How Much Momentum Will *Momentive* Create? Judicial Interpretation and Enforcement of Intercreditor Agreements

CONCURRENT SESSION

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The more things change with intercreditor agreements, the more they stay the same — or so it seems. The interpretation and enforcement of intercreditor agreements continues to take center stage in many cases (high-profile and otherwise), and each decision seems to equally shed more light and raise more questions about intercreditor agreements in the bankruptcy context. No doubt, the person who came up with the concept of intercreditor agreements for multi-tranches of lenders to a common borrower thought they had created the end to intercreditor litigation. Of course, that didn't happen. While a properly drafted intercreditor agreement among the parties to a financial transaction is both necessary and instructive in ensuring that the relative rights and obligations of each party are enforced in a distress or bankruptcy situation, some agreements are not as well drafted as the parties originally thought or intended.

I. Intercreditor Agreements

Intercreditor agreements are contracts, and therefore, can contain whatever terms the parties are inclined to agree to amongst themselves. The usual and customary terms of an intercreditor agreement contains provisions on collateral sharing, payment priority and subordination, control over acceleration and collection, and control over certain bankruptcy-related rights such as providing debtor in possession financing, plan terms and voting. An intercreditor agreement usually (but not always) prevents the junior creditors from interfering with foreclosure or the sale or other disposition of the collateral by the senior lender. The general purpose of an intercreditor agreement is to ensure that the senior creditors get paid first, can realize on their collateral, are able to exercise their rights without the interference of the junior creditors, and can keep the junior creditors as invisible and as silent as possible.

Section 510(a) of the Bankruptcy Code provides that a subordination agreement is enforceable in bankruptcy to the same extent that such agreement in enforceable under applicable non-bankruptcy law. In contemplation of a potential bankruptcy scenario, a typical intercreditor agreement also contains waivers in favor of senior lenders by attempting to deprive the junior creditors of various bankruptcy rights, such as the right to vote on a plan, the right to seek relief from the automatic stay, the right to support or block a sale or foreclosure of collateral without the consent of the senior lender, the right to contest any request by the senior creditors for adequate protection, and the right to object to claims by the senior creditors for post-bankruptcy interest.

It is not clear that all bankruptcy-related provisions will always be enforced in a bankruptcy court. Some courts are reluctant to allow a private agreement to alter rights created in the Bankruptcy Code, especially bankruptcy voting rights. The general trend appears to be that courts seek to "enfranchise" stakeholders who have something to contribute to the restructuring efforts. If the junior creditors have value to bring to the table, a court is more likely to interpret the intercreditor agreement in a way that allows such creditors to play a role. Thus, senior creditors need to draft the intercreditor agreements carefully and be as specific as possible in listing the rights to be waived by the junior lenders. A general waiver of rights may not be sufficient.

The following is a discussion of some common intercreditor agreement provisions and how they have been interpreted in some recent court decisions in the bankruptcy context. These cases provide a good incentive for clear drafting of specific provisions in intercreditor agreements and getting bankruptcy attorneys involved in the drafting of these agreements. Simply stated, the more specific that the intercreditor agreement is in listing a restriction on a second-lien lender's rights in bankruptcy, the more likely that restriction will be upheld.

A. Waiver of the Right to Object: "No-action Clauses"

***In re American Roads, LLC*, 496 B.R. 727 (Bankr. S.D.N.Y. 2013).**

In *American Roads*, an *ad hoc* committee of bondholders objected to the debtor's plan of reorganization despite the existence of a "no-action" clause which specifically permitted only collective enforcement action — to the exclusion of individual action by bondholders — and a delegation of enforcement authority to a monoline insurer. So long as the insurer honored its insurance obligations, the bondholders had specifically agreed that they would be barred from instituting any proceedings to enforce the indenture and that the insurer would be granted the sole power to control and direct all remedies. Given the explicit provisions in the credit documentation, and the fact that the bondholders were sophisticated parties, Judge Lifland enforced the no-action clause as written. The Court also noted that no-action clauses serve a legitimate purpose to promote efficiency and prevent obstructionist behavior. The Court was not persuaded that the general standing provision of Section 1109 of the Bankruptcy Code overrode the contractual agreement of the parties.

***In re CyberDefender Corp.*, Case No. 12-10633 (BLS) (Bankr. D. Del. May 2, 2012).**

In *CyberDefender*, the debtor, the first lien lender and the junior lien holders were parties to an Intercreditor Agreement that contained broad subordination provisions preventing the junior lien holders from interfering with the first lien lender's rights and remedies. When the first lien lender sought to credit bid its debt at a Section 363 sale of all of the debtor's assets, the junior lien holders objected arguing that Section 363(f) of the Bankruptcy Code did not permit a sale free and clear of their liens unless they consented or were paid in full. The first lien holders responded, in part, by arguing that the junior lien holders lacked standing based on the terms of the Intercreditor Agreement. The Intercreditor Agreement provided that the junior lien holders would (i) subordinate their liens, (ii) refrain from taking any actions to enforce rights, and (iii) refrain from exercising any remedies until the senior loans were paid in full. The senior lenders argued that the Intercreditor Agreement prevented the junior lien holders from objecting to the sale, which objection constituted a type of enforcement action, and further claimed that the junior note holders were merely attempting to gain leverage by obstructing the first lien holders – the very type of behavior that Intercreditor Agreements are intended to prevent. Judge Shannon remarked that the decision was a close call and struggled with the due process implications of denying the junior lien holders' right to be heard in the Bankruptcy case. Ultimately, he allowed the junior lien holders to be heard but overruled their objection on substantive grounds.

***In re Inn Keepers U.S.A. Trust*, 448 B.R. 131 (Bankr. S.D.N.Y 2011).**

In *Inn Keepers*, Judge Chapman, in a decision subsequent to her decision in *Boston Generating*, ruled that a securitization trust certificate holder was contractually bound by a no-action clause and could not assert individual objections in a bankruptcy case because the certificate holder had expressly agreed that the special servicer under a Pooling and Servicing

Agreement had the sole standing to exercise rights and remedies. In addition to the clear and express terms of the documentation, Judge Chapman noted that, to allow standing would "encourage and embolden other certificate holders to hire their own counsel to challenge the special servicer's authority and to advance their individual and conflicting pecuniary interests." Id. at 144.

***In re Boston Generating LLC*, 440 B.R. 302, 316-19 (Bankr. S.D.N.Y. 2010).**

In *Boston Generating*, Judge Chapman determined that an intercreditor agreement did not prohibit second-lien lenders from objecting to a Section 363 sale process sale despite language in the intercreditor agreement providing first-lien lenders with the "exclusive right to...make determinations regarding the...sale" of collateral. The court ruled that the language was not specific enough to extend to objections to bidding procedures for the sale. The bankruptcy court distinguished the *Ion Media* and *Erickson* cases, noting that the facts before it required a different outcome because the proposed Section 363 sale would effectively deprive the second-lien lenders of the opportunity to vote on the plan even though it was not clear they were actually out of the money. Additionally, the second lienholders were not engaging in the type of obstructionist behavior displayed in *Ion Media* case. Judge Chapman indicated that while she believed intercreditor agreements should be enforceable, they had to be specific. She stuck by this analysis when in a subsequent *Boston Generating* decision (*In re Boston Generating LLC*, 440 B.R. 302, 320, (Bankr. S.D.N.Y. 2010)), Judge Chapman allowed the same second-lien lenders standing to object to the sale itself (which had the consent of the first-lien lenders).

***Erickson Retirement Communities*, 425 B.R. 309 (Bankr. N.D. Tex. 2010).**

In *Erickson*, the Court found that certain subordination agreement provisions prohibited the subordinated creditors from seeking the appointment of an examiner, including a clause which stated that the subordinated creditors would not "exercise any rights or remedies or take any action or proceedings to enforce or collect any of the subordinated obligations without the prior written consent of the agent until the senior secured lenders had been fully satisfied." The Court ruled that seeking the appointment of an examiner constituted an action to enforce remedies and to pursue collection. The Court specifically also noted that "this is the very type of obstructionist behavior that the agreement is intended to suppress." *Id.* at 315.

***In re Ion Media Networks Inc.*, 419 B.R. 585, 595 (Bankr. S.D.N.Y. 2009).**

In *Ion Media*, certain junior lenders challenged the lien rights of the senior lenders on certain FCC licenses, arguing that such liens could not be perfected and thus, could not be part of the "collateral" as defined in the credit agreement and intercreditor agreement. Thus, the juniors objected to the plan because it gave the senior creditors the financial value of the licenses. There appeared to be little dispute that the juniors were out of the money. The Court constantly iterated that the objecting juniors had purchased their paper at a deep discount and had objected to everything in the case for the purpose of obtaining leverage and a recovery of more than they would be entitled. The court determined that the juniors were not only forbidden from objecting to the plan, but also, did not even have the ability to object to the validity of the licenses as collateral. The Intercreditor Agreement had not only included an express waiver of the right to vote contrary to the senior lenders, but also, expressly discussed the fact that because the ability to take a lien on the FCC licenses, was legally unclear, the parties had agreed that regardless of the perfection issue, that the seniors would get the first economic benefit of the licenses, whatever that was. Thus the intercreditor agreement was fully enforced against legally sophisticated assignee.

***In re Dura Automotive Systems, Inc.,* 379 B.R. 257 (Bankr. D. Del. 2007).**

In *Dura*, Judge Carey ruled that certain note holders had a right to be heard with respect to confirmation of the debtors' plan of reorganization despite the fact that the indenture contained a no-action clause. In that case, two individual subordinated note holders commenced an adversary proceeding requesting an interpretation of the indenture and their rights thereunder. Judge Carey was concerned that, if the Bankruptcy Court did not resolve the dispute expeditiously, the debtor might not be able to confirm a plan. Although the Court recognized that parties should be bound by clearly written no-action clauses, the no-action clause before the court was not so clear, and the need to avoid expensive, time-consuming litigation between the note holders and the trustee, which could scuttle the reorganization efforts, out-weighed any other arguments.

B. Waiver/Assignment of Voting Rights

Intercreditor agreements frequently contain provisions prohibiting or restricting the ability of second lien lenders to vote on plans that are not approved by the senior lienholder or to oppose plans that the senior lienholder supports. Depending upon the specificity of the provision, these types of waivers may be enforceable.

***In re Avondale Gateway Center Entitlement, LLC*, No. CV 10-17772, 2011 WL 1376997 (D. Ariz. April 12, 2011).**

Avondale did not deal with an intercreditor agreement, but rather a subrogation clause in a subordination agreement. All rights of the junior creditor were subrogated to the senior creditor in regards to collateral and payment, until such time as the senior lender was paid in full. The subrogation provisions contained no specific mention of plan voting rights and did not expressly assign the junior's rights to the senior lender. The senior lender opposed the debtor's plan and had voted two ballots against the plan - one on behalf of itself and one on behalf of the junior lender. The junior lender cast its own ballot in favor of the plan. The court had to determine whether the subrogation clause affected a waiver of the junior creditor's right to vote. The court analyzed subrogation rights under Arizona (the applicable state) law and determined that the effect of the clause was to give the senior the right to vote the junior's claim until it was paid in full. The court used an ordinary contract analysis to determine that the clause was not ambiguous, both parties had been sophisticated lenders and that the intent was clear - the junior could not take action against the collateral or obtain payment until the senior was paid in full. Since the plan provided just that, the senior lender could step into the junior's shoes and vote against the plan on behalf of the junior lender.

***In re Coastal Broadcasting Systems, Inc.*, 2014 WL 2808260 (3d Cir. June 23, 2014).**

Third Circuit Court of Appeals affirmed the Delaware District Court's decision to affirm confirmation of a chapter 11 plan of reorganization. In doing so, the Court upheld the enforceability of a voting assignment in a subordination agreement that arose from a pre-petition out-of-court restructuring.

Prior to its bankruptcy filing, Coastal effectuated an out-of-court restructuring whereby the company redeemed the shares of two shareholders in exchange for a $1.7 million promissory note. In addition, Coastal's existing secured creditor provided it with additional loans. As part of the restructuring, Coastal, the shareholders and the secured lender signed a Subordination and Intercreditor Agreement pursuant to which the promissory notes to the shareholders were subordinated to the secured lender's debt. The agreement permitted the shareholders to vote the subordinated debt in connection with any future reorganization of Coastal. Coastal was unable to service its debt following the out-of-court restructuring, and ultimately was sued by the shareholders to recover on their notes. In January 2011, Coastal filed for bankruptcy under chapter 11 of the Bankruptcy Code.

Coastal's proposed plan of reorganization included five different classes of claims, including: (i) Class 1, comprised of the secured lender; (ii) Class 3, comprised of all other general unsecured creditors; and (iii) Class 4, comprised of the shareholders. The disclosure statement provided that Class 3 claims would share pro rata in a $100,000 distribution and Class 4 claims would receive nothing per the subordination agreement. Class 3 (the only class deemed impaired by Coastal) voted in favor of the proposed plan. The secured lender stated that it would vote in favor of the proposed plan on behalf of the Class 4 claims. The shareholders objected to confirmation based on classification and feasibility. More specifically, the shareholders argued that their claims were impaired (entitling them to vote), that they were improperly classified in a separate class from other unsecured creditors, and that the plan was not feasible under 11 U.S.C. § 1129(a)(1). Moreover, the shareholders argued that their voting rights were not, in fact, assigned to the secured lender because the subordination agreement only applied to liquidations.

At the confirmation hearing, the Bankruptcy Court concluded that while the shareholders' claims were properly classified, the proposed plan improperly designated the claims as unimpaired. Notwithstanding, the Court confirmed the plan because it determined the secured lender was entitled to and, indeed, voted for confirmation on behalf of the Class 4 claims pursuant to the rights afforded to it by the subordination agreement. On appeal, the District Court affirmed the decision of the Bankruptcy Court.

The Third Circuit affirmed. Construing the subordination agreement under New Jersey law, the Court upheld the enforceability of the voting assignment in the subordination agreement, noting that it specifically permitted the secured lender to vote the shareholders' debt if there was a reorganization of Coastal. Regarding the classification objection, the Court recognized that the grouping of similar claims in different classes is permitted so long as the classification is reasonable. Because the shareholders' claims were uniquely subject to the subordination agreement, the Court held that there was nothing unreasonable about placing the shareholders in a separate class from other unsecured creditors. The Court also observed, that because the secured lender was allowed to vote the shareholders' debt, any error in the Class 4 classification scheme was harmless as the secured lender would have voted in favor of the plan on behalf of Class 4 anyway.

***In re Hart Ski Mfg. Co., Inc.*, 5 B.R. 734 (Bankr. D. Minn. 1980).**

Court refused to prevent junior creditor from participating in case holding that the intent of Section 510(a) (subordination) is to allow the consensual and contractual priority of payment to be maintained between creditors among themselves in a bankruptcy proceeding. Court determined there was no indication that Congress intended to allow creditors to alter, by a subordination agreement, the bankruptcy laws unrelated to distribution of assets. The Bankruptcy Code guarantees each secured creditor certain rights, regardless of subordination. These rights include the right to assert and prove its claim, the right to seek Court ordered protection for its security, the right to have a stay lifted under proper circumstances, the right to participate in the voting for confirmation or rejection of any plan of reorganization, the right to object to confirmation, and the right to file a plan where applicable. These rights cannot be affected by the actions of the parties prior to the commencement of a bankruptcy case when such rights did not even exist.

***In re 203 North LaSalle Street Partnership*, 246 B.R. 325 (Bankr. N.D. Ill. 2000).**

Similarly, the Court in this case denied the senior lender the right to vote the subordinated lender's claim in a Chapter 11 plan confirmation proceeding, despite express language in the intercreditor agreement which granted the senior lender that right. As in *Hart Ski*, the court held that Section 510(a) of the Bankruptcy Code, which provides that a subordination agreement is enforceable in bankruptcy, was only meant to apply with respect to the priority of payment, and not meant to allow parties to alter any other substantive rights set forth in the Bankruptcy Code.

ABI Commission to Study the Reform of Chapter 11

The Report (the "Report") of the American Bankruptcy Institute ("ABI") Commission to Study the Reform of Chapter 11 (the "Commission"),[1] which was released on December 8, 2014, has weighed in on the issue of the assignment of voting rights.

The Commission has made the following recommendations in this regard:

> Recommended Principles:
>
> • The contractual assignment or waiver of voting rights in favor of senior creditors under an intercreditor, subordination, or similar agreement should not be enforced. Subordinated creditors should retain the right to vote on a plan (or their right to be deemed to have done so under section 1126(g) of the Bankruptcy Code) and to invoke the protections of section 1129(b).
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> • The contractual assignment of voting rights in favor of an assignee or purchaser of a claim against the estate should be enforced only to the extent of the portion of the claim and economic interest also transferred to the assignee or purchaser. For purposes of this principle, the holder of a

[1] Harner, Michelle M., *Final Report of the ABI Commission to Study the Reform of Chapter 11* (2014), reprinted at http://digitalcommons.law.umaryland.edu/books/97.

> claim should be the party entitled to exercise the voting rights assigned or associated with the claim.

Report at Sec. VI.F.2, pp. 261 – 263.

In making these recommendations, the Commission has attempted to resolve the split among the courts as to the enforceability of pre-petition voting waivers or assignments. The Commission focused its analysis on policy considerations regarding protecting the private contract rights of non-debtors vis a vis fostering the underlying goal of Chapter 11. Ultimately, the Commission determined that the key element of subordination agreements – preserving payment priorities between creditors – would not be impacted by a prohibition on the waiver or assignment of voting rights.

C. Waiver of the Right to Object to DIP Loans/Cash Collateral

Intercreditor agreements frequently contain provisions prohibiting or restricting the ability of second lien lenders from objecting to financing arrangements supported by the first lien lenders, including the use of cash collateral. Such provisions have generally been enforced by Bankruptcy Courts, including in cases such as *Aurelius Capital Master Limited vs. TOUSA Inc*., 08-61317-Civ-Gold, 2009 U.S. Dist. LEXIS 12735 (S.D. Fl. Feb. 5, 2009). In that case, the District Court ruled that the agent for the second lien lenders, who was a party to an Intercreditor Agreement that barred it from requesting any form of adequate protection or any other relief in connection with the use of cash collateral, had bargained away its right to object to a financing arrangement supported by the first lien lenders, including the terms for the use of cash collateral.

The ABI Report has also weighed in on this issue. Included in its recommendations regarding the terms of post-petition financing is the following Recommended Principle:

> Any prepetition contractual prohibition on subordinated prepetition junior secured creditors offering or providing postpetition financing to the debtor should not be enforced in the chapter 11 case, provided that: (i) any such subordinated prepetition junior secured creditors should not be permitted to prime the perfected security interests of the prepetition senior secured creditors with the postpetition financing facility; and (ii) if the court approves the postpetition financing facility offered by the subordinated prepetition junior secured creditors, the prepetition senior secured creditors should have the option to match the terms of, and to provide the financing facility in lieu of, the subordinated junior secured creditors within a reasonable time as specified in the court's interim order approving the postpetition financing. These provisions would render unenforceable any contractual damages provisions that would otherwise allow prepetition senior secured creditors to recover damages for breach of contract against subordinated prepetition junior secured creditors under nonbankruptcy law based on the provision of postpetition financing. Sections 364 and 510 should be amended accordingly.

Report at Section IV.B.2, pp. 73-79.

The Commission evaluated the provision commonly found in most intercreditor agreements precluding junior lenders from offering post-petition financing to a debtor without the consent of the senior lenders. The Commission noted that such provisions chill the available sources of debtor in possession financing available to a Chapter 11 debtor. Therefore, the Commission recommends that a junior creditor subject to such a pre-petition prohibition be permitted to provide post-petition financing to a debtor free from risk of litigation subject to two conditions: (i) the proposed facility does not prime the liens of the senior creditor, and (ii) the senior creditor must be afforded the right to provide financing to the debtor under the same terms and conditions as those proposed by the junior creditor.

D. The Cramdown Exception

***TCI 2 Holdings, LLC*, 428 B.R. 117 (Bankr. D. N.J. 2010).**

Some uncertainty exists over whether Intercreditor Agreements are enforceable in a cramdown pursuant to Section 1129(b)(1) of the Bankruptcy Code, which begins with the phrase "[N]otwithstanding Section 510(a) of this title, . . ." In *TCI*, two competing plans – one proposed by the first lien lenders, and the other proposed by the second lien lenders - were confirmable. The first lien lenders objected to the second lien lenders' plan on the grounds that the Intercreditor Agreement required that the first lien lenders be paid in full in cash before any second lien lenders could receive a distribution. The court overruled the objection because the second lien lenders' plan was a cramdown plan and the introductory clause to Section 1129(b)(1) meant that the court was not required to enforce the Intercreditor Agreement under Section 510(a) of the Bankruptcy Code.

***In re MPM Silicones, LLC,* Case No. 14-22503 (Bankr. S.D.N.Y September 9, 2014), *affirmed*, *U.S. Bank N.A. v. Wilmington Savings Fund Society (In re MPM Silicones, LLC)*, Case. No. 14-cv-07492 (S.D.N.Y. May 4, 2015).**

Intercreditor agreements and the definitional sections have become so complex that what can or cannot be included in the term "senior indebtedness" can also be disputed by the alleged junior creditors. In *MPM Silicones*, Judge Drain issued a bench ruling on several aspects of the plan of reorganization filed by debtor Momentive Performance Materials, Inc., a specialty chemicals manufacturing company, and its affiliated debtors. A Corrected and Modified Bench Ruling on Confirmation of Debtors' Joint Chapter Plan of Reorganization was issued on September 9, 2014. Several intercreditor and subordination issues were addressed in that series of opinions, some of which will be further discussed in other sections of this paper. Judge Drain's series of confirmation related opinions were all affirmed by the District Court.

One of litigation matters deal with the ability of the second lienholders to propose a plan contrary to the wishes of the first lienholders and cram down the first lienholders. The debtors filed for Chapter 11 relief on April 13, 2014. Prior to filing, the company entered into a restructuring support agreement with certain holders of the debtors' second lien notes (the "RSA"), which formed the foundation for the debtors' Plan of Reorganization. The Court approved the debtors' assumption of the RSA over the objections of the first lien creditors.

The first lienholders filed complaints against second lien creditors in a New York state court (the actions were subsequently removed to the Bankruptcy Court), asserting violations of the intercreditor agreement. Senior creditors alleged that the second lien creditors' execution of the RSA and performance under it created three separate intercreditor agreement breaches: first, by allegedly contesting first lien creditor requests for adequate protection; second, by intervening in an adversary proceeding commenced by the debtors to contest the first lien creditors' asserted make-whole claims; and third, by supporting the company's Plan itself. The final objection centered, in large part, on the Plan's treatment of the debtors' secured debt. On the Plan effective date, second lien creditors received the reorganized debtors' equity. The first lien creditors were given a "death trap" choice. If the classes of first lien claims voted in favor of the Plan, first lien creditors would receive cash equal to the full amount of their claims, excluding any amounts recoverable as a make-whole premium or breach claim under the first lien loan documentation. Conversely, if either class of first lienholders voted to reject the Plan, first lien creditors in that class would receive replacement notes with a present value equal to their full first lien claim, but the right to litigate the claim amount and entitlement to the make-whole premium would be reserved. Both classes of first lien creditors overwhelmingly voted to reject the Plan, prompting a confirmation battle over the first lien claim amount and the terms of the replacement notes.

The first lien creditors sought support for their breach allegations in various intercreditor agreement provisions, certain of which directly curtailed the actions available to second lien creditor in the event of a bankruptcy. Specifically, first lien creditors alleged that execution of the RSA (obligating second lien creditors to support the debtors' post-petition financing) breached the intercreditor agreement's prohibition against section lien creditors' contesting any first lien request for adequate protection. Similarly, first lien creditors asserted the second lien creditors' support for the debtors' cram-down Plan violated intercreditor agreement restrictions on second lien creditors' receipt of collateral or proceeds thereof prior to the payment of all first lien obligations in full in cash. Finally, first lien creditors asserted that the junior creditors' intervention in the make-whole litigation generally constituted an action that would hinder any exercise of remedies by first lien creditors in violation of the intercreditor agreement. No intercreditor agreement provision directly prohibited claim objections.

The second lien creditors contested each allegation, and in particular, argued that their actions were consistent with their rights as unsecured creditors, rights expressly preserved under the intercreditor agreement.

The bankruptcy court dismissed the intercreditor actions based on its analysis of the overarching purpose of the intercreditor agreement. The Court determined that the intercreditor agreement primarily served to define the parties' rights in respect of shared collateral. In reaching this conclusion, the Court highlighted the second lien creditors' broad retention of unsecured creditors' rights and remedies against the debtors. As the actions taken by the second lien creditors did not directly pertain to the senior creditors' interest in shared collateral or any right expressly precluded or constrained by the intercreditor agreement, the Court refused to find the existence of any contractual breach. The intercreditor agreement did not expressly prohibit second lien creditors from contesting the first lien asserted claim, and the Court rejected the argument that the second lien creditors' intervention in the make-whole litigation could be construed as an attempt to hinder senior creditors' ability to exercise their rights in violation of the ICA. In short, the Court declined to read into the intercreditor agreement provisions governing the parties' respective rights regarding collateral as any type of restriction on junior creditors' contesting the senior creditors' asserted claim. Absent a specific and applicable prohibition, the intercreditor agreement had to be read to give the second lien creditors the unfettered right to act as unsecured creditors to object to the senior lien holders' claims.

The Court employed a similar analysis when evaluating arguments about the second lien creditors' entry into the RSA and related support for the DIP financing and the Plan. Again, the Court started from the basic proposition that second lien creditors, as holders of a substantial unsecured deficiency claim, retained their right to take any position unless expressly constrained by the intercreditor agreement. While the intercreditor agreement prohibited second lien creditors from objecting to DIP financing supported by first lien creditors and contesting any first lien creditor request for adequate protection, there was no correlative restriction against second lien creditors either providing their own financing or supporting a financing provided by a third party, nor was there evidence on the record of the second lien creditors' having taken any position with regard to first lien adequate protection. Finally, the intercreditor agreement did not expressly contain any restriction regarding plan confirmation. As a result, the debtors and the second lien creditors were free to enter into the RSA, notwithstanding its relation to the priming DIP financing or cram-down Plan. From the Court's perspective, the second lien creditors, while taking actions adverse to first lien creditors' interests, were simply exercising their rights as unsecured creditors as expressly permitted by the intercreditor agreement.

Another issue dealt with by the *Momentive* Court was whether the plan was fair and equitable to the subordinated noteholders. The capital structure of the debtors was extremely complex. In addition to two classes on senior secured creditors and junior secured creditors, there were unsecured senior subordinated noteholders. This second subordination battle was between the junior secured noteholders and the subordinated noteholders.

Momentive's plan proposed to give the second lien noteholders a recovery of approximately 12.8% to 28%, but wiped out the senior subordinated noteholders on the ground that the senior subordinated notes were subordinated to the second lien notes. Early in the cases, the senior subordinated noteholders had filed an adversary proceeding against the debtors and the second lien noteholders seeking a declaration that senior subordinated notes were not subordinated to the second lien notes. Although the second lien notes would have a senior right to any recovery on account of their liens (which were wholly underwater), the senior subordinated noteholders argued that, pursuant to the terms of the applicable indenture, any unsecured claims of the two classes should be *pari passu*.

Resolution of this issue depended upon an interpretation of the subordination provision in the indenture governing the senior subordinated notes. The indenture was governed by New York law and provided that the senior subordinated notes would be subordinated to "all existing and future Senior Indebtedness of the Company" and added that "only Indebtedness of the Company that is Senior Indebtedness of the Company shall rank senior to the [senior subordinated notes] . . . ."

Thus everything was riding on the definition of "Senior Indebtedness." The senior subordinated notes indenture defined "Senior Indebtedness" as follows:

> all Indebtedness . . . unless the instrument creating or evidencing the same amount or pursuant to which the same is outstanding expressly provides that such obligations are subordinated in right of payment to any other Indebtedness of the Company or such Restricted Subsidiary, as applicable; [we will call this the "Payment Subordination Provision"] provided however, that Senior Indebtedness shall not include, as applicable:
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> ***
>
> (4) any Indebtedness or obligation of the Company or any Restricted Subsidiary that by its terms is subordinate or junior in any respect to any other Indebtedness or obligation of the Company or such Restricted Subsidiary, as applicable, including any Pari Passu Indebtedness [we will call this the "Subordination Exception"] . . . .

The meaning of "junior in any respect" was the main determinative clause. The senior subordinated noteholders argued that, because the liens securing the second lien notes were junior in priority to those of the two classes of first lien notes, the second lien notes were "junior in any respect to … other Indebtedness," and, therefore, fell within the language of the indenture's subordination exception. The result of that would be that the senior subordinated noteholders and the second lien noteholders would be *pari passu* with respect to the unsecured claims of the second lien notes. In a bit of unhelpful contractual circularity, the indenture for the second lien notes (an agreement to which the senior subordinated noteholders were not parties) provided that the second lien notes were senior to any "Subordinated Indebtedness."

The court held that New York law on contract interpretation dictated that the second lien notes were not subordinated. The Bankruptcy Code provides that subordination agreements are only enforceable in bankruptcy to the extent they are enforceable under applicable non-bankruptcy law. Thus, Judge Drain determined that under New York contract interpretation rules the court should first determine whether the language of the contract at issue is complete, clear, and unambiguous on its face. The subordination provision must be considered in the context of the entire agreement, and a contract should be construed as to give effect to all its provisions such that no part will be inoperative or superfluous. According to the court, these guiding principles of contract interpretation led to only one conclusion — the subordination exception in the senior subordinated notes indenture was not intended to affect the second lien notes' senior right to payment with respect to the senior subordinated notes.

Looking first at the principle that the contract should be construed to give effect to all its provisions, Judge Drain noted that the senior subordinated noteholders' interpretation of the subordination exception would "swallow up" the payment subordination provision of the indenture. The court instead sided with the debtors' interpretation of the subordination exception, which gave meaning to the subordination exception only in situations where a separate subordination agreement, rather than the instrument itself, caused the subordination.

The court also held that the debtors' interpretation tracked the plain terms of the subordination exception, which, when read strictly, provided that Senior Indebtedness would not include Indebtedness "that by its terms is subordinate or junior" to any other Indebtedness. The indenture for the second lien notes, which created the "Indebtedness," did not by its terms subordinate the second lien notes to any other debt. On the contrary, only the lien securing the second lien notes was subordinated as a matter of lien priority to another lien. The Court made a clear distinction between lien subordination and debt subordination.

As a final theory, the senior subordinated noteholders argued that, under the debtors' interpretation of the senior subordinated notes indenture, the debtors could theoretically continue to add priority notes ahead of the senior subordinated notes by providing the new debt with illusory under-secured liens. Considering this possibility, the senior subordinated noteholders argued that the subordination exception served an important "anti-layering" function. The court, however, refused to buy the argument, pointing out that the indenture had no anti-layering provision or covenant, even though it contained plenty of other provisions about incurring additional debt.

The senior subordinated noteholders appealed. The district court affirmed the bankruptcy court and held that the senior subordinated notes were, indeed, subordinated to the second lien notes, and that the second lien notes were "Senior Indebtedness" as the term was defined in the senior subordinated noteholders indenture. The district court's decision rested on a "plain meaning" interpretation of the senior subordinated noteholders indenture, and the distinction between payment subordination (where a subordinated creditor does not receive a recovery on account of its subordinated claim until the senior creditor has been paid in full), and lien subordination (where a subordinated secured creditor has no recourse to collateral until the senior creditor has recovered in full). The key difference between the two is that lien subordination is only concerned with rights to collateral, meaning that unsecured deficiency claims would recover pari passu, while payment subordination encompasses all recoveries and, until the senior creditor is paid in full, would divert recoveries from the subordinated creditor's unsecured claims.

E. Jurisdictional Issues in Intercreditor Disputes

In *Charter Communications*, 409 B.R. 649 (Bankr. S.D.N.Y. 2009), a pre-negotiated plan provided for, among other things, the deceleration and reinstatement of billions of dollars of debt in order to deny certain prepetition lenders veto rights during the plan confirmation process. The administrative agent for the lenders objected to reinstatement, asserting that the debtor had committed prepetition breaches that were not curable. The agent further contended that the dispute was noncore and, therefore, the Bankruptcy Court did not have jurisdiction to render a judgment. The Bankruptcy Court applied the two-part test from *United States Lines, Inc. vs. American S.S. Owners Mut. Protection and Indemnity Ass'n*, 197 F.3d 631 (2d Cir. 1999), which held that proceedings can be core if they are either (i) the type of proceeding which is unique to or uniquely affected by the bankruptcy case, or (ii) directly affect a core bankruptcy function. The *Charter* Court ruled that the close relationship between the agent's objection and the bankruptcy process rendered the dispute a core matter. While a breach of contract action between creditors may not typically be a core proceeding, the agent's objection was "part of a coordinated and carefully executed strategy to oppose confirmation of the pre-negotiated plan." *Id.* at 656. Because the dispute directly affected confirmation and would be dispositive of whether or not reinstatement was permissible, the Court ruled that the dispute was a core matter and thereby exercised jurisdiction. *In re Best Products Co.*, 68 F.3d 26 (2d Cir. 1995) (a contract dispute between two creditors was a core matter because it involved issues "at the heart of the bankruptcy process").

If a first lien lender were to commence a state court litigation seeking an injunction to enforce an Intercreditor Agreement, or sought monetary or other pecuniary damages against the junior parties, it may be more difficult to remove the case to the Bankruptcy Court or commence such a case in the Bankruptcy Court due to the jurisdictional limitations imposed on Article I courts under the Constitution. *Orion Pictures Corp.*, 4 F.3d 1095 (2d Cir. 1993). However, such difficulty did not prevent the court in *Extended Stay, Inc. vs. Lightstone Holdings, LLC*, 418 B.R. 49 (Bankr. S.D.N.Y. 2009) from exercising jurisdiction. In that case, the special servicer commenced a state court action seeking a declaratory judgment that certain certificate holders had breached the Servicing Agreement by engaging in negotiations with the debtor without the servicer's consent. The lawsuit was removed to the federal district court, which referred the matter to the Bankruptcy Court. The debtor was not a party to the Intercreditor Agreement and the suit did not name the debtor as a party. Upon a motion to remand the case back to the state court, the Bankruptcy Court held that the dispute was a core matter because a determination of which parties were entitled to negotiate with the debtor during the reorganization case would directly and profoundly affect the reorganization process.

It is unclear what effect the Supreme Court's decision in *Stern vs. Marshall*, 131 S. Ct. 2594 (2011) will ultimately have on the jurisdiction of Bankruptcy Courts to hear intercreditor disputes. Although *Stern*'s progeny have provided some clarity with respect to the scope of so-called "Stern Claims" (i.e., core claims which the Bankruptcy Courts have statutory authority to decide under 28 U.S.C. §157(b)(1) but over which they lack constitutional authority), there has been no definitive ruling that an intercreditor dispute between non-debtor parties would or would not constitute a Stern Claim. In the recent *Momentive* decision (*In re MPM Silicones, LLC*, 518 B.R. 740 (Bankr. S.D.N.Y. 2014)) which dealt with a number of intercreditor disputes, the court did specifically overrule a *Stern* objection, stating that such disputes are not Stern Claims because they directly involve the adjustment of debtor/creditor relationships, how the assets of the debtor will be distributed, how Section 510(a) of the Bankruptcy Code is applied, and the treatment of claims under Sections 502(b)(2) and 506(b) of the Code. Further, the *Momentive* court determined it could enter final orders because such disputes are core matters under 28 U.S.C. § 157(b)(2). In any event, even if intercreditor disputes are ultimately determined to be Stern Claims, it is likely that such claims, at a minimum, would constitute "related to" claims under 28 U.S.C. § 157(c)(1), which provides for a Bankruptcy Court to hear, but not finally determine, such matters.[2]

F. Make-Whole Premiums

In re MPM Silicones, LLC.

[2] Section 157(c)(1) provides for a Bankruptcy Court to hear, but not finally determine, a matter which is not a core proceeding but that is otherwise related to a case under Title 11. That section goes on to provide that the Bankruptcy Court shall submit proposed findings of fact and conclusions of law to the District Court, and any final judgment will be entered by the District Court after considering such findings and conclusions but reviewing *de novo* those matters to which a party has objected. This was the resolution dictated by the Supreme Court in *Executive Benefits Insurance Agency vs. Arkinson (In re Bellingham Insurance Agency)* (134 S. Ct. 2165 (2014)), which determined that a fraudulent conveyance claim was a Stern Claim.

Make-whole premiums were also at issue in the *Momentive* cases discussed previously. As part of Judge Drain's confirmation rulings, he held that the debtors were not required to pay senior noteholders a make-whole payment provided for in their notes and that the debtors could satisfy the cramdown provisions of Section 1129(b) of the Bankruptcy Code without providing a market rate of interest.

In the chapter 11 cases, the holders of $1.0 billion of First Lien Notes and $250 million of so-called 1.5 Lien Notes were over-secured and asserted that they were entitled to a "make whole" premium -- a type of call provision on a bond allowing the borrower to pay off remaining debt prior to maturity subject to payment of the premium – in addition to unpaid principal and accrued interest. The debtors' plan provided that if the noteholders voted in favor of the plan and agreed to waive their make-whole claim they would receive cash in the full amount of their claims (except for the make-whole payment claim). However, if the noteholders rejected the plan, the debtors sought to "cram down" the noteholders and satisfy their claims with replacement notes, but the noteholders would maintain their right to argue for the make-whole payments. All the First Lien and 1.5 Lien noteholders voted to reject the plan and filed objections to confirmation of the plan, arguing they were entitled to receive the make-whole payments and that their treatment under the plan was not "fair and equitable" as required by Section 1129(b).

The noteholders argued that they were entitled to make-whole payments based on the automatic acceleration of their debt after the debtors' bankruptcy filings. The Court ruled that the noteholders were not entitled to receive make-whole payments because the indentures did not expressly provide for the make-whole premium upon the automatic acceleration of debt as a result of a bankruptcy filing. He reasoned that bankruptcy default and automatic acceleration were not the same as a prepayment of the debt and therefore, by the express terms of the indentures, the noteholders were not entitled to the make-whole payment. The Court further noted that by agreeing to the automatic acceleration provision in the indentures, the noteholders had voluntarily forfeited their right to the make-whole premium based on the debtors' bankruptcy filing. The Court, however, left open the possibility that a future agreement might provide for a make-whole payment as part of a bankruptcy claim, but he stated that this language must be expressly set forth in the contract.

The Court also addressed the noteholders' argument that the debtors breached the agreement once the acceleration occurred because the indentures included a no-call provision stating that the notes were not redeemable. The Court noted that this provision was not specifically a no-call provision but instead, provided the noteholders with the option to redeem in return for payment of the applicable make-whole payment. Although recognizing the noteholders may be entitled to damages available under applicable state law, the Court stated that such a damages claim would be disallowed as a claim for unmatured interest under Section 502(b)(2) of the Bankruptcy Code.

The noteholders also argued that they should be able to decelerate the notes and thus increase their bankruptcy claim because sending such a deceleration notice was not prohibited by the automatic stay. More specifically, the noteholders argued that the sending of a rescission notice to decelerate the First and 1.5 Lien notes would merely be liquidating a securities contract, which is permissible under Section 555 of the Bankruptcy Code notwithstanding the automatic stay under Section 362(a). The Court dismissed this argument on a number of grounds. First, The Court stated that he had “serious doubts” that the indenture itself is a securities contract under Section 741(7)(A) of the Bankruptcy Code. Second, the Court suggested that deceleration of the notes to permit the increase of a claim against the debtors is not a “liquidation” as contemplated by Section 555. Third, the Court determined that the rescission right the noteholders sought to exercise was not a right automatically arising upon the commencement of the debtors’ bankruptcy cases and, thus, he reasoned, is not covered by Section 365(e) of the Bankruptcy Code as contemplated by the plain language of Section 555.

Finally, the noteholders alternatively requested that the automatic stay be lifted so that they could provide notice rescinding the automatic acceleration of their notes. The Court explained that the purpose of sending the notice would be to “resurrect the make-whole claim”, which the Second Circuit recently held would be subject to the automatic stay. *See In re AMR Corp.*, 730 F.3d 88 (2d Cir. 2013). Moreover, the Court determined that lifting the automatic stay to allow the noteholders to send a rescission notice would have a material adverse effect on the estate and its creditors. Accordingly, the Court held that the automatic stay should not be lifted to allow the noteholders to rescind the automatic acceleration.

On May 4, 2015, the District Court affirmed Judge Drain’s decision in all respects.

