more naturally apply to distributions *within* a class, and not prohibit subordination of an entire class to another, different class.⁷⁵ Indeed, it is telling that when the parties here adopted the Supplemental Indenture, they included such a standard clause. “Notwithstanding the foregoing in this Section 9.02, no amendment, supplement or waiver to the Indenture or any other Note Document shall subordinate the Lien securing the Notes Obligations to any other Lien (and the Trustee shall not enter into any intercreditor agreement providing for such subordination) without the consent of the holders of at least 66-2/3% in aggregate principal amount of the Notes then outstanding.”⁷⁶

In the circumstances of this case, however, even more telling context is provided by the other terms of the 2019

Indenture itself. As described above, that agreement created a hierarchy of consents needed for particular amendments. It generally provided for control by the majority; stated that a super-majority of two-thirds was required to release all or substantially all of the collateral; and then identified ten “sacred rights” that required unanimous consent (of affected holders).

The logic of that hierarchy would suggest that the matters included among the ten sacred rights would be actions that – at least from the perspective of an individual holder – would be more problematic or potentially prejudicial than the kinds of actions that can be taken simply with the approval of a simple or two-thirds majority. Reading § 9.02(d)(10) to be limited to protecting the right to pro rata distributions would be consistent with this structure. Surely an individual holder would be severely prejudiced if the other holders all agreed that they would be paid in full out of the distribution of the proceeds of collateral before that individual holder received any distribution.

*12 Reading § 9.02(d)(10) to treat any subordination as violating a “sacred right,” however, would be inconsistent with this hierarchy. Subordination of a lien to that of another lender is a *less* drastic intrusion on the rights of an individual holder than simply releasing all of the collateral. It would therefore create an anomaly to read the 2019 Indenture to permit a two-thirds majority to release all of the collateral but not to subordinate a lien to that of another lender.

As a commercial matter, there are ample reasons why a lender might agree to subordinate its lien to one in favor of a new lender. In circumstances in which a borrower is facing a liquidity constraint, an old lender that is unwilling or unable to make a further loan might be very happy to subordinate its lien if that is the most cost-effective way for the borrower to attract new capital and thus avoid the greater threat to the lender's collateral that a default would precipitate. As a matter of ordinary logic, an agreement to subordinate thus seems far *less* drastic than releasing all of the collateral. It therefore would not make sense to read the document to permit a two-thirds majority to take a *more* drastic action but give every holder the right to block the *less* extreme measure.

While counsel for the objecting noteholders, at argument, vigorously disputed the contention that a release of collateral is a more drastic action than the subordination of a lien to that of another lender,⁷⁷ the Court is persuaded that it is more drastic. As such, the internal logic and hierarchy of the 2019

Indenture thus counsels strongly against reading § 9.02(d)(10) to provide that the subordination of a lien is a matter “dealing with application of the proceeds of Collateral” that would be treated as a “sacred right.”

Nor does the fact that the Supplemental Indenture also made the 2019 Indenture subject to the 2021 Intercreditor Agreement alter the analysis. The provision of the 2019 Intercreditor Agreement that addressed the allocation of proceeds (§ 4.1(a)) set forth the respective rights of the holders of the ABL facility and those of the holders of the 10.5% Notes. While the 2021 transaction put additional debt ahead of *both* the 10.5% Notes and the ABL facility, nothing in those transactions affected the *relative* rights of those holders vis-à-vis each other. As such, the change did not “deal with the allocation of proceeds of the Collateral” within the meaning of § 9.02(d)(10) of the 2019 Indenture.

In sum, contrary to the argument advanced by the objecting noteholders, the Court concludes that § 9.02(d)(10) of the 2019 Indenture is primarily directed at protecting the holders’ rights to ratable treatment and should not be read as an anti-subordination provision in disguise. Indeed, simply as a commercial matter, the need to infuse a borrower with new money in order to protect the value of existing collateral might well provide a sound reason why lenders would agree that a majority (or, in the case of the Supplemental Indenture, a super-majority) may bind a class of holders to a decision to subordinate their lien.

As far as commercial norms go, to the extent that the objecting noteholders have anything to complain about from the 2021 transaction, that complaint is more with the fact that the objecting noteholders were not offered the opportunity to participate in the new loan than it is with the treatment of their old debt. But as counsel for the ad hoc group of noteholders indicated during the June 29 hearing, “there's nothing in the [2019 Indenture] that says I had the right to participate in some other financing.”⁷⁸ And it is true that the debtors were free to make their own business decisions in deciding from whom to borrow new money. So while the various 2021 transactions may have violated what the *Trimark* court (perhaps aspirationally) called the “all for one, one for all” spirit of a syndicated loan,⁷⁹ the transactions did not violate the letter of the applicable agreements in a manner that gives rise to a claim by the objecting noteholders. There is nothing in the law that requires holders of syndicated debt to behave as Musketeers. To the extent such holders want to be protected against self-interested actions by borrowers and

other holders, they must include such protections in the terms of their agreements.

B. The consent letters received by TPC were effective to authorize the 2021 transactions.

*13 The objecting noteholders also argue that the transactions were ineffective because the 2019 Indenture requires the consent of “Holders,” which is defined as the “Person in whose name a Note is registered in the register maintained by the Registrar.”⁸⁰ But rather than obtaining consents from the “registered holders” of the notes, TPC obtained consents from the beneficial holders. Those consents contained signatures of the beneficial holder and/or investment advisor, a certification of the holdings, a stamp or seal certifying ownership of the notes, and/or a certified letter or account summary.⁸¹

Section 9.02(b) of the 2019 Indenture, however, authorizes the Trustee to “join with the Issuer and the Guarantors in the execution of such amended or supplemental indenture” when the Trustee receives “evidence satisfactory to the Trustee of the consent of the Holders.”⁸² In the absence of an objection

to the form of consent from the Trustee, the 2019 Indenture thus does not appear to authorize other holders to assert a claim that the form of authorization was improper. And even if it did, in circumstances (such as here) where the distinction between registered and beneficial holders would elevate form over substance, New York courts have declined to enforce it.⁸³ The Court accordingly will not invalidate the 2021 transactions on this basis.

Conclusion

For the reasons described above, the Court concludes that the Supplemental Indenture and the 2021 Intercreditor Agreement did not violate the rights of the objecting noteholders under the 2019 Indenture. The parties are directed to settle appropriate forms of order that resolve the outstanding motions and provide for the entry of judgment.

All Citations

Not Reported in B.R. Rptr., 2022 WL 2498751

Footnotes

- 1 See, e.g., Diane L. Dick, *Hostile Restructurings*, 96 Wash. L. Rev. 1333 (2021). Materials from a recent symposium devoted to this topic can be found at: <https://creditorcoalition.org/upcoming-symposium-intra-creditor-class-warfare/>.
- 2 In view of this distinction, the parties dispute whether the transaction at issue here is properly characterized as an “uptier” transaction. But because that label has no particular legal significance, that is not an issue that the Court is properly called upon to resolve.
- 3 These notes will be referred to as the “10.5% Notes.” The indenture for these notes, referred to as the “2019 Indenture,” can be found in the record at D.I. 5 Ex. A. Items docketed in this adversary proceeding are cited as “D.I. ___.” Items docketed in the main bankruptcy case, *In re TPC Group, Inc.*, No. 22-10493 (CTG) (Bankr. D. Del.), are cited as “Main Bankruptcy D.I. ___.” U.S. Bank National Association serves as trustee and collateral agent under the 2019 Indenture.
- 4 See Main Bankruptcy D.I. 74-1. Bayside Capital, Inc. is referred to as “Bayside Capital.” Cerberus Capital Management, L.P. is referred to as “Cerberus.” Bayside Capital and Cerberus are referred to, collectively, as the “objecting noteholders.”
- 5 2019 Indenture § 14.08.
- 6 *Id.* § 6.05.

7 *Id.* § 9.02(a).

8 *Id.*

9 *Id.* § 9.02(e).

10 *Id.*

11 *Id.* § 9.02(d)(10).

12 Because, under the principle of *ejusdem generis*, the meaning of the relevant provision can be informed by the context provided by the other provisions, the full enumeration of “sacred rights” – those changes that cannot be made without the consent of every affected party – is set out below:

(1) reduce the principal amount of Notes whose Holders must consent to an amendment, supplement or waiver;

(2) reduce the principal of or extend the fixed maturity of any Note or alter the provisions with respect to the redemption of the Notes (for the avoidance of doubt, repurchases of the Notes by the Issuer pursuant to Sections 4.08 and 4.12 hereof are not redemptions of the Notes);

(3) reduce the rate of or extend the time for payment of interest, including default interest, or premium on any Note;

(4) waive a Default or Event of Default in the payment of principal of, or premium, if any, or interest on, the Notes (except a rescission of acceleration of the Notes by the Holders of at least a majority in aggregate principal amount of the then outstanding Notes and a waiver of the payment default that resulted from such acceleration);

(5) make any Note payable in money other than that stated in the Notes;

(6) make any change in the provisions of this Indenture relating to waivers of past Defaults or impair the rights of Holders of Notes to receive payments of principal of, or interest of premium, if any, on the Notes;

(7) waive a redemption payment with respect to any Note (for the avoidance of doubt, any payment required by Sections 4.08 or 4.12 hereof is not a redemption payment);

(8) release any Guarantor that is a Significant Subsidiary of the Issuer from any of its obligations under its Note Guarantee or this Indenture, except in accordance with the terms of this Indenture;

(9) make any change in the preceding amendment and waiver provisions; or

(10) make any change in the provisions in the Intercreditor Agreement or this Indenture dealing with the application of proceeds of Collateral that would adversely affect the Holders.

Id. § 9.02(d).

13 *Id.* § 6.10.

14 The no-action clause reads as follows:

Section 6.06 Limitation on Suits.

(a) A Holder may pursue a remedy with respect to this Indenture or the Notes only if:

- (1) such Holder has previously given the Trustee written notice that an Event of Default is continuing;
- (2) Holders of at least 25% in aggregate principal amount of the then outstanding Notes have requested the Trustee in writing to pursue the remedy;
- (3) such Holder or Holders offer and, if requested, provide to the Trustee security or indemnity satisfactory to the Trustee against any loss, liability or expense;
- (4) the Trustee does not comply with the request within 60 days after receipt of the request and the offer of security or indemnity; and
- (5) during such 60-day period, Holders of a majority in aggregate principal amount of the then outstanding Notes do not give the Trustee a written direction inconsistent with such request.

Id. § 6.06.

15 Main Bankruptcy D.I. 27 ¶ 33.

16 *Id.* ¶ 34.

17 D.I. 5 Ex. B. This agreement is referred to as the “2019 Intercreditor Agreement.”

18 Main Bankruptcy D.I. 27 ¶¶ 53-59.

19 These notes will be referred to as the “10.875% Notes.” The indenture for these notes, referred to herein as the “2021 Indenture,” can be found in the record at D.I. 5 Ex. C. As with the 10.5% Notes, U.S. Bank National Association serves as trustee and collateral agent under the indenture for the 10.875% Notes.

20 2021 Indenture § 14.08.