In Re Energy Future Holding Corp., **Case No. 14-723 (D. Del. Feb. 19, 2015).**

Energy Future Holding Corporation and its subsidiaries filed for chapter 11 bankruptcy relief in on April 29, 2014. Debtors are organized into two principal businesses, one of which is Energy Future Intermediate Holdings, LLC ("EFIH”). EFIH's primary asset is an 80% ownership stake in Oncor, the largest regulated utility in Texas. At the time of the bankruptcy filing, EFIH had three creditor constituencies: $4 billion of first lien notes, $2.2 billion of second lien notes, and $1.7 billion of unsecured notes. The first lien notes were comprised of approximately $3.5 billion of 10% notes due 2020 and approximately $500 million of 6-7/8% notes due 2017.

Both of these notes contain "make-whole" provisions that protect the noteholders from premature redemption. If EFIH redeemed the notes prior to maturity, the make-whole clause required EFIH to pay a redemption premium to the noteholders. The value of this premium depends on the length of time remaining until the maturity date and the stated interest rate of the note. The "make-whole claims" of the 6-7/8% notes and the 10% notes were stipulated to be contractually identical, and differ in value only to account for the different maturity dates and interest rates of those notes. The debtors and the noteholders did not dispute the amount of outstanding principal and interest due, but did dispute whether the make-whole claims constitute allowable claims in bankruptcy.

On the same day they filed their bankruptcy petition, the debtors filed a Restructuring Support and Lock-up Agreement ("Global Settlement") that documented a broad settlement reached among debtors and various creditors. This Global Settlement encompassed several discrete agreements, one of which was a settlement between debtors and some of the first lien noteholders ("First Lien Settlement"). The debtors initiated this particular settlement through a tender offer to all first lien noteholders. The tender offer proposed to exchange the existing notes for new debt obligations to be issued under a $5.4 billion DIP Financing Facility. The tender offer remained open for thirty-one days, though certain key terms would change periodically as time elapsed. The debtors' tender offer compensated the noteholders with new value of 105% of their outstanding principal and 101% of the accrued interest. Under the terms of the agreement, the noteholders agreed to release their disputed make-whole claims. Because the new obligations issued under the DIP Facility carried a lower rate of interest than the existing first lien notes, the debtors projected that the deal would save the bankruptcy estate tens of millions of dollars per month in interest expenses.

Overall, 42% of the noteholders accepted the offer, which represented 97% of the 6-7/8% noteholders and 34% of the 10% noteholders. While the settling noteholders released the disputed make-whole claims, the noteholders who did not accept the tender offer retained their rights to litigate those claims. On June 6, 2014, the Bankruptcy Court conducted a hearing to determine the propriety of the First Lien Settlement and subsequently, approved the First Lien Settlement under Federal Rule of Bankruptcy Procedure 9019. For a variety of reasons, the debtors ultimately withdrew the Global Settlement, with the exception of the First Lien Settlement.

The indenture trustee for one of the groups of noteholders appealed, arguing that the settlement was a coercive tender offer that wouldn't pass muster outside bankruptcy and should not have been allowed in bankruptcy either. The indenture trustee said the offer was unfair because one set of noteholders got a 62% recovery on the make-whole while the return was only 25% for the other "identically situated" group.

The District Court affirmed the ruling of the Bankruptcy Court. First, the District Court determined that the use of the tender offer procedure was not impermissible in bankruptcy cases, notwithstanding the limited input of the SEC. Nor did the court have an issue with the use of the 9019 settlement process, especially in light of the fact that those who did not opt into the settlement preserved their right to litigate the make-whole dispute.

The Court also rejected the argument that the debtors were treating similarly situated creditors differently because one differing recoveries between the two groups of noteholders resulted from the differences in the maturity dates and interest rates on the two bond issues. The court further rejected the argument that Section 1123(a)(4) of the Bankruptcy Code was violated because it proscribes unequal treatment of similar claims. The Court said that even if that section could be applied to pre-plan settlements, it permits creditors to accept different treatment voluntarily.

***In Re Energy Future Holding Corp.,* Adversary Proc. No. 14-50363 (Bankr. Del. March 26, 2015).**

In this chapter of the *Energy Future* saga, Judge Sontchi ruled that the repayment in full of certain senior secured notes pursuant to the First Lien Settlement did not trigger an obligation by the debtors to pay a make-whole premium. In his Findings of Fact and Conclusions of Law Regarding Cross-Motions for Summary Judgment, Judge Sontchi closely followed the reasoning of Judge Drain's decision involving a make-whole premium in the *Momentive* cases, as discussed above, as well as earlier Southern District of New York cases such as *In re Solutia*, *Inc.*, and *In re Calpine Corp*., thereby expanding the reasoning of these cases into Delaware for the first time.

Judge Sontchi stated that make-whole premiums are often used in connection with the issuance of debt in order to protect noteholders with long term investment horizons from being repaid early when interest rates drop. However, that the right to payment of a make-whole premium must be clearly stated in the applicable indenture, and in the absence of express language that it was due and owing following a default and an acceleration of the underlying notes caused by the commencement of a bankruptcy case, a claim for such amount must be denied.

Similar to the circumstances in *Momentive*, at the time of the bankruptcy filing of EFH, certain of the EFH debtors were obligated under a series note issued by EFIH. Under the indenture governing the notes, EFIH's bankruptcy filing caused the automatic acceleration of the notes. Shortly after the filing, EFIH sought approval the First Lien Settlement pursuant to which debtor-in-possession financing was used, in part to repay all principal and accrued interest under the notes. The indenture trustee for the noteholders objected, contending that the repayment by EFIH constituted an "Optional Redemption" under the indenture, and that such a redemption gave rise to a secured claim under the indenture for the make-whole premium. EFIH argued in response that no Optional Redemption had occurred because of the automatic acceleration under the indenture upon the filing of the bankruptcy. Once the acceleration occurred, the notes were due and owing, such that the repayment of the notes pursuant to the First Lien Settlement could not constitute an Optional Redemption. As set forth above, Judge Sontchi overruled the trustee's objection and permitted EFIH to make the repayment in June 2014, while reserving the Trustee's right to continue to seek the make-whole premium.

The trustee subsequently commenced an adversary proceeding, in which it repeated its claim that EFIH's repayment constituted an Optional Redemption that required the payment of the make-whole premium. It further argued that it could retroactively decelerate the Notes, so that they would not have been due and owing when they were repaid by EFIH in June 2014 with the proceeds of the debtor-in-possession financing, thus bringing the EFIH repayment clearly within the ambit of an Optional Redemption. The trustee also contended that the deceleration of the notes would not violate the automatic stay or, alternatively, that cause existed to lift the automatic stay. The Trustee's complaint additionally stated that the make-whole premium should be payable because EFIH's bankruptcy filing constituted an "intentional" default in order to avoid paying the make-whole premium, and asserted additional causes of action based alleged breaches of the Indenture and the "perfect tender" rule under New York law. Following discovery, both sides moved for summary judgment.

Judge Sontchi granted EFIH's motion for summary judgment on most counts, and denied the Trustee's motion. Similar to Judge Drain in *Momentive*, he held that under New York law, an indenture must contain express language requiring payment of a prepayment premium upon acceleration; otherwise, it is not owed. He looked first at what he viewed as the plain language of the indenture, and found it to be indistinguishable from the language in the *Momentive* indenture (and indentures in other cases), in which there was no express language specifying that a make-whole premium would be owed upon automatic acceleration. Judge Sontchi focused carefully on the distinction between "redemption" and "acceleration," and noted that under the indenture, these were two separate and distinct acts. He parsed the indenture closely, and agreed with EFIH that (i) the make-whole premium was due only upon an Optional Redemption, and (ii) repayment following acceleration did not constitute an Optional Redemption. He concluded that the Optional Redemption contemplated a voluntary action by EFIH, and that under New York law, repayment after acceleration is not considered voluntary. Therefore, the plain language of the indenture did not require the payment of the make-whole premium in June 2014 when EFIH repaid the notes following the automatic acceleration caused by the bankruptcy filing.

Judge Sontchi also rejected the trustee's argument that the make-whole premium should be paid because the bankruptcy filing was an intentional default aimed at avoiding it. He noted first that the indenture contained no provision stating that the make-whole premium would be owed if there were an intentional default. Furthermore, he held that even though there was substantial evidence prior to the bankruptcy that EFIH intended to avoid paying the make-whole once it filed, EFIH and the debtors had ample grounds to file bankruptcy due to their unsupportable capital structure and a liquidity crisis. Once in bankruptcy, EFIH was free to use whatever rights it had at its disposal to minimize estate liabilities. He also rejected the breach of contract claim based on a breach of the indenture, ruling that there was no violation of the "perfect tender" rule under New York law for the same reason that there was no Optional Redemption – the notes had already been accelerated.

The court's ruling was not a complete victory for EFIH. Judge Sontchi agreed with the trustee that it has a qualified right under the indenture to rescind the automatic acceleration that took place upon the bankruptcy filing. He further agreed that if the rescission were to be effective retroactively (i.e., prior to June 2014), then EFIH's repayment would in fact constitute an Optional Redemption and the make-whole premium would then be due. Judge Sontchi cautioned that while the Trustee could not decelerate without violating the automatic stay, there was a material issue of fact as to whether "cause" existed to lift the stay. Thus, EFIH's motion for summary judgment on this issue was denied, and if the matter is not settled, a trial will be held on the merits of whether the trustee can obtain relief from the stay to retroactively decelerate the notes. While at this stage of the proceeding, Judge Sontchi rejected the trustee's contention that the automatic stay should be lifted if it can be shown that EFIH is solvent, he acknowledged that solvency would be a significant factor in determining whether "cause" exists to lift the automatic stay.

***In re School Specialty, Inc.*, (Bankr. D. Del. 2013).**

When the debtors entered into a forbearance agreement prior to bankruptcy, they acknowledged a breach of a covenant in the term loan which explicitly triggered the obligation to pay a make-whole premium. Based upon the explicitness of the documentation, and even though the premium represented approximately 35% of the entire principal amount outstanding, the Court concluded that it was not plainly disproportionate to the lender's loss.

***In re South Side House, LLC*, 470 B.R. 659 (Bankr. E.D.N.Y. 2012).**

The credit facility documentation explicitly provided that the obligation was subject to a prepayment premium in the event that the debtor paid off the balance before termination of the loan. The documentation further provided that if the debtor attempted to satisfy the debt after foreclosure had been commenced but prior to a foreclosure sale, such payment would constitute an evasion of the prepayment penalty. Despite the clear provisions of the loan documentation, when the lender accelerated and commenced foreclosure proceedings but the debtor filed for bankruptcy protection several months later, the Bankruptcy Court disallowed the prepayment penalty, reasoning that the debtor never voluntarily attempted to tender payment in satisfaction of the debt.

***In re LaGuardia Associates, L.P.*, 2012 Bankr. LEXIS 5612 (Bankr. E.D. Pa. Dec. 5, 2012).**

Upon an event of default, the lender was entitled to accelerate the maturity of the note and declare any or all of the obligations to be immediately due and payable. The note provided that "upon any such acceleration, payment of such accelerated amount shall constitute a prepayment of the principal balance of the note and any applicable prepayment fee provided for in the note should then be immediately due and payable." Despite the seemingly clear language of the note, the Court held that the existence of the phrase "should then be immediately due and payable" at the end of the clause meant that the prepayment fee was not due and payable unless the principal balance of the note was prepaid, which the debtor was unable to do on account of the automatic stay.

***In re Trico Marine Services*, 450 B.R. 474 (Bankr. Del. 2011).**

The lender included make-whole damages in its claim. The Court analogized such claim to liquidated damages, not unmatured interest. As such, the claim was an unsecured claim notwithstanding the fact that the repayment of principal and interest was secured by collateral.

***In re Premier Entertainment Biloxi,* 445 B.R. 582 (Bankr. S.D. Miss. 2010).**

The credit documentation did not provide for a make-whole, but it did contain a no-call provision. In a solvent debtor case, the Court ruled that noteholders could rescind acceleration that had automatically occurred upon the filing of the bankruptcy and waive any default so as to preserve the right to make a future claim under the no-call clause. The court ruled that, when a debtor is solvent, the lender is entitled to damages for the breach of a no-call provision.

***In re Calpine Corp.*, 2010 U.S. Dist. LEXIS 96792 (S.D.N.Y. 2010).**

In *Calpine*, the lender claimed that it was entitled to a make-whole premium on account of New York's so-called "perfect tender rule" and an explicit no-call clause. The perfect tender rule in New York, similar to many other jurisdictions, prohibits a borrower from prepaying a debt unless the credit documentation so provides. The Court ruled that the no-call provision as well as the perfect tender rule were unenforceable because, under the Bankruptcy Code, a debtor cannot be prevented from reorganizing and paying its creditors. Accordingly, there could be no make-whole premium due and owing on account of such an unenforceable provision.

***In re Solutia Inc.*, 379 B.R. 473 (Bankr. S.D.N.Y. 2007).**

The filing of bankruptcy constituted an event of default resulting in automatic acceleration of the credit facility, but the indenture failed to include language explicitly requiring the payment of a make-whole premium in the event of automatic acceleration. In an effort to preserve the right to claim make-whole amounts in the future, the note holders sent a notice of rescission of acceleration and waiver of default, but the indenture only allowed deceleration after a notice of acceleration had been actually delivered, which was not the same as automatic acceleration. The Court ruled that the deceleration notice was void because it violated the automatic stay. Independently, the Court also ruled that the noteholders were not entitled to make-whole damages because, in exchange for automatic acceleration, the bondholders had essentially agreed to give up any make-whole premium in return for an immediate right to collect.

II. Bankruptcy Issues Presented by Recent Unitranche Loan Structures

A recent trend in middle market lending is the use of so-called "unitranche" facilities. A unitranche structure is an alternative to a traditional first and second lien financing structure. In traditional first and second lien financings, each of the facilities is documented separately with a unique set of credit documents, including, for example, separate credit agreements that involve separate agents for the first lien lenders and for the second lien lenders. The intersecting or conflicting rights of the first lien and second lien lenders are governed by an Intercreditor Agreement. In contrast, a unitranche facility is documented pursuant to a single credit agreement, a single security agreement, and a single set of ancillary loan documents that are administered by a single agent for both tranches of lenders. Unitranche structures have gained popularity because borrowers believe that, by reducing the sheer volume of documents and the need to effectively negotiate two, separate loans, the costs, complexity and time needed for closing will be reduced.

Unlike the classic first and second lien structure, a unitranche facility does not employ a document entitled "Intercreditor Agreement." Instead, the rights among the lenders are set forth in a document entitled Agreement Among Lenders ("AAL"). The AAL is almost never executed by the borrower, thereby sparing the borrower from inter-lender negotiations. The provisions of an AAL create a "first out" and "last out" stream of payments for the two sets of lending groups, which are referred to as the "first-out lenders" and the "last-out lenders."

In contrast to a first lien/second lien arrangement in which each debt tranche carries a separate rate of interest, from the borrower's (debtor's) point of view, a unitranche loan has only one rate of interest set forth in the single note or credit agreement. That rate of interest is blended to result in a desired stream of payments to the first-out lenders and to the last-out lenders pursuant to a payment waterfall which is detailed in the AAL. The waterfall allocates each payment made by the borrower such that, mathematically, the first-out lenders receive their anticipated rate of interest and the last-out lenders receive their anticipated rate of interest. Payments are made ratably in this manner to the first-out and last-out lenders until the occurrence of a "waterfall trigger event," whereupon the first-out lenders receive payment priority until principal and interest are paid in full. The waterfall trigger events usually include bankruptcy.

Most Intercreditor Agreements for first and second lien credit facilities do not provide for voting arrangements whereby the first and second lien lenders vote together to take joint actions such as the exercise of remedies. In contrast, almost all AALs contain detailed voting arrangements and procedures among the first-out and last-out lenders, and the single agent is required to take action on behalf of all of the unitranche lenders in accordance with the voting results. Voting is not necessarily *pro rata* - many AALs give certain lenders veto rights over important actions.

Given the unique nature of unitranche facilities, the enforcement of an AAL in bankruptcy may create issues that are not presented by traditional Intercreditor Agreements. Because unitranche facilities are a relatively new phenomenon, there is a dearth of instructive case law.[3] Nevertheless, certain bankruptcy issues arising out of the differences between unitranche facilities and traditional first lien/second lien structures can be anticipated.

A. Unsecured Creditor Clause

Intercreditor Agreements frequently include a general provision that second lien lenders retain the right to take any action in a bankruptcy case that could be undertaken by an unsecured creditor. As demonstrated by some of the recent case law, that exception to the subordinated rights of junior creditors can be large enough to authorize a wide array of actions. Although AALs generally also contain such a clause, the unique structure of a unitranche facility may create a different result. An AAL is generally quite clear that only the agent for the lenders can pursue enforcement actions against the borrower, that the agent acts for all of the lenders, and that all of the lenders are bound by the results of the voting between the first-out and last-out lenders which is laid out in great detail in the AAL. Thus, there may be a much stronger argument that the last-out lenders cannot take any action that is inconsistent with the actions of the agent or which are contrary to a vote taken pursuant to the AAL voting procedures. If the last-out lender was "out voted" under the AAL, it may be difficult to argue that it should have a second bite at the apple in court and thereby ignore the explicit voting provisions of the AAL which it negotiated and agreed to.

B. Adequate Protection/Post-Petition Interest

Claims for adequate protection and/or post-petition interest generally turn on whether the creditor is over secured. In the classic first lien/second lien situation, because the facilities constitute separate legal obligations, courts generally measure the value of the collateral against the first lien debt to determine the rights of the first lien lender, and then separately measure the value of the collateral against the first lien plus the second lien debt to determine the rights of the second lien lender. The Intercreditor Agreement becomes an overlay on that analysis. In a unitranche scenario, the facility constitutes a single, legal obligation. It is likely that the adequate protection/post-petition interest analysis would turn on the value of the collateral supporting the entire unitranche facility, not simply upon the first-out or last-out lenders' waterfall priority under the AAL.

The conflating of the debt in a unitranche facility may also work solely to the disadvantage of the first-out lender, especially if the last-out lender's *pro rata* portion of the unitranche facility is far larger than the proportion allocated to the first-out lender. In such a case, if the facility had been documented as first lien/second lien loans, and the collateral value

[3] *See*, *In re American Roads, LLC*, 496 B.R. 727 (Bankr. S.D.N.Y. 2013), which is one of the first reported decisions to deal with intercreditor issues under unitranche facilities.

exceeds the first lien debt but not the first lien plus the second lien debt, the first-out lender might have been able to establish itself as over-secured and might have been entitled to current interest payments. This would also provide the first-out lender with certain protections in the event of an attempted cram down, *e.g.*, making it harder to extend the time for repayment.

C. Claims Classification

It is almost universally understood that, in a traditional first lien/second lien situation, the claims of the lenders under the respective facilities comprise two, distinct and separate classes of claims that must be separately classified in a plan of reorganization. Because the claims of unitranche lenders arise under a unitary set of loan documents that are administered by a single agent, the separate classification of the first-out and last-out lenders may not be permitted due to the fact that Section 1122 of the Bankruptcy Code has generally been interpreted to prevent debtors from placing substantially similar claims into separate classes.

Placing all of the unitranche lenders in the same class may effectively result in altering the lenders' voting rights under the AAL. If the last-out lenders control more than one third of the unitranche loans, and the court enforces the traditional "one-creditor-one-vote" rule, those lenders may have a plan blocking position pursuant to Section 1126(c) of the Bankruptcy Code which they would not otherwise enjoy under the terms of the AAL. This would potentially give the last-out lenders greater leverage than they would have in a traditional first lien/second lien arrangement.

D. Release of Liens

A minority of cases has taken the position that any secured party can block a sale under Section 363(f) of the Bankruptcy Code unless the secured party's lien is paid in full or the secured party releases its lien. As noted above, the agent is the party that acts on behalf of the first-out and last-out lenders in a unitranche facility pursuant to the voting provisions of the AAL. If the first-out lenders do not have sufficient votes under the AAL to require the agent to release liens, the last-out lenders may be able to block a sale by virtue of Section 363(f) of the Bankruptcy Code. This problem rarely occurs in a traditional first lien/second lien arrangement because a typical Intercreditor Agreement provides that the first lien lenders can unilaterally compel the second lien lenders to consent to a release of liens.

E. *In re RadioShack Corporation*, Case No. 15-10197 (Bankr. D. Del. March 2015)

In the RadioShack case, the Bankruptcy Court considered the relative rights of first out and last out lenders under an AAL in the context of a sale of the debtors' assets at a hearing, which while not resulting in a decision, gave some insight on how courts might rule on unitranche structures. Specifically, the Bankruptcy Court addressed whether the right of the first out lenders to receive payment in full under the AAL prior to the last out lenders receiving any recovery through a credit bid of their last out debt included payment of the first out lenders' contingent indemnification claims. The Bankruptcy Court stated that the first out lenders had rights which were part of their bargained for collateral package that must be respected under the documents and rights that must be respected under the Bankruptcy Code. However, the

Bankruptcy Court also made clear that the debtor's obligation to establish a cash reserve to pay the contingent indemnification claims would be limited to an amount significantly less than the potential maximum amount of the claims. Otherwise, the Bankruptcy Court indicated, the sale of RadioShack as a going concern and thousands of jobs would be at risk. The Bankruptcy Court took into account that the principal and interest of the first out lenders would be paid in full under the proposed transaction. Equitable and practical concerns, therefore, tempered the Bankruptcy Court's treatment of the first out lenders' contingent indemnification claims despite the Bankruptcy Court's implicit recognition of the validity of the AAL.

After a four day hearing, the parties settled on a reserve for expenses and a reserve for indemnification claims, abrogating the need for further judicial review. The parties did retain any rights against each other under the AAL and other financing documents, so related issues may rise again in the case. While no binding precedent was created in this instance because the Bankruptcy Court did not rule on the issues, the Court did indicate support for the position that AALs should be enforceable in a chapter 11 case.

III. Conclusion

The ABA Business Law Section Commercial Finance Task Force on the Model First Lien/Second Lien Intercreditor Agreement was established to develop a balanced, market-based model form of intercreditor agreement that specifies the rights of first lien and second lien lenders holding *pari passu* senior debt secured by identical collateral that fairly protects the respective interests of first lien and second lien lenders while reflecting market expectations and standard practices. The Model Agreement includes alternative and optional provisions as well as commentary. The Task Force Report along with the Model Agreement was published in the May 2010 edition of *The Business Lawyer* and can be accessed through several website. The drafters of the Model Agreement attempted to deal with several issues raised in bankruptcy cases prior to the publication of the Model Agreement.

However, as with any model, it is only as good as the drafters revising it and its ability to morph with new case law and new structures. As seen in cases like *Energy Future*, *Momentum* and *RadioShack*, capital structures have become increasingly complex. While the recommendations of the Commission on certain intercreditor agreement issues will, if enacted into law, create some clarity on those specific issues, others will arise and others will remain unresolved.

While there has been a perceived shift towards enforceability of intercreditor agreements in the courts, the case law regarding enforceability of bankruptcy provisions remains unsettled and fact-specific. While it is clear that the more specific an agreement is, the more likely it will be enforced, Courts will continue to try to find a balance between their duty to provide equitable solutions to all stakeholders in a bankruptcy against the rights of sophisticated parties to contract around uncertainty.

527 B.R. 178
United States Bankruptcy Court,
D. Delaware.

In re Energy Future Holdings Corp., et al., Debtors.
Delaware Trust Company as
Indenture Trustee, Plaintiff,
v.
Energy Future Intermediate Holding Company
LLC and EFIH Finance Inc., Defendants.

Bankruptcy Case No. 14–10979 (CSS) (Jointly Administered) | Adversary Proceeding No. 14–50363 (CSS) | Signed March 26, 2015

Synopsis
Background: Indenture trustee objected to motion by debtor for leave to obtain debtor-in-possession financing to pay off notes that had been accelerated upon its bankruptcy filing, on ground that noteholders were entitled to prepayment premium.

Holdings: The Bankruptcy Court, Sontchi, J., held that:

[1] trust indenture did not require payment of applicable prepayment premium upon satisfaction of notes that had been accelerated due to the issuer's bankruptcy filing;

[2] that debtors, prior to filing for bankruptcy, may have planned to use automatic default created by their bankruptcy filing, and the automatic acceleration of their notes, to avoid paying prepayment premium to noteholders was insufficient to raise genuine issue of material fact as to whether debtors had intentionally created event of default solely for purpose of avoiding payment of prepayment penalty;

[3] rescission notice that indenture trustee attempted to send was in nature of attempt to "collect, assess or recover" on a claim, and was void ab initio as violative of automatic stay;

[4] genuine issue of material fact as to whether indenture trustee could establish cause to retroactively lift automatic stay nunc pro tunc to allow trustee to waive automatic default and to decelerate notes precluded entry of summary judgment in dispute regarding noteholders' right to contractual prepayment premium

[5] New York "perfect tender" rule did not apply; and

[6] trustee had no claim for damages for denial of this purported right to rescind.

So ordered.

Attorneys and Law Firms

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FINDINGS OF FACT AND CONCLUSIONS OF LAW REGARDING CROSS–MOTIONS FOR SUMMARY JUDGMENT [1]

Sontchi, J.

I. INTRODUCTION & PROCEDURAL HISTORY [2]

1. This adversary proceeding relates to a series of 10% First Lien Notes issued by Energy Future Intermediate Holding Company LLC and EFIH Finance Inc., with original maturity of 2020, pursuant to an Indenture dated August 17, 2010. The original indenture was supplemented as of January 29, 2013.

2. On April 29, 2014, the EFIH Debtors filed petitions for relief under chapter 11 of the Bankruptcy Code. The EFIH Debtors sought approval of debtor-in-possession financing, in part, to repay all of the outstanding Notes and settle certain Noteholders' claims (the "*DIP Motion*"). (No. 14–10979, D.I. 74, 858, 859.) The non-settling Noteholders are represented by the Trustee, the Plaintiff in this adversary proceeding.

3. On May 13, 2014, the Trustee objected to the DIP Motion, arguing that the Noteholders were entitled to a secured claim for an amount described in the Indenture as the "Applicable Premium" because: (i) an Optional Redemption would occur when the Notes were repaid; (ii) the EFIH Debtors intentionally defaulted by filing bankruptcy to avoid paying the Applicable Premium, and (iii) the repayment would be a breach of the Noteholders' purported right to rescind the Notes' acceleration. (No. 14–10979, D.I. 421.)

4. On May 15, 2014, the Trustee initiated this adversary proceeding. (No. 14–10979, D.I. 470; No. 14–50363, D.I. 1.) The Complaint contained the claims from the May 13 objection, plus (a) an unsecured claim for breach of a purported "no-call" covenant in the Indenture; and (b) three unsecured claims, one for each of the three counts raised in its May 13 objection. (Compl.¶ 76.) The Trustee also simultaneously filed a motion seeking a declaration that it could decelerate the Notes without violating the automatic stay. (No. 14–10979, D.I. 473 ("*Stay–Applicability Motion*").) On June 4, 2014, the Trustee sent a purported notice of deceleration to the EFIH Debtors.

5. On June 6, 2014, the Court approved the DIP financing, the EFIH Debtors' use of the DIP financing to pay the outstanding EFIH First Lien Noteholders, and the settlement resolving certain Noteholders' claims for the Applicable Premium. (No. 14–10979, D.I. 858 (Order Approving EFIH First Lien Settlement), [3] 859 (Order approving use of DIP financing).) The Noteholders who chose not to accept the settlement are pursuing claims for an ***183** Applicable Premium in this adversary proceeding. (No. 14–50363, D.I.9, 10.) These Noteholders have been paid their full principal and accrued interest using DIP financing, which was funded on June 19, 2014.

6. On September 12, 2014, the Court bifurcated this adversary proceeding. (D.I.128) [4] This is Phase One of the litigation in which the Court will determine (1) whether EFIH is "liable under applicable non-bankruptcy law for ... a Redemption Claim," including the "make-whole" or other "damages ... under any 'no-call' covenant, 'right to de-accelerate,' " or applicable law, and (2) "whether the Debtors intentionally defaulted in order to avoid paying an alleged make-whole premium or other damages." (Id. at 2–3.) Except with respect to the Trustee's claim that EFIH intentionally defaulted to evade payment of the make-whole, "the Court will assume solely for the purposes of Phase One that the EFIH Debtors are solvent and able to pay all allowed claims of their creditors in full." (*Id*.) If the Court finds EFIH liable for a Redemption Claim, and if EFIH contests that it is, in fact, solvent, Phase Two will determine "(a) whether the EFIH Debtors are insolvent, and, if so, whether that insolvency gives rise to any defenses arising under the Bankruptcy Code in favor of the EFIH Debtors that bar or limit the amount of the Redemption Claim, and (b) the dollar amount of ... any Redemption Claim." (*Id*.)

7. The parties conducted full discovery on the Phase One issues, including the production of documents, multiple fact witness depositions, production of expert reports, and multiple expert witness depositions. Thereafter, the EFIH Debtors and the Trustee submitted cross-motions for summary judgment, seeking to resolve all of the claims raised in the contested matter, the adversary complaint, and the Stay–Applicability Motion. (D.I.175, 176, 178, 179.)

8. As set forth below, the Court will grant, in part, and deny, in part, the EFIH Debtors' motion for summary judgment, and deny in its entirety the Trustee's motion for summary judgment. More specifically, the Court holds as follows:

a. The plain language of the Indenture does not require payment of an Applicable Premium upon a repayment of the Notes, following an acceleration under section 6.02 of the Indenture, arising from a default for the commencement of "proceeding to be adjudicated bankrupt or insolvent" under section 6.01(a)(6)(i) of the Indenture.

b. The EFIH Debtors' filing of bankruptcy, which gave rise to the default at issue, was not an intentional default under the Indenture.

c. The Trustee's right under Section 6.02 of the Indenture to waive the automatic default arising from the EFIH Debtors' bankruptcy filing and rescind the acceleration of the Notes is not barred by the language in the Indenture extinguishing that right if rescission would "conflict with any judgment of a court of competent jurisdiction" because the automatic stay under section 362 of the Bankruptcy Code is not a "judgment of a court."

d. The Trustee's attempt to waive the default and decelerate the Notes by sending notice of same on June 4, 2014, was barred by the automatic ***184** stay under section 362(a)(3) and (6) of the Bankruptcy Code.

e. If the Court were to lift the automatic stay, *nunc pro tunc* to a date on or before the repayment of the Notes on June 19, 2014, to allow the Trustee to waive the default and decelerate the Notes than EFIH's refinancing would be an Optional Redemption under section 3.07 of the Indenture and the Applicable Premium (also referred to as Redemption Claim) would be due and owing to the non-settling Noteholders.

f. A genuine issue of material fact exists that requires a trial on the merits as to whether the Trustee can establish cause to lift the automatic stay, *nunc pro tunc* to a date on or before June 19, 2014, to allow the Trustee to waive the default and decelerate the Notes.

g. The Trustee has no claim for (i) breach of the "no-call" provision of section 3.07(c) of the Indenture; (ii) violation of the "perfect tender" rule under New York law; nor (iii) breach of the right to waive the default and decelerate the Notes.

II. FINDINGS OF FACT

9. The parties' cross-motions for summary judgment implicate various provisions in the Indenture dated August 17, 2010 governing the EFIH 10.000% Senior Secured Notes Due 2020 ("*Indenture*"). (March 2, 2015 Romanowicz Am. Decl. in Support of Defs.' Mot. for SJ (D.I. 197) ("*Romanowicz Am. Decl*."), Ex. 1) (execution version of Indenture).) That Indenture was supplemented, as of January 29, 2013, but the parties agree that the provisions of that supplement are not relevant here. Additionally, EFIH issued certain 6.875% Senior Secured Notes Due 2012, pursuant to a separate 2012 indenture. That 2012 indenture is substantially identical in all relevant aspects to the Indenture.

A. The Parties

10. Plaintiff is the indenture trustee (the "*Trustee*" or "*Indenture Trustee* ") for the 10.000% Senior Secured Notes due 2020 ("*Notes*"), representing Noteholders who did not accept a settlement offer in connection with the repayment of the Notes at the outset of these chapter 11 cases. (*See* No. 14–10979, D.I. 74.) Defendants are Energy Future Intermediate Holding Company, LLC and EFIH Finance, Inc. (collectively "*EFIH,*" the "*EFIH Debtors,*" or "*Defendants*").

11. In addition, the following parties are intervenors in this adversary proceeding: UMB, N.A., as indenture trustee for certain senior unsecured notes issued by EFIH (D.I. 13); Fidelity Management & Research Company (D.I. 14); the ad hoc committee of holders of certain unsecured EFIH toggle notes (D.I. 15); Pacific Investment Management Company LLC, investment manager for certain holders of the Notes (D.I. 16); Computershare Trust Company, N.A., and Computershare Trust Company of Canada, the indenture trustee for certain EFIH senior secured second lien notes (D.I. 19); the ad hoc group of holders of the so-called "Legacy Notes" issued by EFH Corp. (D.I. 18); the Official Committee of Unsecured Creditors of EFH Corp. and EFIH (D.I. 207); and the Official Committee of Unsecured Creditors of Energy Future Competitive Holdings Company LLC, Texas Competitive Electric Holdings Company LLC and their direct and indirect subsidiaries, and EFH Corporate Services Company (D.I. 227).

B. Negotiation of the EFIH Notes

12. In the summer of 2010, EFIH negotiated and ultimately executed a debt ***185** exchange that involved the issuance of $2.18 billion of Notes. EFIH and the so-called "Dealer Manager" investment banks, who represented the interests of the lenders who would be accepting the new Notes, were the principal negotiators of the offering and execution documents, including the governing Indenture that is at the center of the parties' cross-motions for summary judgment. (Moldovan Tr. 40:22–41:20, 47:17–21.) [5] The Indenture Trustee for the Notes was involved in this process as well; the lead negotiating parties sent the Trustee (and its counsel) drafts of key issuing documents, such as the description of the Notes and the actual global note certificate representing the 10% Note, and solicited (and accepted many of) the Trustee's proposed changes. (Moldovan Tr. 41:16–20; March 2, 2015 Madron Decl. in Support of Defs.' Memo. in Opposition to Pl.'s Mot. for SJ (D.I. 205) ("*Madron Decl*."), Exs. 19–21 (email communications transmitting draft documents to Indenture Trustee).)

13. Many terms and conditions of the Indenture were modeled on other indentures governing previous debt issuances by EFIH and EFH Corp. in 2009 and 2007, respectively. (Moldovan Tr. 143:11–20.) Like the Indenture, these previous agreements included an "Optional Redemption" provision providing for the payment of an "Applicable Premium" under certain circumstances upon an early, voluntary repayment of the Notes. (Indenture § 3.07.) Such "call protections" are common features in the indentures governing the type of high-yield debt issued by the EFH corporate family.

C. The August 2010 EFIH Debt Exchange

14. The "August 2010 Exchange" called for exchanging outstanding 11.250%/12.000% Senior Toggle Notes due 2017 and 10.875% Senior Notes due 2017 issued by EFH Corp. in 2007 and guaranteed by EFIH (the "*Old Notes*") for up to $2.18 billion aggregate principal amount of Notes, as well as an aggregate of $500 million in cash. (Press

Release (July 30, 2010), http:// www.sec.gov/Archives/edgar/ data/1023291/000119312510171555/dex992.htm.) The EFIH Debtors also announced plans to amend the indenture governing any Old Notes that would remain outstanding after the August 2010 Exchange was executed. These amendments called for eliminating substantially all of the restrictive covenants contained in the existing indenture and the Old Notes, eliminating certain events of default, and modifying covenants regarding mergers and consolidations, in addition to other changes. (*Id.*) 99.51% of the Old Notes agreed to participate in the exchange, and the requisite number of holders also agreed to the proposed amendments. (*Id.*)

15. Therefore, the EFIH Debtors issued the new EFIH Notes pursuant to the Indenture dated August 17, 2010 between EFIH and the Bank of New York Mellon Trust Company, N.A., as trustee. (Press Release (August 18, 2010), http:// www.sec.gov/Archives/ edgar/ data/1023291/000119312510191917/d8k.htm.) The Indenture is governed by New York Law. (Indenture § 13.08.) Plaintiff later succeeded Bank of New York Mellon Trust Company, N.A., as the indenture trustee.

D. Key Provisions of the Notes Indenture

16. These cross motions for summary judgment call for the Court to interpret the meaning of the Indenture, including section 3.07 ("*Optional Redemption*"), section ***186** 6.01 ("*Events of Default*"), section 6.02 ("*Acceleration*"), and the definition of "Applicable Premium" in section 1.01 ("*Definitions*"). Each is discussed below:

17. In section 3.07, the Indenture specifies what constitutes an Optional Redemption. Section 3.07(a) states:

> At any time prior to December 1, 2015, the Issuer may redeem all or a part of the Notes at a redemption price equal to 100% of the principal amount of the Notes redeemed *plus* the Applicable Premium as of, and accrued and unpaid interest to, the date of redemption (the "Redemption Date")....

(Indenture § 3.07(a).)

18. The Applicable Premium referenced in section 3.07(a) is defined in section 1.01:

> "Applicable Premium" means, with respect to any Note on any Redemption Date, the greater of: (1) 1.0% of the principal amount of such Note; and (2) the excess, if any, of (a) the present value at such Redemption Date of (i) the redemption price of such Note at December 1, 2015 (such redemption price as set forth in the table appearing under Section 3.07(d) hereof), plus (ii) all required interest payments due on such Note through December 1, 2015 (excluding accrued but unpaid interest to the Redemption Date), computed using a discount rate equal to the Treasury Rate as of such Redemption Date plus 50 basis points; over (b) the principal amount of such Note.

(*Id.* § 1.01.)

19. The Indenture also specifies certain Events of Default as well as the consequences of such Events of Default. Section 6.01 defines the various Events of Default and, relevant here, sections 6.01(a)(6) and (a)(7) specify Events of Default related to bankruptcy. In particular, section 6.01(a)(6)(i) states that an Event of Default occurs when EFIH "commences proceedings to be adjudicated bankrupt or insolvent." (*Id.* § 6.01(a)(6)(i).)

20. The acceleration clause in section 6.02 explains the consequences of this bankruptcy-caused Event of Default:

> [I]n the case of an Event of Default arising under clause (6) or (7) of Section 6.01(a) hereof [including EFIH's bankruptcy filing], all outstanding Notes shall be due and payable immediately without further action or notice.

(*Id.* § 6.02, ¶ 2.)

21. By contrast, for an Event of Default unrelated to a bankruptcy filing, the Indenture provides an option to accelerate the Notes. (*Id.* § 6.02, ¶ 1.) Specifically, for non-bankruptcy defaults, the Trustee or holders of at least 30% of the Notes "may declare the principal, premium, if any, interest

and any other monetary obligations on all the then outstanding Notes to be due and payable immediately." (*Id.*) This optional right to accelerate the Notes, however, does not apply to a bankruptcy default; instead, acceleration upon a bankruptcy default is automatic. (*Id.*)

22. Finally, in the event of an acceleration of the Notes, the Trustee possesses a qualified right effectively to decelerate the Notes through the act of rescission:

> The Holders of at least a majority in aggregate principal amount of the Notes by written notice to the Trustee may on behalf of all the Holders waive any existing Default and its consequences under the Indenture except a continuing Default in the payment of interest on, premium, if any, or the principal of any Note (held by a non consenting Holder) and rescind any acceleration with respect to the Notes and its consequences (so long as such rescission would not ***187** conflict with any judgment of a court of competent jurisdiction).

(*Id.* § 6.02, ¶ 3.)

E. EFIH's Decision to File for Chapter 11 Protection

23. One of the issues before the Court is whether the Debtors intentionally defaulted in order to avoid paying an alleged make-whole premium or other damages. Both sides assert that there is no genuine issue of material fact as to why EFIH filed bankruptcy, which gave rise to the default. As discussed below, the Court agrees; thus, this issue is appropriate for summary judgment.

i. The EFIH Debtors' Position

24. The EFIH Debtors argue that there is no genuine issue of material fact as to why EFIH filed for bankruptcy—they were running out of cash. For many months before EFIH ultimately filed for chapter 11 protection, the EFH corporate family pursued restructuring strategies that would involve seeking bankruptcy protection for TCEH but keeping EFIH out of bankruptcy. (*See, e.g.*, Pl. App'x, A–112 (May 29, 2013 EFIH Unsecured Creditors Advisor Presentation calling for recapitalizing EFIH "out-of-court"); Horton Tr. 94:17–24.) This strategy, known as "Project Olympus," was an effort to obtain the consent of key creditor constituencies to a consensual, prepackaged transaction that would minimize the amount of time spent in a restructuring, avoid potentially significant tax impacts, and maintain the EFH corporate family in one consolidated group. (8–K Filing of EFH (October 15, 2013).) This effort was ultimately unsuccessful, and all of the Debtors, including the EFIH Debtors, filed a bankruptcy petition on April 29, 2014.

25. After the company's attempts to pursue Project Olympus failed on November 1, 2013, it was clear that EFIH would have to join the rest of the EFH corporate family in filing for bankruptcy. As the company's Treasurer stated at his deposition, "We're going to have to file EFIH now regardless of what ... anyone else is saying because we're running out of cash.... Project Olympus isn't happening, ... EFIH is going to have to file...." (Horton Tr. 190:19–191:2.) EFIH's Executive Vice President and CFO further explained that by April 28, 2014, the day before EFIH filed for bankruptcy, the company had run out of cash to satisfy its interest obligations coming due on June 1 of that year. (Keglevic Tr. 52:25–53:14.) Mr. Keglevic also testified at the June 5, 2014 hearing that the DIP was needed, in part, to provide liquidity to fund operations. (Hr'g Tr. 96:14–20, 100:12–101:3 (June 5, 2014)) The EFIH Debtors did not see "any ability to issue debt or get equity to increase the amount of cash" needed to meet those interest obligations. (*Id.* 172:14–173:4.)

ii. The Trustee's Position

26. The Trustee counters at length that there is no genuine issue of material fact as to why the EFIH Debtors filed bankruptcy—it was to avoid having to pay the Applicable Premium. First, the Trustee asserts that foregoing liability on the Applicable Premium was a reason for the bankruptcy filing. Second, the Trustee counters EFIH's position that liquidity issues ultimately required EFIH to file for bankruptcy. The Trustee asserts that EFIH avoided the most obvious potential source of liquidity for EFIH outside of bankruptcy, a sale of EFIH's equity stake in its principal assets, including its interest in Oncor Holdings.

27. As discussed above, from late 2012 until November 2013, the Debtors pursued a plan known as "Project Olympus." (Horton Tr. 124:8–20.) The goal was to put TCEH into bankruptcy and convert its ***188** first-lien debt into EFH equity, but to "keep EFH and EFIH

out of bankruptcy." (Horton Tr. 94:6–95:3, 122:9–124:7; Keglevic Tr. 39:10–14.) EFIH's senior executives believed this approach made sense because they were convinced that EFIH was solvent. (Horton Tr. 125:4–13; Keglevic Affidavit at 26–28.)

28. In stage 1 of Project Olympus, EFH would raise $2 billion of equity and use it to refinance EFIH first lien, second lien and unsecured notes (the so-called "*PIK Notes*") while TCEH was in bankruptcy. (Horton Tr. 166:14–22; Horton Ex. 14 at –2605, –2606; Horton Ex. 15 at 5648.) In stage 2, after TCEH emerged from bankruptcy, all remaining EFIH first-lien and second-lien debt would be refinanced. (Horton Tr. 166:23–167:11; Horton Ex. 15 at 5648.) In both stages, EFIH would use the optional redemption provisions of the Indenture for the Notes and pay the required make-whole. (Horton Tr. 153:19–154:3, 162:25–163:22; Horton Ex. 14 at 2605, 2606; Horton Ex. 15 at 5648; Keglevic Tr. 84:22–86:25 ("To the extent we called it, we would of course follow the indenture which said a call premium was due.").) During this period, the Debtors "were continuously looking for opportunities" to "refinance the first lien debt" through an optional redemption that EFIH admits would have triggered the make-whole. (Horton Tr. 70:18–71:23, 122:12–20; Horton Ex. 9; Horton Ex. 10.) But, in the Debtors' view, any restructuring "require[d]" the "agreement" of two creditor groups: the "TCEH 1st lien creditors" and the "EFIH/ EFH unsecured creditors," i.e., the holders of the PIK Notes. (Horton Ex. 16 at 2696.)

29. In March 2013, the TCEH first-lien noteholders presented the Debtors with proposals that would put EFIH into bankruptcy. (Keglevic Tr. 87:9–88:25.) They proposed an "alternative refinancing case," in which "significant value could be unlocked" if EFIH did not pay the make-whole after it filed for bankruptcy. (Keglevic Ex. 6 at 0825); *see also* (Millstein & Co., Project Olympus Preliminary Discussion Materials May 2013, SP_MW_000000741 ("If EFIH and EFH file for bankruptcy, thereby accelerating the maturity of the EFIH debt, the Company may be able to refinance EFIH without paying make-whole premiums, resulting in substantial savings compared to the Company's forecast.").) In the view of these creditors, there was "more value through potentially going into bankruptcy and either negotiating or winning make-wholes than a settlement outside of bankruptcy." (Keglevic Tr. 90:7–17.)

30. In addition, the Debtors had proposed that the PIK noteholders convert their debt to equity. (Horton Tr. 186:9–187:25.) Those PIK noteholders evidently viewed that equity as valuable. (Ying Tr. (6/23) 120:24–123:18; Horton Tr. 188:4–189:22.) Because that equity would be more valuable if EFIH could refinance its debt without paying a make-whole, they too pushed the Debtors to contest the Noteholders' right to a make-whole. (Horton Tr. 189:11–22.)

31. On October 15, 2013, EFIH filed an 8–K with the SEC disclosing a restructuring proposal from the TCEH first-lien noteholders, in which, among other things, EFIH would file for bankruptcy and "refinance" the EFIH Notes without paying "any make-whole amount." (Horton Ex. 19 at 2–3 & Ex. 99.2; *id*. Ex. 99.2 at 1 (proposing that TCEH first-lien noteholders receive 100% of EFH equity); Horton Tr. 206:3–208:17.)

32. On October 24, 2013, the EFIH PIK noteholders sent the Debtors a restructuring proposal that likewise provided, among other things, for EFIH to file bankruptcy, refinance the Notes and "disallow ***189** ... any make-whole fee." (Horton Ex. 17 at 6084, 6088; *id*. at 6086, 6088 (proposing that PIK noteholders receive up to 94.9% of EFIH equity); Horton Tr. 191:20–197:25.)

33. The Debtors agreed that "[t]here [was] value in not paying the [make-whole]" on the EFIH First Lien Notes. (Horton Tr. 96:12–22; *see id*. 97:21–98:2.) On November 1, 2013, the Debtors filed an 8–K with the SEC disclosing their own proposal whereby, among other things, EFIH would file for bankruptcy and refinance the Notes without paying "any make-whole amount." (Horton Ex. 20 (EFIH 8–K) at 4, Ex. 99.1 at 2; Horton Tr. 184:9–23, 213:13–219:13.) This was the first time EFIH had publicly suggested that it would, or could, refinance the Notes in bankruptcy without paying a make-whole. The Debtors ultimately memorialized this plan in a Restructuring Support Agreement (the "*RSA*") with certain creditors, including the PIK noteholders, who were to receive most of the EFH equity. (Keglevic Affidavit at 71–72, 75–76; No. 14–10979, D.I. 98 (RSA term sheet) at 2–4.)

34. In the October 2012 and December 2012 dealer manager agreements for the EFIH 6.875% Notes and in the January 2013 exchange for the Notes, EFIH's executives represented to the Dealer Managers that EFIH was "solvent."[6] At no point did the Debtors conclude that EFIH's assets were worth less than its liabilities. (Horton Tr. 270:9–271:24; Keglevic Tr. 158:4–15, 169:24–170:11.) EFIH had not missed any payment on the Notes or otherwise defaulted. (Horton Tr. 80:23–81:16; Keglevic Tr. 52:17–53:14, 189:15–190:2.)

35. Before filing for bankruptcy, EFIH solicited, negotiated, and obtained commitments for, and obligated itself to pay commitment and other fees on, $5.4 billion in DIP financing. (No.14–50363, D.I. 27 ¶¶ 3, 15, 31–34.) On the Petition Date, EFIH filed and served the EFIH First Lien DIP Motion seeking authority for the DIP financing. Ultimately, EFIH obtained $5.4 billion in DIP financing, most of which it used to pay off the outstanding principal and interest (other than disputed interest) on the Notes.

36. EFIH sought authority to, and did, redeem the Notes because it had "the opportunity to pay [them] off and ... replac[e] [them] with DIP financing, ... lower[ing] the interest costs." (Keglevic Tr. 182:22–183:23.) The DIP financing bore an interest rate of 4.25% (Horton Tr. 37:1820; Keglevic Tr. 184:15–20), substantially less than the interest rate that EFIH was paying on the Notes (10% for most of the Notes; 6.875% for the rest). (Horton Tr. 37:21–25; Keglevic Tr. 184:2125). Mr. Keglevic testified that "by paying it sooner we could replace it with cheaper cost of money." (Keglevic Tr. 186:10–187:1.) The refinancing's purpose, as EFIH explained, was "to take advantage of highly favorable debt market conditions to refinance the EFIH First Lien Notes," "saving an estimated $13 million in interest per month." (No. 14–10979, D.I. 74 at 4 ¶ 4; Horton Tr. 40:9–41:13, 44:15–20, 89:11–24; Horton Ex. 5 (Goldstein Decl.) at 5 ¶ 9.)

37. On June 19, 2014, EFIH paid all outstanding principal and accrued interest ***190** (other than disputed amounts of interest and any make-whole or comparable damages) on the First Lien Notes, and the Notes were then cancelled. [7]

38. Prior to filing bankruptcy, EFIH did not market its assets to avoid bankruptcy. (Horton Tr. 226:13–228:1; Keglevic Tr. 54:16–55:21, 57:2–58:5, 60:8–61:12.) EFIH did not pursue a possible sale of its interest in Oncor because it wanted to limit the tax liabilities of a separate entity, its parent EFH. *See, e.g.,* Omnibus Tax Memorandum (No. 14–10979, D.I. 2296 at 12 ("The principal goal of all the Debtors ... was to keep EFH, TCEH, and EFIH together as a single consolidated group for federal income tax purposes and to *avoid* a taxable separation ... [that] would trigger a tax liability of potentially $7 *billion* or more for EFH.")); Ruling on Bid Procedures, Nov. 3, 2014 Tr. at 13:1–6 ("There can be no question that the debtors' proposed tax structure that calls for a complicated tax-free deconsolidation of the E side and T side of the balance sheet was the fundamental element of the RSA, and is the debtors' preferred structure for the sale of the Oncor business....".)

III. CONCLUSIONS OF LAW

A. Jurisdiction and Venue

39. The Debtors commenced these chapter 11 cases on April 29, 2014 (the "*Petition Date*"). Venue in the United States Bankruptcy Court for the District of Delaware was proper as of the Petition Date pursuant to 28 U.S.C. §§ 1408 and 1409 and continues to be so in the context of this adversary proceeding. This Court has subject matter jurisdiction over this adversary proceeding pursuant to 28 U.S.C. §§ 157 and 1334. This is a core proceeding pursuant to 11 U.S.C. § 157(b).

B. Standard for Summary Judgment

40. Federal Rule of Civil Procedure 56, made applicable to adversary proceedings by Federal Rule of Bankruptcy Procedure 7056, directs that summary judgment should be rendered if the pleadings, the discovery and disclosure materials on file, and any affidavits "show that there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *see also In re Delta Mills, Inc.,* 404 B.R. 95, 103 (Bankr.D.Del.2009). Summary judgment is designed "to avoid trial or extensive discovery if facts are settled and the dispute turns on an issue of law." *Delta Mills,* 404 B.R. at 104.

41. Here, the parties agree that there are no material facts in dispute, and that the questions necessary to resolve this proceeding are purely legal in nature. The Court mostly agrees. As discussed below, however, there is a genuine issue of material fact as to whether cause exists to lift the automatic stay, *nunc pro tunc* to a date on or before June 19, 2014, to allow the Trustee to decelerate the Notes. Otherwise, summary judgment is appropriate at this stage. *Niagara Frontier Transit Metro Sys., Inc. v. Cnty. of Erie,* 212 A.D.2d 1027, 623 N.Y.S.2d 33 (1995) (citing *W.W.W. Assoc., Inc. v. Giancontieri,* 77 N.Y.2d 157, 565 N.Y.S.2d 440, 566 N.E.2d 639, 642 (1990) ("Where the contract is unambiguous on its face, it should be construed as a matter of law and summary judgment is appropriate.")); *Green Mach. Corp. v. Zurich Am. Ins. Grp.,* No. CIV. A. 99–3048, 2001 WL 1003217, at *6 (E.D.Pa. Aug. 24, 2001) ("Whether a contract provision ***191** is ambiguous is a question of law for the court."), *aff'd sub nom. Green Mach. Corp. v. Zurich–Am. Ins. Grp.,* 313 F.3d 837 (3d Cir.2002).

C. Contract Interpretation Under New York Law

[1] **[2]** 42. Under New York law, which governs the Indenture, the Court need not look "outside the four corners" of a complete document to determine what the parties intended. *W.W.W.,* 565 N.Y.S.2d 440, 566 N.E.2d at 642; *see also R/S Assocs. v. N.Y. Job Dev. Auth.,* 98 N.Y.2d 29, 744 N.Y.S.2d 358, 771 N.E.2d 240, 242 (2002) (applying same principle). Here, neither party has alleged that the Indenture is an incomplete document, so it is not necessary to resort to extrinsic evidence to interpret it. Moreover, neither party contends that any term in the Indenture is ambiguous —instead, each party relies on its own "plain reading" of the indenture in reaching competing results. A contract is not ambiguous merely because the parties offer different constructions of the same term. *Sayers v. Rochester Tel. Corp. Supp. Mgmt. Pension Plan,* 7 F.3d 1091, 1095 (2d Cir.1993). The Court finds that the Indenture is not ambiguous.

[3] **[4]** **[5]** 43. Having reached the conclusion that the Indenture is unambiguous, the Court relies on long-recognized canons of interpretation to determine its meaning. First, "[t]he best evidence of what parties to a written agreement intend is what they say in their writing." *Schron v. Troutman Sanders LLP,* 20 N.Y.3d 430, 963 N.Y.S.2d 613, 986 N.E.2d 430, 433 (2013) (internal quotation marks and citation omitted). Second, should there be an inconsistency between a specific and general provision of a contract, the specific controls. *Muzak Corp. v. Hotel Taft Corp.,* 1 N.Y.2d 42, 150 N.Y.S.2d 171, 133 N.E.2d 688, 690 (1956); *Waldman v. New Phone Dimensions, Inc.,* 109 A.D.2d 702, 487 N.Y.S.2d 29, 31 (N.Y.1985). Third, "[a] reading of the contract should not render any portion meaningless." *See Beal Sav. Bank v. Sommer,* 8 N.Y.3d 318, 834 N.Y.S.2d 44, 865 N.E.2d 1210, 1213 (2007) (quotation marks and citations omitted); *Barrow v. Lawrence United Corp.,* 146 A.D.2d 15, 538 N.Y.S.2d 363, 365 (N.Y.1989) ("Contracts are also to be interpreted to avoid inconsistencies and to give meaning to all of its terms.").

D. The Plain Language Of The Indenture Does Not Require Payment Of The Applicable Premium

[6] 44. The Trustee seeks a declaratory judgment that EFIH's refinancing of the Notes constituted a redemption requiring payment of the Applicable Premium as a secured claim. (Compl.¶¶ 51–57, 74–76.) [8]

45. The Court begins its analysis with the most relevant provision, the acceleration provision of section 6.02 of the Indenture. Under section 6.02, "in the case of an Event of Default arising under clause (6) or (7) of Section 6.01(a) hereof, all outstanding Notes shall be due and payable immediately without further action or notice." Here, EFIH's filing for bankruptcy was an Event of Default arising under clause (6) of Section 6.01(a). Thus, the Notes were automatically accelerated on the Petition Date and became due and payable immediately without further action ***192** or notice of the Trustee or any Noteholder. (Indenture § 6.02, ¶ 2.)

46. There is no reference in Section 6.02 to the payment of the "Applicable Premium" upon an automatic acceleration, nor is section 3.07 incorporated into section 6.02. The parties included the concept of an Applicable Premium in only one instance (an optional redemption under section 3.07). It is not mentioned in section 6.02 or anywhere else in the Indenture.

[7] 47. Under New York law, an indenture must contain express language requiring payment of a prepayment premium upon acceleration; otherwise, it is not owed. *See Northwestern Mut. Life Ins. Co. v. Uniondale Realty Assocs.,* 11 Misc.3d 980, 816 N.Y.S.2d 831, 836 (N.Y.Sup.Ct.2006) ("A prepayment premium will not be enforced under default circumstances in the absence of a clause which so states."); *In re South Side House, LLC,* 451 B.R. 248, 268 (Bankr.E.D.N.Y.2011) ("[A] lender is not entitled to prepayment consideration after a default unless the parties' agreement expressly requires it."), *aff'd U.S. Bank Nat'l Ass'n v. South Side House, LLC,* No. 11–4135, 2012 WL 273119 (E.D.N.Y. Jan. 30, 2012); *In re Premier Entm't Biloxi LLC,* 445 B.R. 582, 626; Hr'g Tr. 36:9–14, *In MPM Silicones, LLC, et al.,* No. 14–22503, 2014 WL 4436335, at *13–14 (Bankr.S.D.N.Y. Sept. 9, 2014) ("*Momentive*").

[8] 48. The parties certainly could have bargained for such a provision. In many other cases—including cases decided before August of 2010, when this Indenture was negotiated —clauses specifically requiring post-acceleration payment of a make-whole, prepayment premium, or certain costs were upheld. *See, e.g., United Merchs. & Mfgrs., Inc. v. Equitable Life Assurance Soc'y of the United States (In re United Merchs. & Mfrs., Inc.),* 674 F.2d 134, 141–43 (2d Cir.1982); *Parker Plaza W. Partners v. UNUM Pension & Ins. Co.,* 941 F.2d 349, 355–56 (5th Cir.1991); *Teachers Ins. & Annuity Ass'n of Am. v. Butler,* 626 F.Supp. 1229, 1230 (S.D.N.Y.1986); *In re AE Hotel Venture,* 321 B.R. 209, 217–

20 (Bankr.N.D.Ill.2005); *In re Vanderveer Estates Holdings, Inc.*, 283 B.R. 122, 126–27 (Bankr.E.D.N.Y.2002); *In re Fin. Ctr. Assocs. of E. Meadow L.P.*, 140 B.R. 829, 834–35 (Bankr.E.D.N.Y.1992); *In re Schaumburg Hotel Owner*, 97 B.R. 943, 952–54 (Bankr.N.D.Ill.1989). The Indenture here was negotiated at arm's length between sophisticated parties who were represented by counsel. The Court is unwilling to "read[ ] into agreements between sophisticated parties provisions that are not there." *In re Solutia*, 379 B.R. 473, 485 n.7 (Bankr.S.D.N.Y.2007). [9]

[9] 49. The EFIH Debtors' reading is also correct based on well-accepted canons of contract interpretation. Under established principles of New York law, "a specific provision ... governs the circumstance to which it is directed, even in the face of a more general provision." *In re AMR Corp.*, 730 F.3d 88, 99 (2d Cir.2013) (citation omitted), *cert denied*, ––– U.S. ––––, 134 S.Ct. 1888, 188 L.Ed.2d 913 (2014); *Muzak Corp.*, 150 N.Y.S.2d 171, 133 N.E.2d at 690 ("Even if there was an inconsistency between a specific provision and a general provision of a contract (we find none), the specific provision controls." ***193**). As the Second Circuit has reasoned, "[i]n analyzing whether a Make–Whole Amount is due, the Court turns first to the provision of the Indentures that most specifically addresses the circumstances before the Court. That provision is Section 4.01(g), which provides that the filing of a voluntary bankruptcy constitutes an event of default." *In re AMR Corp.*, 485 B.R. 279, 289 (Bankr.S.D.N.Y.2013), *aff'd* 730 F.3d 88 (2d Cir.2013). Here, that specific provision is section 6.02. Nowhere in section 6.02 is there a reference to Applicable Premium, to Optional Redemption, section 3.07, or anything that would support the Trustee's position that the Applicable Premium is owed upon a bankruptcy event of default and acceleration.

50. Comparing the relevant language in the governing Indenture with language from other cases compels the conclusion that the Indenture does not provide for a make-whole premium following a bankruptcy acceleration.

- ***Calpine***: "In the case of an Event of Default specified in clause (10) or (11) of Section 6.01 [which includes a bankruptcy filing], ***all outstanding Notes will become due and payable immediately without further action or notice.***" (Romanowicz Decl., Ex. 2 § 6.02 ¶ 1, *In re Calpine Corp.*, No. 05–60200, 2007 WL 950090 (Bankr.S.D.N.Y.2007) (Dkt. No. 3481–4), overruled by *HSBC Bank USA, N.A. v. Calpine Corp.*, No. 07–3088, 2010 WL 3835200 (S.D.N.Y. Sept. 15, 2010) (emphasis added)); *HSBC Bank USA, N.A. v. Calpine Corp.*, No. 07–3088, 2010 WL 3835200, at *4–*5 (S.D.N.Y. Sept. 15, 2010) ("Calpine II").

- ***Premier***: "In the case of an Event of Default specified in clause (j) [commencement of a voluntary bankruptcy case] ... of § 6.01 hereof, with respect to Premier ... *all outstanding Notes will become due and payable immediately without further action or notice*." (Romanowicz Decl., Ex. 3, at 73 (§ 6.02 ¶ 2), *In re Premier Entm't Biloxi LLC*, 445 B.R. 582 (Bankr.S.D.Miss.) (Dkt. No. 6–1 to –3) (emphasis added)); *In re Premier Entm't Biloxi LLC*, 445 B.R. at 626–632.

- ***Momentive***: "If an Event of Default specified in Section 6.01(f) or (g) [which includes a bankruptcy filing] with respect to the Company occurs, *the principal of, premium, if any, and interest on all the Notes shall ipso facto become and be immediately due and payable without any declaration or other act* on the part of the Trustee or any Holders." (Romanowicz Decl., Ex. 5, at 92, *In re MPM Silicones, LLC*, et al., No. 14–22503 (Bankr.S.D.N.Y. June 18, 2014) (Dkt. No. 464–1) (emphasis added)); *Momentive*, 2014 WL 443635, at *13–14.

- ***Solutia***: "If an Event of default specified in 6.01(7) occurs with respect to the Company or any Subsidiary Guarantor [which includes filing a bankruptcy petition] *the principal of and premium, if any, and accrued interest, if any, on the Notes then outstanding shall become and be immediately due and payable without any declaration or other act* on the part of the Trustee or any Holder.' " (Romanowicz Decl., Ex. 4, at 11/70 (§ 6.02 ¶ 1), *In re Solutia*, 379 B.R. 473 (Bankr.S.D.N.Y.2007) (Dkt. No. 4211–1 to –2) (emphasis added)); *In re Solutia Inc.*, 379 B.R. at 488.

51. In each of these cases, the court found no make-whole obligation was created by acceleration provisions substantially similar to the language before the Court. The Court agrees with the holdings in these cases and finds that the acceleration provision in the Indenture does not include ***194** clear and unambiguous language that a make-whole premium (here the "Applicable Premium") is due upon the repayment of the Notes following a bankruptcy acceleration. Because the Indenture does not specify that the Applicable Premium is owed after automatic acceleration, the Applicable Premium is not owed.

52. In contrast, the Trustee's reading of the Indenture does not give meaning to each provision. Both parties have argued that the Indenture must be read as a whole giving meaning to each provision. The Court agrees. *See Beal Sav. Bank v. Sommer*, 8 N.Y.3d 318, 834 N.Y.S.2d 44, 865 N.E.2d 1210, 1213 (2007) (A reading of the contract should not render any portion meaningless.") (citations omitted); *Barrow v. Lawrence United Corp.*, 146 A.D.2d 15, 538 N.Y.S.2d 363, 365 (N.Y.1989) ("Contracts are also to be interpreted to avoid inconsistencies and to give meaning to all its terms."). A review of section 3.07, one of the sections upon which the Trustee heavily relies, does not change the Court's reading of section 6.02. The Trustee argues that section 3.07, the "Optional Redemption" provision, is a wholesale bar to any repayment before December 1, 2015. This reading is strained for a number of reasons.

53. As an initial matter, the Trustee looks to Article 3, "Redemption," instead of Article 6, "Defaults and Remedies," to determine the Debtors' obligations and the Trustee's remedies upon a default. This defies the canons of contract interpretation. Further, the Trustee asks this Court to conclude, contrary to New York law, that because section 3.07 does not include language expressly disclaiming the effect of section 6.02, section 3.07 must control.[10] This argument fails on the same grounds.

54. "Optional Redemption" under section 3.07 is an act separate and apart from automatic acceleration. This is evident in part from the noticing scheme outlined in Article 3, "Redemption." (*See* Indenture §§ 3.01–3.06 (requiring written notice prior to redemption and outlining procedures for same).) This noticing scheme specifies a detailed process for advance notice of redemption, including the "Redemption Date," the Notes to be redeemed, and more. No part of this notice process is required to be followed when the Notes become "due and payable immediately without further action or notice" under section 6.02.

55. In other words, under the Indenture, redemption and acceleration are not the same thing. The Indenture in various places distinguishes between the two concepts:

- "(a) An 'Event of Default' ... means ... (1) default in payment when due and payable, upon *redemption, acceleration* or otherwise, of principal, or premium, if any, on the Notes...." (Indenture § 6.01(a)(1) (emphasis added).)

- "The due and punctual payment of the principal, premium, if any, and interest on the Notes when and as the same shall be due and payable, whether on an Interest Payment Date, at maturity, by *acceleration*, repurchase, *re* ***195** *demption* or otherwise...." (*Id.* § 10.04 (emphasis added).)

- "[T]he principal, premium, if any, and interest on the Notes shall be promptly paid in full when due, whether at maturity, by *acceleration, redemption* or otherwise...." (*Id.* § 11.01 (emphasis added).)

[10] **[11]** 56. When the EFIH Debtors filed for bankruptcy, the Notes automatically accelerated and became due and payable immediately. Under New York law, "a borrower's repayment after acceleration is not considered voluntary." *South Side*, 451 B.R. at 268; *see also AMR*, 730 F.3d at 103 (rejecting the claim that an accelerated repayment was a "voluntary redemption"). This is because "[a]cceleration moves the maturity date from the original maturity date to the acceleration date and that date becomes the new maturity date." *Solutia*, 379 B.R. at 484.

[12] 57. "Prepayment can only occur prior to the maturity date," *Id.* at 488 (emphasis omitted), and "acceleration, by definition, advances the maturity date of the debt so that payment thereafter is not prepayment but instead is payment made after maturity." *In re LHD Realty Corp.*, 726 F.2d 327, 330–31 (7th Cir.1984). "Once the maturity date is accelerated to the present, it is no longer possible to prepay the debt before maturity." *Northwestern Mutual*, 816 N.Y.S.2d at 834 (quoting *Rodgers v. Rainier Nat'l Bank*, 111 Wash.2d 232, 757 P.2d 976 (1988)); *see also Solutia*, 379 B.R. at 488 ("Because the 2009 Notes were automatically accelerated, any payment at this time would not be a prepayment."). Acceleration therefore "does not trigger the [Trustee's] right to prepayment consideration" under the Optional Redemption provision. *South Side*, 451 B.R. at 268. Thus, the Trustee's claim that the EFIH Debtors' repayment was an optional redemption must fail. For these reasons, the Trustee is not entitled to an Applicable Premium.

E. The EFIH Debtors' Bankruptcy Filing Was Not An Intentional Default Under The Indenture

[13] 58. The Trustee also seeks judgment for an allowed secured claim arguing that EFIH's default was done with intent to deny the Trustee the Applicable Premium. (Compl.¶¶

58–65, 74–76.) The Court disagrees with the Trustee that it would be entitled to any relief.

59. First, unlike in some cases, the Indenture does not contain a provision stating that a premium will be owed if EFIH intentionally causes an event of default to avoid paying the Applicable Premium. *Compare with Premier,* 445 B.R. at 591 ("If an Event of Default occurs ... by reason of any willful action ... with the intention of avoiding the prohibition on redemption of the Notes ... an additional premium shall also become due."); and *South Side,* 451 B.R. at 269–70 ("[P]arties may agree that a borrower's repayment of the debt after acceleration ... will be deemed an evasion of the parties' prepayment agreement.")

60. Second, the Trustee has the burden of supplying "sufficient evidence (not mere allegations)" for a reasonable factfinder to conclude that the EFIH Debtors intentionally defaulted. *United States v. Jamas Day Care Ctr. Corp.,* 152 Fed.Appx. 171, 173 (3d Cir.2005) (quoting *Olson v. General Elec. Astrospace,* 101 F.3d 947, 950 (3d Cir.1996)). A material fact is one that could "alter the outcome of the case." *Argus Mgmt. Group v. GAB Robins, Inc. (In re CVEO Corp.),* 327 B.R. 210, 214 (Bankr.D.Del.2005) (quoting *Horowitz v. Fed. Kemper Life Assurance Co.,* 57 F.3d 300, 302 n. 1 (3d Cir.1995)). It is genuine when it is "triable," that is, when reasonable minds could disagree on the result. ***196** *Id.* at 210 (quoting *Matsushita Elec. Indus Co. v. Zenith Radio Corp.,* 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986)).

61. Viewing all factual inferences in a light most favorable to the Trustee, its argument is nonetheless insufficient to create a genuine issue of material fact as to why the EFIH Debtors filed bankruptcy. While it is certainly the case that the EFIH Debtors planned pre-petition and followed through after filing bankruptcy to use the default created by that filing to refinance the Notes without having to pay the Applicable Premium, that is not enough to counter the overwhelming evidence that the Debtors filed bankruptcy because they were facing a severe liquidity crisis. The collapse of Project Olympus doomed a T-side only bankruptcy and to suggest that the Debtors refused to market and sell Oncor, which may be worth $18 billion, to avoid having to pay a $400 million make-whole premium stretches the bounds of credulity. The EFIH Debtors are no different than any other debtor that is forced into bankruptcy because of financial reasons but decides to use the tools provided by that bankruptcy, such as the power to reject unprofitable leases, for business reasons. The Trustee has presented insufficient evidence to rebut that put forth by the EFIH Debtors. There is no genuine issue of material fact—the EFIH Debtors did not file bankruptcy in an intentional effort to default under the Indenture so that the Applicable Premium would not be due.

F. The Trustee's Right To Rescind Acceleration

62. The Trustee asserts that the Noteholders had an "absolute right" to rescind the automatic acceleration of the Notes. Based on this theory, the Trustee also seeks a declaratory judgment that it is entitled to an allowed secured claim in the amount of the Applicable Premium, for breach of the alleged right to rescind. (Compl. 11 69, 73.) The Trustee's qualified right of rescission raises a number of issues.

i. The Trustee's right to rescind the acceleration of the Notes is not barred because the automatic stay under section 362 of the Bankruptcy Code is not a "judgment of a court."

[14] 62. First, while the Trustee has the right under Section 6.02 of the Indenture to waive the automatic default arising from the EFIH Debtors' bankruptcy filing and rescind the acceleration of the Notes, that right is not absolute. Section 6.02 of the Indenture, the relevant provision, reads:

> The Holders of at least a majority in aggregate principal amount of the Notes by written notice to the Trustee may on behalf of all the Holders waive any existing Default and its consequences under the Indenture except a continuing Default in the payment of interest on, premium, if any, or the principal of any Note (held by a non consenting Holder) and rescind any acceleration with respect to the Notes and its consequences (*so long as such rescission would not conflict with any judgment of a court of competent jurisdiction*).

(Indenture § 6.02, ¶ 3 (emphasis added).)

64. Thus, the Trustee may not rescind acceleration of the Notes if so doing would "conflict with any judgment of a court of competent jurisdiction." The EFIH Debtors argue that the right to rescind incorporates and is expressly limited

by judicial orders, including the automatic stay. *In re Gruntz,* 202 F.3d 1074, 1082 (9th Cir.2000) ("The automatic stay is an injunction issuing from the authority of the bankruptcy court, and bankruptcy court orders are not subject to collateral attack in other courts."); ***197** *In re San Angelo Pro Hockey Club, Inc*., 292 B.R. 118, 124 (Bankr.N.D.Tex.2003) ("The automatic stay is self-executing injunction, and therefore, for contempt purposes, constitutes an order issuing from the bankruptcy court.").

[15] 65. The Court disagrees. The automatic stay is not a "judgment of a court of competent jurisdiction." It is prescribed by statute, not by any court, and applies in every bankruptcy case automatically without any court order. *See* 11 U.S.C. § 362(a); *In re James,* 257 B.R. 673, 678 (8th Cir. BAP 2001) ("[T]he stay is a statutory provision and not a court order [.]"); *In re Alberts,* 381 B.R. 171, 176 (Bankr.W.D.Pa.2008) ("The 'automatic stay' is a statutory injunction ... that ... arises without ... court order."). Nor is the automatic stay a "judgment" under New York law, which provides that a judgment is "the determination of the rights of the parties in an action or special proceeding," N.Y. CPLR § 5011, and is appealable as of right. [11] N.Y. CPLR § 5701(a)(1). The fact that a bankruptcy filing gives rise to an automatic stay, by contrast, cannot be appealed.

Thus, the Trustee's right to rescission is not barred by section 6.02 of the Indenture as a result of the imposition of the automatic stay. [12]

ii. The automatic stay bars the Trustee's rescission notice.

[16] 67. Second, the automatic stay bars the Trustee's rescission notice of June 4, 2014. Upon filing its voluntary chapter 11 petition, EFIH's assets, including its rights under the Indenture, became subject to the automatic stay. 11 U.S.C. § 362(a). Sending a notice of rescission is an act to "collect, assess or recover" on a claim, especially when the Noteholders have already been paid their full principal and accrued interest. *Id*. § 362(a)(6); *see also Momentive*, 2014 WL 4436335, at *19 ("[T]he automatic stay does, in fact, apply to the sending of a rescission notice."); *AMR Corp*., 485 B.R. at 294 ("Any deceleration of these notes, however, is barred by the automatic stay imposed by the filing of this bankruptcy."), *aff'd* 730 F.3d 88 (2d Cir.2013); *Solutia*, 379 B.R. at 485 ("[W]here the indenture provides for an automatic acceleration any attempt at deceleration would violate the automatic stay.").

iii. If the Court were to lift the automatic stay the Applicable Premium would be due.

68. Third, if the Court were to lift the automatic stay, *nunc pro tunc* to a date on or before the repayment of the Notes on June 19, 2014, to allow the Trustee to waive the default and decelerate the Notes than EFIH's refinancing would be an Optional Redemption under section 3.07 of the Indenture and the Applicable Premium would be due and owing to the non-settling Noteholders.

69. Had EFIH refinanced the debt on the same day (June 19, 2014), on the same terms, outside of bankruptcy, on which it redeemed the Notes in bankruptcy, it would have owed the Applicable Premium. ***198** The only thing that stands in the way of owing the Applicable Premium is that the bankruptcy caused an automatic default that accelerated the debt. The Trustee, however, had the right to waive that default and decelerate the Notes, which it attempted to do by sending a rescission notice on June 4, 2014. That notice, however, was void *ab initio* as a result of the automatic stay. Were the Court, however, to lift the automatic stay, *nunc pro tunc* to a date on or before June 19, 2014, to allow the Trustee's rescission notice to take effect then the automatic default would be waived, the Notes would no longer be immediately due and the refinancing would require payment of the Applicable Premium.

70. Were the Court, however, either not lift the stay or do so, but not *nunc pro tunc* to a date on or before June 19, 2014, the date the Notes were paid, then the Applicable Premium would not have been owed at the time the Notes were paid in full. At most, the Trustee and the Noteholders would have a damages claim for denial of the rescission right. Whether such a claim exists is discussed below.

iv. A genuine issue of material fact exists as to whether the Trustee can establish cause to lift the automatic stay.

[17] 71. Fourth, a genuine issue of material fact exists as to whether the Trustee can establish cause to lift the automatic stay, *nunc pro tunc* to a date on or before June 19, 2014, to allow the Trustee to waive the default and decelerate the Notes, i.e., to give effect to the June 4, 2014 notice.

72. The Stay–Applicability Motion requests a determination that the automatic stay would not bar the Noteholders from rescinding acceleration or, in the alternative, that the stay should be lifted. The Court has already held that the automatic stay applies to the June 4 rescission notice. There is a genuine issue of material fact precluding summary judgment as to whether cause exists to lift the automatic stay.

[18] **[19]** 73. The Bankruptcy Code authorizes bankruptcy courts to grant relief from the stay for "cause." 11 U.S.C. § 362(d)(1). Courts are to determine "cause" based on the totality of the circumstances in each particular case. *In re Wilson,* 116 F.3d 87, 90 (3d Cir.1997). The factors courts generally use in determining whether cause exists are (1) whether any great prejudice to either the bankrupt estate or the debtor will result from a lifting of the stay; (2) whether the hardship to the non-bankrupt party by maintenance of the stay considerably outweighs the hardship to the debtor; and (3) the probability of the creditor prevailing on the merits. *In re Downey Fin. Corp.,* 428 B.R. 595, 609 (Bankr.D.Del.2010).

[20] 74. The Trustee argues that, as a matter of law, cause exists to lift the automatic stay because at this stage of the proceedings the EFIH Debtors are presumed to be solvent. The Trustee cites to a number of cases in support of its argument. *See, e.g., Claughton v. Mixson,* 33 F.3d 4 (4th Cir.1994); and *In re Texaco, Inc.,* 81 B.R. 804 (Bankr.S.D.N.Y.1988). These cases do not stand for the proposition that a debtor's solvency is, as a matter of law, cause to lift the automatic stay. While a debtor's solvency may, in certain cases, be a relevant consideration in determining whether cause exists to lift the automatic stay it is not the sole factor to be considered by the Court.

75. The Trustee further argues that lifting the automatic stay would not prejudice either the bankruptcy estate or the debtor because doing so would simply hold the EFIH Debtors to their bargain and ***199** there can be no harm to a solvent estate. The Court disagrees. Several courts have held that lifting the automatic stay to trigger liability under a make-whole claim may harm a debtor or its estate and that analysis does not depend solely on whether that estate is insolvent. *See, e.g., In re AMR Corp.,* 485 B.R. 279, 295 (Bankr.S.D.N.Y.2013); *In re AMR Corp.,* 730 F.3d 88, 112 (2d Cir.2013), and *Momentive,* 2014 WL 4436335, at *23. Moreover, "denial" of the Noteholders' contractual right to rescission does not, in and of itself, establish cause to lift the automatic stay.

76. While the Trustee cannot meet its burden on summary judgment that cause exists to lift the stay, the Court cannot hold on summary judgment, as urged by the EFIH Debtors, that cause does not exist. In short, there is a genuine dispute of material fact as to whether cause exists to lift the automatic stay.

G. The Trustee has no claim for (i) breach of the 'no-call" provision of section 3.07(c) of the Indenture; (ii) violation of the "perfect tender" rule under New York law; nor (iii) breach of the right to waive the default and decelerate the Notes.

77. The Trustee asserts claims for various breaches of the Indenture. No such claims exist.

i. Breach of no-call provision

[21] 78. The Trustee argues it should be entitled to a claim for damages arising from the Debtors' breach of section 3.07(c) of the Indenture's No–Call Provision. (Compl.¶¶ 74–76.) The Court disagrees.

79. As an initial matter, the Trustee appears to concede that section 3.07(c) is *not* a "no-call" provision prohibiting repayment. (Pl.'s Memo. in Support of Mot. for SJ 66. ("*Pl. Br.*").) The Trustee characterizes 3.07(c) as requiring payment of a make-whole premium if the Notes are repaid (under any circumstances) before December 1, 2015. But Section 3.07(c) provides only that redemptions at the EFIH Debtors' option, as defined by that section, require paying the Applicable Premium.

80. The court in *Momentive* analyzed a nearly identical provision. The indenture there provided: "the Note shall not be redeemable at the option of MPM prior to October 15, 2015," which language, the court found, was "no more than an introduction or framing device for the notes' elective redemption provisions." *Momentive,* 2014 WL 4436335, at *16. The same is true here.

81. Because the Notes were not optionally redeemed, section 3.07(c) does not apply, and the Court finds that the Trustee is not entitled to damages based on a breach of "no-call" theory.

ii. "Perfect Tender" claim

82. The Trustee also asserts that repayment pursuant to section 6.02 of the Indenture breached New York's common-law "perfect tender" rule. (Pl.Br.66–67.) The Court disagrees.

[22] 83. Under the perfect tender" rule, "a [borrower] has no right to pay off his obligation prior to its stated maturity date in the absence of a prepayment clause." *Arthur v. Burkich,* 131 A.D.2d 105, 106, 520 N.Y.S.2d 638 (N.Y.1987). The Trustee claims that section 6.10 of the Indenture ("Rights and Remedies Cumulative"), which states that "every right and remedy shall, to the extent permitted by law, be cumulative and in addition to every other right and remedy," requires this Court to find the EFIH Debtors liable for damages under the rule of perfect tender.