21 Main Bankruptcy D.I. 27 ¶ 36.

22 By its terms, the 10.5% Notes contemplated that TPC might incur certain additional indebtedness. See 10.5% Notes § 4.07. The document amending the 2019 Indenture so as to authorize the issuance of the 10.875% Notes is referred to as the “Supplemental Indenture,” and can be found in the record at D.I. 5 Ex. D.




23 See D.I. 5 Ex. G (attaching consents from holders of a supermajority of the 10.5% Notes to 2021 transactions). See also D.I. 41 ¶¶ 10, 40 (asserting that TPC obtained consents from the holders of 66.72% – \$620.487 million of a total issuance of \$930 million – of the outstanding 10.5% Notes).







24 Among other things, the Supplemental Indenture operated to ensure that (a) the 2019 Indenture would be subject not only to the original 2019 Intercreditor Agreement, but also the 2021 Intercreditor Agreement; and (b) alters the definition of permitted liens to except certain of the new notes from the limitations on such liens contained in the 2019 Indenture. See Supplemental Indenture §§ 4.07(d); 12.01(c).

25 This agreement is referred to as the “2021 Intercreditor Agreement” and can be found in the record at D.I. 5 Ex. F.

26 2021 Intercreditor Agreement §§ 2.1, 4.1.

27 See D.I. 5 Ex. G.

- 28 While the Court granted interim authority for the debtors to borrow on a postpetition basis, that order expressly reserves the authority of the court to fashion any appropriate remedy in the event that final approval of the DIP is not granted. See Main Bankruptcy D.I. 147 ¶ 2(d).
- 29 D.I. 1, 3.
- 30 D.I. 4.
- 31 While TPC Group, Inc. and various of its affiliates are debtors in the jointly administered bankruptcy cases, only the lead debtor, TPC Group, Inc., is named as a defendant in this adversary proceeding.
- 32 D.I. 15.
- 33 D.I. 16.
- 34 D.I. 18.
- 35 D.I. 40.
- 36 D.I. 47.
- 37 D.I. 28. This group of intervening defendants is described as the “ad hoc group of noteholders.”
- 38 D.I. 38.
- 39 D.I. 42.
- 40 D.I. 43.
- 41 D.I. 48.
- 42 D.I. 49.
- 43 Fed. R. Civ. P. 56(a).
- 44 Fed. R. Civ. P. 56(c)(1) (identifying the types of “materials in the record” that may be cited in support of a motion for summary judgment).
- 45 Fed. R. Civ. P. 56(c)(1) (noting that the identified materials may be cited by a “party asserting that a fact cannot be or is genuinely disputed”).
- 46 *In re DPH Holdings Corp.*, 553 B.R. 20, 27-28 (Bankr. S.D.N.Y. 2016).
- 47 *Id.* (internal ellipses and citations omitted). See also  *Mastrovincenzo v. City of New York*, 435 F.3d 78, 104 (2d Cir. 2006) (“The cardinal principle for construction and interpretation of ... all contracts ... is that the intentions of the parties should control. Unless otherwise indicated, words should be given the meanings ordinarily ascribed to them.”).
- 48 *MLB Const. Servs. v. Dormitory Auth.*, 149 N.Y.S.3d 271, 276 (2021) (citations omitted).
- 49  *Septembertide Pub., B.V. v. Stein & Day, Inc.*, 884 F.2d 675, 682 (2d Cir. 1989); see also  *In re KB Toys Inc.*, 736 F.3d 247, 254 (3d Cir. 2013) (a claim that would be subject to disallowance under § 502(d) in the hands of the original creditor is equally subject to disallowance after the claim is sold to a buyer).

- 50 See D.I. 17 at 6-12; D.I. 19 at 5-7; D.I. 40 at 12-15; D.I. 61 at 4-7.
- 51  *Beal Sav. Bank v. Sommer*, 865 N.E.2d 1210 (N.Y. 2007).
- 52 *Id.* at 1219. See also  *Quadrant Structured Prods. Co. v. Vertin*, 16 N.E.3d 1165 (N.Y. 2013) (holding that no-action clause applies only to claims under indenture agreement and does not bar individual suits to enforce common-law or statutory rights);  *Cortland Street Recovery v. Bonderman*, 96 N.E.3d 191, 201 (N.Y. 2018) (explaining that no-action clause may prohibit individual holders, but not the indenture trustee, from bringing fraudulent conveyance claim).
- 53 No. Civ. A. 1607-N (LES), 2006 WL 668441 (Del. Ch. Mar. 8, 2006).
- 54 *Id.* at *6.
- 55  *Eaton Vance Management v. Wilmington Savings Fund Society, FSB*, No. 654397/2017 (SWK), 2018 WL 1947405 (N.Y. Sup. Ct. Apr. 25, 2018).
- 56 *Id.* at *8.
- 57 *Id.* at *9.
- 58 See, e.g.,  *Feldbaum v. McCrory Corp.*, Civ. A. No. 11866 (LA), 1992 WL 119095 (Del. Ch. June 2, 1992).
- 59  865 N.E.2d at 1213 (internal citations and quotations omitted).
- 60 *Id.*
- 61 June 29, 2022 Hearing Tr. at 34. See also *id.* at 35 (acknowledging that the no-action clause does not preclude objecting noteholders from bringing suit to enforce their right under the indenture to object to an amendment that “dealt with the application of the proceeds of collateral” which is one of the indenture’s “sacred rights”).
- 62 See D.I. 4 at 14-15.
- 63 D.I. 44 at 17.
- 64 2019 Indenture § 6.10(a).
- 65 With respect to the 2019 Intercreditor Agreement, the ad hoc group of noteholders argues that the provision of the agreement that deals “with the application of proceeds of collateral” is 4.1(a), which is captioned “Application of Proceeds” and addresses the relative rights of the holders of the ABL facility and the holders of the 10.5% Notes with respect to the collateral in which both groups of holders assert liens.
- 66 *Audax Credit Opportunities Offshore Ltd. v. TMK Hawk Parent, Corp.*, No. 565123/2020 (JMC), 2021 WL 3671541 (N.Y. Sup. Ct. Aug. 16, 2021) (“*Trimark*”).
- 67 *Id.* at **11.
- 68 *Id.* at **12.
- 69 *Id.*
- 70 *Id.* (internal quotation marks omitted).

71 *Id.*

72 *Id.*

73 *Id.*

74 *Orchard Hill Master Fund Ltd. v. SBA Commc'ns Corp.*, 830 F.3d 152, 156-157 (2d Cir. 2016).

75 The U.S. District Court for the Southern District of New York reached a similar conclusion in [LCM XXII Ltd. v. Serta Simmons Bedding, LLC](#), No. 21 Civ. 3987 (KPF), 2022 WL 953109, at *10 (S.D.N.Y. Mar. 29, 2022) (“[T]he court is unmoved by Plaintiffs’ proffered interpretation of their sacred rights to *pro rata* payments. The plain terms of Section 2.18 of the Agreement make clear that the first-lien lenders’ rights to *pro rata* payments apply only to debt within the same ‘Class,’ viz., among first-lien lenders.”).

76 Supplemental Indenture § 9.02(f).

77 See June 29, 2022 Hearing Tr. at 40-41.

78 *Id.* at 74.

79 *Trimark*, 2021 WL 3671541 at **1.

80 2019 Indenture § 1.01.

81 See D.I. 5 Ex. G.

82 2019 Indenture § 9.02(b).

83 See [Friedman v. Airlift Intern., Inc.](#), 355 N.Y.S.2d 613, 615 (1974); [Allan Applestein TTEE FBO D.C.A. v. Province of Buenos Aires](#), 415 F.3d 242, 245-246 (2d Cir. 2005).

72 Misc.3d 1218(A)

Unreported Disposition

(The decision is referenced in the New York Supplement.)

This opinion is uncorrected and will not be published in the printed Official Reports.

Supreme Court, New York County, New York.

AUDAX CREDIT OPPORTUNITIES OFFSHORE LTD., Audax Credit Opportunities (SBA), LLC, Audax Credit BDC Inc., Audax Senior Loan Insurance Fund SPV, LLC, Audax Senior Loan Fund III SPV, LLC, Audax Senior Loan Fund III (Offshore) SPV, Ltd., KOCAA/Audax Private Debt Fund, LP, Audax Senior Debt (AZ) SPV, LLC, Audax Senior Debt (MP) SPV, LLC, Audax Senior Loan Fund I (Offshore) SPV, Ltd., Audax Senior Loan Fund (ST) SPV, LLC, Audax Senior Loan Fund I (Offshore) SPV II, Ltd., BlueMountain CLO 2012-2 Ltd., BlueMountain CLO 2013-1 Ltd., BlueMountain 2013-2 Ltd., BlueMountain CLO 2015-2 Ltd., BlueMountain CLO 2015-4 Ltd., BlueMountain CLO 2016-1 Ltd., BlueMountain CLO 2016-2 Ltd., BlueMountain CLO 2018-2 Ltd., BlueMountain CLO 2018-3 Ltd., BlueMountain CLO XXII Ltd., BlueMountain Fuji US CLO II Ltd., BlueMountain Fuji US CLO III Ltd., Golub Capital Partners CLO 19(B)-R, Ltd., Golub Capital Partners CLO 22(B)-R, Ltd., Golub Capital Partners CLO 23(B)-R, Ltd., Golub Capital Partners CLO 26(B)-R, Ltd., Golub Capital Partners CLO 35(B), Ltd., Golub Capital Partners CLO 37(B), Ltd., Golub Capital Partners CLO 39(B), Ltd., Golub Capital Partners CLO 40(B), Ltd., ICG US CLO 2014-1, Ltd., ICG US CLO 2014-2, Ltd., ICG US CLO 2014-3, Ltd., ICG US CLO 2015-2R, Ltd., ICG US CLO 2016-1, Ltd., ICG US CLO 2017-1, Ltd., ICG US CLO 2017-2, Ltd., ICG US CLO 2018-1, Ltd., ICG US CLO 2018-2, Ltd., ICG US CLO 2013-3, Ltd., New Mountain Finance DB, L.L.C., New Mountain Finance Holdings, L.L.C., New Mountain Guardian III SPV, L.L.C., Romark CLO-I Ltd., Romark CLO-II Ltd., Romark WM-R Ltd., Brookside Mill CLO Ltd., Jefferson Mill CLO Ltd., Jackson Mill CLO Ltd., Adams Mill CLO Ltd., Sudbury Mill CLO Ltd., York CLO-1 Ltd., York CLO-2 Ltd., York CLO-3 Ltd., York CLO-4 Ltd., York CLO-5 Ltd., York CLO-6 Ltd., Z Capital Credit Partners CLO 2018-1 Ltd., Z Capital Credit Partners CLO 2019-1 Ltd., Plaintiffs,

v.