[23] 84. In a subsequent opinion, the *Momentive* court explained that the perfect tender rule does not apply if, as was ***200** the case there, the indenture modified the common-law rule. Bench Ruling Tr. 16:19–17:9, *In re MPM Silicones, LLC, et al.,* 518 B.R. 740 (Bankr.S.D.N.Y.2014) (Dkt. No. 60).) The Court agrees. Section 6.02 of the Indenture makes payment of the Notes automatic and mandatory before the Notes' stated maturity. This provision directly modifies the common-law "perfect tender" rule, and the Trustee therefore is not entitled to damages.

iii. Claim for denial of right of rescission

[24] 85. The Trustee also argues that it is entitled to a claim for the denial of the right to rescind acceleration, which constituted a breach of the Indenture giving rise to damages in the amount of the make-whole that the Noteholders would have been entitled to receive if their contractual right to rescind had been honored. The Court disagrees.

86. Oversecured creditors have allowed claims for "reasonable fees, costs, or charges" when those amounts are "provided for under the agreement ... under which such claim arose." *See* 11 U.S.C. § 506(b). The Indenture here does not provide for any fee, cost, or charge for breach of the purported right to rescind. The Trustee merely asserts a vague claim for damages arising out of its inability to decelerate the Notes.

[25] 87. As several courts have explained, secured claims are not allowed for breach of contract damages unless those damages are specifically provided for in the Indenture. For example, in *Continental Securities* the lender sought damages for the alleged breach of a no-call provision. *Cont'l Secs. Corp. v. Shenandoah Nursing Home P'ship,* 188 B.R. 205, 215 (W.D.Va.1995), *aff'd,* 104 F.3d 359 (4th Cir.1996) (per curiam). The court denied the secured claim, however, because the note there did not include any penalty provision for breach of the no-call provision. *Id.* Similarly, in *Vest Associates* a lender acknowledged that the note at issue did not provide for a make-whole premium upon post-acceleration repayment, but the lender nonetheless asserted a secured claim for the adverse tax consequences allegedly caused by the prepayment. *In re Vest Assocs.,* 217 B.R. 696, 699 (Bankr.S.D.N.Y.1998). The court denied the claim because the damages sought were not provided for in the loan agreement. *Id.* Here, as in *Continental* and in *Vest,* the damages sought for the asserted breach of the alleged right to rescind are not set forth in the Indenture, and they cannot therefore be allowed as a secured claim.

88. The cases the Trustee cites are inapposite. *See In re Rodriguez,* 629 F.3d 136, 141–42 (3d Cir.2010) (finding that underlying agreement provided for an enforceable state law claim); *In re Chemtura Corp.,* 439 B.R. 561, 603 (Bankr.S.D.N.Y.2010) (noting first the requirement that a claim must be valid under applicable non-bankruptcy law).

H. Counts I–IV of the Complaint

89. Before the Court are cross motions for summary judgment on the Complaint filed by the Trustee. Having addressed the relevant factual and legal issues raised by the parties, the Court now turns to the Complaint.

i. Count I

90. Count I of the Complaint seeks a declaratory judgment that the EFIH Debtors' refinancing of the Notes constitutes a redemption under section 3.07 of the Indenture requiring payment of the Applicable Premium as an allowed secured claim. (Compl.¶¶ 51–57.) The Court has held that where, as here, the Notes were paid following an acceleration under section ***201** 6.02 of the Indenture arising from a default for the commencement of "proceeding to be adjudicated bankrupt or insolvent" under section 6.01(a)(6)(i) of the Indenture, the plain language of the Indenture does not require payment of an Applicable Premium. The Court has also held that if it were to lift the automatic stay, *nunc pro tunc* to a date on or before the repayment of the Notes on June 19, 2014, to allow the Trustee to waive the default and decelerate the Notes than EFIH's refinancing would be an

Optional Redemption under section 3.07 of the Indenture and the Applicable Premium would be due and owing to the non-settling Noteholders. As a result, were the Court to grant relief from the automatic stay as outlined above, it could enter judgment in favor of the Trustee on Count I. Thus, the Court will grant summary judgment in favor of the EFIH Debtors on Count I of the Complaint without prejudice to the Court's right to reinstate Count I and enter judgment in favor of the Trustee if, and only if, the Court deems it appropriate upon entry of an order lifting the automatic stay, *nunc pro tunc* to a date on or before the repayment of the Notes on June 19, 2014, to allow the Trustee to waive the default and decelerate the Notes.

ii. Count II

91. Count II of the Complaint seeks a declaratory judgment that the EFIH Debtors' default under the Notes with an intent to deny payment of the Applicable Premium requires payment of the Applicable Premium as an allowed secured claim. (Compl.¶¶ 58–65.) The Court has held that the EFIH Debtors did not file bankruptcy in an intentional effort to default under the Indenture so that the Applicable Premium would not be due. Thus, the Court will enter summary judgment in favor of the EFIH Debtors on Count II of the Complaint.

iii. Count III

92. Count III of the Complaint seeks a declaratory judgment that the EFIH's Debtors' denial of the Noteholders' right to rescind acceleration of the Notes under section 6.02 of the Indenture gives rise to an allowed secured claim. (Compl.¶¶ 66–73.) The Court has held that while the Noteholders have a right of rescission under section 6.02 of the Indenture their attempt to exercise that right was a violation of the automatic stay. As such, there can be no claim for breach of contract arising from operation of the automatic stay. Moreover, secured claims are not allowed for breach of contract damages unless those damages are specifically provided for in the Indenture, which is not the case here. Thus, the Court will enter summary judgment in favor of the EFIH Debtors on Count III of the Complaint

iv. Count IV

93. Count IV of the Complaint seeks a declaratory judgment that EFIH's refinancing gives rise to an unsecured claim for the same reasons set forth in Counts I–III as well as for breach of section 3.07(c) of the Indenture's "no-call" provision, violation of New York's "perfect tender rule" and denial of the right to rescission. (Compl.¶¶ 74–76.) The Court has ruled that the EFIH Debtors' are entitled to summary judgment on Counts I–III (although without prejudice as to Count I) and there is no claim for breach of section 3.07(c) of the Indenture's "no-call" provision, violation of New York's "perfect tender rule" and denial of the right to rescission. The sole avenue for relief in connection with the denial of the right to rescission is to seek relief from the automatic stay, which, if granted, might give rise to a claim under Count I. Thus, the Court will grant summary judgment in favor of the EFIH Debtors on Count IV of the Complaint.

***202 I. The Stay–Applicability Motion**

94. The parties have also sought summary judgment on the Stay–Applicability Motion, which requests a determination that the automatic stay would not bar the Noteholders from rescinding acceleration or, in the alternative, that the stay should be lifted to give effect of the rescission. The Court has held that the right of rescission is not barred by the automatic stay but the issuance of the notice of rescission was a stay violation and void *ab initio*. The Court has further held that if it were to lift the automatic stay, *nunc pro tunc* to a date on or before the repayment of the Notes on June 19, 2014, to allow the Trustee to waive the default and decelerate the Notes than EFIH's refinancing would be an Optional Redemption under section 3.07 of the Indenture and the Applicable Premium would be due and owing to the non-settling Noteholders. In that instance, the Court could reinstate Count I of the Complaint, which is why summary judgment on Count I is being granted in favor of the EFIH Debtors without prejudice. Finally, the Court has held that a genuine issue of material fact exists as to whether the Trustee can establish cause to lift the automatic stay. Thus, the Court will grant summary judgment, in part, in favor of the EFIH Debtors on the Stay–Applicability Motion in that the automatic stay is applicable and the issuance of the notice of rescission was a stay violation. The Court will not grant summary judgment in favor of either party on the Stay–Applicability Motion on the issue of whether the Trustee can establish cause exists to lift the automatic stay.

IV. CONCLUSION

95. For the reasons and to the extent set forth above, the EFIH Debtors' motion for summary judgment is granted, in part, and denied, in part, and the Trustee's motion for summary judgment is denied in its entirety. Summary judgment is entered in favor of the EFIH Debtors on Counts I–IV of the Complaint, provided, however, that entry of summary judgment on Count I of the Complaint is without prejudice, summary judgment is entered, in part, in favor of the EFIH Debtors on the Stay–Applicability Motion, and summary judgment is not entered on the Stay–Applicability Motion solely to the issue of whether cause exists to lift the automatic stay.

96. An order will be issued.

Footnotes

1 The Court hereby makes the following findings of fact and conclusions of law pursuant to Fed. R. Bank. P. 7052, which is applicable to this matter by virtue of Fed. R. Bankr. P. 9014. To the extent any findings of fact constitute conclusions of law, they are adopted as such. To the extent any conclusions or law constitute findings of fact, they are adopted as such.

2 Capitalized terms in the Introduction and Procedural History section not otherwise defined in this section are defined below.

3 The non-settling Noteholders appealed the Court's Order approving the EFIH First Lien Settlement. The district court, in an order dated February 19, 2015, affirmed this Court's Order and dismissed the non-settling Noteholders' appeal. (No. 14–00723, D.I. 50 (D.Del. 2015).)

4 References in this opinion to "D.I.," without further description, shall refer to docket entries in this adversary proceeding, No. 14–50363.

5 Deposition transcripts referenced herein are cited as "Deponent Tr. Page:line"

6 *See* Horton Tr. 129:12–135:23, 151:23–152:22, 162:15–24, 176:12–177:15, 181:6–17; Keglevic Tr. 153:3–8, 162:23163:18, 174:22–175:6, 207:13–208:1; Horton Ex. 13 (Oct. 18, 2012 dealer manager agreement) at 0018, 0030 (EFIH representation that it is solvent); Keglevic Ex. 9 (EFIH Dec. 21, 2012 dealer manager agreement) at 9706 (EFIH representation that it is solvent); Horton Ex. 14 (Feb.2013 presentation) at 2554 (referring to a "solvent" EFIH); Horton Ex. 15 (March 2013 presentation) at 5602 (same).

7 No. 14–10979, D.I. 859 (DIP Financing Order) ¶ 12 (directing Trustee to reduce Notes in customary manner following payment).

8 A secured claim is allowable only if, in the first instance, it is "provided for under the agreement ... under which such claim arose." 11 U.S.C. § 506(b); *see id.* § 502(b); *HSBC Bank USA, N.A. v. Calpine Corp.,* No. 07–3088, 2010 WL 3835200, at *5 (S.D.N.Y. Sept. 15, 2010) (citing *Travelers Cas. & Sur. Co. of Am.,* 549 U.S. 443, 450, 127 S.Ct. 1199, 167 L.Ed.2d 178 (2007)).

9 Because this Court does not find that an ambiguity exists, it is not necessary to consider the question whether the Indenture need to be construed against the EFIH Debtors. *Wallace v. 600 Partners Co.,* 86 N.Y.2d 543, 634 N.Y.S.2d 669, 658 N.E.2d 715, 717 (1995) ("The rules governing the construction of ambiguous contracts are not triggered unless the court first finds an ambiguity.").

10 The Trustee cites to *NML Capital v. Republic of Argentina,* 17 N.Y.3d 250, 928 N.Y.S.2d 666, 952 N.E.2d 482, 492 (2011) for the proposition that absent specific language indicating that the parties intended for 3.07(c) to terminate upon acceleration, section 3.07(c) still applies after acceleration. This is not the law. In *NML Capital,* the Second Circuit stated that Argentina had not pointed to any language indicating that the biannual interest payment terminated upon acceleration of the debt. *Id.* at 263. It did not state that there must be specific language indicating that the parties intended for a provision to terminate upon acceleration.

11 *See also* Fed. R. Civ. P. 54(a) ("Definition; Form. 'Judgment' as used in these rules includes a decree and any order from which an appeal lies."); Black's Law Dictionary 970 (10th ed.2014) ("judgment" means "[a] court's final determination of the rights and obligations of the parties in a case. The term judgment includes an equitable decree and any order from which an appeal lies.").

12 Moreover, even were the automatic stay a judgment under section 6.02 of the Indenture, the automatic stay can always be lifted. In that case, rescission would no longer conflict with a judgment of the Court because the stay/judgment would simply cease to exist.

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United States Bankruptcy Court, S.D. New York.

In re: MPM Silicones, LLC, et al., Debtors.

Case No. 14-22503-rdd
| Signed September 9, 2014

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Chapter 11

Corrected and Modified Bench Ruling on Confirmation of Debtors' Joint Chapter Plan of Reorganization for Momentive Performance Materials Inc. and its Affiliated Debtors.

BEFORE: HON. ROBERT D. DRAIN U.S. BANKRUPTCY JUDGE

***1** Good afternoon. We are back on the record in In re MPM Silicones, LLC. I had adjourned my bench ruling on confirmation of the debtors' chapter 11 plan and the related rulings in the three adversary proceedings to give the parties another day to see if they could negotiate, as between the first and the 1.5 lien holders and the debtors and the second lien holders' representatives, any settlement of their issues. I gather, since you're all here and looking fairly stony faced, that hasn't happened?

Okay. All right. So, I will give you my ruling on confirmation.

I am going to give what will sound like a series of bench rulings on five issues that remain open regarding confirmation of the chapter 11 plan and, with respect to the subordination of the senior subordinated unsecured notes, or the extent of that subordination, and the extent of the so-called make-whole provisions in the first and 1.5 lien indentures, in the three related adversary proceedings covered by my prior order on confirmation hearing procedures. The context of each of these rulings, however, is my ruling on confirmation of the debtors' chapter 11 plan, as it has been modified on the record a couple of times during the confirmation hearing.

I have reviewed all of the evidence submitted in connection with the debtors' request for confirmation of the plan, which includes not only the live trial record of the four-day confirmation hearing held last week, but also the declarations, exhibits, including expert reports, and deposition testimony that was admitted into evidence during that time. It's clear to me that, except for the issues that I am about to rule on and the one other issue that I ruled on last week, namely, the absolute priority rule objection to confirmation of the plan raised by the subordinated noteholders, which I decided in favor of the debtors, there are no disputes as to the confirmation of the plan. And, having reviewed the record, I am prepared to make the findings under section 1129(a) of the Bankruptcy Code required for confirmation, leaving aside, again, the five issues that I am going to address this afternoon.

I clearly have jurisdiction with regard to those issues, which arise under sections 510(a), 502(b)(2), 506(b), 1129(a) and (b) of the Bankruptcy Code, pursuant to 28 U.S.C. sections 157(a)-(b) and 1334(b), as these issues arise under the Bankruptcy Code and in the chapter 11 case, let alone that they're clearly related to the chapter 11 case.

As I noted, two of the issues also arise in three adversary proceedings, and at least one of the parties in those proceedings has stated, as required under the Local Rules, its view that the Court lacks the power to issue a final order or final determination of the issues in that proceeding. Absent the Supreme Court's ruling in Stern v. Marshall, 131 S.Ct. 2594 (2011), there would be no question that I have such power, as these are all core matters under 28 U.S.C. section 157(b)(2), each pertaining to confirmation of the debtors' plan and/or the treatment of the claims of the first lien holders, 1.5 lien holders, second lien holders and subordinated noteholders.

***2** I continue to have the power to issue a final order on these issues on a Constitutional basis under Stern v. Marshall. The issues all involve fundamental aspects of the adjustment of the debtor/creditor relationship. Colloquially, they pertain to how the pie of the bankruptcy estate will be divided among the groups of claimants that I just listed, not whether the estate will be augmented by a claim against a third party. Moreover, the issues clearly pertain to rights unique to bankruptcy law under section 1129(b) of the Bankruptcy Code and sections 1129(a)(1) and 510(a) of the Code, as well as the treatment of claims under sections 502(b)(2) and 506(b) of the Code. Accordingly, under Stern v. Marshall, 131 S.Ct. 2618, I have the power to issue a final order or determination on these issues notwithstanding that this is an Article I, not an Article III, court.

These rulings, as will ultimately be memorialized in an order on confirmation as well as orders in respect of the three adversary proceedings, in each case will be a final determination by the Court.

Before I get to the rulings, I also want to note that I am providing a bench ruling here in recognition of the need for a prompt determination in this case of these issues, after having established a complete record and thought about them, I hope, thoroughly. These are ongoing businesses with thousands of employees as well as hundreds if not thousands of creditors and customers, and they deserve a prompt response. As I noted yesterday, when I give a bench ruling, at times the ruling can be lengthy with significant citation; and in those instances I normally go over the transcript and reserve the right to correct it not only as to inaccuracies by the court reporter, but also as to content, whether I said something ungrammatically, for example, or whether I wanted to say something slightly differently. If I do edit the ruling on the latter two grounds, I will separately file it as a modified bench ruling. It won't be the transcript at that point; it will instead be a modified bench ruling, although the holdings on these issues won't change.

Let me turn to the first issue, which involves, as noted, the extent of the subordination of the senior subordinated unsecured notes. This issue comes up in Adversary Proceeding No. 14–08238 under section 510(a) of the Bankruptcy Code, which provides, "A subordination agreement is enforceable in a case under this title to the same extent that such agreement is enforceable under applicable nonbankruptcy law." It is also integral to the Court's consideration of the debtors' request for confirmation of the chapter 11 plan, because the plan has a specific interpretation of the extent of the subordination of the senior subordinated notes that the subordinated noteholders disagree with and provides, based on that interpretation, that there will be no distribution to the senior subordinated noteholders in recognition of the debtors' view, supported by the second lien holders, that their subordination agreement requires that any distribution that would otherwise go to them would have to be distributed instead to the second lien holders in full.

It thus serves as a gate-keeping issue for confirmation of the plan, because section 1129(a)(1) of the Bankruptcy Code provides that, to be confirmed, the plan must comply with the applicable provisions of the Code, which include section 510(a).

The outcome hinges primarily if not entirely on interpretation of the relevant agreement, the senior subordinated unsecured note indenture, which, as all of the parties recognize, is governed by New York law. They also recognize that, when interpreting the indenture, the Court should apply basic New York contract law. See In re AMR Corp., 730 F.3d, 88, 98 (2d Cir.2013), citing, among other cases, Sharon Steel Corp. v. Chase Manhattan Bank N.A., 691 F.2d 1039, 1049 (2d Cir.1982).

***3** Those basic contract interpretation principles are well established. Under New York law, the best evidence, and, if clear, the conclusive evidence, of the parties' intent, is the plain meaning of the contract. Thus, in construing a contract under New York law, the Court should look to its language for a written agreement that is complete, clear, and unambiguous on its face; and, if that is the case, it must be enforced according to its plain terms. J. D'Addario & Company Inc. v. Embassy Industries, Inc., 20 N.Y.3d 113, 118 (2012); Greenfield v. Philles Records Inc., 98 N.Y.2d 562, 569 (2002).

A contract is ambiguous if its terms are "susceptible to more than one reasonable interpretation." Evans v. Famous Music Corp., 1 N.Y.3d 452, 458 (2004); see also British International Insurance Co. v. Seguros La Republica, S.A., 342 F.3d 78, 82 (2d Cir.2003), stating, "an ambiguity exists where the terms of the contract could suggest more than one meaning when viewed objectively by a reasonably intelligent person who has examined the context of the entire integrated agreement and who is cognizant of customs, practices, usages and terminology as generally understood in the particular trade or business."

Thus, while in instances of ambiguity the Court may look to parole evidence, if the agreement on its face is reasonably susceptible to only one meaning, that meaning governs; a court is not free to alter the contract to reflect its personal notions of fairness and equity. Greenfield v. Philles Records Inc., 98 N.Y.2d at 569; see also In re AMR Corp., 730 F.3d at 98.

Some additional points are worth emphasizing before proceeding to the language of the indenture itself. As noted in several of the foregoing authorities, the context of the entire agreement is important. The courts have cautioned (including when construing subordination language) that one should not take an isolated provision that might be susceptible to one or more readings out of context, but should apply it instead in the context of the entire agreement, or construe it in a way that is plausible in the context of the entire agreement. See, for example, Barclays Capital, Inc. v. Giddens, 2014 U.S.App. LEXIS 15009, at *21 (2d Cir. Aug. 5, 2014); In re Tribune Company, 472 B.R. 223, 255 (Bankr.D. Del. 2012), aff'd in part, vacated in part on other grounds, 2014 U.S. Dist. LEXIS 82782 (D. Del. June 18, 2014).

It is also fundamental that every word of the agreement should, to the extent possible, be given a meaning, or, in other words, one of the most basic interpretive canons is that a contract should be construed so that effect is given to all of its provisions and no part will be inoperative or superfluous or of no significance. See, for example, LaSalle Bank N.A. v. Nomura Asset Capital Corp. 424 F.3d 195, 206(2d Cir.2005); Lawyers' Fund for Client Protection v. Bank Leumi Trust Co. of New York, 94 N.Y.2d 398, 404 (2000).

It is also relevant, at least to confirm what appears to be an unambiguous provision or set of provisions in a contract, to consider the parties' interpretation of the contract in practice before litigation with respect to the underlying issue. See, for example, In re Actrade Financial Technologies, Ltd., 424 B.R. 59, 74 (Bankr.S.D.N.Y.2009), and In re Oneida, Ltd., 400 B.R. 384, 389 (Bankr.S.D.N.Y., 2009), aff'd 2010 U.S. Dist. LEXIS 6500 (S.D.N.Y. January 22, 2010).

Finally, the Court may be assisted in its understanding of the context of the contract by third party commentaries, particularly by seemingly nonpartisan industry groups like the ABA. See, for example, In re Metromedia Fiber Network, Inc., 416 F.3d 136, 139–40 (2d Cir.2005), as well as, at least when a contract's meaning is being clarified in context, Quadrant Structured Products Co., Ltd. v. Vertin, 2014 N.Y. LEXIS 1361, at *31–2 (N.Y. June 10, 2014).

***4** Having laid out these basic contract interpretation principles, let me turn to the language of the senior subordinated unsecured note indenture itself, noting first that both sides in this dispute have taken the position that these terms, although their import is disputed, are, in fact, unambiguous and susceptible to a plain meaning reading.

The operative paragraph providing for the subordination of the senior subordinated unsecured notes is Section 10.01 of the indenture, which provides in relevant part, "The Company [meaning the issuer/debtor] agrees, and each Holder, by accepting a Security agrees, that the Indebtedness evidenced by the Securities, is subordinated in right of payment, to the extent and in the manner provided in this Article 10, to the prior payment in full of all existing and future Senior Indebtedness of the Company and that the subordination is for the benefit of and enforceable by the holders of such Senior Indebtedness. The Securities shall in all respects rank pari passu in right of payment with all the existing and future Pari Passu Indebtedness of the Company and shall rank senior in right of payment to all existing and future Subordinated Indebtedness of the Company; and only Indebtedness of the Company that is Senior Indebtedness of the Company shall rank senior to the Securities in accordance with the provisions set forth herein."

“Indebtedness” is defined in the indenture at page 19 as “(1) the principal and premium (if any) of any indebtedness”—lower case i—“of such Person whether or not contingent, (a) in respect of borrowed money, (b) evidenced by bonds, notes debentures or similar instruments or letters of credit or banker's acceptances (or, without duplication, reimbursement agreements in respect thereof), (c) representing the deferred or unpaid purchase price of any property,” and other types of debt not relevant hereto;

and then, in paragraph (2), “to the extent not otherwise included, any obligation”—lower case o—“of such Person to be liable for, or to pay, as obligor, guarantor or otherwise, on the Indebtedness of another Person (other than by endorsement of negotiable instruments for collection in the ordinary course of business);

“(3) to the extent not otherwise included, Indebtedness of another Person secured by a Lien”—uppercase L—“on any asset owned by such Person (whether or not such Indebtedness is assumed by such person); provided, however, that the amount of such Indebtedness will be the lesser of: (a) the Fair Market Value of such asset at such date of determination, and (b) the amount of such Indebtedness of such other Person;”

and then (4), another type of indebtedness that is not relevant here; and there is a proviso that's also not relevant here, with respect to contingent obligations as deferred or prepaid revenues of purchase price holdbacks.

It is clear, therefore, from a plain reading of Section 10.01 of the indenture and the definition of “Indebtedness” that the indenture and, in particular, its subordination provision, provides for debt or claim subordination, not lien subordination.

There is a good example in the record of lien subordination, which I will get to, in the form of the Intercreditor Agreement among the second lien holders and the senior lien holders, as well as the debtors. However, it is clear from the subordination provision of Section 10.01 and the definition of “Indebtedness” that I previously quoted that the subordination of the senior subordinated unsecured notes is a subordination in respect of the payment of debt, and that the parties distinguished liens, which secure indebtedness, from indebtedness itself in several instances in the indenture, including in the definition of “Indebtedness” and “Lien,” which is found on page 21 of the indenture: “ ‘Lien’ means with respect to any asset, any mortgage, lien, pledge, charge, security interest or encumbrance of any kind in respect of such asset, whether or not filed, recorded or otherwise perfected under applicable law (including any conditional sale or other title retention agreement, any lease in the nature thereof, any option or other agreement to sell or give a security interest in and any filing of or agreement to give any financing statement under the Uniform Commercial Code (or equivalent statutes) of any jurisdiction).”

***5** Clearly, liens differ from indebtedness in common parlance and as defined in the indenture. Liens have a life of their own; they are not a characteristic of indebtedness but, rather, secure it.

Under Section 10.01 of the indenture, the senior subordinated noteholders have subordinated their right to payment of the debt owed to them to the extent provided for in the indenture to the prior payment in full of all existing and future “Senior Indebtedness.” The issue comes down to, then, in large measure, the definition of “Senior Indebtedness” found at page 32 of the indenture, which provides, “ ‘Senior Indebtedness' means all Indebtedness and any Receivables Purchase Option of the Company or any Restricted Subsidiary, including interest thereon (including interest accruing on or after the filing of any petition in bankruptcy or for reorganization relating to the Company or any Restricted Subsidiary at the rate specified in the documentation with respect thereto, whether or not a claim for post-filing interest is allowed in such a proceeding) and other amounts (including fees, expenses, reimbursement obligations under letters of credit and indemnities) owing in respect thereof, whether outstanding on the Issue Date or thereafter incurred, unless the instrument creating or evidencing the same or pursuant to which the same is outstanding expressly provides that such obligations are subordinated in right of payment to any other Indebtedness of the Company or such Restricted Subsidiary, as applicable.”

That last clause is the first proviso to “Senior Indebtedness.” That is, Senior Indebtedness means all Indebtedness “unless the instrument creating or evidencing the same or pursuant to which the same is outstanding expressly provides that such obligations are subordinated in right of payment to any other Indebtedness of the Company.” In other words, this first proviso states that indebtedness under the senior subordinated unsecured notes will not be subordinated to indebtedness under instruments that expressly provide that such indebtedness is itself subordinated debt.

Next, the indenture's definition of "Senior Indebtedness" sets forth a series of other exceptions or provisos, stating, "provided, however, that Senior Indebtedness shall not include, as applicable: (1) any obligation of the Company to any Subsidiary of the Company other than any Receivables Repurchase Obligation or any Subsidiary of the Company to the Company or any other Subsidiary of the Company [that is, intercompany debt is not Senior Indebtedness];

"(2) any liability for Federal, state, local, or other taxes owed or owing by the Company or such Restricted Subsidiary [that is, tax obligations are not Senior Indebtedness];

"(3) any accounts payable or other liability to trade creditors arising in the ordinary course of business (including guarantees thereof or instruments evidencing such liabilities)" [that is, trade debt is not Senior Indebtedness];

"(4) any Indebtedness or obligation of the Company or any Restricted Subsidiary that by its terms is subordinate or junior in any respect to any other Indebtedness or obligation of the Company or such Restricted Subsidiary, as applicable, including any Pari Passu Indebtedness;

***6** "(5) Any obligations with respect to any Capital Stock; or

"(6) any Indebtedness Incurred in violation of this Indenture, but as to any such Indebtedness Incurred under the Credit Agreement, no such violation shall be deemed to exist for purposeless of this clause (6) if the holders of such Indebtedness or their Representative shall have received an Officer's Certificate to the effect that the Incurrence of such Indebtedness does not (or, in the case of a Revolving Credit Facility thereunder, the Incurrence of the entire committed amount thereof at the date on which the initial borrowing thereunder is made, would not) violate this Indenture."

The subordinated noteholders contend that clause (4) of the definition of "Senior Indebtedness" which I have just quoted provides that (notwithstanding clause 4's failure to refer to liens) any indebtedness that would otherwise be Senior Indebtedness would not have the benefit of the indenture's subordination provision because of the fact that it is secured by a junior lien

Again, clause (4) to this series of additional provisos to the definition of "Senior Indebtedness" excludes any "Indebtedness or obligation of the Company or any Restricted Subsidiary that by its terms is subordinate or junior in any respect to any other Indebtedness or obligation of the Company or such Restricted Subsidiary, as applicable."

The subordinated noteholders contend (and it is basically their only argument) that the foregoing "junior in any respect" language would pick up, given the broad meaning of "in any respect," liens that are junior to other liens, and accordingly, indebtedness secured by such liens.

The debtors disagree, arguing that, when viewed pursuant to the contract interpretation principles that I have stated, clause (4) of this second group of provisos to the definition of "Senior Indebtedness" pertains only to debt subordination and not to lien subordination, consistent with the distinction throughout the indenture between liens and debt, on the one hand, and liens that secure such obligations, on the other, starting with Section 10.01.

After reviewing the indenture and the commentaries and other documents that were admitted into evidence in connection with this dispute, I agree with the debtors' interpretation of clause (4). I do so for a number of reasons, but primarily because of the wording of the clause itself and the fundamental contract interpretation principle that no material term of an agreement should be superfluous under one party's construction where it has a meaning under the other's, or, in other words, that the contract should be read to give effect to all of its provisions. See, again, LaSalle National Bank Association v. Nomura Asset Capital Corp., 424 F.3d at 206; Lawyers' Fund for Client Protection v. Bank Leumi Trust Co., 94 N.Y.3d at 404.

Under the definition of Senior Indebtedness that I've quoted, the parties first excluded Indebtedness where "the instrument creating or evidencing the same or pursuant to which the same is outstanding expressly provides that such obligations are subordinated in right of payment to any other Indebtedness of the Company." Then, in clause (4) of the definition, the parties further excluded "any Indebtedness or obligation of the Company or a Restricted Subsidiary that by its terms is subordinated or junior in any respect to any other Indebtedness or obligation of the Company." The subordinated noteholders' reading of clause (4) would swallow up the first exclusion that I have quoted. That is, under their interpretation, as long as any rights of a creditor are junior to any other creditor's rights, such as in respect of a junior-in-time or junior-by-agreement lien, the creditor's indebtedness is not Senior Indebtedness entitled to the benefit of section 10.01. This broad reading of the exclusion in clause (4) would render the definition's first exclusion of expressly contractually subordinated debt superfluous.

***7** On the other hand, the debtors' interpretation of clause (4), which is that it applies to obligations that are by their terms subordinate even if not expressly so stated in the instrument creating the obligation, permits both exceptions to "Senior Indebtedness" to have a separate purpose. For example, obligations made subordinate to other obligations in a separate agreement, like an intercreditor agreement, or obligations that do not expressly state that they are subordinate to other obligations but are so by their terms, such as a "last out" facility in which one tranche of debt is to be paid after the rest of the debt under the same note, would fall within clause (4)'s exception but not into the first, introductory exception under the debtors' reading of the definition of Senior Indebtedness.

The debtors' interpretation also tracks the plain terms of clause (4), noting the difference between a debt and a lien that secures a debt. Thus clause (4) excepts from the definition of "Senior Indebtedness" "any Indebtedness or obligation of the Company or a Restricted Subsidiary that by *its* terms is subordinate or junior in any respect to any other Indebtedness or obligation." (Emphasis added.) The highlighted word "its" refers to the terms of the *Indebtedness* or the *obligation*—which are separate from the terms of a lien, mortgage, security interest, encumbrance, etc.—as being junior to any other Indebtedness or obligation, not to the terms of a *lien* being junior to any other lien.

The debtors also correctly point out that the commentary to the ABA model subordinated unsecured note indenture, appearing in Committee on Trust Indentures and Indenture Trustees ABA Section of Business Law, "Model Negotiated Covenants and Related Definitions," 61 Bus. Law. 1439 (Aug.2006), states that the form of clause (4) should be omitted if the obligor is "issuing junior subordinated securities." Id. at 62. Again, that is, the emphasis is on debt subordination, not lien subordination, junior subordinated securities being debt that is subordinated in any way by its terms to other debt. The commentary does not state that the clause should alternatively be omitted if the subordinated debt is intended to be pari passu with debt secured by a lien junior to another lien granted by the issuer.

The debtors' reading is also consistent with the rest of the indenture and the context of its subordination provision. The rationale, according to the subordinated noteholders, of an additional carve-out from Senior Indebtedness for indebtedness secured by a junior lien is the concern that junior lien financings could effectively overcome or get around or fit into a loophole in contracts pursuant to which one group of debt holders subordinate their debt to another. The second lien indebtedness would be senior debt, that is, layered ahead of the senior subordinated notes although secured by only a junior lien that, based on the value of the collateral, might be largely or entirely undersecured, something that senior subordinated unsecured noteholders would not necessarily want.

It does not appear, however, that there is any anti-layering provision in this indenture responsive to that underlying concern. To the contrary, there are covenants in the indenture that deal with the incurrence of additional debt, in section 4.03, the incurrence of additional liens, in section 4.12, and a limitation, in section 4.13, on senior or pari passu subordinated indebtedness that permit both the issuance of the second lien notes and, more importantly, permit them to be senior to the subordinated notes regardless of whether they were secured by a lien. Notwithstanding those specific provisions, however, the subordinated noteholders have proposed an interpretation of clause (4) in the definition of "Senior Indebtedness" that would essentially override those provisions and exclude the second lien notes from the benefit of Section 10.01 merely because they were secured.

***8** Moreover, the commentary upon which the senior subordinated noteholders base their argument that clause (4) was intended to close a loophole presented by junior lien financings points to the need, if one wants to exclude debt secured by a junior lien from the benefit of a subordination provision, to do so in an anti-layering covenant.

That is the case in the Fitch commentary, at page 275, which is attached as Exhibit L to Mr. Kirpilani's declaration, as well as the presentation to an American Bankruptcy Institute panel from 2006 attached as Exhibit J to his declaration, at pages 13–14. Indeed, the Thomson Reuters Legal Solutions Practical Law excerpt attached as Exhibit H to Mr. Kirpilani's declaration states at pages 4–5 that the better solution to deal with the concern about not being subordinated to second lien debt would be to place the exclusion in the anti-layering covenant itself or to add a new anti-layering provision.

The senior subordinated noteholders point to Section 1.04 of the indenture, which is entitled "Rules of Construction" and includes as one of the parties' rules of construction, in clause (f), the following: "[U]nsecured Indebtedness shall not be deemed to be subordinate or junior to Secured Indebtedness [and thus excluded from the definition of Senior Indebtedness] merely by virtue of its nature as unsecured Indebtedness." They suggest that the absence of another, similar provision in the indenture, which *does* appear in the 2006 ABA's "Model Negotiated Covenants and Related Definitions" discussion, 61 Bus. Law. at 71, providing that "[S]ecured Indebtedness shall not be deemed to be subordinate or junior to any other secured Indebtedness merely because it has a junior priority with respect to the same collateral," establishes, under the principle of expressio unius est exlusio alterius, that the parties meant to exclude debt secured by a junior lien from the reach of the subordination provision.

However, I disagree with that interpretation. It seems to me that, instead, given the clear resolution of the parties' anti-layering rights, the plain meaning of the definition of "Senior Indebtedness" and the principle evident throughout the indenture that liens secure debt and are not themselves debt, there would be no need in the "Rules of Construction" section to have such a provision specifically *include* debt secured by a junior lien as Senior Indebtedness, in contrast to the need to add Section 1.04(f), which pertains to debt, not liens. In any event, it is clear from the ABA commentary, which dates from August 2006—just a few months before the issuance of the senior subordinated unsecured notes—and other presentations attached to Mr. Kirpilani's declaration that issues pertaining to the subordination of unsecured debt to debt secured by junior liens were still evolving when the senior subordinated unsecured notes were issued; there was no well established standard form that might add a meaningful context to the indenture's plain terms and internal consistency. Cf. Quadrant Structured Products Co., Ltd. V. Vertin, 2014 N.Y. LEXIS 1361, at *31–2 (relying, in addition to considerable precedent, on model no-action clause produced by the Ad Hoc Committee for Revisions of the 1983 Modified Simplified Indenture that predated the indenture at issue by 10 years).

***9** The subordinated noteholders' interpretation of "Senior Indebtedness" also would lead, to the anomalous result that their notes would be subordinated to senior unsecured debt (in this case, as suggested above, including the second lien debt, which, when issued, was unsecured because it had only a springing lien), but would cease to be subordinated when that lien sprung or when such debt was issued on a secured basis. There is no logical reason for such a distinction, notwithstanding the subordinated noteholders' attempt to find one.

The subordinated noteholders next contend that, even under the debtors' interpretation of "Senior Indebtedness," the Intercreditor Agreement entered into among the debtors, the second lien holders and the first lien and 1.5 lien holders, among others, and attached as Exhibit C to Mr. Kirpilani's declaration, goes *beyond* lien subordination (which I have found does not fit within the exception to "Senior Indebtedness"), providing, in essence, for the subordination of the second lien holders' *debt* to the debt secured by the liens of the first and 1.5 lien holders and any other debt that might be secured by senior liens.

The Intercreditor Agreement clearly does restrict the rights of the second lien holders, two of those restrictions having been highlighted by the subordinated noteholders. First, it provides that the second lien holders' right to the shared collateral is subordinate to the senior lien holders' right to such collateral, even if it turns out that the liens securing the senior lien debt are not perfected or enforceable. Second, it provides in paragraph 4.04 that the second lien holders shall turn over to the senior lien holders any recoveries that they obtain not only on account of their contractual liens on the shared collateral, but also on account of judicial liens that they may obtain.

However, contrary to the interpretation offered by the subordinated noteholders that these provisions of the Intercreditor Agreement are debt subordination provisions, they pertain to lien subordination, governing rights in respect of the shared collateral. Intercreditor agreements of this nature that pertain to secured creditors' lien rights are commonly geared to those rights whether or not the liens are perfected. The parties are certainly free to, and do, agree that their contractual liens, which they have mutually verified, are effective as among each other, even if such liens later prove to be generally ineffective because of a debtor's lien avoidance powers. The focus still is on the collateral that was agreed to be secured by the liens. See In re Ion Media Newworks, Inc., 419 B.R. 585, 594–95 (Bankr.S.D.N.Y.2009) ("By virtue of the Intercreditor Agreement, the parties have allocated among themselves the economic value of the FCC licenses as 'Collateral' (regardless of the actual validity of liens in these licenses.)").

Similarly, it is typical of intercreditor agreements among secured parties that rights to enforce interests in the collateral are, as they are here, thoroughly addressed. Accordingly, a provision stating that collections on a judicial lien (as well as from enforcement of the second lien holders' contractual lien) shall be turned over to the senior lien holders are common in shared collateral agreements, given that control over the collateral is a fundamental aspect of such agreements. See, for example the American Bankruptcy Institute presentation attached as Exhibit I to Mr. Kirpilani's declaration, at page 25, listing intercreditor agreement provisions that promote “first lienholders' desire to ‘drive the bus' in respect to remedies against the shared collateral.”

***10** In contrast, Section 5.04 of the Intercreditor Agreement provides that nothing in that agreement alters the second lien holders' rights in their capacity as *unsecured* creditors, again highlighting the distinction between lien subordination and debt subordination.

While there is no interpretive language contemporaneous with the parties' entry into the senior subordinated unsecured note indenture, the parties' subsequent actions further support the debtors' reading of the subordination provision's reach. For example, a substantial portion of the subordinated notes, roughly $118 million in face amount, was exchanged in 2009 at a discount of at least 60 percent for second lien notes, which is inconsistent with the subordinated noteholders' present argument that those notes are pari passu.

In addition, the trustees for the senior subordinated notes took no action with respect to the issuance of the second lien debt or the springing of the lien securing it, although arguably under the subordinated noteholders' current interpretation the debtors' disclosures with respect to the second lien notes—that they were senior in right of payment to the subordinated notes—was inaccurate. It is clear from the exhibits to the responses by the ad hoc committee of second lien holders and Apollo, as well as the debtors' submissions, that such disclosure was clear in the company's 8–K, 10–Ks, and prospectuses.

It is also the case that, under the subordinated noteholders' broad interpretation of clause 4's exception to “Senior Indebtedness,” the debt under the debtors' current first and 1.5 lien notes also would not benefit from Section 10.01's subordination provision, notwithstanding that the indenture's definition of “Designated Senior Indebtedness” would include the first and 1.5 lien notes. In other words, the definition of “Designated Senior Indebtedness” is not integrated into the definition of “Senior Indebtedness” as proposed by the subordinated noteholders, again rendering their broad interpretation of clause 4's exception to such definition highly unlikely in the context of the entire indenture.