TMK HAWK PARENT, CORP., Centerbridge Partners, L.P., Blackstone Tactical Opportunities Fund L.P., Oaktree Star Investment Fund II, L.P., Seventh Street Holdings 1, L.P., Seventh Street Holdings 2, L.P., Seventh Street Holdings 3, L.P., Seventh Street Holdings 4, L.P., Seventh Street Holdings 5, L.P., Seventh Street Holdings 6, L.P., Seventh Street Holdings 7, L.P., Seventh Street Holdings 8, L.P., Seventh Street Holdings 9, L.P., Seventh Street Holdings 10, L.P., Seventh Street Holdings 11, L.P., Seventh Street Holdings 12, L.P., Seventh Street Holdings 13, L.P., Seventh Street Holdings 14, L.P., Oaktree Huntington Investment Fund II, L.P., ASOF Holdings I L.P., Ares Institutional Loan Fund, L.P., Ares XXVII CLO Ltd., Ares XXVIII CLO Ltd., Ares XXIX CLO Ltd., Ares XXXIR CLO Ltd., Ares XXXIIR CLO Ltd., Ares XXIV CLO Ltd., Ares XXXVR CLO Ltd., Ares XXXVII CLO Ltd., Ares XXXVIII CLO Ltd., Ares XXXIX CLO Ltd., Ares XL CLO Ltd., Ares XLI CLO Ltd., Ares XLII CLO Ltd., Ares XLIII CLO Ltd., Ares XLIV CLO Ltd., Ares XLV CLO Ltd., Ares XLVI CLO Ltd., Ares XLVII CLO Ltd., Ares XLVIII CLO Ltd., Ares XLIX CLO Ltd., Ares L CLO Ltd., Ares LI CLO Ltd., Ares LII CLO Ltd., Ares LIII CLO Ltd., Ares LIV CLO Ltd., Denali Capital CLO X Ltd., Ares Senior Loan Trust, Future Fund Board of Guardians on Behalf of Future Fund and Medical Research Future Fund, Transatlantic Reinsurance Company, Rsui Indemnity Company, Inc., CIBC Asset Management Inc. as Trustee of Renaissance Floating Rate Income Fund, Stichting Pensioenfonds Hoogovens, Ares Institutional Credit Fund LP, SEI Investments Management Corporation on Behalf of SEI Institutional Investments Trust, Bowman Park CLO, Ltd., Bristol Park CLO, Ltd., Burnham Park CLO, Ltd., Buttermilk Park CLO, Ltd., Catskill Park CLO, Ltd., Chenango Park CLO, Ltd., Cole Park CLO Limited, Cumberland Park CLO, Ltd., Dewolf Park CLO, Ltd., Dorchester Park CLO Designated Activity Company, Gilbert Park CLO, Ltd., Grippen Park CLO, Ltd., Jay Park CLO, Ltd., Long Point Park CLO, Ltd., Seneca Park CLO, Ltd., Stewart Park CLO, Ltd., Taconic Park CLO, Ltd., Thacher Park CLO, Ltd., Thayer Park CLO, Ltd., Treman Park CLO, Ltd., Webster Park CLO, Ltd., Westcott Park CLO, Ltd., Scottish Widows Pension Trustees

Limited as Trustee of Scottish Widows Retirement Benefits Scheme, OZLM XVII, Ltd., OZLM Funding, Ltd., OZLM Funding IV, Ltd., OZLM XIX, Ltd., OZLM XI, Ltd., OZLM XXI, Ltd., OZLM XXII, Ltd., OZLM XVI, Ltd., OZLM Funding II, Ltd., OZLM Funding III, Ltd., OZLM VI, Ltd., OZLM VII, Ltd., OZLM VIII, Ltd., OZLM IX, Ltd., OZLM XII, Ltd., OZLM XIII, Ltd., OZLM XV, Ltd., OZLM XVIII, Ltd., OZLM XX, Ltd., OZLM XIV, Ltd., ABR Reinsurance Ltd., Chubb European Group SE, ACE Property & Casualty Insurance Company, J.P. Morgan Bank (Ireland) Public Limited Company on Behalf of BlackRock Bank Loan Fund, BlackRock Advisors, LLC On Behalf of BlackRock Floating Rate Income Trust, BlackRock Limited Duration Income Trust, BlackRock Credit Strategies Fund, BlackRock Funds II, and BlackRock Funds V, BlackRock Multi-Strategy Credit Fund Ltd., Commission De La Construction Du Quebec, Corporation Des Maitres Electriciens Du Quebec on Behalf of Fonds De Formation Des Salaries De L'Industrie De La Construction Du Quebec, BlackRock Debt Strategies Fund, Inc., BlackRock Floating Rate Income Strategies Fund, Inc., BlackRock Fund Management Company S.A. on Behalf of BlackRock Global Investment Series, Loan Funding II, LLC, Magnetite XII, Ltd., Magnetite XIV-R, Limited, Magnetite XV, Limited, Magnetite XVI, Limited, Magnetite XVII, Limited, Magnetite XVIII, Limited, Magnetite XIX, Limited, Magnetite XX, Limited, Magnetite XXI, Limited, Magnetite XXII, Limited, Magnetite VII, Limited, Magnetite VIII, Limited, BlackRock Multi-Strategy Credit Master Fund Ltd., Caaps Trustee Limited as Trustee of Civil Aviation Authority Pension Scheme, NC Garnet Fund, L.P., Fixed Income Opportunities Nero, LLC, BlackRock Senior Floating Rate Portfolio, Defendants.

565123/2020

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Decided on August 16, 2021

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Opinion

Joel M. Cohen, J.

****1** The following e-filed documents, listed by NYSCEF document number (Motion 002) 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 61, 62, 63, 64, 65, 66, 67, 68, 93, 94, 96, 97, 98, 99, 137 were read on this motion to DISMISS.

The following e-filed documents, listed by NYSCEF document number (Motion 003) 35, 36, 37, 69, 70, 71, 72, 73, 74, 75, 76, 95, 138 were read on this motion to DISMISS.

The following e-filed documents, listed by NYSCEF document number (Motion 004) 38, 39, 40, 41, 42, 43, 77, 78, 79, 80, 81, 82, 83, 84, 101, 139 were read on this motion to DISMISS.

The following e-filed documents, listed by NYSCEF document number (Motion 005) 44, 45, 46, 47, 85, 86, 87, 88, 89, 90, 91, 92, 100, 140 were read on this motion to DISMISS. A syndicated loan is a loan extended by a group of lenders (*i.e.*, a syndicate) to a single borrower, typically under a single

agreement with common terms. By pooling their resources, the lenders share the benefits and risks of the transaction. Generally speaking, the spirit of such arrangements among lenders is all for one, one for all. But not always.

This dispute arises from the amendment of a syndicated credit agreement that left one group of First Lien lenders (Plaintiffs) subordinated, without their consent, to the interests of another group of First Lien lenders (the Lender Defendants).¹ The Lender Defendants purportedly worked with the Borrower Defendant (TriMark), in a carefully-crafted multi-step process, to swap their First Lien loans for a new category of “super senior” debt that is to be repaid in full before Plaintiffs’ nominally “first” priority loans are repaid at all. According to Plaintiffs, the Defendants sought to insulate their maneuver from scrutiny by amending the credit agreement to make it “extraordinarily difficult,” if not impossible, for Plaintiffs to challenge the transaction in court.

The results, as alleged by Plaintiffs, were stark and unevenly distributed. On the positive side, the transaction injected \$120 million in fresh liquidity for TriMark, a restaurant-supply business struggling in the throes of the COVID-19 pandemic. It also benefited TriMark's Equity Sponsors, Defendants Centerbridge and Blackstone, who had a financial interest in TriMark receiving additional funding. And of course, it benefited the Lender Defendants, who secured a place at the front of the repayment line, albeit at the cost of extending additional credit to a troubled borrower. Plaintiffs, on the other hand, were left with loans that likely would be worthless in the event of a default. The transaction purportedly caused the rating and market value of Plaintiffs’ loans to plummet.

In this action, Plaintiffs denounce Defendants’ conduct as a “cannibalistic assault,” “lender-on-lender violence,” and outright “theft.” They seek a declaratory judgment that the amended credit agreement crafted by the Lender and Borrower Defendants is void. They also assert claims for breach of contract, breach of the implied covenant of good faith and fair dealing, tortious interference with contract, and violations of the New York Uniform Voidable Transactions Act. Defendants, for their part, assert that they simply were exercising contractual rights as holders collectively of more than 50% of the outstanding loan amount in the syndicate to amend the credit agreement. Moreover, they argue that certain “no-action” provisions contained in the amended credit agreement preclude Plaintiffs from bringing this lawsuit. They move to dismiss the Complaint.

****2** For the reasons set forth below: (i) Defendants’ motions to dismiss the claims for declaratory relief (first cause of action) and breach of contract (second and third causes of action) are *denied*; and (ii) Defendants’ motions to dismiss the claims for breach of the implied covenant of good faith and fair dealing (fourth cause of action), tortious interference with contract (fifth cause of action), and violation of the UVTA (sixth cause of action) are *granted*.

FACTUAL BACKGROUND

A. The Original Agreement

1. The TriMark LBO

TriMark, a Delaware corporation with its principal place of business in Massachusetts, is a leading distributor of food service equipment (Compl. ¶20).² In August 2017, two private equity firms, Centerbridge Partners, L.P. (“Centerbridge”) and Blackstone Tactical Opportunities Fund, L.P. (“Blackstone”), acquired a combined 86.6% equity interest in TriMark through a \$1.265 billion leveraged buyout (“LBO”) (*id.* ¶¶40-41).

An LBO, as its name suggests, is an acquisition financed with a substantial amount of debt (*id.* ¶34, 36). Loans financing such transactions tend to be riskier than traditional commercial loans because, by definition, they are made to heavily leveraged borrowers with lower credit ratings (*id.*). Case in point, at the time of the TriMark LBO, TriMark was rated B3 by Moody's and B by Standard & Poor's (*id.* ¶40). Such borrowers often must work with banks to structure, arrange, and eventually sell (or “syndicate”) leveraged loan interests to other investors to diffuse the risk exposure of the loan (*id.* ¶36).

The TriMark LBO was financed by an \$820 million syndicated loan (the “Leveraged Loan”) (*id.* ¶41), which was eventually syndicated to lenders that include Plaintiffs and the Lender Defendants (*id.*). The Leveraged Loan had two tranches — First Lien and Second Lien — both secured by the same collateral, which included TriMark's capital stock and other assets (*id.* ¶42). As the name suggests, the First Lien tranche (a total of \$585 million) had priority above the Second Lien tranche (*id.* ¶43). In other words, in the event of a default, TriMark had to pay the First Lien Lenders in full before it paid the Second Lien Lenders anything (*id.*). Plaintiffs and the Lender Defendants were all Lenders in the First Lien tranche (*id.*).

The First Lien Lenders made the \$585 million loan to TriMark under a First Lien Credit Agreement, issued on August 28, 2017 and amended on September 27, 2017 (the “Original Agreement”) (NYSCEF 23). In Plaintiffs’ view, the Original Agreement guaranteed that all first-lien lenders would share pro rata in the loans’ benefits and losses and have priority claims to the collateral above anyone else in the event of a liquidation. For the next three years — until September 2020 — TriMark made quarterly payments under the Original Agreement without issue (*id.* ¶44).