The debtors, the ad hoc committee of second lien holders, and Apollo in its capacity as a second lien holder have also argued, in their briefs at least, that the subordinated noteholders are estopped by laches or other equitable principles from making the arguments that they are making now, given their silence in the face of the issuance of over a billion dollars of second lien debt that was widely disclosed to be senior in right of payment to the senior subordinated unsecured notes. At oral argument, the debtors and the second lien holders seem to have walked back on that argument, however, and I believe that it would not apply here under the case law, in any event, in light of the need to establish conduct upon which reliance is based and the absence of a factual record to show such reliance. See, for example, River Seafoods, Inc. v. J.P. Morgan Chase Bank, 796 N.Y.S.2d 71, 74 (1st Dept.2005) (stating elements of equitable estoppel under New York law), and Eppendorf–Netheler–Hinz GMBH v. National Scientific Supply Company Inc., 14 Fed. Appx. 102, 105 (2d Cir. July 13, 2001) (stating elements of laches under New York law).

***11** But, based on the plain meaning of Section 10.01 and the definition of “Senior Indebtedness,” and, secondarily, the distinction throughout the indenture, as well as when the relevant provisions are read context, between lien rights and the subordination of debt, I conclude that the second lien holders' notes are “Senior Indebtedness” and, therefore, entitled to the benefit of the subordination provision of Section 10.01 of the indenture.

The next two issues pertain to a different set of agreements that are subject to the same rules of contract interpretation that I've previously summarized and won't repeat, as both operative sets of agreements—indentures and notes—are governed by New York law. The two issues involve the rights of the indenture trustees, and therefore the holders, of the first and 1.5 lien holders to a so-called contractual “make-whole” claim, or, barring such a claim, a common law claim for damages, based on the debtors' payment of their notes before the original stated maturity of the notes. The first and 1.5 lien holders' rights to such a claim are in the first instance governed by the respective indentures and notes, which, as relevant, contain the same provisions.

If, in fact, the trustees are entitled to such a claim that is enforceable in bankruptcy, it will increase the amount of the replacement notes to be issued to the first and 1.5 lien holders as their distribution under the debtors' chapter 11 plan. That is, the plan leaves open, now that the classes of first and 1.5 lien holders have rejected the plan, for the Court to decide whether the first and 1.5 lien holders' allowed claim includes a make-whole amount, whereas, if those classes had accepted the plan they would have received a cash distribution in the amount of their allowed claims specifically without any make-whole amount.

The indentures for both sets of notes provide in Section 3.01, captioned "Redemption," that "the Notes may be redeemed, in whole, or from time to time in part, subject to the conditions and at the redemption prices set forth in paragraph 5 of the form of Notes set forth in Exhibit A and Exhibit B hereto, which are hereby incorporated by reference and made a part of this Indenture, together with accrued and unpaid interest to the redemption date."

Section 3.02 of each indenture states, "Applicability of Article. Redemption of Notes at the election of the Issuer or otherwise, as permitted or required by any provision of this Indenture, shall be made in accordance with such provision and this Article."

Section 3.03 sets forth the procedure pursuant to which the issuer, that is the debtors, "shall elect to redeem Notes pursuant to the optional redemption provisions of paragraph 5 of the applicable Note."

Section 3.06 of the indentures, entitled "Effect of Notice of Redemption," states, "Once notice of redemption is delivered in accordance with Section 3.05, Notes called for redemption become due and payable on the redemption date and at the redemption price stated in the notice, except as provided in the final sentence of paragraph 5 of the Notes."

Section 3.09 of each indenture, in contrast to the optional or elective redemption under sections 3.01 and 3.03 of the indentures and paragraph 5 of the notes, provides for a special mandatory redemption on the terms set forth in Section 3.09.

Paragraph 5 of the form of first and 1.5 lien notes states, "Optional Redemption. Except as set forth in the following two paragraphs, the Notes shall not be redeemable at the option of MPM prior to October 15, 2005. Thereafter, the Notes shall be redeemable at the option of MPM, in whole at any time or in part from time to time" as provided therein. And then it states, "In addition, prior to October 15, 2015, the Issuer may redeem the Notes at its option, in whole at any time or in part from time to time, upon not less than 30 nor more than 60 days' prior notice delivered electronically or mailed by first-class mail to each holder's registered address, at a redemption price equal to 100% of the principal amount of the Notes redeemed plus the Applicable Premium as of, and accrued and unpaid interest and Additional Interest, if any, to, the applicable redemption date (subject to the right of the Holders of record on the relevant record date to receive interest due on the relevant interest payment date)."

***12** "Applicable Premium" is separately defined in the indentures as follows: "With respect to any Note on any applicable redemption date, the greater of: (1) 1% of the then outstanding principal amount of such Note and (2) the excess of: (a) the present value at such redemption date of (i) the redemption price of such Note, at October 15, 2015 (such redemption price being set forth in paragraph 5 of the applicable Note) plus (ii) all required interest payments due on such Note through October 15, 2015 (excluding accrued but unpaid interest), computed using a discount rate equal to the Treasury Rate as of such redemption date plus 50 basis points; over (b) the then outstanding principal amount of such Note."

The indenture trustees for the first and 1.5 lien notes argue that the chapter 11 plan's payment of the holders with replacement notes entitles them to the Applicable Premium, as they will receive such notes before October 15, 2015. They contend that such payment would be an optional or elective redemption under the provisions of the indentures and notes that I have just read.

As I've noted and will discuss later, the trustees for the first and 1.5 lien notes also argue that, even if they are not entitled by contract to an Applicable Premium constituting a make-whole under these circumstances, they nevertheless have a claim under otherwise applicable law or the first sentence of paragraph 5 of the notes, which they contend is a "non-call" covenant, that is triggered by the debtors' early payment of their notes in the form of replacement notes under the plan, although the amount of such claim, or formula therefor, is not set forth in the indentures or the notes.

Let me address the Applicable Premium argument first. It is well established that when considering the allowance of a claim in a bankruptcy case the court first considers whether the claim would be valid under applicable nonbankruptcy law, and then, second, if the claim is valid under applicable nonbankruptcy law, whether there is any limitation on or provision for disallowance of the claim under the Bankruptcy Code. See Ogle v. Fidelity & Deposit Company of Maryland, 586 F.3d 143, 147–48 (2d Cir.2009); HSBC Bank U.S.A. v. Calpine Corp., 2010 U.S. Dist. LEXIS 96792, at *18 (S.D.N.Y. Sept. 15, 2010).

It is well settled under New York law, which is, again, the law governing these agreements, that the parties to a loan agreement, indenture or note can amend the general rule under New York law of "perfect tender" to provide for a specific right on behalf of the borrower or issuer to prepay the debt in return for agreed consideration that compensates the lender for the cessation of the stream of interest payments running to the original maturity date of the loan. Without that contractual option, under the New York rule of perfect tender the borrower/issuer would be precluded from paying the debt early. See U.S. Bank National Association v. South Side House LLC, 2012 Dist. LEXIS 10824, at *12–13 (E.D.N.Y. January 30, 2012), as well as Northwestern Mutual Life Insurance Company v. Uniondale Realty Associates, 816 N.Y.S.2d 831, 835, 11 Misc.3d 988, 984 (N.Y.Sup.Ct.2006). See generally Charles & Kleinhaus, "Prepayment Clauses in Bankruptcy," 15 Am. Bankr.Inst. L.Rev. 537, 541 (Winter 2007) ("Charles & Kleinhaus"), and the cases cited therein at 541 n.13, applying New York's perfect tender rule.

It is also well-settled law in New York that a lender forfeits the right to such consideration for early payment if the lender accelerates the balance of the loan. The rationale for this rule is logical and clear: by accelerating the debt, the lender advances the maturity of the loan and any subsequent payment by definition cannot be a prepayment. In other words, rather than being compensated under the contract for the frustration of its desire to be paid interest over the life of the loan, the lender has, by accelerating, instead chosen to be paid early. See U.S. Bank National Association v. South Side House, 2012 U.S. Dist. LEXIS 10824, at *13–14, and the cases cited therein, including In re LHD Realty Corp., 726 F.2d 327, 331 (7th Cir.1984); In re Solutia, Inc., 379 B.R. 473, 487–88 (Bankr.S.D.N.Y.2007); In re Granite Broadcasting Corp., 369 B.R. 120, 144 (Bankr.S.D.N.Y.2007); and Northwestern Mutual Life Insurance Company v. Uniondale Realty Associates, 816 N.Y.S.2d at 836.

***13** There are two well-recognized exceptions to that proposition. The first is agreed not to apply here, namely when the debtor intentionally defaults in order to trigger acceleration and evade the prepayment premium or make-whole, the debtor will remain liable for the make-whole notwithstanding acceleration of the debt. See Sharon Steel Corp. v. The Chase Manhattan Bank. N.A., 691 F.2d 1039, 1053 (2d Cir.1982). Here, even if the trustees had not conceded this point, it is clear that the debtors' bankruptcy is not simply a tactical device to deprive the first and 1.5 lien holders of a make-whole claim.

The second exception, which is at issue here, is when a clear and unambiguous clause calls for the payment of a prepayment premium or make-whole even in the event of acceleration of, or the establishment of a new maturity date for, the debt. See, again, U.S. Bank National Association v. South Side House, 2012 U.S. Dist. LEXIS 10824, at *14–16 and *23; Northwestern Mutual Life Insurance Company v. Uniondale Realty Associates, 816 N.Y.S.2d at 836, and the cases cited therein. Thus, the first and 1.5 lien holders' right to an Applicable Premium, or make-whole, hinges on whether the relevant sections of their indentures and notes provide with sufficient clarity for the payment of such premium after the maturity of the notes has been accelerated.

Critically important, therefore, is another provision of the indentures, Section 6.02, which provides generally that the trustee or the holders of at least 25 percent of principal amount of the outstanding notes, upon an event of default, can elect to accelerate the notes, but also states, "If an Event of Default specified in Section 6.01(f) or (g) with respect to MPM [which includes the debtors' bankruptcy] occurs, the principal of, premium, if any, and interest on all the Notes shall ipso facto become and be immediately due and payable without any declaration or other act on the part of the Trustee or any Holders."

The form of note attached to the indentures also provides, in paragraph 15, "If an Event of Default relating to certain events of bankruptcy, insolvency or reorganization of the Issuer occurs, the principal of, premium, if any, and interest on all the Notes shall become immediately due and payable without any declaration or other act on the part of the Trustee or any Holders."

(Section 6.02 in the indentures also provides, in its final sentence, "The Holders of a majority in principal amount of outstanding Notes by notice to the Trustee may rescind any such acceleration with respect to the Notes and its consequences," and the last sentence of paragraph 15 of the notes states, "Under certain circumstances, the Holders of a majority in principal amount of the outstanding Notes may rescind any such acceleration with respect to the Notes and its consequences." The first and 1.5 lien trustees' arguments to rescind acceleration of the notes are discussed in the third section of this ruling)

In light of the automatic acceleration of the notes under Section 6.02 of the Indentures, as also obliquely referenced in paragraph 15 of the notes, upon the debtors' bankruptcy filing, the debtors and the second lien holders contend that the maturity date of the notes has been contractually advanced and, thus, under New York law the first and 1.5 lien holders, having provided for acceleration in the applicable agreements, bargained for prepayment of the notes upon the event of the debtors' bankruptcy and therefore forfeited their right to the Applicable Premium.

***14** (In addition, the debtors and the second lien holders contend that the debtors' payment of the first and 1.5 lien holders as required by the Bankruptcy Code before the original maturity of the notes (or at least before October 15, 2015) is not elective or voluntary, and, therefore, again, does not subject the debtors to the Applicable Premium owed upon an elective redemption under the express terms of Sections 3.02–3.03 of the indentures and paragraph 5 of the notes. The debtors have the option under section 1124 of the Bankruptcy Code, however, to reinstate the first and 1.5 lien notes rather than pay them with substitute consideration, under a chapter 11 plan. In addition, the notice requirements of Bankruptcy Rule 2002 arguably functionally track the election/notice process provided in sections 3.03 and 3.05 of the indentures. Thus, I have not further considered this argument of the debtors and second lien holders in light of the efficacy of their first argument.)

As noted previously, it is "well-settled law," South Side House, 2012 U.S. Dist. LEXIS 10824, at *12, that, unless the parties have clearly and specifically provided for payment of a make-whole (in this case the Applicable Premium), notwithstanding the acceleration or advancement of the original maturity date of the notes, a make-whole will not be owed. Such language is lacking in the relevant sections of the first and 1.5 lien indentures and notes; therefore, they do not create a claim for Applicable Premium following the automatic acceleration of the debt pursuant to Section 6.02 of the indentures. In addition to the cases that I have already cited for this proposition, see In re Madison 92nd Street Associates, LLC, 472 B.R. 189, 195–96 (Bankr.S.D.N.Y.2012); In re LaGuardia Associates LLP, 2012 Bankr.LEXIS 5612, at *11–13 (Bankr.E.D.Pa. Dec. 5, 2012); In re Premiere Entertainment Biloxi, LLC, 445 B.R. 582, 627–28 (Bankr.S.D.Miss.2010), and the cases cited therein, all of which interpret New York law, and some of which involve automatic acceleration clauses, which, as noted by the district court in South Side House, have the same negating effect as the voluntary exercise of an acceleration right, given that such clauses were negotiated by the parties. 2012 U.S. Dist. LEXIS 10824, at *20–23. See also In re AMR Corporation, 730 F.3d at 101, in which the Second Circuit made clear that such an automatic acceleration provision operates by the choice of the indenture trustee as much as the issuer/debtor; that is, such contractual automatic acceleration is not voluntary on the issuer's part because it is an enforceable covenant, including not being subject to invalidation under any section of the Bankruptcy Code, such as section 365(e), which would negate so-called ipso facto provisions triggered by a debtor's bankruptcy filing.

The trustees for the first and 1.5 lien holders try to get around the problem that their documents do not contain sufficient language triggering an Applicable Premium after acceleration in a couple of ways, one of which is to refer to a discussion in In re Chemtura Corporation, 439 B.R. 561, 596–02 (Bankr.S.D.N.Y.2010), in which Judge Gerber evaluated the settlement of a make-whole dispute that was opposed by those who contended that the beneficiaries of the settlement, who were receiving a range of 39 and 43 percent of their make-whole claim under it, should really recover nothing or at least far less than that amount on account of such claims.

The trustees contend that Judge Gerber concluded that a covenant triggering a make-whole amount upon a prepayment by a date certain would be a specific enough of a reference to the make-whole's being owed, notwithstanding the acceleration of the debt, to satisfy the explicitness requirement in the cases that I have previously cited.

I should note, however, that, in addition to the settlement context in which Judge Gerber gave his analysis, where he considered only whether the settlement lay within the lowest bounds of reasonableness, he was focusing in Chemtura not on a specific date like the pre-October 15, 2015 date set forth in paragraph 5 of the notes here, but, rather, on a provision that was triggered off a *differently defined maturity date* than the original maturity date, thus keying liability for the make-whole back to the need, as stated in the cases that I have cited, to state clearly that the premium would be owed notwithstanding the acceleration of the original maturity date. Id. at 601

***15** That is not the case under the notes and the indentures here. Indeed, in each of the reported cases that quote language that would be explicit enough to overcome the waiver of the make-whole upon acceleration under New York law, more was required than is contained in the relevant sections of the indentures and notes that I have quoted—either an explicit recognition that the make-whole would be payable notwithstanding the acceleration of the loan or, as stated by Charles & Kleinhaus, a provision that requires the borrower to pay a make-whole whenever debt is repaid prior to its *original* maturity, which is in essence what Judge Gerber was referring to in the Chemtura case. See Charles & Kleinhaus, 15 Am. Bankr.Inst. L.Rev. at 556. See also, for examples of the type of specificity required to satisfy applicable New York law, the discussion in U.S. Bank National Association v. South Side House, LLC, 2012 U.S. Dist. LEXIS, 10824, at *21–24, and In re LaGuardia Associates, L.P., 2012 Bankr.LEXIS 5612, at *14–16.

That type of specificity works notwithstanding the purpose of a make-whole, which is to ensure that the lender is compensated for being paid earlier than the original maturity of the loan for the interest it will not receive, because make-wholes are properly viewed as an option pursuant to which the parties have allocated the cost of prepayment between themselves. South Side House, 2012 U.S. Dist. LEXIS 10824, at *22–23; Northwestern Mutual Life Insurance Company v. Uniondale Realty Associates, 816 N.Y.S.2d at 984; Charles & Kleinhaus, 15 Am. Bankr.Inst. L.Rev. at 566–67. However, the option, as noted, must be specific if the parties want it to apply even after acceleration of the debt.

The trustees for the first and 1.5 lien notes also contend that, even if they are not entitled to an Applicable Premium, other provisions of the indentures refer to a lower case "prepayment premium." For example, as I noted, Section 3.02 of the indentures refers to the "Redemption of Notes at the election of the Issuer *or otherwise* as permitted or required by any provision of this Indenture shall be made in accordance with such provision in this Article." (Emphasis added.) (Although it should be noted that Section 3.09 of the indentures provides for a mandatory redemption, which is what the "or otherwise" reference in Section 3.02 apparently addresses.) In addition, they point out that Section 6.02 of the indentures provides for the automatic acceleration upon the debtors' bankruptcy of "the principal of, *premium, if any,* and interest on all the Notes" (emphasis added), and Section 6.03 states that "If an Event of Default occurs and is continuing, subject to the terms of the New Intercreditor Agreement or the Junior Priority Intercreditor Agreements, the Trustee may pursue any available remedy at law or equity to collect the payment of principal of or interest on the Notes or to enforce the performance of any provision of the Notes, this Indenture or the Security Documents" (that is, acknowledging the trustees' common law enforcement rights, which, the trustees, contend, would include the payment of a prepayment premium).

Each of these references to other rights or "premiums, if any," to be paid upon prepayment are not specific enough, however, to overcome the requirement of New York law that I have previously outlined in order for a make-whole or prepayment claim to be payable post-acceleration.

Moreover, the "if any" language that I've quoted refers back to the actual provisions of the indentures and notes, the only one of which that specifically provides for an optional redemption and payment of a specific premium (the Applicable Premium) does not sufficiently provide for payment after acceleration under New York law, as previously discussed. A similar provision appeared in the instrument at issue in In re LaGuardia Associates, L.P., 2012 Bankr.LEXIS 5612, and Judge Raslavich construed it much as I have here, stating, "On the contrary, [such provision] references 'any payment required to be paid under the note.' That returns the inquiry back to Section 1.02(b) of the note and its description of the specific two events which have not occurred." Id. at *19–20. Similarly, Section 3.02 of the indentures, which states, "Redemption of Notes at the election of the Issuer or otherwise, as permitted or required by any provision of this Indenture, shall be made in accordance with such provision and this Article," does not create a separate make-whole right enforceable upon acceleration of the debt but only refers to rights that may be triggered in accordance with the specific provisions of Article 3.

***16** It is also the case that Section 3.06 of the indentures, which states that "Once notice of redemption is delivered in accordance with Section 3.05, Notes called for redemption become due and payable on the redemption date and at the redemption price stated in the notice, except as provided in the final sentence of paragraph 5 of the Notes," is superseded by the automatic acceleration upon the issuer's bankruptcy, provided for in Section 6.02. That is, the foregoing language from the Section 3.06 is not a substitute for acceleration, which made the notes due and payable on the bankruptcy petition date, or a clear enough statement that, notwithstanding acceleration, the redemption date, that is, the date upon which the issuer would call the notes for redemption, would artificially jump ahead of the prior acceleration or ignore the acceleration and entitle the holders to a make-whole under New York law.

Therefore, the indentures and notes do not overcome or satisfy the requirement under New York law that a make-whole be payable specifically notwithstanding acceleration or payment prior to the original maturity date under the terms of the parties' agreements. There is, therefore, no claim for Applicable Premium or any other amount under the indentures and notes for the first and 1.5 lien holders that would be triggered by the lien holders' treatment under the debtors' chapter 11 plan, or any other payment of their notes following their automatic acceleration under Section 6.02 of the indenture.

This leaves to be decided the first and 1.5 lien holders' remaining claim based on payment, under the chapter 11 plan by new replacement notes, of the first and 1.5 notes prior to their maturity that would arise, they contend, under New York's common law rule of perfect tender or, as argued by the trustees, under the first sentence of paragraph 5 of the notes. That sentence, they contend, sets forth a "non-call" covenant when it states, "Except as set forth in the following two paragraphs [which reference payments of contractual make-whole that I have just ruled are not here owing], the Note shall not be redeemable at the option of MPM prior to October 15, 2015."

The debtors and the second lien holders argue that this sentence is no more than an introduction or framing device for the notes' elective redemption provisions in return for payment of the Applicable Premium, which immediately follow the "non-call" sentence, and is not a specific contractual non-call provision. In support of this contention, they point out that the make-whole right actually arises under Sections 3.01–3.03 of the indentures, which then reference paragraph 5 of the notes, which states the right to a make-whole amount under certain circumstances. They are right: the indentures and notes do not contain a covenant stating the amount owing upon the voluntary call of the notes with the exception of sections 3.01–3.03 and the definition of Applicable Premium.

This leaves the trustees with the argument that New York's common law of perfect tender would apply even if their agreements were silent regarding the consequences of such prepayment. That is, the trustees for the first and 1.5 lien notes contend that the holders are entitled to a claim under New York law for a prepayment premium based merely on the fact of prepayment, which, they point out, would be preserved under the general reservation of common law rights and remedies set forth in Section 6.03 of the indentures.

As noted previously, New York law would, in fact, provide for such a claim for breach of the rule of perfect tender, at least one for specific performance. However, applying the two-step claim analysis required by Ogle v. Fidelity & Deposit Company of Maryland, 586 F.3d at 147–48, the trustees would not have an allowable claim for such damages under the Bankruptcy Code, because this is one of the few instances when specific provisions of the Bankruptcy Code disallow such a claim—section 506(b), as well as section 502(b)(2), which disallows claims for unmatured interest.

***17** First, it is well recognized that, notwithstanding New York's perfect tender rule, such right is not enforceable by specific performance in a bankruptcy case, given the Bankruptcy Code's non-contractual acceleration of debt for claim determination purposes. See, for example, HSBC Bank USA v. Calpine Corp., 2010 U.S. Dist. LEXIS 96792, at *11–14, and Charles & Kleinhaus, 15 Am. Bankr.Inst. L.Rev. at 563–64.

In addition, as noted, no provision of the indentures and notes (except as already found to be inapplicable in light of the acceleration of the debt) provides for an additional premium to be paid upon the prepayment of the notes. Thus, the claim would not fall under the allowed claim provided to oversecured creditors for fees and charges under the parties' agreement under section 506(b) of the Bankruptcy Code up to the value of their collateral. See HSBC Bank USA v. Calpine Corp., 2010 U.S. Dist. LEXIS 96792, at *14–21; In re Solutia Inc., 379 B.R. at 485; In re Calpine Corp., 365 B.R. 392(Bankr. S.D.N.Y. 2007), rev'd on other grounds, 2011 U.S. Dist. LEXIS 62100 (S.D.N.Y. June 7, 2011); and In re Vest Assocs., 217 B.R. 696, 699 (Bankr.S.D.N.Y.1998).

It is not clear whether a claim for breach of a contractual make-whole provision should be viewed as a claim for unmatured interest (compare In re Trico Marine Services, Inc., 450 B.R. 474, 480–81 (Bankr.D.Del.2013) (recognizing split of authority but holding that claim for breach of contractual make-whole is liquidated damages for breach of an option to prepay, not for unmatured interest), and In re

Doctors Hospital of Hyde Park, Inc., 508 B.R. 596, 605–06 (Bankr.N.D.Ill.2014) (claim for breach of contractual yield maintenance premium is for unmatured interest not paid as a result of prepayment)). However, the measure of a claim based on New York's rule of perfect tender or a non-call right that does not provide for liquidated damages would be the difference between the present value of the interest to be paid under the first and 1.5 lien notes through their stated maturity and the present value of such interest under the replacement notes to be provided to the fist and 1.5 lien holders under the chapter 11 plan, which should equate to unmatured interest. See Charles & Kleinhaus, 15 Am. Bankr.Inst. L.Rev. at 541–42, 580–81. Accordingly such a claim also would be disallowed as unmatured interest under section 502(b)(2) of the Bankruptcy Code. It is not interest that has accrued during the bankruptcy case, but would, rather, accrue in the future, at least to 2015 if not to 2020, the original maturity date of the notes, and, therefore, would not be an allowed claim under section 502(b)(2). HSBC Bank USA v. Calpine Corp., 2010 U.S. Dist. LEXIS, at *14–21.

The two cases relied upon by the first and the 1.5 lien trustees for the contrary proposition actually are consistent with the foregoing analysis. The debtors in both cases (unlike here) were solvent and, therefore, the courts found them to be subject to an exception to section 502(b)(2) of the Code's disallowance of claims for unmatured interest under either equitable principles, as set forth in the legislative history to section 1124 of the Bankruptcy Code (see 140 Cong. Rec. H 10,768 (October 4, 1994)), or because of the application of the best interests test in section 1129(a)(7) of the Code when the debtor is solvent. See In re Premier Entertainment Biloxi, LLC, 445 B.R. at 636–37; In re Chemtura Corp., 439 B.R. at 636–37.

***18** This analysis applies also to any claim premised on the debtors' breach of the provision in the last sentence Section 6.02 of the indentures, obliquely referenced in paragraph 15 of the notes, that the issuer would under certain circumstances permit the rescission of automatic acceleration under Section 6.02 upon the issuer's bankruptcy. The damages for breach of such a rescission right, which are unspecified in both the indentures and the notes, would equate to the same lost unmatured interest that would apply to a breach of the right of perfect tender or non-liquidated damages non-call right.

Accordingly, I conclude both for purposes of confirmation of the debtors' chapter 11 plan, as well as for Adversary Proceeding Nos. 14–08227 and 14–08228, that the plain language of the first and 1.5 lien indentures and notes as applied to the present facts requires the allowed claim of the indenture trustees for the first and 1.5 lien holders to exclude any amount for Applicable Premium or any other damages based on the early payment of the notes.

There is no relevant commentary or conduct by the parties that would or should change that view, given that there is no ability to consider parol evidence in light of the plain meaning of the agreements under the contract interpretation cases that I have already cited. I will note, however, that the trustees for the first and 1.5 lien holders have contended that the disclosure in the prospectuses for their notes, while lengthy, fails to highlight the risk that, upon bankruptcy and the automatic acceleration of the notes, no make-whole claim or other damages would be owed upon the early payment of the notes.

It is true that there is no such disclosure. I note, however, that the vast majority of risk disclosures in the prospectuses, 54 risk factors, pertains to fact-based risks—either market or business or product risks. Of the risk factors disclosed, only six are bankruptcy-related, and they do not specifically disclose material risks affecting the notes in the issuer's bankruptcy in addition to the risk to the make-whole claim. Two disclosed bankruptcy-related risks pertain to the potential avoidance of the notes or the liens under chapter 5 of the Bankruptcy Code. Others state that the ability of holders to realize upon their collateral and claims is subject to certain bankruptcy law limitations (which may, in fact, include, in broad scope, the risk that the first and 1.5 lien holders may not have an allowed claim based on prepayment of the notes in a bankruptcy case, although perhaps such disclosure could simply be taken as a reference to the imposition of the automatic stay under section 362(a) of the Bankruptcy Code). But, as noted, there are other specific bankruptcy risks in addition to risks to the allowance of a make-whole claim that are not disclosed, including the risk of being crammed down with notes payable over time, as opposed to being paid in cash or reinstated, under section 1129(b)(2) of the Bankruptcy Code.

Moreover, as observed by the Court in South Side House, 2012 U.S. Dist. LEXIS 10824, at *12, the law that I have applied to the first and 1.5 lien holders' make-whole claim is “well-settled” and long established. It has been stated readily and cogently by courts that do not specialize in New York law; i.e., courts from the Seventh, Third, and Fifth Circuits, the latter two from Pennsylvania and Mississippi, as well as Delaware. Thus it does not appear, to the extent that one would even give any weight to the disclosure, or lack thereof, in the prospectuses, that the noteholders needed to be specially alerted to the risk that their make-whole claims might be disallowed in bankruptcy based on the automatic contractual acceleration of their notes, beyond the disclosure that the issuer's bankruptcy might alter the noteholders' rights.

***19** Relatedly, as I've noted, the first and 1.5 lien trustees have sought freedom from the automatic stay under section 362(a) of the Bankruptcy Code to implement the rescission of the automatic acceleration of the notes that occurred under Section 6.02 of the indentures upon the debtors' bankruptcy filing. The mechanism for such rescission is also set forth in Section 6.02 of the indentures and is loosely referenced in paragraph 15 of the notes, which states, "Under certain circumstances, the Holders of a majority in principal amount of the outstanding Notes may rescind any such acceleration with respect to the Notes and its consequences."

The first and 1.5 lien holders want to rescind the contractual acceleration under Section 6.02 to avoid the fatal effect of such acceleration upon their make-while rights in light of their agreements' lack of the specificity required to trigger the Applicable Premium upon acceleration under New York law.

The trustees make three arguments to support their request. First, they state that the automatic stay does not actually apply to sending a rescission notice. Second, they contend that, even if the automatic stay under section 362(a) of the Code applies to such a notice, rescission is excepted from the stay by section 555 of the Bankruptcy Code. Finally, they contend that, even if the automatic stay applies, they should be granted relief from the stay pursuant to section 362(d) of the Code.

I conclude that the automatic stay does, in fact, apply to the sending of a rescission notice and contractual deceleration of the debt. Two provisions of the Bankruptcy Code's automatic stay apply here. First, section 362(a)(3) of the Code states that the automatic stay upon the filing of the case includes a stay of "any act to obtain possession of property of the estate or property from the estate or to exercise control over property of the estate." Section 362(a)(6) then states that the following also are stayed: "any act to collect, assess or recover a claim against the debtor that arose before the commencement of the case under this title."

In essence, as I've said, the first and 1.5 lien trustees seek through a rescission notice to exercise a right under the indentures, which, as contracts to which the debtors are a party, are property of the debtors' estates. The purpose of sending a rescission notice would be to enable the holders to recover a sizeable claim against the debtors—that is, to resurrect their make-whole claim, which has been loosely quantified as approximating $200 million—through deceleration of the debt. They thus seek to control property of the estate by exercising a contract right to the estate's detriment and recover, by decelerating, a claim against the debtors.

The Second Circuit has recently held in a very similar context that sending such a notice would, in fact, be subject to the automatic stay of section 362(a). In re AMR Corp., 730 F.3d at 102–03 and 111–12, citing In re 48th Street Steakhouse, Inc., 835 F.3d, 427 (2d Cir.1987), and In re Enron Corp., 300 B.R. 201 (Bankr.S.D.N.Y.2013), in which contract rights were found to be property of the debtor and actions that had the effect of terminating, or would, in fact, terminate or alter, those rights, even if taken against a third party, as in 48th Street Steakhouse, would therefore constitute the exercise of control over property of the estate stayed by section 362(a)(3). See also In re Solutia Inc., 379 B.R. at 484–85.

Additionally, here, as in AMR and Solutia, the purpose of sending such a notice would be to recover a claim against the debtors, because the first and most important step in recovering a make-whole claim would be to resurrect the right to the Applicable Premium by decelerating the debt. Therefore, it is clear that the automatic stay under section 362(a)(6) of the Code also applies.

***20** The trustees have argued that a rescission notice would not alter what the *debtors* would retain under the plan, and, therefore, that section 362(a)(3) should not apply, because this is fundamentally, or economically, an intercreditor dispute; i.e., the value—the $200 million— that the first and 1.5 lien holders seek to include as part of their claim if rescission and deceleration is permitted, would otherwise effectively be distributed to the second lien holders and the trade creditors under the plan.

However, that is not a proper reading of section 362(a) of the Bankruptcy Code. As noted by the court in In re Strata Title, LLC, 2013 Bankr.LEXIS 1704 at *17–18 (Bankr.D Az. Apr. 25, 2013), such a reading of section 362(a)(3) would add a phrase to the statute that is not present, namely "unless such act would provide economic value to the estate." Moreover, it ignores the applicability of section 362(a)(6).

This is also clearly not a case, as the trustees contended at oral argument, where the automatic stay wouldn't apply because the transaction is only between third parties, in the nature of a letter of credit draw which is not subject to the automatic stay because the issuer has a separate and independent obligation to the beneficiary the payment of which does not control the debtor's property; rather, the effect on the debtors' estates of the requested rescission and deceleration would be direct —controlling and increasing the first and 1.5 lien holders' recovery of property of the estate.

Similarly, Second Circuit cases cited by the trustees for the proposition that, "[t]he general policy behind section 362(a) is to grant complete immediate, albeit temporary, relief to the debtor from creditors and also to prevent dissipation of the debtor's assets before any distribution to creditors can be effective," SEC v. Brennan, 230 F.3d 65, 70 (2d Cir.2000), are taken entirely out of context, whereas the trustees ignore numerous cases, discussed below, in which the courts have prohibited, as did the Second Circuit in AMR, actions that would permanently alter, postpetition, the rights of creditors that existed on the petition date, such as by sending notices like the rescission notice at issue here.

It is clear that there is a difference between automatic acceleration pursuant to a contract, as is the case here, and acceleration generally as a matter of bankruptcy law upon the commencement of a bankruptcy case for the purpose of determining claims against the estate, as I'll discuss in more detail when I consider whether relief should be granted from the stay pursuant to section 362(d) of the Code. For present purposes, however, it is sufficient to note that here a contract to which the debtors are a party would specifically be affected for the purpose of recovering on a claim against the debtors, and, therefore, the automatic stay under section 362(a) of the Bankruptcy Code applies.

In addition, the indenture trustees make an argument that was not raised in AMR or Solutia: that the sending of a rescission notice to decelerate the first and 1.5 lien notes would merely be liquidating a securities contract, which is permissible under section 555 of the Bankruptcy Code notwithstanding the automatic stay under section 362(a).

Section 555 of the Bankruptcy Code provides, "The exercise of a contractual right of a stockbroker, financial institution, financial participant or securities clearing agency to cause the liquidation, termination or acceleration of a securities contract as defined in section 741 of this title, because of a condition of the kind specified in section 365(e) of this title [i.e., so called "ipso facto" conditions such as the commencement of the bankruptcy case], shall not be stayed, avoided or otherwise limited by operation of any provision of this title."

***21** The first and 1.5 lien trustees contend that the effect of the rescission notice would be to fix and, therefore, liquidate, the amount of their claims in the bankruptcy case and, therefore, that it would, pursuant to section 555 of the Code, not be subject to the automatic stay. There are several problems with this argument, however.

First, I have serious doubts that the indenture itself is a securities contract as defined in section 741(7)(A) of the Bankruptcy Code, at least with respect to this issue. Generally speaking, section 741(7) of the Code's definition of "securities contract," which is lengthy, states that it is a contract for the purchase, sale or loan of a security. Clearly, the indentures themselves are not contracts for the purchase, sale or loan of a security; they instead set forth the terms under which the underlying notes will be governed and the role of the trustees in connection therewith. See In re Qimonda Richmond, LLC, 467 B.R. 318, 323 (Bankr.D.Del.2012), holding, albeit without much discussion, that an indenture does not fall within the definition of section 741(7)(A).

The trustees rely on subsection (A)(x) of section 741(7) of the Code to fit the indentures within the "securities contract" definition notwithstanding that the indentures themselves are not contracts for the purchase, sale or loan of a security. Section 741(7)(A)(x) states, in relevant part, "A 'securities contract' means ... (x) a master agreement that provides for an agreement or transaction referred to in [among other sub-clauses] clause (i)[that is, a contract for the purchase, sale, or loan of a security, among other transactions], without regard to whether the master agreement provides for an agreement or transaction that is not a securities contract under this subparagraph, except that such master agreement shall be considered to be a securities contract under this subparagraph only with respect to each agreement or transaction under such master agreement that is referred to in clause (i) [i.e., a contract for the purchase, sale or loan of a security]."

It is far from clear that the indentures would be viewed as such a master agreement, however, given the proviso in the last clause of subsection 741(A)(x), with respect to the indentures' rescission section, which does not itself pertain to the purchase, sale or loan of the notes and, further, because paragraph 15 of the notes does not specify any rescission right but instead refers to a right that is exercisable under unidentified provisions upon certain unspecified circumstances.

Relatedly, and even more significantly, I do not believe that sending the rescission notice, the consequences of which, as I have stated, would enable the deceleration of the notes to permit the increase of a claim against the debtors in the amount of the make-wholes, is in fact covered by section 555 of the Bankruptcy Code, because it is not a "liquidation" as contemplated by that section.

The customary interpretation of section 555 is that it "provides a tool for the non-defaulting ... participant to exercise its contractual right to close-out, terminate or accelerate a 'securities contract.' Such a close-out or liquidation typically entails termination or cancellation of the contract, fixing of the damages suffered by the nondefaulting party based on market conditions at the time of liquidation, and accelerating the required payment date of the net amount of the remaining obligations and damages." In re American Home Mortgage, Inc., 379 B.R. 503, 513(Bankr.D. Del 2008), quoting 5 Collier on Bankruptcy, paragraph 555.04 (16th ed.2014).

***22** Here, to the contrary, the first and 1.5 lien trustees look to *de* celerate and create a *different* claim than existed on the bankruptcy petition date. As discussed by Judge Peck in decisions in the Lehman Brothers case pertaining to a closely analogues provision of the Bankruptcy Code, section 560, that type of action does not fall within section 555 of the Bankruptcy Code, which, with its companion sections, is a narrow provision that should not be used to improve a contract party's standing or claim in the bankruptcy case. See Lehman Brothers Special Fin. Inc. v. Ballyrock AGS CDO 2007–1 Ltd., 452 B.R. 31, 40 (Bankr.S.D.N.Y.2011), in which Judge Peck held that, rather than exercising a right subject to the safe harbor of section 560 of the Code, the parties were impermissibly seeking to improve their positions. See also In re Lehman Brothers Holdings, Inc., 502 B.R. 383, 386 (Bankr.S.D.N.Y.2013), discussing Ballyrock and Lehman Brothers Special Fin. Inc. v. BNY Corporate Trading Services Ltd., 422 B.R. 407, 421 (Bankr.S.D.N.Y.2010).

Moreover, the rescission right sought to be exercised here is not a right automatically arising upon the commencement of the debtors' bankruptcy case and, thus, covered by section 365(e) of the Bankruptcy Code as referenced in section 555. As noted, the trustees instead seek to *de*celerate debt that was automatically accelerated under Section 6.02 of the indentures upon the bankruptcy filing. Thus, the exercise of the rescission right does not fall within the plain language of section 555 of the Code.

I have also concluded, in large measure based upon the AMR case, that relief from the automatic stay should not be granted here under section 362(d) of the Bankruptcy Code. The Second Circuit in AMR affirmed Judge Lane's determination in the exercise of his discretion not to lift the automatic stay to permit a similar notice to be sent. 730 F.3d at 111–12.

The trustees argue for stay relief under both sections 362(d)(1) and (d)(2) of the Code. I conclude that subsection (d)(2) is not applicable here. It provides for "relief from the stay provided under subsection (a) of this section with respect to a stay of an act against property under subsection (a) of this section if (A) the debtor does not have an equity in such property; and (B) such property is not necessary to an effective reorganization." Here, the debtors convincingly argued that subsection 362(d)(2) was intended to address, and does, by its terms, address, acts against property in which a creditor has an interest, such as a lien interest, as opposed to a right against a contract or to exercise a right under a contract, such as under Section 6.02 of the indentures. See In re Motors Liquidation Company, 2010 U.S. Dist. LEXIS 125182, at *8–9 (S.D.N.Y. Nov. 17, 2010).

Moreover, under section 362(g) of the Code, the movant has the burden to show that the debtor does not have an equity in such property under section 362(d)(2)(A), and I believe that it was conceded during oral argument, and, in any event, I so find, that the first and 1.5 lien trustees have not sustained that burden. It is not clear to me how they possibly could have shown that the debtors have no equity in the indentures, given that, before a rescission the trustees' claims pursuant to the indentures are worth far less, perhaps $200 million less, than if the trustees obtain relief from the stay for rescission. That $200 million would establish, I believe, the debtors' equity in light of the fact that the trustees do not have a lien on or other prior interest in the indentures.

That leaves the trustee's request for relief under section 362(d)(1) of the Bankruptcy Code, which provides for relief from the automatic stay "for cause, including a lack of adequate protection of an interest in property of such party-in-interest." As noted, we are not dealing with a lien or other prior interest in property held by the indenture trustees; we are dealing with their desire to exercise a contract right, rescission. Therefore, the Second Circuit's Sonnax case, which applies generally where relief from the stay is sought for purposes other than to enforce an interest in property, controls. In re Sonnax Industries, 907 F.2d 1280, 1285–86 (2d Cir.1990) (setting forth factors that may be relevant to a determination on a request to lift the automatic stay in such circumstances); see also In re Bogdanovich, 292 F.3d 104, 110 (2d Cir.2002). AMR applied the Sonnax factors in this context. 730 F.3d at 111–12.