2. “Required Lenders” and “Sacred Rights”

The Original Agreement provides that any of its provision, except for certain so-called “sacred rights” provisions, could be “waived, amended or modified ... pursuant to an agreement or agreements in writing” by the Company and the “Required Lenders” (Original Agreement § 9.02 [b]).³ “Required Lenders” are defined to mean:

****3** [A]t any time, Lenders having or holding more than 50.0% of the outstanding Term Loans and unused Commitments at such time; provided that (a) the total outstanding Term Loans subject to Section 9.04(g) and unused Delayed Draw Commitments of the Borrower or any Affiliate thereof (other than any Affiliated Debt Fund) and (b) whenever there are one or more Defaulting Lenders, the total outstanding Term Loans and Commitments of each Defaulting Lender shall, in the case of each of clauses (a) and (b), be excluded for purposes of making a determination of Required Lenders.

Section 9.02 [b] requires that “an agreement or agreements” between or among TriMark and any Required Lenders to amend the Original Agreement must have “the written consent of each Lender directly and adversely affected” by such agreement or agreements if it would impact certain sacred rights, which Section 9.02 [b] groups in two categories.

First, Lenders have the right to veto any amendment that “directly and adversely” affects that Lender by: (a) increasing the Commitment of any Lender; (b) reducing the principal amount or rate of interest of any Loan; (c) postponing the maturity of any Loan; or (d) changing the “waterfall” provisions in section 7.03 of the Original Agreement or Section 4.02 of the Collateral Agreement (*see id.* §§ 9.02 [b] [i] [A]-[D]). **Second**, all Lenders — whether or not they are affected by any such change — must consent to any amendment that reduces the percentages set forth in the definitions of “Required Lenders” or “Majority in Interest” or releases Guarantees or Collateral (*see id.* §§ 9.02 [b] [ii]-[v]).

B. The Liquidity Transaction

1. TriMark Announces the Liquidity Transaction

The COVID-19 pandemic brought about the suspension of indoor restaurant dining in many states and, predictably, put tremendous strains on TriMark’s business (Compl. ¶45). In June 2020, Moody’s downgraded TriMark’s debt to Caa2 (*id.*). And by August 2020, the First Lien Debt was trading in the high 70s cents on the dollar (*id.*). “TriMark’s financial outlook remained grim” that summer (*id.* ¶45).

During the late spring and summer of 2020, a group of Lenders formed a committee to engage with TriMark to try to understand whether the company needed additional liquidity to weather the stress caused by the pandemic and, if needed, to explore potential pro rata financing options (*id.* ¶46). TriMark allegedly denied to the committee, and to the public markets, that it had any near-term cash issue, that it required additional liquidity, or that it had spoken to outside financing sources (*id.*).

Then, on September 14, 2020, TriMark announced a new transaction (the Liquidity Transaction), which included an agreement between TriMark and the Participating Lenders to amend the terms of the Original Credit Agreement to eliminate the restrictions on TriMark’s issuance of incremental senior debt (*see* NYSCEF 25, Art. VI [redline showing changes in Amendment]; *compare with* Original Credit Agreement § 6.01 [a] [“The Borrower will not, and will not permit any Restricted Subsidiary to, incur or permit to exist any Indebtedness, except [specified exceptions]”]; *see* Oral Arg. Tr. at 11-12 [NYSCEF 170] [TriMark’s counsel noting “we couldn’t issue more senior secured debt without amending the credit agreement”]).

Plaintiffs were not given advance notice of the Liquidity Transaction (Compl. ¶47). That, Plaintiffs say, was by design. According to Plaintiffs, Defendants (including members of the Lenders committee) “were huddled in a back room to cut a deal with TriMark that would not only provide new cash to the company, but would also benefit Lender Defendants while breaching contractual duties owed to Plaintiffs and causing Plaintiffs to incur substantial financial losses” (*id.* ¶46). Plaintiffs further allege, on information and belief, that “this scheme was chiefly hatched and led by TriMark’s private equity sponsor, Centerbridge, and two of the Lender Defendants, Oaktree and Ares,” and that “these parties induced TriMark and the remaining Lender Defendants to enter into the unlawful transaction challenged herein” (*id.*).

****4 2. Features of the Liquidity Transaction**

The Liquidity Transaction had three main components, effected through a series of interlocking agreements executed the same day, principally among TriMark, the Lender Defendants, and non-party Alter Domus (US) LLC (“Alter Domus”).

First, TriMark entered into a Super Senior Credit Agreement (the “Super Senior Credit Agreement”). Pursuant to that Agreement, the company issued new “First-Out Super Senior Debt” to a group of unidentified Lenders, which on information and belief included one or more Lender Defendants, for \$120 million. This new debt was secured by the same collateral that secured TriMark’s existing First Lien Debt. If TriMark defaulted, it purportedly would repay this new First-Out Super Senior Debt before paying any other debt—including its existing First Lien Debt. TriMark did not offer to issue this new debt to Plaintiffs (*id.* ¶48).

Second, TriMark issued \$307.5 million in new “Second-Out Super Senior Debt” to Lender Defendants in a dollar-for-dollar exchange for their existing \$307.5 million face amount of First Lien Debt, which was automatically retired upon assignment back to TriMark. At this time, the Lender Defendants’ First Lien Debt was trading at about 78 cents on the dollar, representing a total market value of about \$239.85 million. As a result, the Second-Out Super Senior Debt-for-First Lien Debt exchange would net the Lender Defendants approximately \$67.65 million in increased value. The Second-Out Super Senior Debt was secured by the same collateral as the First Lien Debt but had a higher priority claim to that collateral. So, if TriMark defaulted, it purportedly would repay this Second-Out Super Senior Debt right after repaying the First-Out Super Senior Debt, but before paying

any of Plaintiffs’ First Lien Debt. As a result, the Second-Out Super Senior Debt was significantly more valuable than the First Lien Debt it replaced. By exchanging the First Lien Debt for an identical face amount of Second-Out Super Senior Debt, TriMark valued the First Lien Debt at an above-market price. TriMark did not offer or issue this new debt to Plaintiffs (*id.* ¶¶49-50).

Third, Plaintiffs allege that Lender Defendants and TriMark stripped covenants from the First Lien Credit Agreement, which removed bargained-for protections for Plaintiffs’ investment. Among other things, this alleged covenant-stripping removed Plaintiffs’ rights to information regarding their investment, thereby restricting Plaintiffs’ ability to make informed decisions about whether to keep or sell their debt (*id.* ¶51).

The Impact of the Liquidity Transaction

From Plaintiffs’ perspective, the Liquidity Transaction was immediately detrimental to their interests because it effectively transformed their First Lien Debt into third lien debt, ranking below in priority to \$427.5 million in new First-Out and Second-Out Super Senior Debt (*id.* ¶57).

[Image Omitted] (*id.* at 28).

This negative impact was reflected in the market’s assessment of the exchange. S & P soon lowered its “recovery rating” on TriMark’s First Lien Debt, and the market price of the First Lien Debt dropped (Compl. ¶¶58-59).

****5 C. The Amended Agreement**

As described by Plaintiffs, the Amended Agreement was the linchpin to the Liquidity Transaction. It lifted restrictions on TriMark’s ability to take on new “super senior” debt, enabled the Lender Defendants to usurp Plaintiffs’ right to Collateral proceeds, and restricted Plaintiffs’ right to challenge the transaction in court.

1. Amended Debt and Collateral Provisions

In sections 2.11 [a] [ii], [e] [i], and [f] [i], the Original Agreement permits TriMark to offer to prepay First Lien Debt only on a “pro rata basis” (Compl. ¶64). Deleting those sections, in section 2.11 [a] [i] [A], the Amended Agreement purportedly lets TriMark prepay Term Loans “at, below, and/or above par at its sole discretion[] on a non-pro rata basis” (*id.* ¶74). In section 2.20, the Original Agreement lets

TriMark incur new debt only if it ranks equal in priority of payment and security or lower than existing First Lien Debt (*id.* ¶62). Deleting that section, in section 2.21, the Amended Agreement purportedly lets TriMark refinance debt senior to the First Lien Debt on a non-pro rata basis with any Lender (*id.* ¶74). And in section 2.25, the Original Agreement lets TriMark offer to exchange debt only with “all” First Lien Lenders on a pro rata basis (*id.* ¶63). Modifying that provision, the Amended Agreement purportedly lets TriMark exchange debt with “one or more” Lenders on a non-pro rata basis (*id.* ¶¶63, 74).

In a similar vein, in sections 6.01 and 6.02 of the Original Agreement, TriMark covenants not to incur new debt or new liens on the Collateral senior in right of payment or security to the First Lien Lenders’ interests, such as the Super Senior Debt (*id.* ¶62). The Amended Agreement deletes Article VI in its entirety (*id.* ¶68).

Next, Defendants purported to rewrite the First Lien Lenders’ priority rights to collateral proceeds in a liquidation. Section 4.02 of the Collateral Agreement sets up a waterfall among three separate constituents in the credit arrangement, with collateral proceeds going first to reimburse certain costs and expenses of the Collateral Agent, then pro rata “to the payment in full of [the First Lien Debt]”, and then to other parties. This structure is “[s]ubject to the terms of the Intercreditor Agreements,” a defined term incorporated from the Original Agreement (see Collateral Agreement § 1.01 [a]; Compl. ¶73; Original Agreement at 48). Under the Original Agreement, the structure ensured that First Lien Lenders had priority over other Lenders in rights to Collateral proceeds. But the Amended Agreement modifies the definition of “Intercreditor Agreements” to include the new Super Senior debt, which means that the Super Senior Lenders now take priority above the First Lien Lenders in the order of distribution (Compl. ¶¶73-74).

2. Amended No-Action Provisions

The Original Agreement contained a narrow “no-action” provision that prohibited Lenders from bringing suit in their own name “to realize upon any of the Collateral or to enforce any Guarantee of the Secured Obligations,” requiring instead that such actions be pursued by the Administrative Agent, which at the time was Barclays Bank PLC (Compl. ¶¶ 60, 72, 74).

****6** The Amended Agreement imposed substantial new restrictions on First Lien Lenders’ ability to bring suit

to enforce their rights. Specifically, Section 9.18 of the Amended Agreement precludes any First Lien Lender from “tak[ing] or institut[ing] any actions or proceedings, judicial or otherwise, for *any right or remedy* or assert[ing] *any other Cause of Action*” not only against TriMark but also, “in a notable departure from industry norms,” the Lender Defendants (*id.* ¶72 [emphasis added]). Instead, “the remaining First Lien Lenders purportedly had to direct [the Administrative Agent] to sue.” (*id.* ¶¶ 72, 74).

However, the ability to “direct” had a new and significant catch. Under Section 9.03[f] of the Amended Agreement, the Administrative Agent may not proceed unless the Lenders post a cash indemnity “of *not less than* the sum of (x) all fees, costs and expenses of the Administrative Agent determines, *in its sole discretion*, could foreseeably be incurred in connection with such action and (y) the amount of any claims, obligations or liability, via counter-claims or otherwise, that the Administrative Agent determines, *in its sole discretion*, could foreseeably be awarded to the defendants in connection with such action” (NYSCEF Doc. No. 24 at p. 196-97 [emphasis added]; Compl. ¶ 72, 74). For good measure, the Amended Agreement purportedly indemnifies the Administrative Agent “for acts taken in bad faith.” (*id.* ¶ 71).

These new restrictions were “intended to make it extraordinarily difficult for Plaintiffs to bring suit — if the Amended Agreement was valid” (*id.* ¶ 72). According to Plaintiffs, Barclays Bank PLC “refused to participate in this illicit Scheme and resigned as Administrative Agent” (*id.* ¶¶60-61). Defendants then replaced Barclays with Alter Domus (US) LLC, which allegedly “has engineered a variety of similar illicit transactions” (*id.* ¶61).

Finally, while section 9.03 [b] of the Original Agreement required TriMark to indemnify the First Lien Lenders for “any and all losses, claims, damages and liabilities” and related “legal fees and expenses” (*id.* ¶74; *see id.* ¶¶71-72), the Amended Agreement strips those indemnification rights (*id.* ¶71) while at the same time, as noted above, broadening the indemnification of the Administrative Agent to include “acts taken in bad faith.”

D. The Instant Action

On November 7, 2020, Plaintiffs commenced this action by Summons and Complaint (NYSCEF 1), bringing claims against the Lender Defendants and Tri-Mark for (1) a declaratory judgment that the Amended Agreement is void

because it was invalidly adopted (First Cause of Action); (2) breaches of the Original Agreement (Second and Third Causes of Action); (3) breaches of the implied covenant of good faith and fair dealing (Fourth Cause of Action); and (4) violations of the New York Uniform Voidable Transactions Act (“UVTA”) (Sixth Cause of Action). Plaintiffs also bring a claim against the Equity Sponsor Defendants (Centerbridge and Blackstone) for tortious interference with contract (Fifth Cause of Action).

DISCUSSION

“On a [CPLR 3211](#) motion, the court must ‘accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory’ ” (*DKR Soundshore Oasis Holding Fund Ltd. v Merrill Lynch Int'l*, 80 AD3d 448, 449 [1st Dept 2011], quoting [Leon v Martinez](#), 84 NY2d 83, 87-88 [1994]). “[H]owever, ‘allegations consisting of bare legal conclusions as well as factual claims flatly contradicted by documentary evidence are not entitled to any such consideration’ ” (*Myers v Schneiderman*, 30 NY3d 1, 11 [2017] [citations omitted]).

****7** A motion to dismiss under [CPLR 3211\(a\)\(1\)](#) on the basis of documentary evidence outside the Complaint “may be granted ‘only where the documentary evidence utterly refutes [the complaint’s] factual allegations, conclusively establishing a defense as a matter of law’ ” (*id.* at 449-50 [alteration in original], quoting [Goshen v Mut. Life Ins. Co. of NY](#), 98 NY2d 314, 326 [2002]).

A. The Amended No-Action Provisions Do Not Mandate Dismissal of Plaintiffs’ Claims

As a threshold matter, Defendants assert that Plaintiffs do not have standing to assert their claims because they failed to comply with the amended no-action provisions requiring Plaintiffs to pre-fund a cash indemnity and request the Administrative Agent to initiate litigation on their behalf. The Court rejects that argument.

The Court of Appeals has cautioned that “no-action clauses are to be *construed strictly* and thus *read narrowly*” ([Quadrant Structured Products Co., Ltd. v Vertin](#), 23 NY3d 549, 560 [2014] [emphasis added]). The “primary purpose” of such provisions, which are found in a variety of multiparty financial agreements, “is to protect


issuers from the expense involved in defending [individual] lawsuits that are either frivolous or otherwise not in the economic interest of the corporation and its creditors” ([id.](#) at 565). “These limitations protect[] against the risk of strike suits” and “make[] it more difficult for individual bondholders to bring suits that are unpopular with their fellow bondholders” ([id.](#) at 565-66; *see also* [Ellington Credit Fund, Ltd. v Select Portfolio Servicing, Inc.](#), 837 F Supp 2d 162, 184 [SD NY 2011] [“[t]he purpose of no-action clauses is to protect the securitizations—and in turn other certificateholders—from the expense of litigating an action brought by a small group of certificateholders that most investors would consider not to be in their collective economic interest”]).

Within those parameters, no-action clauses typically are “not unenforceable as violative of public policy, given [their] salutary purpose of preventing undue expense to certificate holders and inconvenience to the investment vehicle in general,” and are “not unconscionable” (*Anato Opportunity Fund I, LP v Wells Fargo Bank, N.A.*, 153 AD3d 1161, 1162 [1st Dept 2017]).

This is not, however, a typical case. The parties have not cited, and the Court has not found, any case in which a no-action provision was strategically deployed in the manner alleged here — by a subset of lenders, without notice or consent, as part of a larger scheme to breach and then exit the agreement. The amended no-action provisions were, according to Plaintiffs, purpose-built to prevent *these Plaintiffs* from suing *these Defendants* in connection with *this transaction* — a preemptive self-pardon, of sorts. Subtle this was not.

Moreover, in addition to prohibiting Plaintiffs from suing directly, the provisions require Plaintiffs to fund a cash indemnity with no upper boundary — “not less than” the costs of litigation plus the defendants’ potential damages with respect to unspecified counterclaims — that rests in the “sole discretion” of an entity hand-picked by the Lender Defendants for the task. That requirement is particularly burdensome here, according to Plaintiffs, because “many of the lenders here are collateralized loan obligations whose investors may number in the hundreds,” and which “do not typically have the liquidity to post an indemnity of this magnitude or potentially even the legal right to do so,” rendering the entire process “futile” (*see* Oral Arg. Tr. at 46 [NYSCEF 170]). Finally, Plaintiffs allege that the amended








no-action provisions are themselves integral components of Defendants' broader scheme to deprive Plaintiff of "sacred rights" protections for which their consent is expressly required in the Amended *and* Original Agreements.

****8** No-action provisions are enforceable, first and foremost, because they reflect an *ex ante* agreement to sacrifice certain individual rights for the "salutary purpose" of benefiting the venture as a whole (*see, e.g., Sass v New Yorker Towers, Ltd.*, 23 AD2d 105, 107-08 [1st Dept 1965] [no-action provision was not "unconscionable" or "unreasonable" where "[a] mere reading of the debenture reveals the terms and conditions are set forth clearly," "the high rate of interest provided would, under ordinary conditions, provoke more than a casual interest in the reading in order to ascertain what limitations were consequent upon the enjoyment of such a generous return," and "the stockholders bound themselves because of a common interest—the protection of their investment already made in the corporation"];  *Feldbaum v McCrory Corp.*, CIV. A. 11866, 1992 WL 119095, at *7 [Del Ch June 2, 1992] ["courts systematically conclude that, in consenting to no-action clauses by purchasing bonds, plaintiffs waive their rights to bring claims that are common to all bondholders, and thus can be prosecuted by the trustee, unless they first comply with the procedures set forth in the clause"]; *Friedman v Chesapeake & Ohio Ry. Co.*, 261 F Supp 728, 730 [SD NY 1966] [enforcing restriction to sue under indenture where the provision "fairly places the bondholder on notice that his rights to sue before the stated maturity date are restricted and conditioned by the indenture" and "plaintiff has had knowledge of the indenture's provisions for at least ten years"], *affd sub nom. Friedman v Chesapeake & O. Ry. Co.*, 395 F2d 663 [2d Cir 1968]).

Here, taking Plaintiffs' allegations as true, there was no *ex ante* agreement to the no-action provisions *or* salutary benefit. Plaintiffs signed on to the substantially narrower no-action provisions in the Original Agreement and did not consent to the amendment. Moreover, the amended provisions lack any semblance of arm's-length agreement because the Lender Defendants allegedly crafted them with a view to *immediately exiting the contract*, thus gaining the protective benefit of the no-action provisions' amended terms without ever having to abide by them as parties to the contract. Even assuming the Original Agreement permitted (or at least did not expressly prohibit) "Required Lenders" to amend the no-action provision in some respects, it cannot reasonably be construed to give Defendants *carte blanche* to make it exorbitantly expensive, if not impossible, for Plaintiffs to

enforce their *un*-amendable consent rights under Section 9.02 [b] of the Original Agreement.

Nor does the amendment of the no-action provisions serve the "salutary purpose of preventing undue expense to certificate holders and inconvenience to the investment vehicle in general" (*Anato*, 153 AD3d at 1162). Regardless of the ultimate merit of Plaintiffs' claims, it cannot seriously be questioned — at least on this motion to dismiss — that Defendants' amendment of the no-action provisions was an act of *self*-interest, not a consensual decision to promote the interest of the "investment vehicle in general." And it certainly was not one to which the other First Lien Lenders willingly signed on.⁴

****9** The authorities on which Defendants rely are inapposite. Most of them simply interpreted or enforced no-action clauses that were unquestionably valid ( *Quadrant*, 23 NY3d at 565-66 [answering certified question regarding scope of no-action provision];  *Emmet & Co.*, 37 Misc 3d at 858-61;  *Feldbaum*, 1992 WL 119095, at *7-8;  *RBC Capital Mkts., LLC v Educ. Loan Tr. IV*, 2011 WL 6152282, at *5-7 [Del. Ch. Dec. 6, 2011]). Defendants also cite to *Eaton Vance*, in which the Court enforced an amended no-action provision because — as here — "amendment of the no-action clause [did] not require unanimous consent of the Lenders, but only consent of the Required Lenders (which indisputably was procured)" ( 2018 WL 1947405 at *4 n.12). But that case is distinguishable in several respects. Most notably, the court in *Eaton Vance* did not address the argument, raised by Plaintiffs here, that the amendment itself was instrumental to the disputed transaction. Indeed, the disputed transaction in *Eaton Vance* (another debt restructuring) was being discussed (and objected to) by the plaintiffs months before the amendment occurred ( *id.* at *3); they were not part of a single choreographed maneuver, as alleged here. In any event, the court in *Eaton Vance* found that *both* versions of the no-action clause barred at least some of the plaintiffs' claims ( *id.* at *7 n.16), which is not the case here.

For the foregoing reasons, and consistent with the mandate that such provisions be construed narrowly to reflect the agreement among the parties, the Court finds that the amended no-action provisions are unenforceable and inapplicable to the claims asserted in this action. They were never agreed to by the parties to the Original Agreement,

do not serve the “salutary purpose” that generally supports enforceability of such restrictions on access to the courts, and are alleged to be an integral part of Defendants’ breach of contract. This holding is confined to the allegations made in the Complaint and does not reflect hostility to no-action provisions in general.

B. Declaratory Judgment (First Cause of Action)⁵

Turning to the merits of Plaintiffs’ claims, their first cause of action seeks “a declaration that the Amended Agreement is not a valid and enforceable contract, and is thus void” (Compl. ¶91) because (1) the amendments lacked the consent of “Required Lenders” under section 9.02 [b] (*id.* ¶84) and, independently, (2) the amendments lacked the additional consent required to approve changes to sacred rights under section 9.02 [b] (*id.* ¶¶84-89).