***23** As I noted earlier, the sending of a rescission, or deceleration notice significantly impacts the debtors' estate and creditors—in this case by enhancing claims potentially by hundreds of millions of dollars. It is, therefore, the type of action that courts have routinely refused to permit under section 362(d)(1) of the Bankruptcy Code. As noted by Judge Beatty in In re Solutia, 379 B.R. at 488, a contractual acceleration provision goes well beyond the acceleration that occurs as a matter of bankruptcy law with respect to the determination of claims against the estate. One can, as discussed in In re Solutia; In re Manville Forests Products Corp., 43 B.R. 293, 297–98 (Bankr.S.D.N.Y.) and HSBC Bank USA v. Calpine Corp., 2010 U.S. Dist. LEXIS 96792, at *10–11, observe that as a matter of law the filing of the bankruptcy case itself accelerates debt. However, a *contractual* acceleration provision advances the maturity date of the debt in ways that have consequences in the bankruptcy case beyond the operation of this general bankruptcy law principle. For example, such acceleration may give rise to a right to damages under section 1124(2)(C) of the Bankruptcy Code if the debtor later attempts to decelerate and reinstate the debt. It also may give the creditor a right to a different type or amount of interest; and the presence or absence of such a provision may also affect rights against other parties including co-debtors. See, e.g., In re Texaco, Inc., 73 B.R. 960 (Bankr.S.D.N.Y. 1987). In that case, because there was no automatic contractual acceleration provision, noteholders sought to send an acceleration notice that would give them the right to an increased interest rate under their agreement. The court declined to lift the automatic stay. Id. at 968, stating that the noteholders sought more than simply to preserve the prepetition status quo. See also In re Metro Square, 1988 Bankr.LEXIS 2864, at *7–9 (Bankr.D.Minn., August 10, 1988). And, as noted, by Judge Lifland in In re Manville Forest Products, 43 B.R. at 298 n.5, "While the Court today holds that sending a notice of acceleration is unnecessary to file a claim against a debtor for the entire amount of the debt, despite the actual maturity date or the terms of the contract, this does not apply where notice is required as a condition precedent to establish other substantive contractual rights such as the right to receive a post-default interest rate. In that case, the sending of such notice would be ineffective under the automatic stay provisions of the Code if done without the provision of the bankruptcy court." Of course, Judge Lane performed a similar analysis in denying the trustee's request for stay relief in In re AMR Corp., 485 B.R. 279, 295–96 (Bankr.S.D.N.Y.2013), aff'd 730 F.2d at 111–12.

Thus, the first and 1.5 lien trustees' request for stay relief should not be granted to permit such a material change to be effectuated. Key "Sonnax factors" regarding the impact of rescission and deceleration on the parties and on the case strongly argue against granting such relief. Therefore, in the exercise of my discretion under section 362(d)(1) of the Code, I conclude that the automatic stay should not be lifted to enable the resurrection of a make-whole claim by means of the rescission of the automatic acceleration provided for in Section 6.02 of the indentures.

As previously noted, the holders of the first and 1.5 lien notes have voted as classes to reject confirmation of the debtors' chapter 11 plan. The plan otherwise meets, as I've stated, the confirmation requirements of section 1129(a) of the Bankruptcy Code. But, to be confirmed over the objection of the objecting classes comprising the first and 1.5 lien holders, the plan must also satisfy the "cram down" requirements of section 1129(b) of the Bankruptcy Code. At issue is whether section 1129(b)(2) of the Code has been satisfied, there being no objection to the cramdown requirements pertaining to secured creditors set forth in section 1129(b)(1) with the exception of its requirement that the a plan be "fair and equitable," which term is defined in section 1129(b)(2).

Section 1129(b)(2) of the Bankruptcy Code states, "For the purpose of this subsection, the condition that a plan be fair and equitable with respect to a class includes the following requirements: (A) With respect to a class of secured claims, the plan provides—(i)(I) that the holders of such claims retain the liens securing such claims, whether the property subject to such liens is retained by the debtor or transferred to another entity, to the extent of the allowed amount of such claims; and (II) that each holder of a claim of such class receive on account of such claim deferred cash payments totaling at least the allowed amount of such claim, of a value, as of the effective date of the plan, of at least the value of such holder's interest in the estate's interest in such property."

Section 1129(b)(2)(A)(ii) and (iii) set forth two other ways under which a plan can be "fair and equitable" to a dissenting secured class, but neither is applicable here, the debtors relying, instead, on section 1129(b)(2)(A)(i).

The only issue as to whether the debtors' chapter 11 plan satisfies section 1129(b)(2)(A)(i) of the Code is whether the plan provides, as set forth in sub-clause (A)(i)(II), that the holders of the first and 1.5 lien notes will "receive on account of such claim deferred cash payments totaling the allowed amount of such claim, of a value, as of the effective date of the plan, of at least the value of such holder's interest in the estate's interest in such property." (Sub-clause (A)(i)(I) is satisfied because under the plan the first and 1.5 lien holders shall retain the liens securing their claims to the extent of their allowed secured claims. Their liens are not being diminished under the plan, and, as I have previously found, those liens will secure the allowed amount of their claims.)

***24** Whether the plan satisfies section 1129(b)(2)(A)(i)(II) of the Code depends on the proper present value interest rate under the replacement notes to be issued to the first and 1.5 lien holders under the plan on account of their allowed claims, given that those notes will satisfy their claims over seven and seven-and-a-half years, respectively. The debtors contend that the interest rates under the 13 replacement notes are sufficient on a present value basis to 14 meet the test of section 1129(b)(2)(A)(i)(II).

The interest rate on the new replacement first lien notes that are proposed to be issued under the plan is the seven-year Treasury note rate plus 1.5 percent. As of August 26, 2014, the date of my bench ruling, that would equal an approximately 3.60 percent interest rate, based on public data issued for such Treasury notes. The proposed replacement notes for the 1.5 lien holders would have an interest rate equal to an imputed seven-and-a-half-year Treasury note (based on the weighted averaging of the rates for seven-year and ten-year Treasury notes) plus 2 percent, which as of August 26, 2014 I calculated as approximately 4.09 percent based on public data for such Treasury notes.

The indenture trustees for the first and the 1.5 lien holders contend that those rates do not satisfy the present value test in section 1129(b)(2)(A)(i)(II) of the Code and argue for higher interest rates under the replacement notes based on their view of what market-based lenders would expect for new notes if the same tenor issued by comparable borrowers.

The Court clearly is not writing on a blank slate on this issue. It is largely governed by the principles enunciated by the plurality opinion in Till v. SCS Credit Corp., 541 U.S. 465 (2004), and, to the extent that the Court has any concerns based on Till being a plurality opinion, In re Valenti, 105 F.3d 55 (2d Cir.1997).

Both of those cases analyzed and applied a closely analogous provision in chapter 13 of the Bankruptcy Code, section 1325(a)(5)(B)(i)(II), which states that, among other things required to confirm a plan with respect to an allowed secured claim, the plan must provide that, "the value, as of the effective date of the plan, of property to be distributed under the plan on account of such claim is not less than the allowed amount of such claim." As noted by the Court in Till, this provision is not only closely analogous to other provisions of the Bankruptcy Code (including section 1129 (b)(2)(A)(i)(II) that I have just quoted), but also "Congress likely intended bankruptcy judges and trustees to follow essentially the same approach when choosing an appropriate interest rate under any of the many Code provisions requiring a court to discount a stream of deferred payments back to their present dollar value." 541 U.S. at 474. Valenti, which was cited favorably in Till and which applies generally the same approach as Till to the proper present value interest rate for chapter 13 plan purposes, has also been construed as applying in a chapter 11 context to the cramdown of a secured creditor under section 1129(b)(2)(A)(i)(II). In re Marfin Ready Mix Corp., 220 B.R. 148, 158 (Bankr.E.D.N.Y. 1998). As discussed later, there is no sufficiently contrary basis to distinguish the chapter 13 and chapter 11 plan contexts in light of the similarity of the language of the two provisions and the underlying present value concept that Till recognized should be applied uniformly throughout the Code.

***25** Till and Valenti establish key first principles that I should follow, therefore, when considering the proper interest rate to present value a secured creditor's deferred distributions under a plan for cramdown purposes. Both cases quite clearly rejected alternatives that were proposed, and have been proposed now by the first and 1.5 lien trustees, that require a market-based analysis or inquiry into interest rates for similar loans in the marketplace. That is, both cases rejected the so-called "forced loan" or "coerced loan" approach, which Valenti defined as adopting the "interest rate on the rate that the creditor charges for loans of similar character, amount, and duration to debtors in the same geographic region." 105 F.3d at 63. See Till, 541 U.S. at 477, where the Court rejected market-based methodologies in favor of the so-called "formula approach":

> [We] reject the coerced loan, presumptive contract rate, and cost of funds approaches. Each of these approaches is complicated, imposes significant evidentiary costs, and aims to make each individual creditor whole rather than to ensure the debtor's payments have the required present value. For example, the coerced loan approach requires bankruptcy courts to consider evidence about the market for comparable loans to similar (though nonbankrupt) debtors —an inquiry far removed from such courts' usual task of evaluating debtors' financial circumstances and the feasibility of their debt adjustment plans. In addition, the approach overcompensates creditors because the market lending rate must be high enough to cover factors, like lenders' transaction costs and overall profits, that are no longer relevant in the context of court-administered and court-supervised cramdown loans.

541 U.S. at 477. See also In re Valenti, 105 f.3d at 63–4, (rejecting forced loan approach in favor of a formula approach). Of course the so-called "presumptive contract rate," that Till rejected was also a market-based test based on the parties' prepetition interest rate as adjusted for current market factors, as, in lesser degree, was the "cost of funds" approach that Till also rejected, which was based on the creditor's cost of capital, again tracking a market, although, in that case, with the emphasis on the creditor's characteristics rather than the debtor's.

Both courts stated similar reasons for rejecting market-based approaches in setting a cramdown rate. As stated in Valenti, "the 'forced loan' approach misapprehends the 'present value' function of the interest rate. The objective of Section 1325(a)(5)(B)(ii) is to put the creditor in the same economic position it would have been in had it received the value of its allowed claim immediately. The purpose is *not* to put the creditor in the same position that it would have been in had it arranged a 'new' loan." (Emphasis in the original). 105 F.3d at 63–4. "Moreover, as our analysis in the preceding section illustrates, the value of a creditor's allowed claim does not include any degree of profit. There is no reason, therefore, that the interest rate should account for profit." Id. at 64. Similarly, Till distinguished the cramdown rate from market loans; the former does not require the lender to be indifferent compared to the result in a foreclosure, where the creditor could then re-lend the proceeds in the marketplace, 541 U.S. at 476, and should not "overcompensate[ ] creditors because the market lending rate must be high enough to cover factors, like lenders' transaction costs and overall profits, that are no longer relevant in the context of court-administered and court-supervised cramdown loans." Id. 541 U.S. at 477–78.

The cramdown rate analysis, therefore, should focus on a rate that does not take market factors into account but, rather, starts with the riskless rate applicable to all obligations to be paid over time, adjusted for the risks unique to the debtor in actually completing such payment. Id. 541 U.S. at 474–80. It should thus be a relatively simple, uniform approach consistent with bankruptcy "courts' usual task of evaluating the feasibility of their debt adjustment plans" not on costly and expensive evidentiary hearings to discern marketplace data. Id. 541 U.S. at 477; see also In re Valenti, 105 F.3d at 64.

***26** As noted, in light of the foregoing considerations the Supreme Court adopted, as did the Second Circuit in Valenti before it, a formula approach, which is also the approach adopted by the debtors (in contrast to the trustees for the first and 1.5 lien holders, who have utilized a market-based approach) with respect to the replacement notes to be issued under the plan. Under the formula approach, the proper rate for secured lenders' cramdown notes begins with a risk-free base rate, such as the prime rate used in Till, or the Treasury rate used in Valenti, which is then adjusted by a percentage reflecting a risk factor based on the circumstances of the debtor's estate, the nature of the collateral security and the terms of the cramdown note itself, and the duration and feasibility of the plan. Till, 541 U.S. at 479; Valenti, 104 F.3d at 64. Both Till and Valenti held that, generally speaking, the foregoing risk adjustment should be between 1 and 3 percent above the risk-free base rate. Id.

It is clear from those opinions that the formula approach's risk adjustment is not a back door to applying a market rate. Indeed, the Supreme Court stated, "We note that if the Court could somehow be certain a debtor would complete his plan, the prime rate would be adequate to compensate any secured creditors forced to accept cramdown loans." 541 U.S. at 479 n.18. That is, no adjustment whatsoever to the risk-free rate would be required if the Court found that the debtors were certain to perform their obligations under the replacement notes. The focus, therefore, should be generally on the risk posed by the debtor within a specified band, as opposed to market rates charged to comparable companies. Nothing could be clearer than the two Courts' statements on that point. Therefore, as a first principle, the cramdown interest rate, under section 1129(b)(2)(A)(i)(II) of the Code, should not contain any profit or cost element, which were rejected by Till and the Second Circuit in Valenti as inconsistent with the present-value approach for cramdown purposes. In addition, market-based evidence should not be considered, except, arguably and, if so secondarily, when setting a proper risk premium in the formula approach taken by Till and Valenti.

Notwithstanding this very clear guidance, some courts, and the first and 1.5 lien trustees here, have argued that a market rate test should nevertheless be followed in chapter 11 cases. They have relied, as they must since there is no other basis in Till or Valenti for the argument, entirely on footnote 14 in Till, which appears at 541 U.S. 476.

That footnote states, "This fact helps to explain why there is no readily apparent Chapter 13 cramdown market rate of interest. Because every cramdown loan is imposed by a court over the objection of a secured creditor, there is no free market of willing cramdown lenders. Interestingly, the same is *not* true in the Chapter 11 context, as numerous lenders advertise financing for Chapter 11 debtors-in-possession." (Emphasis in the original.)

Till's footnote 14 then cites certain web site addresses that advertise such financing, and continues, "Thus, when picking a cramdown rate in a Chapter 11 case, it might make sense to ask what rate an efficient market would produce. In the Chapter 13 context, by contrast, the absence of any such market obligates courts to look to first principles and ask only what rate will fairly compensate a creditor for its exposure."

I have the following reactions to that discussion. First, as is clear from its introductory clause, Till's footnote 14 is referring to a specific fact alluded to in the sentence to which it is footnoted, which is that the cramdown rate of interest does not "require that the creditors be made subjectively indifferent between present foreclosure and future payment," that is, between future payment under the plan and how the creditor would put its money to use lending to similar borrowers after a foreclosure in the marketplace. Id. And then the Court says, "Indeed the very idea of a cramdown loan *precludes* the latter result: By definition, a creditor forced to accept such a loan would prefer instead to foreclose." (Emphasis in the original.) Therefore, footnote 14's statement that "this fact helps to explain why there is no readily apparent Chapter 13 cramdown market rate of interest," is referring to a willingness to lend to a debtor in bankruptcy but does so in a context that very clearly rejects the lender's right or to be rendered indifferent to cramdown or to be compensated for cramdown purposes on a market basis. More specifically, footnote 14 refers to debtor-in-possession financing, where third parties seek to lend money to a debtor and the debtor seeks to borrow it, in contrast to opposing the debtor's forced cramdown "loan."

***27** (As an aside, I should note that Till has been criticized for its understanding of debtor-in-possession, or "DIP" loans, and I believe no case has suggested that a DIP loan rate should be used as the rate for a cramdown present-value calculation. The criticism is found in 7 Collier on Bankruptcy, paragraph 1129.05[c][i] (16th ed.2014), where the editors state, "The problem with this suggestion"—i.e., footnote 14's reference to DIP loans—"is that the relevant market for involuntary loans in Chapter 11 may be just as illusory as in Chapter 13. The reason for this illusion is the inapt and unstated inference the Court makes with respect to the similarity between the interest rates applicable to debtor-in-possession financing and the interest rates applicable to loans imposed upon dissenting creditors at cramdown. While both types of financing can occur in a Chapter 11 case, that may be the extent of their similarity. Debtor-in-possession financing occurs at the very beginning of the case, while the determination of a cramdown rate, under Section 1129(b)(2), occurs at confirmation. Thus, instead of the interim and inherently more uncertain risk present in debtor-in-possession financing, the court, at confirmation, is presented with a less risky, more stable and restructured debtor. The fact that the debtor is more stable is bound up in the court's necessary feasibility determination under Section 1129(a)(11). In addition, common risk factors, such as the loan's term and the level of court supervision, differ greatly between the two types of financing. There are many more differences, but they can be summed up as follows: loans imposed at confirmation resemble more traditional exit or long-term financing than interim debtor-in-possession financing.")

Thus it was not general financing in the marketplace that Till was focusing on in footnote 14, because, again, it was describing loans that lenders *want* to make to the debtor itself, not loans that they could make with the proceeds of a foreclosure or in the marketplace to similarly situated borrowers. This is made clear by footnote 15 in Till, as well as footnote 18 that I previously quoted. Footnote 15 states that the Court disagrees with the district court's coerced loan approach, which "aims to set the cramdown interest rate at the level the creditor could obtain from new loans of comparable duration and risk." 541 U.S. at 477 n.15. Moreover, as noted before, the Court actually contemplated, in footnote 18, literally no premium on top of the risk-free rate if it could be determined with certainty that the debtor would complete the plan. Id. 541 U.S. at 479 n.18.

In addition, there clearly was some form of market for automobile loans to debtors like the debtors in the Till case. That market, in fact, had a lot of data behind it. Id. 541 U.S. at 481–82; 495 n.3 (dissenting opinion). Nevertheless, the Court felt constrained to refer to it as not a "perfectly competitive market," Id. 541 U.S. at 481, for which Justice Scalia's dissent somewhat berated the plurality. Id. 541 U.S. at 494–95. Indeed, based on my experience reviewing hundreds, if not thousands, of reaffirmation agreements and other matters involving auto loans, there are and always have been active markets for such loans, just as the value of cars and trucks is tracked in readily accessible market guides. Put differently, there are far more lenders and borrowers for auto loans, with access to more public data, than lenders and borrowers with respect to DIP or exit financing in chapter 11 cases. In this case, for example, the evidence shows that there were only three available exit lenders to the debtors, who eventually combined on proposed backup takeout facilities while seeking to keep confidential their fees and rate flex provisions.

This reality, as well as the fact that the plurality in Till felt the need discount less than a "perfectly competitive market," underscores, along with the rest of the opinion, that footnote 14 is a very slim reed indeed on which to require a market-based approach in contrast to every other aspect of Till. Certainly there is no meaningful difference between the chapter 11, corporate context and the chapter 13, consumer context to counter Till's guidance that courts should apply the same approach wherever a present value stream of payments is required to be discounted under the Code. Id. 541 U.S. at 474. The rights of secured lenders to consumers and secured lenders to corporations are not distinguished in Till, nor should they be. Nor does the relative size of the loan or the value of the collateral matter under Till's footnote 14, as it should not. Till does state that a chapter 13 trustee supervises the debtor's performance of his or her plan, id. 541 U.S. at 477; however, with replacement notes overseen by an indenture trustee for sophisticated holders, there will at least be comparable supervision under the debtors' plan, particularly in a district like this where secured claims often are paid "outside" of chapter 13 plans and, therefore, the chapter 13 trustee will not know whether the debtor has defaulted on the secured debt post-confirmation.

***28** In sum, then, footnote 14 should not be read in a way contrary to Till and Valenti's first principles, which are, instead of applying a market-based approach, a present value cramdown approach using an interest rate that takes the profit out, takes the fees out, and compensates the creditor under a formula starting with a base rate that is essentially riskless, plus up to a 1 to 3 percent additional risk premium, if any, at least as against the prime rate, for the debtor's own unique risks in completing its plan payments coming out of bankruptcy.

As I've stated, certain courts, nevertheless, have required a two-step approach, that is, first inquiring whether there is an efficient market, not for DIP loans, but for financing generally for borrowers like the debtor, and only if there is no such market, applying the formula approach as set forth in Till and Valenti.

The leading case taking this approach is In re American HomePatient, Inc., 420 F.3d 559 (6th Cir.2005), cert. denied, 549 U.S. 942 (2006). It is clear from that case, however, that prior to Till the Sixth Circuit, in contrast to the Second Circuit, had applied the coerced-loan method, id. at 565–66, and then concluded that, given that Till was not on all fours, it should continue to apply the coerced-loan approach unless there was no efficient market. Id. at **568**. This is, of course, in contrast to this Court's duty to follow the guidance offered by Valenti, as well as Till.

Other courts applying American HomePatient's two-step approach include Mercury Capital Corp. v. Milford Connecticut Associates, L.P., 354 B.R. 1, 11–2 (D.Conn.2006) (remanding to the bankruptcy court to make an efficient market rate analysis); In re 20 Bayard Views LLC, 445 B.R. 83 (Bankr. E.D.N.Y.2011) (undertaking, after an eleven-day trial, a market analysis before concluding that there was no efficient market for Till purposes, and then applying the Till formula approach); and In re Cantwell, 336 B.R. 688, 692–93 (Bankr.D. N.J.2006) (applying Till formula approach in the absence of "an efficient market").

I conclude that such a two-step method, generally speaking, misinterprets Till and Valenti and the purpose of section 1129(b)(2)(A)(i)(II) of the Code based on the clear guidance of those precedents.

Further, as noted by the Fifth Circuit in In re Texas Grand Prairie Hotel Realty, L.L.C., 710 F.3d 324 (5th Cir. 2013), the first step of the two-step approach is almost, if not always, a dead end. As that decision observed, the vast majority of cases have ultimately applied a Till prime-plus approach or base rate-plus approach to the chapter 11 cramdown rate, either having spent considerable time determining that there is no efficient market or simply by moving to the base-rate-plus formula in the first instance. Id. at 333–34 (citing cases). This should not be surprising because it is highly unlikely that there will ever be an efficient market that does not include a profit element, fees and costs, thereby violating Till and Valenti's first principles, since capturing profit, fees and costs is the marketplace lender's reason for being. That is, as acknowledged by counsel for the trustees in oral argument, market lenders need to be rewarded, or to receive a profit. (Moreover, the two-step approach has a perverse underpinning: if the debtor is healthy enough to correspond to borrowers who could receive comparable loans in the marketplace, it would in all likelihood have to pay a higher cramdown rate than under the Till and Valenti formula approach for debtors who could not obtain a comparable loan in the market.)

***29** The indenture trustees nevertheless argue that the debtors' case is unique, or at least highly unusual, in that the debtors have substantially contemporaneously with confirmation obtained backup loan commitments to fund the cash-out alternative if the first lien and 1.5 lien holder classes had voted to accept the plan. Specifically the debtors obtained commitments for a $1 billion first lien backup takeout facility and a bridge facility of $250 million. Those commitments provide for higher rates than the replacement notes under the plan for the first and the 1.5 lien holders.

For the committed first lien backup takeout facility, the rate is LIBOR plus 4 percent, with a floor for LIBOR of 1 percent. Because LIBOR is, at this time, approximately .15 percent, effectively this would be a five percent rate. (There is also an alternative base rate for this facility that, given today's prime rate of approximately 3.25 percent, would be 6.25 percent, which is, however, exercisable at the debtors' option.) The committed bridge facility provides for a rate of LIBOR plus 6 percent, increasing in .5 percent increments every three months, to a capped amount. It appears relatively clear that the debtors intend, if rates remain low, to take out that facility before it increases precipitously.

The trustees have argued that these backup takeout loans should be viewed as proxies for the Till formula rate, even though—or, according to the trustees, because—they are based on a market process, albeit one, as discussed above that was relatively opaque and involved only three lenders who ultimately combined to provide the commitments on a semi-confidential basis.

Again, however, I believe that the trustees are misreading Till and Valenti in their emphasis on the market. In addition, it is clear to me that no private lender, including the lenders who the debtors have obtained backup takeout commitments from, would lend without a built-in profit element, let alone recovery for costs and fees, which also, as discussed above, is contrary to Till and Valenti's first principles and the purpose of section 1129(b)(2)(A)(i)(II).

The indenture trustees state that I should assume that all of the back-up lenders' profit is subsumed in the upfront fees that are to be charged under the agreements, as well as an availability fee, but they have not offered any evidence or rationale for that proposition I decline to assume that there is no profit element in the backup facilities' rates. The trustee also have offered no evidence of any profit element that could be backed out of the back-up loans. Therefore, I'm left with the conclusion that there is, in fact, a profit element which is unspecified and unquantified in the backup loans, which, therefore, makes these two loans, even if I were to accept a market-based approach, at odds with Till and Valenti, as well as the courts that have followed Till in the absence of any clear market for coercive loans and those courts that have that followed Till or Valenti in a chapter 11 context without considering markets at all, including In re Village at Camp Bowie I LP, 454 B.R. 702, 712–13 (Bankr.N.D.Tex.2011); In re SW Boston Hotel Venture, LLC, 460 B.R. 38, 56 (Bankr.D. Mass.2011); In re Lilo Props., LLC, 2011 Bankr.LEXIS 4407, at *3–6 (Bankr.D.Vt. Nov. 4, 2011); and In re Marfin Ready Mix Corp., 220 B.R. at 158.

I conclude, therefore, that Till and Valenti's formula approach is appropriate here, that is, that the debtors are correct in setting the interest rates on the first and 1.5 lien replacement notes premised on a base rate that is riskless, or as close to riskless as possible, plus a risk premium in the range of 1 to 3 percent, if at all, depending on the Court's assessment of the debtors' ability to fully perform the replacement notes.

***30** The first and 1.5 lien trustees have next challenged the debtors' analysis of the risk premium. As noted, that risk premium for the first lien replacement notes is 1.5 percent on top of the seven-year Treasury note rate, and with respect to the replacement notes for the 1.5 lien holders, it is 2 percent on top of an imputed seven-and-one-half-year Treasury note rate. I believe that, in light of the factors to be considered when deciding the proper risk premium under the Till and Valenti formula approach, namely, the circumstances of the debtors' estate, the nature of the security (both the underlying collateral and the terms of the new notes), and the duration and feasibility of the reorganization plan, the debtors have also performed a proper analysis of the risk premium.

The record on this issue consists primarily of the declaration and testimony of Mr. Carter (the debtor's CFO), the he expert reports and testimony of Mr. Derrough (the debtors' investment banker), and the expert reports and testimony of Mr. Augustine (the first lien trustee's investment banker) and the expert reports of Mr. Kearns (the 1.5 lien trustee's investment banker).

The only meaningful analysis of the debtors' underlying economic condition and the only projections were those undertaken by the debtors in the process testified to by Mr. Carter and Mr. Derrough. I conclude that such analysis and projections resulted from a rigorous process based upon the debtors' bottoms-up, as well as top-down, budgeting activity for 2014, as well as the debtors' actual results for 2013. The process benefitted, I believe substantially, from the input not only of Mr. Derrough and his team at Moelis, but also from testing by the debtors' future shareholders, including the members of the ad hoc committee of second lien holders and Apollo, who have committed, with others, to invest $600 million of equity in the reorganized debtors under the plan, in addition to agreeing to receive only equity on account of their notes.

Although there was considerable kibbitzing by Messrs. Augustine and Kearns regarding the debtors' projections, they engaged in no independent testing of them. Nor did they engage in a rigorous testing of those projections other than to point out that in the past eight of nine years the debtors have missed their projections, sometimes materially. Those eight or nine years of projections did not have the benefit of vetting by Moelis and the second lien holders, however, that I have discussed. Nor have Messrs. Augustine and Kearns conducted a valuation of the collateral or of the debtors as a going concern, accepting, essentially, the debtors' valuations.

In addition, it was pointed out that the debtors have missed their projections for the first quarter of this case, where there was input from, I can assume, independent third parties interested in making sure the projections were accurate. However, I found credible Mr. Carter's testimony on this point (as I found Mr. Carter generally credible), which was that those downward results for the post-bankruptcy period were largely attributable to the effects of the bankruptcy case, which would be ameliorated if not ended by the debtors' emergence from bankruptcy and re-regularization of customer and supplier relationships.

As far as the analysis is concerned, the post-bankruptcy collateral coverage for the first and 1.5 lien replacement notes is substantially better than the coverage in the Till case. Even with a twenty percent variance for each of the five years of the debtors' projections, it appears clear that the replacement notes would be repaid in full, particularly given the fact that I have found that there will be no make-whole amount included in the principal amount of the loans. Here, the first and 1.5 lien holders' new collateral coverage, unlike in Till (where it was one-to-one, the debt equaling the current value of the collateral, 541 U.S. at 470), and unlike in In re 20 Bayard Views (where it also was one-to-one with considerable execution risk, 445 B.R. at 112), has a large cushion. Here, the debt under the replacement notes is approximately 50 to 75 percent less than the value of the collateral therefor, and closer to 50 percent than 75 percent. Gross debt leverage also will substantially decrease under the plan, from 17.8 percent to 5.6 percent, or from $4.4 billion in debt down to $1.3 billion.

***31** In light of those considerations, as well as the telling fact that there is a committed $600 million equity investment under the plan, one can assume that, in the nature of risk for debtors emerging from bankruptcy, the 1.5 and 2 percent factors chosen by the debtors are appropriate.

In response, the first and 1.5 lien trustees have not carried their burden to show why those risk premiums are too low. First, in proposing their alternative risk premiums their under the twenty percent per year down-side projection scenario that Mr. Derrough ran, instead taking, in effect, a one-time leverage snapshot at its peak.

Mr. Kearns, although not taking as many liberties as Mr. Augustine, only focused on collateral leverage while ignoring the $600 million equity investment and total debt leverage.

Both experts for the first and 1.5 lien trustees also referred to rates of default for notes on a market basis that are rated, as they believe the replacement notes would be rated, at B2B or B and referred to defaults of, in Mr. Kearns' case, 34 percent in respect of such securities. They did not analyze, however, the difference between default and recovery rates. Clearly, the risk of default is an important risk to consider in this type of analysis, but the more important risk is the ultimate risk of non-payment (for example, notwithstanding the debtors' bankruptcy, there is sufficient committed backup takeout financing to pay the first and 1.5 lien holders' allowed claims in full in cash), which is where collateral coverage and total debt leverage come into play and 21 support the debtors' analysis.

The experts for the first and 1.5 lien trustees have also complained about the duration of the notes, although the first lien replacement note's seven-year term is, in essence, the remaining term of the present first lien notes, and the risk differential attributable to the 1.5 lien replacement notes' seven-and-a-half year maturity in Mr. Kearns' chart is de minimis.

I also believe that once one takes out fees such as pre-payment fees and other costs and similar covenants, the covenants in the replacement notes for the first and the 1.5 lien holders are not materially different on an economic basis from the covenants in the proposed backup takeout facilities.

Consequently, applying a formula of prime plus 1 to 3 percent, as I believe is appropriate under Till and Valenti unless there are extreme risks that I believe do not exist here, a risk premium of 1.5 and 2 percent, respectively, for the two series of replacement notes is appropriate.

There is one point, however, on which I disagree with the debtors' analysis. The debtors, consistent with Valenti, 105 F.3d at 64, and the well-reasoned Village at Camp Bowie case, 454 B.R. at 712–15, chose as their base rate the applicable or imputed Treasury note rate. It was appropriate for them to do this, rather than blindly following the prime rate used in Till. The Treasury note rate actually is, as both Mr. Kearns and Mr. Derrough testified, often used as a base rate for longer-term corporate debt such as the replacement notes. The prime rate may, on the other hand, be a more appropriate base rate for consumers, although Valenti chose the Treasury rate, instead, perhaps because such loans are considered to be essentially riskless. Both rates of course are easily determinable. But the Treasury rate, as confirmed by all three experts, does not include *any* risk, given that the United States government is the obligor, whereas an element of risk is inherent in the prime rate, which strongly correlates to the interest rate banks charge each other on overnight interbank loans and thus may reflect risks seen in banks' financial strength, of stronger concern during the last few years.

***32** Given that fact, I question whether the 1 to 3 percent risk premium spread over prime used in Till would be the same if instead, as here, a base rate equal to the Treasury were used. I say this in particular under the present circumstances where the prime rate for short-term loans is materially higher than the Treasury rate for long-term loans, a somewhat anomalous result. It seems to me, then, that although the general risk factor analysis conducted by Mr. Derrough was appropriate, there should be an additional amount added to the risk premium in light of the fact that the debtors used Treasury rates as the base rate. The additional increment, I believe, should be another .5 percent for the first lien replacement notes, and an additional .75 percent for the 1.5 lien replacement notes. I believe that these adjustments adequately take into account risks inherent in the debtors' performance of the replacement notes above the essentially risk-free Treasury note base rates. Therefore, rather than being the seven-year Treasury plus 1.5 percent, equaling 3.6 as of August 26, 2014, the rate for the first lien replacement notes should be the Treasury rate plus 2 percent, for an overall rate of 4.1 percent as of such date; and the rate for the 1.5 lien replacement notes should be the imputed seven-and-a-half-year Treasury note rate plus 2.75 percent, or a 4.85 rate as of August 26, 2014. This would require an amendment to the plan, obviously, and I don't know whether the necessary parties would agree to it, but I believe that they should, because it is necessary to cram down the plan over the objection of the first and 1.5 lien holder classes.

That leaves one remaining issue, which is the confirmability of the plan in light of the plan's third-party release and injunction provisions. Those provisions have not been objected to except for the first and 1.5 lien trustees' objection to the inclusion of third-party releases for parties named or identified in state court lawsuits brought by the first and 1.5 lien trustees to enforce the terms of the Intercreditor Agreement on the second lien holders. (Those lawsuits have been removed to this Court, although remand motions are pending.) The second lien holder third parties covered by the plan's release and injunction provisions are referred to here as the "Released Second Lienholders").

While it is true that third-party releases and related injunctions in Chapter 11 plans and confirmation orders are, under the law of the Second Circuit, proper only in rare cases, see Deutsche Bank AG v. Metromedia Fiber Network, Inc., 416 F.3d 136, 141 (2d Cir.2005), if they are consensual or are not objected to after proper notice, courts generally approve them unless they are truly overreaching on their face. I do not find anything truly offensive in these releases and, thus, to the extent that they have not been objected to or a party voted in favor of the plan or did not opt out notwithstanding the clear notice in the ballot that stated, in upper-case letters, "If you voted to reject the plan and you did not opt out of the release provisions by checking the box below, or if you voted to accept the plan regardless of whether you checked the box below, you will be deemed to have conclusively, absolutely, unconditionally, irrevocably and forever released and discharged the Released Parties from any and all claims and causes of action to the extent provided in Section 12.5 of the plan," the plan may be confirmed consistent with both Metromedia and the case law interpreting it, as summarized by Judge Lane in In re Genco Shipping & Trading, Ltd., 513 B.R. 233 (Bankr.S.D.N.Y.2014).

It is another story, however, where there is a substantial objection to a third-party release and related injunction, which is the case here, albeit that it is by a group that at least under the ruling that I just gave, would be satisfied as a matter of law by a plan that would be consistent with my cramdown ruling (which is one of the factors arguing for a release's effectiveness under the caselaw that I have cited).

Here, what was originally sought to be released included claims made by the first and 1.5 lien trustees against the Released Second Lienholders in the litigation that has been removed to this Court. In that litigation, the first and 1.5 lien trustees assert a breach claim under the Intercreditor Agreement based on the Released Second Lienholders' support of the plan and receipt of consideration under the plan before the payment to the holders of the first and 1.5 liens required by the Intercreditor Agreement, which, they contend, under the agreement's definition of "discharge of indebtedness," is payment in full, in cash.

***33** In light of comments made during the confirmation hearing regarding my concerns about the proposed release as it applied to the Released Second Lienholders, the debtors and those released parties have agreed, however, to amend the plan to carve out of the release of rights with respect to, and the discharge of, the pending litigation, provided that the Court maintains jurisdiction over that litigation.

I conclude, having evaluated the factors under Metromedia and the case law supporting third-party plan releases—and, though not fully, having reviewed the litigation claims against the Released Second Lienholders—that this modified release is appropriate and would be sustained if the plan were otherwise confirmable.

It is clearly the case that the Released Second Lienholders are providing substantial consideration under the plan. They are agreeing not to seek pari passu treatment on their deficiency claims with the trade creditors (that is, all creditors with unsecured claims with the exception of the senior subordinated unsecured noteholders), who are being paid in full under the plan.

They are also committing to underwrite the $600 million equity investment under the plan. They have also supported confirmation of the plan starting with executing a prepetition plan support agreement (although I agree with Judge Lane's conclusion in Genco Shipping & Trading that one cannot bootstrap a plan support agreement containing an indemnification right into consideration for a third-party release under a plan).

I also believe that the third-party release is an important feature of this plan. Counsel for the indenture trustees, in essence, asked me to play a game of chicken with the Released Second Lienholders (beyond my comments that led to the on-the-record amendment of the release) to see if they actually would withdraw their support of the plan if the plan and confirmation order were not reasonably satisfactory to them, by requiring the full deletion of the release, but I'm not prepared to do that. I believe that, instead, I can assess the likelihood that the Released Second Lienholders would walk as well as Mr. Carter on behalf of the debtors did, and assume, like Mr. Carter, that there is a reasonable risk that if this release, as modified on the record, did not remain in the plan, the Released Second Lienholders would withdraw their support of the plan. This reasonable risk is especially significant, moreover, given all that the Released Second Lienholders have committed to do under the plan.

Nevertheless, I think that the released parties' substantial consideration should be weighed against, in some measure, the claims that are being asked to be released and, where they're being actively pursued, as is the case with the carved-out litigation, ensure that such claims are not frivolous or back-door attempts to collect from the reorganized debtors notwithstanding the discharge. Thus, I believe that it is appropriate to maintain jurisdiction over such litigation, as provided in the modified release, for the same reasons that Judge Gerber has discussed in a number of opinions, including In re BearingPoint, Inc., 453 B.R. 486 (Bankr.S.D.N.Y.2011), and In re Motors Liquidation Company, 447 B.R. 198 (Bankr. S.D.N.Y.2011): that, in order to be able to sort out whether a suit is, in large measure, a strike suit or looking to get a recovery from the reorganized debtor through the artifice of proceeding against a third party or, on the other hand, sets forth a genuine claim that would not be covered by the bankruptcy plan or for which there's not sufficient value being provided by the released parties, the court should, at a minimum, keep jurisdiction over the matter. This also avoids the potential for conflicting orders in different courts and the assertion in other courts of positions notwithstanding the doctrines of collateral estoppel and res judicata, which, based on oral argument, I have serious concerns over here. And I do not believe that the Released Second Lienholders or other courts should be subjected to a potentially multi-court process with respect to the pending Intercreditor Agreement litigation and enforcement of this Court's confirmation order.

***34** I also should note, because this was raised in the objection, that I firmly believe that I have jurisdiction over this issue for the reasons that I stated at the beginning of this ruling, and that I can issue a final order on it within the confines of Stern v. Marshall, given that this is in the context of the confirmation of the plan, and pertains ultimately to the debtors' rights under the Bankruptcy Code. That would hold true, even post-confirmation or with regard to a post-confirmation effect on the estate. See, for example, In re Quigley Company, 676 F.3d 45, 53 (2d Cir.2012), cert. denied, 133 C. Ct. 2849 (2013); In re Chateaugay Corp., 213 B.R. 633, 637–38 (S.D.N.Y.1997), and In re Lombard–Wall, Inc., 44 B.R. 928, 935 (Bankr.S.D.N.Y.1984).

So, were the plan to be amended as I have said I would find to be appropriate with regard to the cramdown interest rates, I would confirm the plan as it otherwise stands, including the amended release provision.

I believe that covers all of the outstanding confirmation issues. As I said before, to the extent that these issues also overlap with issues that have been raised in the three adversary proceedings covered by the confirmation procedures order, those issues have been decided at this time as well; therefore, I need an order in those proceedings, regardless of what you do with amending the plan.

End of Document

EXHIBIT A

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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re	Chapter 11
MPM SILICONES, LLC, *et al.*,[1]	Case No. 14-22503 (RDD)
Debtors.	(Jointly Administered)
MOMENTIVE PERFORMANCE MATERIALS INC., MOMENTIVE PERFORMANCE MATERIALS WORLDWIDE INC., MOMENTIVE PERFORMANCE MATERIALS USA INC., JUNIPER BOND HOLDINGS I LLC, JUNIPER BOND HOLDINGS II LLC, JUNIPER BOND HOLDINGS III LLC, JUNIPER BOND HOLDINGS IV LLC, MOMENTIVE PERFORMANCE MATERIALS QUARTZ, INC., MPM SILICONES, LLC, MOMENTIVE PERFORMANCE MATERIALS SOUTH AMERICA INC., MOMENTIVE PERFORMANCE MATERIALS CHINA SPV INC.	Chapter 11 Adversary Proceeding No. 14-08227 (RDD)
Plaintiffs,	
v.	
BOKF, NA, solely as Trustee for the MPM Escrow LLC and MPM Finance Escrow Corp. 8.875% First Priority Senior Secured Notes due 2020,	

1 The Debtors, along with the last four digits of each Debtor's federal tax identification number, are Juniper Bond Holdings I LLC (9631), Juniper Bond Holdings II LLC (9692), Juniper Bond Holdings III LLC (9765), Juniper Bond Holdings IV LLC (9836), Momentive Performance Materials China SPV Inc. (8469), Momentive Performance Materials Holdings Inc. (8246), Momentive Performance Materials Inc. (8297), Momentive Performance Materials Quartz, Inc. (9929), Momentive Performance Materials South America Inc. (4895), Momentive Performance Materials USA Inc. (8388), Momentive Performance Materials Worldwide Inc. (8357), and MPM Silicones, LLC (5481). The Debtors' executive headquarters are located at 260 Hudson River Road, Waterford, NY 12188.

Defendant.

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MOMENTIVE PERFORMANCE MATERIALS INC., MOMENTIVE PERFORMANCE MATERIALS WORLDWIDE INC., MOMENTIVE PERFORMANCE MATERIALS USA INC., JUNIPER BOND HOLDINGS I LLC, JUNIPER BOND HOLDINGS II LLC, JUNIPER BOND HOLDINGS III LLC, JUNIPER BOND HOLDINGS IV LLC, MOMENTIVE PERFORMANCE MATERIALS QUARTZ, INC., MPM SILICONES, LLC, MOMENTIVE PERFORMANCE MATERIALS SOUTH AMERICA INC., MOMENTIVE PERFORMANCE MATERIALS CHINA SPV INC.

Plaintiffs,

v.

WILMINGTON TRUST, N.A., solely as Trustee for the Momentive Performance Materials Inc. 10% Senior Secured Notes due 2020,

Defendant.

Chapter 11
Adversary Proceeding
No. 14-08228 (RDD)

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U.S. BANK NATIONAL ASSOCIATION, AS INDENTURE TRUSTEE

Plaintiff,

v.

WILMINGTON SAVINGS FUND SOCIETY, FSB, AS INDENTURE TRUSTEE; MOMENTIVE PERFORMANCE MATERIALS INC.;

Chapter 11
Adversary Proceeding
No. 14-08238 (RDD)

JUNIPER BOND HOLDINGS I LLC; :
JUNIPER BOND HOLDINGS II LLC; :
JUNIPER BOND HOLDINGS III LLC; :
JUNIPER BOND HOLDINGS IV LLC; :
MOMENTIVE PERFORMANCE :
MATERIALS CHINA SPV INC.; :
MOMENTIVE PERFORMANCE :
MATERIALS HOLDINGS INC.; :
MOMENTIVE PERFORMANCE :
MATERIALS QUARTZ, INC.; :
MOMENTIVE PERFORMANCE :
MATERIALS SOUTH AMERICA INC.; :
MOMENTIVE PERFORMANCE :
MATERIALS USA INC.; MOMENTIVE :
PERFORMANCE MATERIALS :
WORLDWIDE INC.; AND MPM :
SILICONES, LLC :
:
Defendants. :
:
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FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER (I) CONFIRMING JOINT CHAPTER 11 PLAN OF REORGANIZATION FOR MOMENTIVE PERFORMANCE MATERIALS INC. AND ITS AFFILIATED DEBTORS; AND (II) ADJUDICATING CERTAIN ADVERSARY PROCEEDINGS

This Order is entered to effectuate the bench decisions issued on August 26, 2014, as corrected and modified on September 9, 2014 [Docket No. 979][2] (as so corrected and modified, the "**Bench Decisions**"), by this Court on the record at the hearing on confirmation of the Joint Chapter 11 Plan of Reorganization for Momentive Performance Materials Inc. and Its Affiliated Debtors, dated August 18, 2014 [Docket No. 858] (as amended, modified, and/or supplemented from time to time, including the Plan Supplement, the "**Plan**").[3] The Bench Decisions are

[2] The Bench Decisions are also reflected as Docket No. 65 in the First Lien Adversary (as defined herein), Docket No. 73 in the 1.5 Lien Adversary (as defined herein) and Docket No. 51 in the Senior Subordinated Notes Adversary (as defined herein).

[3] Capitalized terms used but not defined herein shall have the meanings assigned to them in the Plan, the Disclosure Statement Order or the Confirmation Brief (each, as defined herein), as applicable. The rules of interpretation set forth in Article I.B of the Plan shall apply to this Order.

incorporated herein by reference. The Bench Decisions constitute this Court's findings of fact and conclusions of law for purposes of this Order. The Court having considered (i) the Plan; (ii) the Disclosure Statement for the Joint Chapter 11 Plan of Reorganization for Momentive Performance Materials Inc. and Its Affiliated Debtors, dated June 23, 2014 [Docket No. 516] (including all exhibits thereto and as amended, modified, and/or supplemented from time to time, the "**Disclosure Statement**"); (iii) that certain Order: (I) Approving Disclosure Statement; (II) Establishing Date of Confirmation Hearing; (III) Establishing Procedures for Solicitation and Tabulation of Votes to Accept or Reject Plan, Including (A) Approving Form and Manner of Solicitation Packages, (B) Approving Form and Manner of Notice of the Confirmation Hearing, (C) Establishing Record Date and Approving Procedures for Distribution of Solicitation Packages, (D) Approving Forms of Ballots, (E) Establishing Deadline for Receipt of Ballots, and (F) Approving Procedures for Vote Tabulations; (IV) Establishing Deadline and Procedures for Filing Objections to Confirmation of Plan; (V) Approving Rights Offering Procedures and (VI) Granting Related Relief [Docket No. 508], entered on June 23, 2014 (as supplemented by the Order Approving a Supplement to the Disclosure Statement With Respect to Rights Offering Procedures [Docket No. 704] entered on July 18, 2014, the "**Disclosure Statement Order**"); (iv) that Certain Order Approving a Supplement to the Disclosure Statement With Respect to Rights Offering Procedures [Docket No. 704], entered on July 18, 2014; (v) the declarations, certifications and related supplements filed by (a) Kurtzman Carson Consultants, LLC dated July 2, 1014 [Docket No. 589] and July 7, 2014 [Docket No. 613] and dated August 5, 2014 [Docket No. 789] (the "**Voting Declaration**"), (b) William H. Carter, Chief Financial Officer of Momentive Performance Materials Inc. [Docket No. 824], (c) William Q. Derrough of Moelis & Company, the Debtors' investment banker and financial advisor dated August 12, 2014 [Docket

No. 819] and dated August 15, 2014 [Docket No. 888], and (d) Eric Thaler, Senior Vice President and General Manager of Basics of Momentive Performance Materials Inc. dated August 12, 2014 [Docket No. 867]; (vi) the affidavits, declarations, witness testimony and exhibits admitted into evidence at the hearing commenced on August 18, 2014, to consider confirmation of the Plan (the "**Confirmation Hearing**"); (vii) arguments of counsel presented at the Confirmation Hearing; (viii) objections filed with respect to confirmation of the Plan by the Dow Chemical Company [Docket No. 727], BOKF, NA, as First Lien Successor Trustee [Docket Nos. 729 and 774], Wilmington Trust, National Association, as Indenture Trustee [Docket Nos. 730 and 773], United States of America [Docket No. 744], New York State Department of Environmental Conservation [Docket No. 745] and U.S. Bank National Association, as Indenture Trustee [Docket No. 770] (collectively, the "**Objections**"); (ix) the Debtors' memorandum of law filed in support of confirmation and in reply to the Objections [Docket No. 814] (the "**Confirmation Brief**"); (x) the Protective Motion (I) for Relief from the Automatic Stay to Permit Rescission of Acceleration or, Alternatively, (II) for Adequate Protection, dated June 18, 2014 [Docket No. 463] (the "**Lift Stay Motion**") and the joinder thereto [Docket No. 467]; and (xi) other pleadings filed in support of confirmation of the Plan; and upon the Court having taken judicial notice of the docket of the Debtors' Reorganization Cases maintained by the Clerk of the Court and/or its duly appointed agent, and all pleadings and other documents filed, all orders entered, and evidence and arguments made, proffered or adduced at, and the hearings held before the Court during the pendency of these Reorganization Cases, including the Order Setting Bar Dates to File Proofs of Claim and Approving the Form and Manner of Notice thereof [Docket No. 329], entered on June 6, 2014; and the Court having found that the Rights Offerings have been properly implemented pursuant to the Disclosure

Statement Order; and the Court having found that due and proper notice has been given with respect to the Confirmation Hearing and the deadlines and procedures for filing objections to the Plan; and the appearance of all interested parties having been duly noted in the record of the Confirmation Hearing; and upon the record of the Confirmation Hearing and these Reorganization Cases, and after due deliberation thereon, and sufficient cause appearing therefor;

FINDINGS OF FACT AND CONCLUSIONS OF LAW:[4]

JURISDICTION AND VENUE

A. The Court has jurisdiction over this matter and these Reorganization Cases pursuant to 28 U.S.C. § 1334. Venue is proper before this Court pursuant to 28 U.S.C. §§ 1408 and 1409.

B. Confirmation of the Plan is a core proceeding pursuant to 28 U.S.C. § 157(b). This Court has jurisdiction to enter a final order with respect to confirmation of the Plan, and all matters related thereto (including resolution of the Adversary Proceedings (as defined below)), and this Court's exercise of such jurisdiction is proper in all respects. The Debtors are proper debtors under section 109 of title 11 of the United States Code (as amended, the "**Bankruptcy Code**"), and the Debtors are proper proponents of the Plan under section 1121(a) of the Bankruptcy Code.

C. This Court has jurisdiction under 28 U.S.C. §§ 1334(a), (b) and (d) with respect to the Intercreditor Actions and the Causes of Action asserted therein.

[4] The findings and conclusions set forth herein constitute the Court's findings of fact and conclusions of law pursuant to Rule 52 of the Federal Rules of Civil Procedure, as made applicable herein by Rules 7052 and 9014 of the Federal Rules of Bankruptcy Procedures. To the extent any of the following findings of fact constitute conclusions of law, they are adopted as such. To the extent any of the following conclusions of law constitute findings of fact, they are adopted as such.

VOTING ON PLAN

D. As evidenced by the Voting Declaration, votes to accept or reject the Plan have been solicited and tabulated fairly, in good faith, and in compliance with the Bankruptcy Code, the Bankruptcy Rules, the Local Rules, the Disclosure Statement Order and all applicable non-bankruptcy laws, rules or regulations.

E. On August 5, 2014, the Debtors filed the Voting Declaration, (i) certifying that 100% in amount and 100% in number of holders of Allowed Claims in Classes 6 and 9 that cast ballots voted to accept the Plan; (ii) certifying that 8.09% in amount and 11.44% in number of holders of Allowed Claims in Class 4 that cast ballots voted to accept the Plan; and (iii) certifying that 19.88% in amount and 19.32% in number of holders of Allowed Claims in Class 5 that cast ballots voted to accept the Plan. All procedures used to tabulate the Ballots were fair, reasonable and complied with the applicable provisions of the Bankruptcy Code, the Bankruptcy Rules, the Local Rules and all other applicable rules, laws and regulations.

F. The Debtors have solicited acceptances of the Plan in good faith and in compliance with the Disclosure Statement Order and applicable provisions of the Bankruptcy Code and Bankruptcy Rules. The Debtors and the Backstop Parties (and each of their respective affiliates, agents, directors, officers, employees, advisors and attorneys, including, for the avoidance of doubt, the Ad Hoc Committee of Second Lien Noteholders Advisors and the advisors to Apollo) participated in good faith and in compliance with the applicable provisions of the Bankruptcy Code in the offer, issuance sale, solicitation and/or purchase of the securities offered and sold under the Plan, and therefore are entitled to the protections of section 1125(e) of the Bankruptcy Code. Based on the foregoing, the Debtors and the Backstop Parties (and each of their respective affiliates, agents, directors, officers, employees, advisors and attorneys, including, for the avoidance of doubt, the Ad Hoc Committee of Second Lien Noteholders

Advisors and the advisors to Apollo) shall not be, liable at any time for the violation of any applicable law, rule, or regulation governing the solicitation of acceptances or rejections of the Plan or the offer, issuance, sale, or purchase of the securities offered and sold under and in accordance with the Plan.

PLAN COMPLIES WITH STANDARDS FOR CONFIRMATION
UNDER SECTION 1129 OF THE BANKRUPTCY CODE

G. Section 1129(a)(1). The Plan complies with each applicable provision of the Bankruptcy Code. In particular, the Plan complies with the requirements of sections 1122 and 1123 of the Bankruptcy Code as follows:

1. In accordance with section 1122(a) of the Bankruptcy Code, Section 4.1 of the Plan classifies each Claim against and Interest in the Debtors into a Class containing only substantially similar Claims or Interests;

2. In accordance with section 1123(a)(1) of the Bankruptcy Code, Section 4.1 of the Plan properly classifies all Claims and Interests that require classification;

3. In accordance with section 1123(a)(2) of the Bankruptcy Code, Section 4.2 of the Plan properly specifies each Class of Claims that is not impaired under the Plan;

4. In accordance with section 1123(a)(3) of the Bankruptcy Code, Sections 5.4, 5.5, 5.6, 5.8, 5.9, 5.10 and 5.11 of the Plan properly specify the treatment of each Class of Claims or Interests that is impaired under the Plan;

5. In accordance with section 1123(a)(4) of the Bankruptcy Code, the Plan provides the same treatment for each Claim or Interest in a particular Class unless the holder of such a Claim or Interest agrees to less favorable treatment;

6. In accordance with section 1123(a)(5) of the Bankruptcy Code, the Plan provides adequate means for its implementation, including the provisions regarding Effective Date transactions and transfers, the post-Effective Date corporate management, governance and actions set forth in Article VII of the Plan, and the funding for the Plan, including from the proceeds of (a) the New First Lien Term Loan Facility (unless the Replacement First Lien Notes are issued);

(b) the Rights Offerings; (c) the New ABL Facility and (d) the Incremental Facility (unless the Replacement 1.5 Lien Notes are issued);

7. In accordance with section 1123(a)(6) of the Bankruptcy Code, the Reorganized Debtors' amended certificates of incorporation contain provisions prohibiting the issuance of non-voting equity securities and providing for the appropriate distribution of voting power among all classes of equity securities authorized for issuance;

8. In accordance with section 1123(a)(7) of the Bankruptcy Code, the provisions of the Plan and the Reorganized Debtors' amended certificates of incorporation and bylaws regarding the manner of selection of officers and directors of the Reorganized Debtors, including the provisions of Section 7.6 of the Plan, are consistent with the interests of creditors and equity security holders and with public policy;

9. In accordance with section 1123(b)(1) of the Bankruptcy Code, Article V of the Plan impairs or leaves unimpaired, as the case may be, each Class of Claims and Interests;

10. In accordance with section 1123(b)(2) of the Bankruptcy Code, Article X of the Plan provides for the assumption or rejection of the Debtors' executory contracts and unexpired leases that have not been previously assumed, assumed and assigned, or rejected pursuant to section 365 of the Bankruptcy Code and orders of the Court;

11. Pursuant to section 1123(b)(3)(A) of the Bankruptcy Code, the settlements and compromises under the Plan of, among other things, causes of action subject to the releases and exculpations provided in Article XII of the Plan, are a valid exercise of the Debtors' business judgment, are fair, reasonable and in the best interests of the Debtors' estates;

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12. In accordance with section 1123(b)(3)(B) of the Bankruptcy Code, Section 12.8 of the Plan provides that, subject to Section 12.5 of the Plan and except as otherwise expressly set forth in the Plan (including Section 5.7(c) of the Plan), the Reorganized Debtors shall (a) retain and may enforce any claims, demands, rights, defenses and causes of action that any Debtor may hold against any entity, to the extent not expressly released under the Plan; and (b) have the exclusive right, authority and discretion to determine and to initiate, file, prosecute, enforce, abandon, settle, compromise, release, withdraw or litigate to judgment any such Causes of Action or to decline to do any of the foregoing without further notice to or action, order or approval of the Court;

13. In accordance with section 1123(b)(5) of the Bankruptcy Code, Article V of the Plan modifies or leaves unaffected, as the case may be, the rights of the holders of Claims and Interests in Classes 1 through 11;

14. In accordance with section 1123(b)(6) of the Bankruptcy Code, the Plan includes additional appropriate provisions that are not inconsistent with applicable provisions of the Bankruptcy Code; and

15. In accordance with section 1123(d) of the Bankruptcy Code, Section 10.3 of the Plan provides for the satisfaction of Claims related to Cure Amounts associated with each executory contract and unexpired lease to be assumed pursuant to the Plan in accordance with section 365(b)(1) of the Bankruptcy Code. All Claims related to Cure Amounts shall be determined in accordance with the underlying agreements and applicable law.

H. Section 1129(a)(2). The Debtors have complied with all applicable provisions of the Bankruptcy Code with respect to the Plan and the solicitation of acceptances or rejections thereof. In particular, the Plan complies with the requirements of sections 1125 and 1126 of the Bankruptcy Code as follows:

1. All persons entitled to receive notice of the Disclosure Statement, the Plan and the Confirmation Hearing have received proper, timely and adequate notice in accordance with the Disclosure Statement Order, applicable provisions of the Bankruptcy Code and the Bankruptcy Rules, and have had an opportunity to appear and be heard with respect thereto.

2. In transmitting the Plan, the Disclosure Statement, the Disclosure Statement Order, the Ballots, and related documents and notices in soliciting and tabulating the votes on the Plan, the Debtors have complied with the applicable provisions of the Bankruptcy Code, including sections 1125 and 1126, the Bankruptcy Rules, applicable non-bankruptcy law, and the Disclosure Statement Order.

3. Written notice of the Confirmation Hearing and the relevant deadlines for the submission of Ballots and objections to confirmation of the Plan has been provided substantially in the form, within the time, and in accordance with the Bankruptcy Rules and the procedures approved and prescribed by this Court in the Disclosure Statement Order. Such written notice is adequate and sufficient.

4. Claims in Classes 1, 2, 3, and 7 under the Plan are unimpaired, and such Classes are deemed to have accepted the Plan pursuant to section 1126(f) of the Bankruptcy Code.

5. All Classes of impaired Claims that were entitled to vote pursuant to the Bankruptcy Code, the Bankruptcy Rules and the Disclosure Statement Order were given the opportunity to vote on the Plan (i.e., Classes 4, 5, 6 and 9). Ballots were received from holders of Claims in all such Classes.

6. The Debtors have made a final determination of the validity of, and tabulation with respect to, all acceptances and rejections of the Plan by holders of Claims entitled to vote on the Plan, including the amount and number of accepting and rejecting Claims in Classes 4, 5, 6 and 9 under the Plan.

7. Each of Classes 6 and 9 have accepted the Plan by at least two-thirds in amount and a majority in number of the Claims in such Classes that actually voted.

I. Section 1129(a)(3). The Plan has been proposed in good faith and not by any means forbidden by law. In so finding, the Court has considered the totality of the circumstances of these Reorganization Cases. The Plan is the result of extensive, good faith, arm's length negotiations among the Debtors and certain of their principal constituencies, such as the members of the Ad Hoc Committee of Second Lien Noteholders, the Backstop Parties, the parties to the RSA (the "**RSA Parties**") and Apollo, and achieves the goal of reorganization

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contemplated by the Bankruptcy Code. The Plan is based upon the RSA, the assumption of which was approved by the Court on June 23, 2014 [Docket No. 507], as being within the Debtors' reasonable judgment. The Debtors filed the Reorganization Cases with an honest belief that they were in need of reorganization and that the reorganization contemplated in the RSA and the Plan was the best restructuring alternative available to them.

The Debtors' good faith is evident from the record of the Reorganization Cases, including the Disclosure Statement, the Plan, and the record of the Confirmation Hearing. The Plan achieves a fair result, consistent with the objectives and purposes of the Bankruptcy Code. The Debtors and each of their respective officers, directors, employees, advisors and professionals (i) acted in good faith in negotiating, formulating, and proposing, where applicable, the Plan and the agreements, compromises, settlements, transactions, and transfers contemplated thereby, and (ii) will be acting in good faith in proceeding to (a) consummate the Plan and the agreements, compromises, settlements, transactions, transfers, and documentation contemplated by the Plan, including, but not limited to, the Plan Supplement documents, and (b) take any actions authorized, directed or contemplated by this Order. Thus, the Plan satisfies the requirements of section 1129(a)(3) of the Bankruptcy Code.

J. Section 1129(a)(4). Except as otherwise provided in the Final DIP Order, any payment made or to be made by the Debtors for services or for costs and expenses in, or in connection with, the Reorganization Cases, or in connection with the Plan and incident to the Reorganization Cases, has been approved by, or is subject to the approval of, this Court as reasonable, satisfying the requirements of section 1129(a)(4) of the Bankruptcy Code. Pursuant to Section 3.3 of the Plan, and except as otherwise provided herein, in the Plan or in the Final DIP Order, all payments to be made to Professional Persons or other entities asserting a Fee

Claim for services rendered before the Effective Date will be subject to review and approval by this Court.

K. Section 1129(a)(5). To the extent known, the Debtors have disclosed the identity and affiliations of the individuals proposed to serve, after confirmation of the Plan, as directors and officers of the Reorganized Debtors; the appointment to, or continuance in, such offices of such individuals is consistent with the interests of the Debtors' creditors and interest holders and with public policy; and the Debtors have disclosed the identity of any insiders who will be employed or retained by the Reorganized Debtors subsequent to the Effective Date and the nature of any compensation to be paid to such insiders. These disclosures satisfy the requirements of section 1129(a)(5) of the Bankruptcy Code.

L. Section 1129(a)(6). The Plan does not provide for any changes in rates that require regulatory approval of any governmental agency.

M. Section 1129(a)(7). The liquidation analysis set forth in Exhibit 2 to the Disclosure Statement and other evidence proffered or adduced at or prior to, or in declarations filed in connection with, the Confirmation Hearing (i) are reasonable, persuasive and credible, (ii) use reasonable and appropriate methodologies and assumptions, (iii) have not been controverted by any other evidence and (iv) establish that each holder of an Allowed Claim or Interest in an impaired Class that has not accepted the Plan will receive or retain under the Plan, on account of such Claim or Interest, property of a value, as of the Effective Date of the Plan, that is not less than the amount that it would have received if the Debtors were liquidated under chapter 7 of the Bankruptcy Code on such date.

N. Each holder of an impaired Claim or Interest in each impaired Class of Claims or Interests that has not accepted the Plan will, on account of such Claim or Interest, receive or retain property under the Plan having a value, as of the Effective Date, that is not less than the amount that such holder would have received or retained if the Debtors were liquidated under chapter 7 of the Bankruptcy Code on the Effective Date. See Disclosure Statement, Exhibit 2.

O. Section 1129(a)(8). The Plan has not been accepted by all impaired Classes of Claims and Interests. As of the Voting Deadline, pursuant to section 1126(g) of the Bankruptcy Code, Classes 4 and 5 have voted to reject the Plan. Holders of Claims and Interests in Classes 8, 10 and 11 are conclusively deemed to have rejected the Plan. Nevertheless, the Plan is confirmable because it satisfies section 1129(b)(1) of the Bankruptcy Code with respect to such non-accepting Classes of Claims and Interests.

P. Section 1129(a)(9). Except to the extent that the holder of a particular Claim has agreed to different treatment, the Plan provides treatment for Administrative Expense Claims, Priority Tax Claims, Fee Claims and Priority Non-Tax Claims that is consistent with the requirements of section 1129(a)(9) of the Bankruptcy Code.

Q. Section 1129(a)(10). As evidenced by the Voting Declaration, the Plan has been accepted by Classes 6 and 9, which are Classes of impaired Claims that are entitled to vote on the Plan, determined without including any acceptance of the Plan by any insider (as that term is defined in section 101(31) of the Bankruptcy Code).

R. Section 1129(a)(11). The Debtors' projections of financial information of the Reorganized Debtors as of the Effective Date are reasonable, made in good faith, were the product of a rigorous, top-down and bottom-up process, and confirmation of the Plan is not likely to be followed by the liquidation or the need for the further financial reorganization of the Debtors.

S. Section 1129(a)(12). The Plan provides that all fees payable pursuant to section 1930 of title 28 of the United States Code, due and payable through the Effective Date shall be paid by the Debtors on or before the Effective Date and all such fees due thereafter shall be paid by the Reorganized Debtors in the ordinary course until the entry of a final decree closing the Reorganization Cases, or the conversion or dismissal of the Reorganization Cases.

T. Section 1129(a)(13). Pursuant to Section 14.2 of the Plan, on and after the Effective Date, pursuant to section 1129(a)(13) of the Bankruptcy Code, the Reorganized Debtors shall continue to pay all retiree benefits (within the meaning of, and subject to the limitations of, section 1114 of the Bankruptcy Code), at the level established in accordance with section 1114 of the Bankruptcy Code, at any time prior to the Confirmation Date, for the duration of the period for which the Debtors had obligated themselves to provide such benefits.

U. Sections 1129(a)(14), 1129(a)(15) and 1129 (a)(16). Sections 1129(a)(14), 1129(a)(15) and 1129(a)(16) of the Bankruptcy Code do not apply to the Reorganization Cases.

V. Section 1129(b). The Plan does not "discriminate unfairly" and is "fair and equitable" with respect to Classes 4, 5, 8, 10 and 11 (i.e., the Classes that are impaired and rejected (or are deemed to reject) the Plan).

(1) Unfair Discrimination. The Plan does not discriminate unfairly with respect to holders of Claims in Classes 4 and 5 because such holders are receiving the same or more favorable treatment as holders of all similarly situated Claims against the Debtors. The Plan does not discriminate unfairly with respect to Classes 8, 10 and 11 because the Claims and Interests in such Classes either are subordinated to other Claims or have no value. The Plan does not discriminate unfairly against holders of Senior Subordinated Note Claims by providing for

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no recovery to such holders because pursuant to section 510(a) of the Bankruptcy Code and Article X of the Senior Subordinated Indenture, holders of Claims in Class 8 are not entitled to receive any payment of principal or interest unless holders of Second Lien Notes are paid in full.

(2) Fair and Equitable. The Plan is "fair and equitable" with respect to each rejecting Class. Specifically, for the reasons set forth in the Bench Decisions, the Plan is "fair and equitable" with respect to Classes 4 and 5. Further, the Plan is "fair and equitable" with respect to Classes 8, 10 and 11 as the Plan does not provide a recovery on account of any Claim or Interest that is junior to such Classes and no Class of Claims or Interests will receive or retain property under the Plan that has a value greater than 100% of such Class's Allowed Claims or Interests. Thus, the Plan may be confirmed notwithstanding the rejection by Classes 4, 5, 8, 10 and 11.

W. Section 1129(c). The Plan is the only plan that has been filed in these cases that has been found to satisfy the requirements of subsections (a) and (b) of section 1129 of the Bankruptcy Code. Accordingly, the requirements of section 1129(c) of the Bankruptcy Code have been satisfied.

X. Section 1129(d). No party in interest, including any Governmental Unit (as defined in section 101(27) of the Bankruptcy Code), has requested that the Court deny confirmation of the Plan on grounds that the principal purpose of the Plan is the avoidance of taxes or the avoidance of the application of section 5 of the Securities Act; the principal purpose of the Plan is not such avoidance. Accordingly, the Plan satisfies the requirements of section 1129(d) of the Bankruptcy Code.

Y. Valuation. The valuation analysis contained in the Disclosure Statement and the evidence adduced at the Confirmation Hearing, including the estimated post-emergence enterprise value of the Reorganized Debtors, are reasonable and credible. All parties in interest have been given the opportunity to challenge the valuation analysis. The valuation analysis (i) is reasonable, persuasive, and credible as of the date such analysis was prepared, presented, or proffered, and (ii) uses reasonable and appropriate methodologies and assumptions.

Z. Modification of the Plan (11 U.S.C. § 1127(a)). Pursuant to and in compliance with section 1127 of the Bankruptcy Code and Bankruptcy Rule 3019, the Debtors proposed certain modifications to the Plan as reflected in the modified or amended versions of the Plan filed with the Court prior to entry of this Order (collectively, the "**Plan Modifications**"). In accordance with Bankruptcy Rule 3019, the Plan Modifications do not (1) affect the classification of Claims or Interests, (2) constitute material modifications of the Plan under section 1127 of the Bankruptcy Code, (3) cause the Plan to fail to meet the requirements of sections 1122 or 1123 of the Bankruptcy Code, (4) materially and adversely change the treatment of any Claims or Interests (other than any Claims and Interests held by those who have accepted such Plan Modifications in writing or in open court), (5) require resolicitation of any holders of Claims or Interests, or (6) require that any such holders be afforded an opportunity to change previously cast acceptances or rejections of the Plan. Under these circumstances, the form and manner of notice of the Plan Modifications are adequate, and no other or further notice of the Plan Modifications is necessary or required.

AA. Satisfaction of Confirmation Requirements. Based on the foregoing, the Plan satisfies the requirements for confirmation set forth in section 1129 of the Bankruptcy Code.

BB. Retention of Jurisdiction. This Court may properly, and shall, retain jurisdiction over, and shall hear and determine, (i) the Intercreditor Actions, the Causes of Action

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asserted therein, and any other similar Causes of Action arising under or in connection with, or otherwise related to, the Second Lien Intercreditor Agreement, whether asserted against a Released Party or another Person, (ii) all adversary proceedings filed in the Reorganization Cases (including the Adversary Proceedings (as defined below)), and (iii) the matters set forth in section 1142 of the Bankruptcy Code and all matters arising in, arising under, or related to the Reorganization Cases as set forth in Article XIII of the Plan.

DISCHARGE, INDEMNIFICATION,
INJUNCTIONS, RELEASES AND EXCULPATION

CC. The indemnification, injunction, discharge, release and exculpation provisions set forth in Article XII of the Plan constitute good faith compromises and settlements of the matters covered thereby. Such compromises and settlements are made in exchange for consideration and are in the best interests of the Debtors and their Estates, are fair, equitable, reasonable, and are integral elements of the restructuring and resolution of the Reorganization Cases in accordance with the Plan. The failure to effect the discharge, release, indemnification, injunction and exculpation provisions described in Article XII of the Plan would seriously impair the Debtors' ability to confirm the Plan. Each of the discharge, release, indemnification, injunction and exculpation provisions set forth in the Plan:

(i) is within the jurisdiction of the Court under 28 U.S.C. §§ 1334(a), (b) and (d);

(ii) is an essential means of implementing the Plan pursuant to section 1123(a)(5) of the Bankruptcy Code;

(iii) is an integral element of the settlements and transactions incorporated into the Plan;

(iv) confers material benefit on, and is in the best interests of, the Debtors and their estates;

(v) is important to the overall objectives of the Plan to finally resolve all Claims among or against the parties in interest in the Reorganization Cases with respect to the Debtors, their organization, capitalization, operation and reorganization; and

(vi) is consistent with sections 105, 1123, 1125(e) and 1129 of the Bankruptcy Code and applicable law.

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED, that:

1. The Plan is confirmed pursuant to section 1129 of the Bankruptcy Code; provided, however, that if there is any conflict between the terms of the Plan and/or the Bench Decisions and the terms of this Order, the terms of this Order shall control.

2. The Effective Date of the Plan shall occur on the first Business Day on which all conditions set forth in Section 11.1 of the Plan have been satisfied or waived in accordance with Section 11.2 of the Plan.

3. Any objections or responses to confirmation of the Plan and any reservation of rights contained therein that (a) have not been withdrawn, waived or settled prior to the entry of this Order or (b) are not cured by the relief granted herein, are hereby OVERRULED in their entirety and on their merits, and all withdrawn objections or responses are deemed withdrawn with prejudice.

4. The business and assets of the Debtors shall remain subject to the jurisdiction of this Court until the Effective Date.

5. On and after the Effective Date, the Reorganized Debtors may operate their businesses and may use, acquire and dispose of property and prosecute, compromise or settle any Claims (including any Administrative Expense Claims) and Causes of Action without supervision of or approval by the Bankruptcy Court and free and clear of any restrictions of the Bankruptcy Code or the Bankruptcy Rules other than restrictions expressly imposed by the Plan or this Order. Without limiting the foregoing, the Reorganized Debtors may pay the charges that they incur on or after the Effective Date for Professional Persons' fees, disbursements, expenses or related support services without application to the Bankruptcy Court.

6. The Plan provides for the entry into, and the Debtors and Reorganized Debtors, as the case may be, are hereby authorized to enter into and execute, the (a) New ABL Facility and (b) all amendments and modifications to the New ABL Facility and any agreements, instruments, certificates or documents, including the Exit Financing Documents (as defined below), or transactions related thereto or contemplated thereby. The New ABL Facility was proposed in good faith, is fair, reasonable, and critical to the success and feasibility of the Plan and is necessary and appropriate for the consummation of the Plan, and entry into the New ABL Facility is in the best interests of the Debtors, their estates and their creditors and the Reorganized Debtors. The Debtors have disclosed all material facts regarding the Reorganized Debtors' obligations under the New ABL Facility and have exercised reasonable business judgment in determining to enter into the foregoing and have provided sufficient and adequate notice thereof. The terms of the New ABL Facility are hereby approved. The Debtors and the Reorganized Debtors and the Persons and entities granted Liens and security interests are hereby authorized, to the extent not already authorized by Order of this Court and without further approval of this Court or notice to any other party, to (u) enter into, execute, file, record, and deliver all notes, agreements, guarantees, security documents, mortgages, control agreements, certificates, insurance documents, opinions and all other documents, instruments, and certificates relating to or contemplated by the New ABL Facility (collectively, the "**Exit Financing Documents**"), including without limitation, any documents required in connection with the creation or perfection of the Liens securing the New ABL Facility, (v) grant such Liens and security interests as are contemplated by the New ABL Facility, (w) obtain any consents and government approvals necessary to establish and perfect such Liens and security interests relating to or contemplated by the Exit Financing Documents under the provisions of applicable

state, federal, or other law (whether domestic or foreign) that would be applicable in the absence of the Plan and this Order, (x) thereafter cooperate to make all other filings and recordings that are necessary or appropriate, (y) in the case of the Debtors and Reorganized Debtors, fully perform all of their obligations under the Exit Financing Documents, including without limitation, pay all fees and other costs contemplated by the Exit Financing Documents and (z) take all such other actions as the Debtors or the Reorganized Debtors may determine are necessary, appropriate or desirable in connection with the consummation of the transactions contemplated by the New ABL Facility. The Exit Financing Documents (when and to the extent entered into) are approved and are or will be, and are hereby deemed to be, binding and enforceable against the Debtors, the Reorganized Debtors and their affiliates party thereto in accordance with their terms. The New ABL Facility (including, without limitation, any and all terms, conditions and covenants thereof) have been negotiated in good faith and at arm's-length among the Debtors and the applicable agents and lenders under the New ABL Facility (the agent and the lenders for the New ABL Facility are collectively referred to herein as the "**Exit Financing Lenders**"), and any credit extended, letters of credit issued for the account of, or loans made to the Reorganized Debtors by the Exit Financing Lenders pursuant to the New ABL Facility shall be deemed to have been extended, issued, and made in good faith and for legitimate business purposes. The guarantees, mortgages, pledges, liens and other security interests granted pursuant to or in connection with the New ABL Facility are hereby approved in their entirety; such mortgages, pledges, Liens and security interests are valid, binding, perfected and enforceable Liens on or security interests in the collateral described in and subject to the relevant Exit Financing Documents; and are or will be (as the case may be) and are hereby deemed to be granted in good faith, for good and valuable consideration and for legitimate business purposes

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as an inducement to the lenders to extend credit thereunder and shall be, and hereby are, deemed not to constitute a fraudulent conveyance or fraudulent transfer and shall not otherwise be subject to avoidance or recharacterization. The priorities of such Liens and security interests shall be as set forth in the intercreditor agreement(s) and other definitive documentation executed in connection with the New ABL Facility.

7. The Debtors and the Reorganized Debtors are hereby authorized, without further approval of this Court or notice to any party, to execute and deliver all notes, agreements, guarantees, security documents, mortgages, control agreements, certificates, insurance documents, opinions and all other documents, instruments and certificates relating to the Replacement First Lien Notes and the Replacement 1.5 Lien Notes (combined, the "**Replacement Notes Documents**) and fully perform their obligations thereunder. The Replacement Notes Documents (when and to the extent entered into) are or will be, and are hereby deemed to be binding and enforceable against the Debtors, the Reorganized Debtors and their affiliates party thereto in accordance with their terms.

8. The settlement and compromise of certain potential inter-creditor disputes under Section 2.1 of the Plan is fair and equitable and in the best interests of the Debtors and creditors in accordance with Bankruptcy Rule 9019. For the avoidance of doubt, the Causes of Action asserted in the Intercreditor Actions have not been settled or compromised.

9. The Distribution Record Date shall be the Effective Date.

A. Plan Implementation

10. In accordance with section 1142 of the Bankruptcy Code, section 303 of the Delaware General Corporation Law and any comparable provisions of the business corporation law of any other state (collectively, the "**Reorganization Effectuation Statutes**"), but subject to the satisfaction or waiver of all conditions precedent listed in Section 11.1 of the

Plan (unless waived in accordance with section 11.2 of the Plan), without further action by the Court or the boards of directors or managers or security holders of any Debtor or Reorganized Debtor, the Debtors and the Reorganized Debtors are authorized to: (a) take any and all actions necessary or appropriate to implement, effectuate and consummate the Plan, this Order or the transactions contemplated thereby or hereby, including those transactions identified in Article VII of the Plan, including performance under any agreement relating to the appointment of directors; (b) execute, deliver, file and record such documents (including the Plan Documents), contracts, instruments, releases and other agreements (collectively, the "**Effectuating Documents**") and perform their obligations thereunder and take such other action as may be necessary to effectuate and further evidence the terms and conditions of the Plan; and (c) take any and all actions necessary or appropriate to effectuate the dissolution of Momentive Performance Materials Holdings Inc. The Effectuating Documents (when and to the extent entered into or adopted) shall constitute legal, valid, binding and authorized obligations of the respective parties thereto, enforceable in accordance with their terms (without further action unless such Effectuating Document otherwise provides).

11. On the Effective Date, Reorganized MPM is authorized, as contemplated by Section 10.5 of the Plan, to enter into the Amended Shared Services Agreement, and such Amended Shared Services Agreement shall be binding on all parties thereto.

12. The First Lien Indenture Trustee and the 1.5 Lien Indenture Trustee are hereby directed to timely take all commercially reasonable steps necessary to effectuate the distribution of the Replacement First Lien Notes and the Replacement 1.5 Lien Notes, including, but not limited to, sending any required notices to DTC.

13. This Order shall constitute all approvals and consents required, if any, by the laws, rules or regulations of any state or any other governmental authority with respect to the implementation or consummation of the Plan and any other acts that may be necessary or appropriate for the implementation or consummation of the Plan.

14. Each federal, state, commonwealth, local, foreign or other governmental agency is hereby directed and authorized to accept for filing and/or recording any and all documents, mortgages and instruments necessary or appropriate to effectuate, implement or consummate the transactions contemplated by the Plan and this Order.

15. The consummation of the Plan, including the assumption of any executory contract or unexpired lease by a Reorganized Debtor, shall not constitute a change in ownership or change in control under any employee benefit plan or program, financial instrument, loan or financing agreement, executory contract or unexpired lease or contract, lease or agreement in existence on the Effective Date to which any Debtor is a party.

B. Executory Contracts and Unexpired Leases

16. Subject to the occurrence of the Effective Date, the Debtors are authorized to assume and/or reject executory contracts or unexpired leases in accordance with Article X of the Plan and orders of this Court. Each executory contract and unexpired lease assumed pursuant to Section 10.1 of the Plan shall revest in and be fully enforceable by the applicable Reorganized Debtor in accordance with its terms, except as modified by the provisions of the Plan, or any order of the Bankruptcy Court authorizing and providing for its assumption or applicable federal law.

17. As of and subject to the occurrence of the Effective Date and the payment of any applicable Cure Amount, all executory contracts and unexpired leases identified on the

Schedule of Assumed Contracts and Leases shall be deemed assumed, and all other executory contracts and unexpired leases of the Debtors shall be deemed rejected, except that: (a) any executory contracts and unexpired leases that previously have been assumed or rejected pursuant to a Final Order of the Bankruptcy Court shall be treated as provided in such Final Order; and (b) all executory contracts and unexpired leases that are the subject of a separate motion to assume or reject under section 365 of the Bankruptcy Code pending on the Effective Date shall be treated as is determined by a Final Order of the Bankruptcy Court resolving such motion.