In a case such as this one, in which Defendants rely principally on the text of the parties’ contract, dismissal is warranted only when the agreement “unambiguously contradicts the allegations supporting a [plaintiff’s] cause of action” (150 *Broadway NY Assocs., L.P. Assocs., L.P. v Bodner*, 14 AD3d 1, 5 [1st Dept 2004]). An agreement is unambiguous if “the language it uses has a definite and precise meaning, unattended by danger of misconception in the purport of the [agreement] itself, and concerning which there is no reasonable basis for a difference in opinion” (Greenfield v Philles Records, Inc., 98 NY2d 562, 569-70 [2002] [quotations omitted]). Where the parties have set down their agreement in a clear, complete document, their writing should be enforced as to its unambiguous terms (*W.W.W. Assocs. v Giancontieri*, 77 NY2d 157, 162 [1990]).

An agreement does not become ambiguous “simply because the parties to the litigation argue different interpretations” (*Riverside S. Planning v CRP/Extell Riverside, L.P.*, 60 AD3d 61, 67 [1st Dept 2008] [internal citation omitted], *aff’d* 13 NY3d 398 [2009]). “To be found ambiguous, a contract must be susceptible of more than one commercially reasonable interpretation. The existence of ambiguity must be determined by examining the entire contract and consider[ing] the relation of the parties and the circumstances under which it was executed, with the wording considered in the light of the obligation as a whole and the intention of the parties as manifested thereby” (*Perella Weinberg Partners LLC v Kramer*, 153 AD3d 443, 446 [1st Dept 2017]). Whether an agreement is ambiguous is “a

question of law for the court” to decide (Taussig v Clipper Grp., L.P., 787 NYS2d 10, 11 [1st Dept 2004]).


****10** With those principles in mind, we turn to the parties’ specific arguments.

1. Approval by the Required Lenders

First, Plaintiffs’ assertion that the Amended Agreement is invalid because it lacked the approval of the “Required Lenders,” as that term is used in section 9.02 [b] of the Original Agreement, is unavailing. As noted above, Required Lenders are defined as “Lenders having or holding more than 50.0% of the outstanding Term Loans and unused Commitments **at such time**” (Original Agreement § 1.01 [emphasis added]), with crucial caveats. Excluded from the 50% tally are “the total outstanding Term Loans subject to Section 9.04(g) and unused Delayed Draw Commitments of the Borrower or any Affiliate thereof (other than any Affiliated Debt Fund)” (*id.*).

Even assuming the truth of Plaintiffs’ factual allegations, the Participating Lenders’ Term Loans were not “subject to” section 9.04 [g] “at such time” as they consented to the amendments.⁶ Section 9.04 [g] permits “[a]ny Lender,” “at any time,” to “assign all or a portion of its Term Loans, and its related rights and obligations under th[e] Agreement,” and then sets out the consequences flowing from such an assignment. By its terms, section 9.04 [g] only applies to the extent Term Loans have actually changed hands (*see, e.g.*, Original Agreement § 9.04 [g] [3] [“[I]n connection with **any assignment effected** pursuant to a Dutch auction or open market purchase,”] [emphasis added]; *id.* § 9.04 [g] [4] [calculating Affiliated Lender Cap “at the time such Loans are purchased”]; *id.* § 9.04 [g] [7] [“[A]ny Term Loans **acquired by** Holdings, the Borrower or any of their respective Restricted Subsidiaries shall, to the extent permitted by applicable Requirements of Law, be retired and immediately canceled promptly upon the acquisition thereof”] [emphasis added]).

It is undisputed that the amendments at issue here preceded the assignment of Term Loans to TriMark (Compl. ¶86 [alleging that “the Amended Agreement [took] effect ‘immediately prior’ to the Open Market Purchase Agreements”]; *see* Amended Agreement § 10 [a]). Therefore, the Participating Lenders’ Term Loans were not “subject to” Section 9.04 [g] when they agreed to the amendment.

Faced with analogous provisions, courts have hewn strictly to the chronology required by the contracts (see *In re Murray Energy Holdings Co.*, 616 BR 84, 97-98 [Bankr SD Ohio 2020] [rejecting argument that “Lenders’ consents to the Third Amendment should not be counted because they had already committed to sell their loans back to Murray at the time they executed the Third Amendment” as “unwarranted logical leap” since “[c]ommitting to do something is not, of course, the same thing as doing it”];  *MeehanCombs Glob. Credit Opportunities Funds, LP v Caesars Entertainment Corp.*, 80 F Supp 3d 507, 517 [SD NY 2015] [notes were not “owned” by company and therefore not disqualified from “count[ing] toward the required majority needed for” amendment approval “[b]ecause the ... [t]ransaction was structured so that the [f]avored [n]oteholders’ consents were given *before* the notes were sold”]).

****11** The Court accepts as true, for present purposes, that the Participating Lenders understood, prior to the amendment, that they were going to transfer their First Lien Debt to TriMark under section 9.04 [g] (Compl. ¶75). That said, the Participating Lenders’ intent prior to the assignment is only relevant to section 9.04 [g] if section 9.04 [g] can apply prior to an assignment. But Plaintiffs do not identify any part of section 9.04 [g] that works that way.⁷ Moreover, other parts of the contract confirm that the order of operations matters. Section 9.02 [d], for example, states that only “the Term Loans of any Lender that is **at the time** ... an Affiliated Lender” are excluded from being “Required Lenders” for a given vote.


Accordingly, Plaintiffs’ argument the Lender Defendants were not Required Lenders when they approved the Amended Agreement fails as a matter of law.

2. Breach of “Sacred Rights” Provisions

Plaintiffs have, however, stated a viable claim that the Amended Agreement was invalid because it impinged upon Plaintiffs’ “sacred rights” under section 9.02 [b] [i] of the Original Agreement without their consent.

a. “Agreement or Agreements”

Initially, the Court finds that the undefined term “agreement or agreements” in section 9.02 [b] reasonably can be read to implicate the Liquidity Transaction *as a whole*, rather than only to the portion of the alleged “scheme” that involved amending the credit agreement itself (see *Bitsight Techs., Inc.*

v SecurityScorecard, Inc., 143 AD3d 619, 620 [1st Dept 2016] [declining to dismiss contract claim because definition of term “Confidential Information” was ambiguous]; see also  *Rudman v Cowles Commc’ns, Inc.*, 30 NY2d 1, 13 [1972] [“Whether the parties intended to treat both agreements as mutually dependent contracts ... is a question of fact ...”]). Agreements “executed at the same time, by the same parties, and for the same purpose ... are, in the eye of the law, one instrument” (*Fernandez v Cohen*, 110 AD3d 557, 558 [1st Dept 2013]). The Liquidity Transaction allegedly comprised a suite of contracts that “are interdependent, repeatedly refer to each other, involve substantially the same parties, and were designed to effectuate the same purpose” (Compl. ¶86). Arguably, then, the Liquidity Transaction is a single “agreement” for purposes of Section 9.02 [b]. Defendants’ argument that the provision can *only* be read as applying to the portion of the Liquidity Transaction on which they choose to focus is unavailing on this motion to dismiss.

b. Implicating Sacred Rights

Taking Plaintiffs’ factual allegations as true, and giving them the benefit of all reasonable inferences, Plaintiffs state a viable claim that the Liquidity Transaction required their consent under, at least, section 9.02 [b] [i] [D].⁸

That provision states as follows:

[N]o such agreement shall ... without the written consent of each Lender directly and adversely affected thereby: ... **(D) waive, amend, or modify (i) Section 7.03 or (ii) Section 4.02 of the Collateral Agreement in a manner that would by its terms alter the order of application of proceeds;**...

Section 4.02 of the Collateral Agreement, in turn, sets up a waterfall among three separate constituents in the credit arrangement. It provides that, “[s]ubject to the terms of the Intercreditor Agreements, the Administrative Agent shall apply the proceeds of any collection or sale of Collateral, including any Collateral consisting of cash” to those three groups in a prescribed order (*id.*)

****12** The Amended Agreement changed the definition of “Intercreditor Agreements” to include the new Super-Priority Intercreditor Agreement (NYSCEF 25 at 36 [redline showing changes in Amendment]), which effectively modifies section 4.02. That modified definition is then expressly incorporated in the Collateral Agreement. So, working back to section 4.02, this means the waterfall is now “[s]ubject to” Defendants’ new super-senior tranches of debt.

One reasonable way to read section 9.02 [b] [i] [D] is that it prohibits Defendants from placing any tranche of debt above Plaintiffs’ place in the waterfall, even if the order of distribution in section 4.02 remains facially unaffected. Under the revised section 4.02, Plaintiffs do not have the right to receive a dollar of collateral upon default until \$427 million is paid back to the new cadre of super-senior lenders (including the Lender Defendants). Although it may be that Plaintiffs are still “first” when compared to the other groups in section 4.02, Plaintiffs have a plausible argument that the Liquidity Transaction required their consent under section 9.02 [b] [i] [D] because it “alter[ed] the order of application of proceeds” by subordinating Plaintiffs’ priority interest to the new Super-Priority Intercreditor Agreement.

In response, Defendants argue that “application of proceeds” can refer only to the *Administrative Agent's* application of proceeds among the categories covered by the agreement. In Defendants’ view, the Administrative Agent's task remains the same before and after the amendment — it still applies the “proceeds” (whatever is left of them) in the order specified in section 4.02. Under this approach, section 9.02 [b] [i] [D] is inapplicable because the amendment does not “alter” the order in which the Administrative Agent doles out those proceeds. Even assuming the Defendants’ interpretation is plausible, it is not the only reasonable way to read the contract.

The “order of application of proceeds” could be read to encompass all of the Administrative Agent's obligations under section 4.02 of the Collateral Agreement. This reading is supported by section 7.03 of the Original Agreement, titled “Application of Proceeds,” which instructs that “amounts received on account of the Secured Obligations shall be applied by the Administrative Agent *in accordance with Section 4.02 of the Collateral Agreement.*” To apply the proceeds “in accordance with Section 4.02” means applying them in a specified order “[s]ubject to the terms of the Intercreditor Agreement.” And because “the terms of the Intercreditor Agreement” have changed, so too have the

Administrative Agent's obligations. Therefore, the change to “Intercreditor Agreements” could be said to have altered the “order of the application of proceeds.”

Because the agreement reasonably can be read to require Plaintiffs’ consent for the Amended Agreement, taking Plaintiffs’ factual allegations as true, the motions to dismiss Plaintiffs’ first cause of action for declaratory judgment are **DENIED**.

C. Breach of Contract (Second and Third Causes of Action)

Plaintiffs’ second and third causes of action assert claims for breach of contract based on alleged breaches of sections 2.11(a)(ii), (e)(i)-(f)(i), 2.18, 2.20(b), 2.25(a)(i), 6.01, and 6.02 of the Original Agreement (Compl. ¶¶96-98, 107). Defendants mainly argue that the contract claims should be dismissed because the Original Agreement was superseded by the Amended Agreement, which permitted the Liquidity Transaction in full (NYSCEF 96 at 18-19).⁹ Because the contract claims turn on whether the Amended Agreement was valid — which, for the reasons stated above, Defendants have not conclusively established — the contract claims also survive.

****13** Accordingly, the motions to dismiss Plaintiffs’ second and third causes of action are **DENIED**.

D. Breach of the Implied Covenant of Good Faith and Fair Dealing (Fourth Cause of Action)

“Implicit in all contracts is a covenant of good faith and fair dealing in the course of contract performance,” which imputes “any promises which a reasonable person in the position of the promisee would be justified in understanding were included” (📄 *Dalton v Educational Testing Serv.*, 87 NY2d 384, 389-90 [1995]). This includes covenants not to “do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract” (*id.*, quoting 📄 *Kirke La Shelle Co. v Paul Armstrong Co.*, 263 NY 79, 87 [1933]), and “not to act arbitrarily or irrationally in exercising ... discretion” (*id.*).

However, “[t]he duty of good faith and fair dealing does not imply obligations inconsistent with contractual provisions (📄 *Gottwald v Sebert*, 193 AD3d 573, 582 [1st Dept 2021]) or “that were not bargained for” (*King Penguin*

Opportunity Fund III, LLC v Spectrum Group Mgt. LLC, 187 AD3d 688, 690 [1st Dept 2020]). Nor can it “impose obligations ... beyond the express terms of the parties’ agreement” (*Darabont v AMC Network Entertainment LLC*, 193 AD3d 500 [1st Dept 2021]). Stated differently, an implied covenant claim “may not be used as a substitute for a nonviable claim of breach of contract” (*StarVest Partners II, L.P. v Emportal, Inc.*, 101 AD3d 610, 613 [1st Dept 2012]).

Moreover, a claim for breach of the implied covenant will be dismissed if it “relies on the same facts that form the basis for the breach of contract claim and seek[s] the exact same damages” (*320 W. 115 Realty LLC v All Bldg. Constr. Corp.*, 194 AD3d 511, 512 [1st Dept 2021] [citation omitted]). To warrant dismissal, “[t]he conduct alleged in the two causes of action need not be identical in every respect. It is enough that they arise from the same operative facts” (*Mill Fin., LLC v Gillett*, 122 AD3d 98, 104-05 [1st Dept 2014]).

In this case, Plaintiffs’ entitlement to relief rests on their assertion that the Liquidity Transaction breached various terms of the Original Credit Agreement. If Defendants were within their contractual rights to amend the Original Credit Agreement without Plaintiffs’ consent, that is the end of the story. If so, the implied covenant cannot be used to impose obligations or restrictions going beyond what is set forth in the contract (*Veneto Hotel & Casino, S.A. v German Am. Capital Corp.*, 160 AD3d 451 [1st Dept 2018]; *Tr. Funding Assoc., LLC v Capital One Equip. Fin. Corp.*, 149 AD3d 23, 29-30 [1st Dept 2017]). If not, Plaintiffs will prevail on their contract claims. In that event, the implied covenant claim is duplicative of Plaintiffs’ breach of contract claims, in that they arise from the same operative facts and seek essentially the same relief (see Compl. ¶¶87-88).

Accordingly, the motions to dismiss Plaintiffs’ fourth cause of action are **GRANTED**.

E. Tortious Interference with Contract (Fifth Cause of Action)

Plaintiffs’ claim for tortious interference with contract targets the Equity Sponsors, Centerbridge and Blackstone, for their alleged roles in orchestrating the Liquidity Transaction. To state such a claim, Plaintiffs must plead facts showing “the existence of a valid contract between the plaintiff and a third party, defendant’s knowledge of that contract, defendant’s intentional procurement of the third-party’s breach of the contract without justification, actual breach of the contract,




and damages resulting therefrom” (*Lama Holding Co. v Smith Barney Inc.*, 88 NY2d 413, 424 [1996]). “Failure to plead in nonconclusory language facts establishing all the elements of a wrongful and intentional interference in the contractual relationship requires dismissal” (*Joan Hansen & Co., Inc. v Everlast World’s Boxing Headquarters Corp.*, 296 AD2d 103, 109-110 [1st Dept 2002]).

**14 Here, Plaintiffs fail to show that the Equity Sponsors acted without economic justification in procuring a breach of the Original Agreement.¹⁰ Under New York law, “a defendant may raise the economic interest defense” in response to a claim for tortious interference with contract — essentially, that the interfering party “acted to protect its own legal or financial stake in the breaching party’s business” (*White Plains Coat & Apron Co., Inc. v Cintas Corp.*, 8 NY3d 422, 426 [2007]). The defense derives from the principle that “[p]rocurring the breach of a contract in the exercise of equal or superior right is acting with just cause or excuse and is justification for what would otherwise be an actionable wrong” (*Felsen v Sol I Mfg. Corp.*, 24 NY2d 682, 687 [1969]; *Morrison v Frank*, 81 NYS2d 743, 744 [Sup Ct, New York County 1948] [“One who has a financial interest in the business of another possesses a privilege to interfere with the contract between the other and someone else if his purpose is to protect his own interests and if he does not employ improper means”] [cited by *Felsen*, 24 NY2d at 687]). “The imposition of liability in spite of a defense of economic interest requires a showing of either malice on the one hand, or fraudulent or illegal means on the other” (*Foster v Churchill*, 87 NY2d 744, 750 [1996]).




Although economic interest is cast as a defense, courts routinely dismiss tortious interference claims at the pleading stage when it is evident, on the face of the complaint, that the doctrine applies (see, e.g., *Johnson v Cestone*, 162 AD3d 526, 527 [1st Dept 2018] [dismissing claim because “the allegations show that [individual defendant] was acting in the economic interest of the corporate defendants”]; *Rather v CBS Corp.*, 68 AD3d 49, 60 [1st Dept 2009] [holding “the court correctly applied the economic interest doctrine to dismiss this claim against the corporate defendant”]; *Collins v E-Magine, LLC*, 291 AD2d 350, 351 [1st Dept 2002] [holding that “[a]s a general matter, economic interest precludes a claim for tortious interference with a contract unless there is a showing of malice or illegality, and no such showing has

been made by plaintiff”]; *U.S. Bank N.A. v Triaxx Asset Mgt. LLC*, 18 CIV. 4044 (VM), 2019 WL 4744220, at *8 [SD NY Aug. 26, 2019] [“The economic interest defense to a claim of tortious interference with contract may be raised at the motion to dismiss stage”] [applying New York law]; *GCA Advisors, LLC v Onion, Inc.*, 2019 NY Slip Op. 32341[U], 3 [Sup Ct, New York County 2019] [Scarpulla, J.].

In this case, the allegations in the Complaint show that the Equity Sponsors’ economic interests were closely aligned with TriMark’s. Plaintiffs allege that Centerbridge and Blackstone together hold an 86.6% equity stake in the company (Compl. ¶40), and that both of them “stand to gain or to lose money on their investments depending on TriMark’s financial performance” (*id.* ¶¶21-22; *see also id.* [noting that Equity Sponsors purchased equity in TriMark “in the hope of delivering returns to clients of those funds when TriMark is sold or otherwise divested”]; *id.* ¶34 [explaining that LBO debt “is serviced using the cash flows from the company’s operations”]). Consequently, the same events that battered TriMark’s financial performance during the pandemic also threatened the Equity Sponsors’ economic interests. As Plaintiffs allege, TriMark’s financial outlook was “grim” in summer 2020. The pandemic “put tremendous strains on TriMark’s business”, and the company’s debt was downgraded to Caa2 (*id.* ¶45). The Liquidity Transaction then, by Plaintiffs’ own reckoning, “provide[d] new cash to the company” at a precarious time and “also benefited its Equity Sponsors” (*id.* ¶46, NYSCEF 139 at 2 [Pls.’ opp.]).

Because the “defendants were significant stockholders in the breaching party’s business” and acted to protect the financial value of their stakes, the economic interest defense bars Plaintiffs’ claim (*see*  *White Plains Coat & Apron Co., Inc.*, 8 NY3d at 426;  *Foster*, 87 NY2d at 750-51 [affirming dismissal of tortious interference claim against “venture capital firms” that held majority stake in allegedly breaching company, where defendants “acted ... to save [the company] from paying out money it could not afford”];  *Felsen*, 24 NY2d at 687 [affirming dismissal of tortious interference claim where defendant, “as the sole stockholder of Sol Cafe, had an existing economic interest in the affairs of Sol Café which it was privileged to attempt to protect when it ‘interfered’ with plaintiff’s contract of employment with Sol Cafe”]; *U.S. Bank N.A.*, 18 CIV. 4044 (VM), 2019 WL 4744220, at *8 [finding that senior noteholder was entitled to economic interest defense]; *Kuhns v Ledger*, 202 F Supp 3d 433, 442 [SD NY 2016] [finding that defendant who “owns

47% of the outstanding shares of” company had “a significant interest”]; *GCA Advisors, LLC*, 2019 NY Slip Op. 32341[U], 3 [applying economic interest defense where defendant had “acquired a 40.5% interest in” company]].

**15 To overcome the economic interest defense, Plaintiffs must plead specific facts showing that the Equity Sponsors caused the alleged contractual interference through illegal or fraudulent means or were otherwise motivated by malice toward Plaintiffs ( *Foster*, 87 NY2d at 750). While the Complaint states, in conclusory fashion, that the Equity Sponsors “acted with malice, in bad faith, and without justification” (Compl. ¶¶53, 128), “bare allegations of malice do not suffice to bring the claim under an exception to the economic interest rule” ( *Rather*, 68 AD3d at 60, citing *Ruha v Guior*, 277 AD2d 116 [1st Dept 2000]). Indeed, even bad faith, without more, does not satisfy the malice requirement (*see*  *Foster*, 87 NY2d at 750). And there is no allegation that the actions taken by the Equity Sponsors were fraudulent or illegal.

Contrary to Plaintiffs’ argument in its opposition papers, the Complaint does not allege that “the Equity Sponsors’ and TriMark’s interests diverged” (NYSCEF 137 at 49, citing Compl. ¶¶46, 52-53 [emphasis omitted]). While the Complaint states that the Liquidity Transaction “did not provide any economic benefit to TriMark” (Compl. ¶129), it alleges elsewhere that the amendment was for “TriMark and the Lender Defendants’ benefit” (*id.* ¶116). And Plaintiffs do not dispute that TriMark received and retained an additional \$120 million of financing by virtue of the deal. What the Complaint alleges, at most, is that Defendants could have secured a *better* deal for TriMark had Plaintiffs been let into the fold. Even so, Plaintiffs cite to no authority holding that the economic interest defense turns on whether the challenged transaction was “the best deal [the breaching party] could secure at the time” (NYSCEF 137 at 48). That is not surprising. Asking whether a company received “the best deal it could secure at the time” licenses judicial second-guessing of rational actors’ economic decisions and demands the kind of fact-intensive inquiry that would render tortious interference claims virtually impervious to dismissal at the pleading stage. At bottom, Plaintiffs’ allegations fail to decouple — and indeed, serve to highlight — the shared economic interests between TriMark and the Equity Sponsors.

Accordingly, the Equity Sponsors’ motions to dismiss Plaintiffs’ fifth cause of action, which is the only claim

asserted against them (and is asserted only against them), is **GRANTED**. The Complaint thus is dismissed in its entirety as against the Equity Sponsor defendants.

F. Violations of New York Uniform Voidable Transactions Act (Sixth Cause of Action)

Finally, Plaintiffs allege that TriMark and the Lender Defendants violated New York's Uniform Voidable Transactions Act (UVTA) by transferring property — *i.e.*, senior security interests — with the intent to “hinder, delay, or defraud Plaintiffs” (Compl. ¶¶135, 137). Essentially, Plaintiffs argue that the Super Senior Liens, which usurped their own First Lien debt in the order of priority, constituted fraudulent transfers because they impaired Plaintiffs’ right to be repaid on a pro rata basis. As a result, Plaintiffs contend, “pursuant to New York Uniform Voidable Transactions Act §§ 273, 276(a), and 276-a, all transfers made and obligations incurred by TriMark to the benefit of the Lender Defendants are voidable and should be unwound” (*id.* ¶143).

This claim fails at the threshold because it purports to plead violations of New York law that do not apply to the disputed transaction. Under the UVTA, a fraudulent transfer claim “is governed by the local law of the jurisdiction in which the debtor is located when the transfer is made or the obligation is incurred,” and if the debtor has more than one place of business, it “is located at its chief executive office” (NY UVTA § 279 [b]). As the Complaint acknowledges, TriMark's chief executive office is in Massachusetts (Compl. ¶20). Accordingly, it is Massachusetts law that governs any fraudulent transfer claim here, and Plaintiffs’ claim, as pleaded, cannot survive (see [Padula v Lilarn Props. Corp.](#), 84 NY2d 519, 521, 523 [1994] [affirming grant of summary judgment dismissing New York law claims because “Massachusetts law was properly applied”]; see also [Oberlander v Monarch Life Ins. Co.](#), 274 AD2d 563, 564 [2d Dept 2000] [affirming dismissal pursuant to [CPLR 3211 \[a\] \[7\]](#) because complaint pleaded violation of the wrong state's statute]).

****16** Contrary to Plaintiffs’ assertion, the choice-of-law provision in the Original Agreement, which specified New York law, does not control their fraudulent-transfer claim. Section 9.09 [a] of the Original Agreement (which is unchanged in the Amended Agreement) provides, in relevant part:

This Agreement shall be construed in accordance with and governed by the law of the State of New York ... regardless of the laws that might otherwise govern under applicable principles of conflicts of laws

Both sides agree that Plaintiffs’ UVTA claim sounds in tort (see NYSCEF 137 at 51 [Pls.’ opp. to motions to dismiss]; NYSCEF 95 at 2 [Def. Lenders’ reply mem. of law]; see also [Morgenthau v A.J. Travis Ltd.](#), 184 Misc 2d 835, 843 [Sup Ct, New York County 2000] [“A cause of action for fraudulent conveyance is a species of tort”]), so the key question is whether section 9.09 [a] imputes New York's substantive law on an extra-contractual claim like this one.

Section 9.09 [a] cannot be read to encompass Plaintiffs’ UVTA claim. New York law provides that “tort claims are outside the scope of contractual choice-of-law provisions that specify what law governs construction of the terms of the contract” ([Fin. One Pub. Co. Ltd. v Lehman Bros. Special Fin., Inc.](#), 414 F3d 325, 335 [2d Cir 2005]). “That the parties agreed that their contract should be governed by an expressed procedure does not bind them as to causes of action sounding in tort” ([Knieriemen v Bache Halsey Stuart Shields Inc.](#), 74 AD2d 290, 293 [1st Dept 1980] [holding that contractual choice-of-law provision that “(t)his contract shall be governed by the laws of the State of New York” did not cover fraud claim]; see [H.S.W. Enterprises, Inc. v Woo Lae Oak, Inc.](#), 171 F Supp 2d 135, 141 [SD NY 2001]). “*Knieriemen* indicates a reluctance on the part of New York courts to construe contractual choice-of-law clauses broadly to encompass extra-contractual causes of action” ([Fin. One](#), 414 F3d at 334; see [Twinlab Corp. v Paulson](#), 283 AD2d 570, 571 [2d Dept 2001] [“(T)he choice of law provision in the consultant agreement between Changes and the appellant did not preclude the plaintiffs from asserting a tort cause of action against him based on the Florida statute”]). Because the choice-of-law provision here is limited to “constru[ing]” the “Agreement,” and not all disputes relating to the Agreement, the same reasoning holds in this case.

To be sure, these highly sophisticated parties could have drafted a broader choice-of-law provision that encompasses extra-contractual claims relating to the Original Agreement, but they did not do so (see, e.g., [Capital Z Fin. Services Fund II, L.P. v Health Net, Inc.](#), 43 AD3d 100, 109 [1st Dept 2007] [holding that extra-contractual claims fell within scope

of choice-of-law provision “broadly stat[ing] that Delaware law governs ‘all issues’ concerning ‘enforcement of the rights and duties of the parties’ ”]; [Avnet, Inc. v Deloitte Consulting LLP](#), 187 AD3d 430, 433 [1st Dept 2020] [holding that choice-of-law provision stating “all matters relating to this Agreement and each Work Order, shall be governed by ... the laws of the State of New York” covered negligence claim]. As written, the provision does not reach Plaintiffs’ UVTA claim (see [Refco Group Ltd., LLC v Cantor Fitzgerald, L.P.](#), 13 CIV. 1654 RA, [2014 WL 2610608](#), at *40 [SD NY June 10, 2014] [“Unlike choice-of-law provisions that apply to disputes ‘arising out of’ or ‘relating to’ a contract, those that provide that the contract will be ‘governed by’ or ‘construed in accordance with’ the law of a particular state are not sufficiently broad to reach tort claims such as fraudulent conveyance”]; [Drenis v Haligiannis](#), 452 F Supp 2d 418, 426 [SD NY 2006] [holding “the choice-of-law provision at issue does not compel the application of Delaware law” to “plaintiffs’ tort claims for fraudulent conveyance”]).

**17 The cases on which Plaintiffs’ argument rests are inapposite. In [Ministers and Missionaries Ben. Bd. v Snow](#), 26 NY3d 466 [2015], there was no dispute that the New York choice-of-law provisions applied to the claims in the case. The dispute focused, instead, on “interpret[ing] the phrase ‘laws of ... New York’ ”, and specifically whether such “laws” included [EPTL 3-5.1 \[b\] \[2\]](#), a statutory choice-of-law directive ([id.](#) at 470). Simply put, the main question in *Ministers and Missionaries* concerned the nature of a statute, not the scope of a contractual provision ([id.](#) at 471 [“The question is whether [section 3-5.1 \(b\) \(2\)](#) should be characterized as part of New York’s substantive or ‘local law,’ ... or whether it is simply a conflict-of-laws rule”]).

Absent in *Ministers and Missionaries* is any discussion about whether a choice-of-law clause like the one here extends to extra-contractual claims. The other key authority on which Plaintiffs rely, [Turtur v Rothschild Registry Int’l., Inc.](#), 26 F3d 304 [2d Cir. 1994], is also irrelevant. As the Second Circuit later noted, “*Turtur* did not apply New York law to determine the scope of the contractual choice-of-law clause at issue in that case” ([Fin. One](#), 414 F3d 325 at 333-35).

Accordingly, the motions to dismiss Plaintiffs’ sixth cause of action are **GRANTED**.

* * * *

Therefore, it is

ORDERED that Defendants’ motions to dismiss are GRANTED with respect to Plaintiffs’ fourth (implied covenant of good faith and fair dealing), fifth (tortious interference with contract), and sixth (NY Uniform Voidable Transactions Act) causes of action, and are otherwise DENIED; and it is further

ORDERED that the Complaint is dismissed in its entirety as against Centerbridge Partners, L.P. and Blackstone Tactical Opportunities Fund, L.P., which are named as defendants only in the now-dismissed fifth cause of action.



This constitutes the Decision and Order of the Court.

All Citations

Slip Copy, 72 Misc.3d 1218(A), 150 N.Y.S.3d 894 (Table), 2021 WL 3671541, 2021 N.Y. Slip Op. 50794(U)

Footnotes

- 1 “Plaintiffs” refers to the entities listed in Schedule 1 appended to the Complaint (NYSCEF 1 at 54-55 [“Compl.”]). And the term “Lender Defendants” refers to the entities listed in Schedule 2 appended to the Complaint (Compl. at 56-59).
- 2 The following statement of facts is based on the allegations in the Complaint, which are taken to be true solely for purposes of this motion to dismiss ([Nomura Home Equity Loan, Inc. v Nomura Credit & Capital, Inc.](#), 30 NY3d 572, 582 [2017]).

- 3 The term “sacred rights” does not appear in the agreements at issue, but both sides use the term to denote the subset of contract rights guarded by special consent requirements in section 9.02 [b] and for convenience the Court will do the same (see *N. Star Debt Holdings, L.P. v Serta Simmons Bedding, LLC*, 2020 NY Slip Op. 31954[U], 3 [Sup Ct, New York County 2020] [referencing “sacred rights” in a credit agreement]).
- 4 The Court sees no basis for Defendants’ conclusory assertion that Plaintiffs’ claims would be barred under the no-action provision in the *Original Agreement* (NYSCEF 7 at 10-11 n.4). That provision states that: “[N]o Secured Party shall have any right individually to **realize upon any of the Collateral or to enforce any Guarantee of the Secured Obligations**, it being understood and agreed that all powers, rights and remedies under the Loan Documents may be exercised solely by the Administrative Agent on behalf of the Secured Parties in accordance with the terms thereof” (Original Agreement at 170 [emphasis added]). In this action, Plaintiffs do not seek to “realize upon any of the Collateral” or to “enforce any Guarantee of the Secured Obligations” here. In the absence of a clear provision prohibiting First Lien Lenders from pursuing claims such as those presented here, the Court will not construe them so broadly, at least on a motion to dismiss ( *Quadrant*, 23 NY3d at 560 [no-action provisions must be “construed strictly” and “read narrowly”]). Defendants clearly knew how to draft such a provision when that was their intention. They did so in the Amended Agreement, but not in the Original Agreement.
- 5 The first, fourth, and sixth causes of action are brought on behalf of all Plaintiffs against TriMark and all Plaintiffs except the Golub Lenders against the Defendant Lenders. The Golub Lenders also do not join in the third cause of action against the Defendant Lenders, and in the fifth cause of action against the Equity Sponsors. For simplicity’s sake, though, the Court will use the term “Plaintiffs” throughout this opinion.
- 6 Consequently, the Court need not — and does not — wade into the dispute over “the rule of the last antecedent.”
- 7 In arguing for a broader “common usage” of the term, Plaintiffs cite only to one context-specific example — the U.S. Supreme Court’s opinion in  *Auer v Robbins* (519 US 452 [1997]), which applied deferential review to a federal agency’s analysis of the phrase in the Fair Labor Standards Act. That case is inapposite here.
- 8 In view of this ruling, the Court does not at this point reach the merits of Plaintiffs’ claim that their consent was also required under other subsections of 9.02 [b] [i].
- 9 Defendants also argue that the Liquidity Transaction was permitted under section 9.04 [g] of the Original Agreement, which provided that “[a]ny Lender may, at any time, assign all or a portion of its Term Loans ... on a non-pro rata basis through ... open market purchases.” The term “open market purchase” is undefined and the parties, predictably, reach conflicting interpretations about its meaning.
- 10 The Court need not — and does not — reach the Equity Sponsors’ other arguments for dismissing this claim.