18. All Claims, if any, arising from the rejection of executory contracts or unexpired leases, if any, will be treated as General Unsecured Claims. In the event that the rejection of an executory contract or unexpired lease by any of the Debtors pursuant to the Plan results in damages to the other party or parties to such contract or lease, a Claim for such damages shall be forever barred and shall not be enforceable against the Debtors or the Reorganized Debtors, or their respective properties or interests in property as agents, successors or assigns, unless a proof of claim is timely filed with the Bankruptcy Court and served upon counsel for the Debtors and the Reorganized Debtors on or before the date that is thirty (30) days after service by the Debtors of individualized notice of the effective date of such rejection (which may be the Effective Date, the date on which the Debtors reject the applicable contract or lease as provided in Section 10.2) of the Plan, or pursuant to an order of the Bankruptcy Court). Unless previously provided by the Debtors, the Debtors shall provide notice of the last date to file a Claim arising from the rejection of an executory contract or unexpired lease to the counterparties of such rejected contracts and leases.

19. Objections to Cure Amounts as filed on the Cure Schedule, timely filed on or before 5:00 p.m. (prevailing Eastern Time) on August 5, 2014 (or as extended by mutual

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agreement), that have not been resolved by the Debtors and the non-Debtor party (the "**Pending Cure Objections**") are hereby preserved and this Court shall retain jurisdiction to hear and determine the Pending Cure Objections to the extent the Debtors and the non-Debtor party are unable to consensually resolve such Pending Cure Objections. The Debtors may, in their discretion, resolve any Pending Cure Objection by mutual agreement with the non-Debtor party and without further order of the Court.

20. The Existing Management Agreement shall, pursuant to Section 10.6 of the Plan, be deemed terminated as of the Petition Date or as soon thereafter as practicable by mutual agreement of the parties thereto. Any Claims thereunder shall be waived and no payments or distributions shall be made on account of such Claims.

21. All contracts, agreements and leases that were entered into by any of the Debtors or assumed by any of the Debtors after the Petition Date shall be deemed assigned by the applicable Debtors to the applicable Reorganized Debtors on the Effective Date.

C. Vesting and Transfer of Assets

22. On the Effective Date, except as otherwise provided herein or in the Plan, all property of the Estates of the Debtors, including all claims, rights and Causes of Action and any property acquired by the Debtors under or in connection with the Plan, shall vest in each respective Reorganized Debtor free and clear of all Claims, Liens, charges, other encumbrances and Interests, except for Liens and security interests that are granted or retained to secure the New ABL Facility, the Replacement First Lien Notes, the Replacement 1.5 Lien Notes and Other Secured Claims, as applicable.

D. Discharge

23. The Plan discharge provision set forth in Section 12.2 of the Plan is approved in all respects is incorporated herein in its entirety, and is so ordered and shall be immediately effective on the Effective Date of the Plan without further order or action on the part of the Court or any other party. Upon the Effective Date and in consideration of the Plan Distributions, except as otherwise provided herein or in the Plan, each Person that is a holder (as well as any trustees and agents on behalf of such Person) of a Claim or Interest shall be deemed to have forever waived, released, and discharged the Debtors, to the fullest extent permitted by section 1141 of the Bankruptcy Code, of and from any and all Claims, Interests, rights, and liabilities that arose prior to the Effective Date. Except as otherwise provided herein, upon the Effective Date, all such holders of Claims and Interests shall be forever precluded and enjoined, pursuant to sections 105, 524, 1141 of the Bankruptcy Code and Section 12.4 of the Plan, from prosecuting or asserting any such discharged Claim against or terminated Interest in any Debtor or any Reorganized Debtor.

E. Approval of Injunction, Release and Exculpation Provisions

24. **Injunction.** The injunction provisions set forth in Article XII of the Plan are approved in all respects, are incorporated herein in their entirety, are so ordered and shall be immediately effective on the Effective Date of the Plan without further order or action on the part of the Court or any other party.

25. In accordance with Section 12.3 of the Plan, as of the Confirmation Date, but subject to the occurrence of the Effective Date, all Persons who have held, hold or may hold Claims against or Interests in the Debtors or the Estates are, with respect to any such Claims or Interests, permanently enjoined after the Confirmation Date from: (i) commencing, conducting

or continuing in any manner, directly or indirectly, any suit, action or other proceeding of any kind (including, without limitation, any proceeding in a judicial, arbitral, administrative or other forum) against or affecting the Debtors, the Reorganized Debtors, the Estates or any of their property, or any direct or indirect transferee of any property of, or direct or indirect successor in interest to, any of the foregoing Persons or any property of any such transferee or successor; (ii) enforcing, levying, attaching (including, without limitation, any pre-judgment attachment), collecting or otherwise recovering by any manner or means, whether directly or indirectly, any judgment, award, decree or order against the Debtors, the Reorganized Debtors, or the Estates or any of their property, or any direct or indirect transferee of any property of, or direct or indirect successor in interest to, any of the foregoing Persons, or any property of any such transferee or successor; (iii) creating, perfecting or otherwise enforcing in any manner, directly or indirectly, any encumbrance of any kind against the Debtors, the Reorganized Debtors, or the Estates or any of their property, or any direct or indirect transferee of any property of, or successor in interest to, any of the foregoing Persons (iv) acting or proceeding in any manner, in any place whatsoever, that does not conform to or comply with the provisions of the Plan to the full extent permitted by applicable law; and (v) commencing or continuing, in any manner or in any place, any action that does not comply with or is inconsistent with the provisions of the Plan; provided, however, that nothing contained herein shall preclude such Persons from exercising their rights, or obtaining benefits, pursuant to and consistent with the terms of the Plan. By accepting Plan Distributions, each holder of an Allowed Claim shall be deemed to have specifically consented to the Injunctions set forth in this Section.

DD. In accordance with Section 12.7 of the Plan, as of the Confirmation Date, but subject to the occurrence of the Effective Date, all Persons and Entities are permanently enjoined from prosecuting, whether directly, derivatively or otherwise, any claims, obligations, suits, judgments, damages, demands, debts, rights, Causes of Action or liabilities released pursuant to the Plan, including but not limited to the claims, obligations, suits, judgments, damages, demands, debts, rights, Causes of Action or liabilities released in Sections 12.5 and 12.6 of the Plan. All Persons are hereby enjoined from commencing any suit, proceeding or cause of action asserting the Causes of Action asserted in the Intercreditor Actions, or any other similar Causes of Action arising under or in connection with, or otherwise related to, the Second Lien Intercreditor Agreement, in any forum except in this Court (the "**Channeling Injunction**"); provided, however, that nothing herein shall enjoin any person or entity from pursuing any and all appeals arising out of the Causes of Action asserted in the Intercreditor Actions. For the avoidance of doubt, nothing in this Order or the Plan shall constitute an injunction (other than the Channeling Injunction) of the Intercreditor Actions or the Causes of Action asserted therein, as may be amended to assert a claim or defense under the Second Lien Intercreditor Agreement that arose out of the conduct, transactions, or occurrences set out, or attempted to be set out, in the original complaints.

26. **Releases.** The Releases set forth in Article XII of the Plan are approved in all respects, are incorporated herein in their entirety, are so ordered and shall be immediately effective on the Effective Date of the Plan without further order or action on the part of the Court, any of the parties to such Releases or any other party.

(a) ***Releases by the Debtors***. Except as otherwise provided in the Plan or this Order, as of the Effective Date, the Debtors and the Reorganized Debtors shall be deemed, pursuant to Section 12.5 of the Plan, to forever release, waive and discharge all claims, obligations, suits, judgments, damages, demands, debts, rights, Causes of Action and liabilities (other than the rights of the Debtors or the Reorganized Debtors to enforce the Plan and the contracts, instruments, releases, indentures and other agreements or documents delivered thereunder) against the Released Parties, whether liquidated or unliquidated, fixed or contingent, matured or unmatured, known or unknown, foreseen or unforeseen, then existing or thereafter arising, in law, equity or otherwise that are based in whole or in part on any act, omission, transaction, event or other occurrence taking place on or prior to the Effective Date in any way relating to the Debtors, the Reorganized Debtors, the parties released pursuant to Section 12.5 of the Plan, the Reorganization Cases, or the Plan or the Disclosure Statement, and that could have been asserted by or on behalf of the Debtors or their Estates or Reorganized Debtors, whether directly, indirectly, derivatively or in any representative or any other capacity, other than claims, obligations, suits, judgments, damages, demands, debts, rights, Causes of Action and liabilities arising out of or relating to any act or omission of a Released Party or a former officer or director of the Debtors that constitutes gross negligence, fraud, willful misconduct or breach of fiduciary duty (if any).

(b) ***Releases by Holders of Claims and Interests***. Except as otherwise provided in the Plan or this Order, on the Effective Date: (i) each of the Released Parties; (ii) each holder of a Claim or Interest entitled to vote on the Plan that did not "opt out" of the releases provided in Section 12.5 of the Plan in a timely submitted Ballot; and (iii) to the fullest extent permissible under applicable law, as such law may be extended or interpreted subsequent to the Effective Date, all holders of Claims and Interests, in consideration for the obligations of the Debtors and Reorganized Debtors under the Plan, the Plan Consideration and other contracts, instruments, releases, agreements or documents executed and delivered in connection with the Plan, and each entity (other than the Debtors) that has held, holds or may hold a Claim or

Interest, as applicable, shall be deemed to have consented to the Plan for all purposes and the restructuring embodied herein and deemed to forever release, waive and discharge all claims, demands, debts, rights, Causes of Action or liabilities (other than the right to enforce the obligations of any party under the Plan and the contracts, instruments, releases, agreements and documents delivered under or in connection with the Plan) against the Released Parties, whether liquidated or unliquidated, fixed or contingent, matured or unmatured, known or unknown, foreseen or unforeseen, then existing or thereafter arising, in law, equity or otherwise that are based in whole or in part on any act or omission, transaction, event or other occurrence taking place on or prior to the Effective Date in any way relating to the Debtors, the Reorganized Debtors, the Reorganization Cases, or the Plan or the Disclosure Statement.

(c) Notwithstanding anything to the contrary contained herein or in the Plan: (i) except to the extent permissible under applicable law, as such law may be extended or interpreted subsequent to the Effective Date, the releases provided for in this Section 12.5 of the Plan shall not release any non-Debtor entity from any liability arising under (x) the Internal Revenue Code or any state, city or municipal tax code, or (y) any criminal laws of the United States or any state, city or municipality; and (ii) the releases set forth in Section 12.6 of the Plan shall not release any (x) any claims against any Person to the extent such Person asserts a crossclaim, counterclaim and/or claim for setoff which seeks affirmative relief against a Debtor or any of its officers, directors, or representatives and (y) claims against any Person arising from or relating to such Person's gross negligence, fraud, willful misconduct or breach of fiduciary duty (if any), each as determined by a Final Order of the Bankruptcy Court. For the avoidance of doubt, nothing in this Order or the Plan shall constitute (x) an injunction (other than the

Channeling Injunction) or (y) a non-consensual, third-party release of the Intercreditor Actions or the Causes of Action asserted therein.

27. **Exculpation.** The exculpation provision set forth in Article XII of the Plan is approved in all respects, are incorporated herein in its entirety, is so ordered and shall be immediately effective on the Effective Date of the Plan without further order or action on the part of the Court.

28. To the extent permissible under applicable law and pursuant to Section 12.6 of the Plan, none of the Released Parties shall have or incur any liability to any holder of any Claim or Interest or any other Person for any act or omission in connection with, or arising out of the Debtors' restructuring, including without limitation, the negotiation, implementation and execution of the Plan, the Reorganization Cases, the Disclosure Statement, the solicitation of votes for and the pursuit of confirmation of the Plan, the consummation of the Plan, or the administration of the Plan or the property to be distributed under the Plan, including, without limitation, all documents ancillary thereto, all decisions, actions, inactions and alleged negligence or misconduct relating thereto and all activities leading to the promulgation and confirmation of the Plan except for gross negligence or willful misconduct, each as determined by a Final Order of the Bankruptcy Court.

29. **Intercreditor Actions.** Nothing in the Plan or this Order shall constitute (x) an injunction (other than the Channeling Injunction) or (y) a non-consensual, third-party release of the Intercreditor Actions or the Causes of Action asserted therein.

30. **Dow**. Nothing in the Plan or this Order, however, shall (i) release, enjoin, waive or discharge any claims, demands, debts, rights, Causes of Action or liabilities held by The Dow Chemical Company and/or any of its affiliates including, but not limited to, Union

Carbide Corporation (collectively, "**Dow**") against the Debtors' non-Debtor subsidiaries and affiliates solely to the extent such subsidiaries and affiliates are independently liable with respect to such claims, demands, debts, rights, Causes of Action or liabilities and/or (ii) enjoin or otherwise preclude Dow from asserting any rights of setoff, recoupment, contribution, indemnification and/or other defenses against the Debtors or Reorganized Debtors in response to any Claims or Causes of Action that have been or may be asserted by or on behalf of the Debtors or the Reorganized Debtors against Dow; provided, however, that nothing in the Plan, this Order or this paragraph shall entitle Dow to any affirmative recovery from the Debtors or Reorganized Debtors with respect to any such rights or defenses.

31. **Debtors' Obligations Under the Backstop Commitment Agreement.** Notwithstanding anything to the contrary in the Plan or this Order, (i) the Debtors' obligations under the Backstop Commitment Agreement, including their indemnification obligations to the Backstop Parties, shall remain unaffected and shall remain in full force and effect following the Effective Date, (ii) any such obligations, including such indemnification obligations, shall not be discharged under the Plan, and (iii) none of the Reorganized Debtors shall terminate any such obligations, including such indemnification obligations.

32. **No Relinquishment of Rights.** Subject to Sections 12.5 and 5.7(c) of the Plan, nothing contained in the Plan or this Order shall, as contemplated by Section 12.8 of the Plan, be deemed to be a waiver or relinquishment of any rights, claims or Causes of Action, rights of setoff, or other legal or equitable defenses that the Debtors had immediately prior to the Effective Date on behalf of the Estates or of themselves in accordance with any provision of the Bankruptcy Code or any applicable non-bankruptcy law. The Reorganized Debtors shall have, retain, reserve, and be entitled to assert all such claims, Causes of Action, rights of setoff, or

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other legal or equitable defenses as fully as if the Reorganization Cases had not been commenced, and all of the Debtors' legal and/or equitable rights respecting any Claim left unimpaired, as set forth in Section 4.2 herein, may be asserted after the Confirmation Date to the same extent as if the Reorganization Cases had not been commenced.

33. No Person may rely on the absence of a specific reference in the Plan or the Disclosure Statement to any Cause of Action against them as any indication that the Debtors or Reorganized Debtors, as applicable, will not pursue any and all available Causes of Action against such Person. The Debtors or Reorganized Debtors, as applicable, expressly reserve all rights to prosecute any and all Causes of Action against any Person, in accordance with the Plan. From and after the Effective Date, the Debtors or Reorganized Debtors, as applicable, shall have the exclusive right, authority and discretion to determine and to initiate, file, prosecute, enforce, abandon, settle, compromise, release, withdraw or litigate to judgment any Cause of Action and to decline to do any of the foregoing without further notice to or action, order or approval of the Court. The Reorganized Debtors are deemed representatives of the Estates for the purpose of prosecuting any claim or Cause of Action and any objections to Claims pursuant to 11 U.S.C. § 1123(b)(3)(B).

34. **Liabilities to, and Rights of, Governmental Units.** Nothing in the Plan or this Order shall, as contemplated by Section 12.5(d) of the Plan, limit or expand the scope of discharge, release or injunction to which the Debtors or Reorganized Debtors are entitled to under the Bankruptcy Code with respect to any Governmental Unit (as defined in section 101(27) of the Bankruptcy Code). The discharge, release and injunction provisions contained in the Plan and this Order are not intended and shall not be construed to bar any Governmental Unit from, subsequent to entry of this Order, pursuing any police or regulatory action, except to the

extent that such police or regulatory action involves pursuing a "claim" within the meaning of section 101(5) of the Bankruptcy Code that is discharged or enjoined by the Plan and this Order.

35. Notwithstanding anything contained in the Plan or this Order to the contrary, nothing in the Plan or this Order shall, as contemplated by Section 12.5(e) of the Plan, discharge, release, impair or otherwise preclude: (1) any liability to a Governmental Unit that is not a Claim; (2) any Claim of a Governmental Unit arising on or after the Confirmation Date; (3) any valid right of set-off or recoupment of the United States against a Debtor; or (4) any liability of the Debtors or Reorganized Debtors under environmental law to any Governmental Unit as the owner or operator of property that such Entity owns or operates after the Confirmation Date, except those obligations to reimburse costs expended or paid by a Governmental Unit before the Petition Date or to pay penalties owing to a Governmental Unit for violations of environmental laws or regulations that occurred before the Petition Date. Nor shall anything in the Plan or this Order: (i) enjoin or otherwise bar the United States or any Governmental Unit from asserting or enforcing, outside the Court, any liability described as not discharged in the preceding sentence; or (ii) divest any court of jurisdiction to determine whether any liabilities asserted by the United States or any Governmental Unit are discharged or otherwise barred by the Plan, this Order, or the Bankruptcy Code.

36. Moreover, nothing in the Plan or this Order shall, as contemplated by Section 12.5(f) of the Plan, release or exculpate any non-Debtor, including any Released Parties, from any liability to the United States, including but not limited to any liabilities arising under the Internal Revenue Code, the environmental laws, or the criminal laws against the Released Parties, nor shall anything in the Plan or this Order enjoin the United States from bringing any claim, suit, action or other proceeding against the Released Parties for any liability whatsoever;

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provided, however, that the foregoing sentence shall not limit the scope of discharge granted to the Debtors under sections 524 and 1141 of the Bankruptcy Code.

37. **Indemnification Obligations.** Notwithstanding anything to the contrary contained herein or in the Plan (including Section 10.1 thereof), subject to the occurrence of the Effective Date, the obligations of the Debtors to indemnify, defend, reimburse, exculpate, advance fees and expenses to, or limit the liability of directors or officers who were directors or officers of any of the Debtors at any time after the Petition Date, against any Causes of Action, shall, as contemplated by Section 12.9 of the Plan, remain unaffected thereby after the Effective Date and are not discharged. On and after the Effective Date, none of the Reorganized Debtors shall terminate or otherwise reduce the coverage under any directors' and officers' insurance policies in effect on the Petition Date, and all directors and officers of the Debtors at any time shall be entitled to the full benefits of any such policy for the full term of such policy, regardless of whether such directors and/or officers remain in such positions after the Effective Date.

38. Notwithstanding anything to the contrary herein or in the Plan, after the Effective Date, the obligations of the Debtors contained in Article VIII of the Backstop Commitment Agreement and approved by the Backstop Commitment Agreement Order to indemnify the Backstop Parties for any fees, expenses, costs and liabilities incurred in connection with the Intercreditor Actions shall remain in full force and effect and are not discharged.

39. **Preservation of Insurance.** The provisions of Section 7.12 of the Plan relating to Insurance Contracts and Insured Claims are approved in all respects, are incorporated herein in their entirety, are so ordered and shall be immediately effective on the Effective Date of

the Plan without further order or action on the part of the Court, any of the parties to such Releases or any other party.

40. The Debtors' discharge and release from all Claims as provided herein and in the Plan shall not diminish or impair the enforceability of any insurance policy that may provide coverage for Claims against the Debtors, the Reorganized Debtors, their current and former directors and officers, or any other Person. Notwithstanding the foregoing, the preservation of insurance shall not impair nor diminish any Releases under the Plan.

41. In the event, an insurer agrees, in its sole discretion, to offer new or renew existing insurance coverage (including any run-off policies), the Debtors (or if applicable, the Reorganized Debtors) are authorized, to the extent necessary and without further order of the Court, to execute all agreements and/or amendments to existing agreements related thereto and perform their obligations thereunder including, *inter alia*, the payment of premium and/or provision/delivery of collateral related thereto.

B. Order Binding on All Parties

42. Pursuant to section 1141 of the Bankruptcy Code, effective as of the Confirmation Date, but subject to the occurrence of the Effective Date, and except as expressly provided in the Plan or this Order, the provisions of the Plan (including the exhibits to, and all documents and agreements executed pursuant to, the Plan) and this Order shall be binding upon, and inure to the benefit of the Debtors, all holders of Claims and Interests, and their respective successors and assigns.

C. Adversary Proceedings

43. For the reasons set forth in the Bench Decisions, the Court hereby enters a judgment in favor of the Plaintiffs in Adversary Proceeding No. 14-08227 (RDD) (the "**First**

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Lien Adversary") and Adversary Proceeding No. 14-08228 (RDD) (the "**1.5 Lien Adversary**"). For the avoidance of doubt, the dispute regarding whether fees and expenses incurred in connection with any review, analysis, dispute or litigation (including the request of the Plaintiffs in the First Lien Adversary and the 1.5 Lien Adversary for a declaration that the Debtors are not obligated to bear any costs or attorneys' fees and expenses incurred by the First Lien Trustee or 1.5 Lien in such adversary proceedings) concerning whether any "make-whole" payment or other prepayment fees or premiums are a First Lien Obligation or a 1.5 Lien Obligation (as such terms are defined in the Final DIP Order) are allowed as part of the Indenture Trustee Fee Claim is hereby preserved and shall be determined at a subsequent time by this Court.

44. For the reasons set forth in the Bench Decisions, the Court hereby enters a judgment in favor of the Defendants in Adversary Proceeding No. 14-08238 (RDD) (the "**Senior Subordinated Notes Adversary**").

45. For the reasons set forth in the Bench Decisions, the Lift Stay Motion is denied with prejudice.

D. Approval of Discharge of Claims and Termination of Interests

46. The discharge provision as set forth in Section 12.2 of the Plan is approved, is so ordered and shall be immediately effective on the Effective Date without further order or action on the part of the Court or any other party.

47. Except as specifically set forth in the Plan or herein, as of the Effective Date, each Person that is a holder (as well as any trustees and agents on behalf of such Person) of a Claim or Interest and any affiliate of such holder shall be deemed to have forever waived, released, and discharged the Debtors, to the fullest extent permitted by section 1141 of the Bankruptcy Code, of and from any and all Claims, Interests, rights, and liabilities that arose prior

to the Effective Date. Except as otherwise provided in the Plan, upon the Effective Date, all such holders of Claims and Interests and their affiliates shall be forever precluded and enjoined, pursuant to sections 105, 524 and 1141 of the Bankruptcy Code, from prosecuting or asserting any such discharged Claim against or terminated Interest in any Debtor or Reorganized Debtor.

E. Exemption From Securities Laws

48. The offering, issuance of and the distribution under the Plan and associated documents and any and all agreements incorporated therein of the New Common Stock and Top HoldCo Common Stock and the exchange of New Common Stock for Top HoldCo Common Stock (a) with respect to the Second Lien Notes Equity Distribution, the Section 1145 Rights Offering Stock and the Section 1145 Subscription Rights shall, as contemplated by Section 8.12 of the Plan, be exempt from registration under the Securities Act and any other applicable securities laws pursuant to section 1145 of the Bankruptcy Code and (b) with respect to the 4(a)(2) Subscription Rights, the 4(a)(2) Rights Offering Stock and the Commitment Premium Shares shall be exempt from registration under the Securities Act and any other applicable securities laws pursuant to Section 4(a)(2) of the Securities Act and Regulation D promulgated thereunder. Subject to any transfer restrictions contained in the Top HoldCo Certificate of Incorporation, (a) the Top HoldCo Common Stock issued in exchange for (i) Section 1145 Rights Offering Stock and (ii) New Common Stock issued pursuant to the Second Lien Notes Equity Distribution may be resold by the holders thereof without restriction, except to the extent that any such holder is deemed to be an "underwriter" as defined in section 1145(b)(1) of the Bankruptcy Code (in which case, such Top HoldCo Common Stock may be resold by the holders thereof pursuant to registration under, or applicable exemptions from registration under, the Securities Act), and (b) the Top HoldCo Common Stock issued in

exchange for the 4(a)(2) Rights Offering Stock and the Commitment Premium Shares may be resold by the holders thereof pursuant to registration under, or applicable exemptions from registration under, the Securities Act.

F. Exemption From Certain Transfer Taxes

49. To the fullest extent permitted by applicable law, all sale transactions consummated by the Debtors and approved by the Bankruptcy Court on and after the Confirmation Date through and including the Effective Date, including any transfers effectuated under this Plan, the sale by the Debtors of any owned property pursuant to section 363(b) of the Bankruptcy Code, and any assumption, assignment, and/or sale by the Debtors of their interests in unexpired leases of non-residential real property or executory contracts pursuant to section 365(a) of the Bankruptcy Code, shall constitute a "transfer under a plan" within the purview of section 1146 of the Bankruptcy Code, and shall not be subject to any stamp, real estate transfer, mortgage recording, or other similar tax.

G. Administrative Bar Date

50. Except as otherwise provided in the Final DIP Order, the RSA Order, the Backstop Commitment Agreement Order or in Section 3.2(a) of the Plan, requests for payment of Administrative Expense Claims must be filed with the Bankruptcy Court and served on the Debtors or Reorganized Debtors (as the case may be), the Claims Agent, the Creditors' Committee and the Office of the United States Trustee proof of such Administrative Expense Claim within thirty (30) days after the Effective Date. Such proof of Administrative Expense Claim must include at a minimum: (i) the name of the applicable Debtor that is purported to be liable for the Administrative Expense Claim and if the Administrative Expense Claim is asserted against more than one Debtor, the exact amount asserted to be owed by each such Debtor; (ii) the

name of the holder of the Administrative Expense Claim; (iii) the asserted amount of the Administrative Expense Claim; (iv) the basis of the Administrative Expense Claim; and (v) supporting documentation for the Administrative Expense Claim. FAILURE TO FILE AND SERVE SUCH PROOF OF ADMINISTRATIVE EXPENSE CLAIM TIMELY AND PROPERLY SHALL RESULT IN SUCH CLAIM BEING FOREVER BARRED AND DISCHARGED.

H. Fee Claims

51. Except as otherwise provided in the Final DIP Order, any Professional Person seeking allowance by the Bankruptcy Court of a Fee Claim shall file with the Bankruptcy Court and serve notice of same on the Reorganized Debtors and the Office of the United States Trustee its respective final application for allowance of compensation for services rendered and reimbursement of expenses incurred prior to the Effective Date no later than forty-five (45) calendar days after the Effective Date. Objections to such Fee Claims, if any, must be filed and served on the applicable Professional Person, the Reorganized Debtors and the Office of the United States Trustee by no later than sixty-five (65) calendar days after the Effective Date or such other date as established by the Bankruptcy Court.

52. The Debtors or Reorganized Debtors, as applicable, shall, pursuant to Section 3.4 of the Plan, pay all outstanding U.S. Trustee Fees of a Debtor on an ongoing basis on the date such U.S. Trustee Fees become due, until such time as a final decree is entered closing the applicable Reorganization Case, the applicable Reorganization Case is converted or dismissed, or the Bankruptcy Court orders otherwise.

53. Notwithstanding anything to the contrary herein, in accordance with the RSA, the Backstop Commitment Agreement, and the Final DIP Order, the reasonable fees,

expenses, costs, and other charges of the RSA Parties, the Backstop Parties, and the Ad Hoc Committee of Second Lien Noteholders, shall, in each case, be allowed as Administrative Claims and shall be paid in full, in Cash on or before the Effective Date without application or approval by the Bankruptcy Court. For the avoidance of doubt, any engagement or fee letters entered into between the Debtors and the legal and financial advisors of the RSA Parties, the Backstop Parties, and the Ad Hoc Committee of Second Lien Noteholders are executory contracts, which the Reorganized Debtors shall assume on the Effective Date.

54. Notwithstanding anything in the *Order Pursuant to 11 U.S.C. §§ 105(a) and 331 Establishing Procedures for Monthly Compensation and Reimbursement of Expenses of Professionals* entered May 16, 2014 [Docket No. 214], all Professional Persons are authorized to file only a single first and final fee application to this Court no later than 45 days after the Effective Date.

I. Senior Subordinated Indenture Trustee Claims

55. Notwithstanding anything to the contrary set forth in the Plan, all Claims of the Senior Subordinated Indenture Trustee for its reasonable and documented fees and expenses arising under Section 7.07 of the Senior Subordinated Indenture shall be treated as General Unsecured Claims under Class 7 of the Plan, and the Senior Subordinated Indenture shall continue to exist after the Effective Date solely to permit the Senior Subordinated Trustee to seek compensation and/or reimbursement of its fees and expenses in accordance with the Senior Subordinated Indenture to the extent permitted or available under applicable law following the cancellation of the Senior Subordinated Indenture on the Effective Date pursuant to the Plan and this Order. The fees and expenses payable pursuant to this paragraph shall be subject to the reasonableness standard for expenses set forth in Section 7.07 of the Senior

Subordinated Indenture and this Court shall resolve any disputes as to the reasonableness of any such fees and expenses and the Debtors or Reorganized Debtors shall pay or file an objection to such fees and expenses within 65 days of the later of (x) the Effective Date or (y) the date of presentment of invoices to the Debtors.

J. Cancellation of Existing Securities and Agreements

56. Except for the purpose of evidencing a right to distribution under the Plan, including the enforcement of any subordination and "pay over" provisions in the Senior Subordinated Indenture, and except as otherwise set forth herein or in the Plan, on the Effective Date all agreements, instruments, and other documents evidencing, related to or connected with any Claim or Interest (but, for the avoidance of doubt, not including the Second Lien Notes Intercreditor Agreement solely to the extent necessary to preserve the Intercreditor Actions), other than Intercompany Interests, and any rights of any holder in respect thereof, shall be deemed cancelled, discharged and of no force or effect. For the avoidance of doubt, the cancellation of the First Lien Indenture and the 1.5 Lien Indenture is without prejudice to the First Lien Indenture Trustee's and the 1.5 Lien Indenture Trustee's respective (i) appellate rights, (ii) ability to continue serving in the capacity as plaintiffs in connection with the Intercreditor Actions, as may be amended to assert a claim or defense under the Second Lien Intercreditor Agreement that arose out of the conduct, transactions, or occurrences set out, or attempted to be set out, in the original complaints, as provided in this Order, and in connection with any appeals arising therefrom, and (iii) ability to enforce any rights they may have under the Final DIP Order or this Order. Further, for the avoidance of doubt, the cancellation of the Senior Subordinated Indenture is without prejudice to the Senior Subordinated Indenture Trustee's appellate rights.

K. Binding Effect of Prior Orders

57. Pursuant to section 1141 of the Bankruptcy Code, effective as of and subject to the occurrence of the Effective Date and subject to the terms of the Plan and this Order, all prior orders entered in the Reorganization Cases, all documents and agreements executed by the Debtors as authorized and directed thereunder and all motions or requests for relief by the Debtors pending before the Court as of the Effective Date that ultimately are granted shall be binding upon and shall inure to the benefit of the Debtors, the Reorganized Debtors and their respective successors and assigns; provided, further, that the Final DIP Order shall remain in effect to the extent necessary to enable the First Lien Indenture Trustee and the 1.5 Lien Indenture Trustee to pursue any and all relief with respect to the adequate protection incurred prior to the Effective Date granted under the Final DIP Order.

L. Notice of Confirmation of the Plan

58. Pursuant to Bankruptcy Rules 2002(f)(7) and 3020(c)(2), the Debtors or the Reorganized Debtors are directed to serve a notice of the entry of this Order, substantially in the form of Appendix II attached hereto (the "**Effective Date Notice**"), on all parties that they served with notice of the Confirmation Hearing and parties to executory contracts or unexpired leases no later than ten (10) days after the Effective Date; provided, however, that the Debtors or the Reorganized Debtors shall be obligated to serve the Effective Date Notice only on the record holders of Claims or Interests as of the Distribution Record Date. As soon as practicable after the entry of this Order, the Debtors shall make copies of this Order available on their reorganization website at www.kccllc.net/mpm.

M. Miscellaneous Provisions

59. Pursuant to Bankruptcy Rule 3020(e), this Order shall be stayed until the expiration of 14 days after the entry of this Order.

60. Without the need for a further order or authorization of this Court, but subject to the express provisions of this Order, the Debtors shall be authorized and empowered as may be necessary to make non-material modifications to the documents filed with the Court, including the Plan Supplement, in their reasonable business judgment, but only in accordance with, and subject to Section 14.6 of the Plan, and upon notice to any affected parties. For the avoidance of doubt, the evidentiary record for the Confirmation Hearing was closed on August 21, 2014, and the evidentiary record shall not be amended, modified or supplemented.

61. The Creditors' Committee shall be automatically dissolved on the Effective Date and, on the Effective Date, each member of the Creditors' Committee (including each officer, director, employee, agent, consultant or representative thereof) and each Professional Person retained by the Creditors' Committee shall be released and discharged from all rights, duties, responsibilities and obligations arising from, or related to, the Debtors, their membership on the Creditors' Committee, the Plan or the Reorganization Cases, except with respect to any matters concerning any Fee Claims held or asserted by any professionals retained by the Creditors' Committee.

62. On the Effective Date, the engagement of each Professional Person retained by the Debtors and the Creditors' Committee shall be terminated without further order of the Bankruptcy Court or act of the parties; provided, however, such Professional Persons shall be entitled to prosecute and defend their respective Fee Claims and represent their respective constituents with respect to applications for payment of such Fee Claims and the Reorganized

Debtors shall be responsible for the reasonable and documented fees, costs and expenses associated with the prosecution and defense of such Fee Claims. Nothing herein or in the Plan shall preclude any Reorganized Debtor from engaging a former Professional Person on and after the Effective Date in the same capacity as such Professional Person was engaged prior to the Effective Date.

63. Except as permitted under applicable law, nothing in the Plan or this Order shall expand this Court's jurisdiction with respect to tax liabilities or tax consequences arising from the Plan. In confirming the Plan, this Court has not made any determination as to the federal tax liabilities or tax consequences of the Plan. Nothing in Sections 7.8(f) or 8.14 of the Plan shall: (i) be deemed to be a determination of the federal tax liability of any person or entity, including but not limited to the Debtors and the Reorganized Debtors, or (ii) be deemed to be a determination of the federal tax treatment of any item, distribution or entity, including the federal tax consequences of the Plan. The fact that certain language was previously included in Section 12.5 of the Plan and then removed from subsequent drafts of the Plan is not intended, and shall not be construed, as evidence as to the federal tax consequences of the Plan.

64. The Debtors and Reorganized Debtors, as applicable, are authorized to enter into and perform any and all agreements with Aetna Life Insurance Company ("**Aetna**") necessary or appropriate to administer a self-funded health plan and other benefits programs as of the Effective Date of the Plan on substantially the same terms provided under the prepetition self-funded health plan administered by Aetna pursuant to that certain Administrative Services Agreement No. ASA-666985 between Aetna and Momentive Specialty Chemicals Inc. (the "**Prepetition ASA**"). In addition to obligations arising under the self-funded plan on and after the Effective Date, the Debtors and Reorganized Debtors, as applicable, shall continue to pay in

the ordinary course of business all obligations arising prior to the Effective Date under the Prepetition ASA to the extent such obligations relate to the Debtors.

65. If all of the conditions to effectiveness have not been satisfied or duly waived (as provided in Section 11.2 of the Plan) and the Effective Date has not occurred on or before the first Business Day that is more than 60 days after the Confirmation Date, or by such later date as set forth by the Debtors (with the consent of Requisite Investors) in a notice filed with the Bankruptcy Court prior to the expiration of such period, then the Debtors, with the consent of the Requisite Investors, may, as contemplated by Section 11.3 of the Plan, file a motion to vacate this Order. Notwithstanding the filing of such a motion, this Order shall not be vacated if all of the conditions to consummation set forth in Section 11.1 hereof are either satisfied or duly waived before the Bankruptcy Court enters an order granting the relief requested in such motion. If this Order is vacated pursuant to Section 11.3 of the Plan, the Plan shall be null and void in all respects, this Order (including the findings with respect to valuation contained in Paragraph X hereof) shall be of no further force or effect, no Plan Distributions shall be made, the Debtors and all holders of Claims and Interests shall be restored to the *status quo ante* as of the day immediately preceding the Confirmation Date as though the Confirmation Date had never occurred, and upon such occurrence, nothing contained in the Plan or this Order shall: (a) constitute a waiver or release of any Claims against or Interests in the Debtors; (b) prejudice in any manner the rights of the holder of any Claim against or Interest in the Debtors; or (c) constitute an admission, acknowledgment, offer or undertaking by any Debtor or any other Person with respect to any matter set forth in the Plan or this Order.

66. Failure specifically to include or reference particular sections or provisions of the Plan or any related agreement in this Order shall not diminish or impair the

effectiveness of such sections or provisions, it being the intent of the Court that the Plan be confirmed and such related agreements be approved in their entirety.

67. Any document related to the Plan that refers to a plan of reorganization of the Debtors other than the Plan confirmed by this Order shall be, and it hereby is, deemed to be modified such that the reference to a plan of reorganization of the Debtors in such document shall mean the Plan confirmed by this Order, as appropriate.

68. In the event of an inconsistency between the Plan, on the one hand, and any other agreement, instrument, or document intended to implement the provisions of the Plan, on the other, the provisions of the Plan shall govern (unless otherwise expressly provided for in such agreement, instrument, or document). In the event of any inconsistency between the Plan or any agreement, instrument, or document intended to implement the Plan, on the one hand, and this Order, on the other, the provisions of this Order shall govern.

69. Unless otherwise provided in the Plan or in this Order, all injunctions or stays in effect in the Reorganization Cases pursuant to sections 105 or 362 of the Bankruptcy Code or any order of this Court and extant on the date of entry of this Order shall, as contemplated by Section 12.3 of the Plan, remain in full force and effect until the Effective Date. All injunctions or stays contained in the Plan or this Order shall remain in full force and effect in accordance with their terms.

70. On the Effective Date, the Plan shall be deemed to be substantially consummated under sections 1101 and 1127 of the Bankruptcy Code.

71. Except as otherwise may be provided in the Plan or herein, notice of all subsequent pleadings in the Reorganization Cases after the Effective Date shall be limited to the following parties: (a) the Reorganized Debtors and their counsel, (b) the United States Trustee,

(c) the First Lien Indenture Trustee, (d) the 1.5 Lien Indenture Trustee and (e) any party known to be directly affected by the relief sought.

72. If the Plan is revoked or withdrawn pursuant to Section 14.7 of the Plan prior to the Effective Date, the Plan shall be deemed null and void.

73. Notwithstanding the entry of this Order, this Court may properly, and from and after the Effective Date shall, to the fullest extent as is legally permissible, (i) retain jurisdiction over, and shall hear and determine, the Intercreditor Actions, the Causes of Action asserted therein, and any other similar Causes of Action arising under or in connection with, or otherwise related to, the Second Lien Intercreditor Agreement, whether asserted against a Released Party or any other Person, (ii) retain exclusive jurisdiction over the Reorganization Cases, and all matters arising under, arising out of, or related to, the Reorganization Cases and the Plan (a) as provided for in Article XIII of the Plan, (b) as provided for in this Order, and (c) for the purposes set forth in sections 1127 and 1142 of the Bankruptcy Code; provided, notwithstanding anything to the contrary in this Order or the Plan in respect of the Court's retention of jurisdiction, the Exit Financing Documents shall govern the enforcement thereof and any rights or remedies with respect thereto.

Dated: September 11, 2014
White Plains, New York

/s/Robert D. Drain
THE HONORABLE ROBERT D. DRAIN
UNITED STATES BANKRUPTCY JUDGE

APPENDIX I

PLAN OF REORGANIZATION

APPENDIX II

EFFECTIVE DATE NOTICE

Matthew A. Feldman
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Counsel for the Debtors and
Debtors in Possession

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re	:	Chapter 11
	:	
MPM Silicones, LLC, <u>et al.</u>,[5]	:	Case No. 14-22503 (RDD)
	:	
Debtors.	:	(Jointly Administered)

NOTICE OF: (I) ENTRY OF ORDER CONFIRMING JOINT CHAPTER 11 PLAN OF REORGANIZATION FOR MOMENTIVE PERFORMANCE MATERIALS, INC. AND ITS AFFILIATED DEBTORS; (II) OCCURRENCE OF EFFECTIVE DATE; AND (III) DEADLINE FOR FILING FEE CLAIMS AND ADMINISTRATIVE EXPENSE CLAIMS

PLEASE TAKE NOTICE THAT:

1. Confirmation of the Plan. On September [__], 2014, the United States Bankruptcy Court for the Southern District of New York entered an order [Docket No. __] (the "**Confirmation Order**") confirming the Joint Chapter 11 Plan of Reorganization for Momentive Performance Materials, Inc. and Its Affiliated Debtors, dated September 3, 2014 [Docket No. 943] (as confirmed, the "**Plan**"). To obtain a copy of the Confirmation Order or the Plan, you may (a) visit the website of the Debtors' balloting agent, Kurtzman Carson Consultants LLC ("**KCC**") at http://www.kccllc.net/mpm, (b) contact KCC by calling (888) 249-2792, or (c) visit

[5] The last four digits of the taxpayer identification numbers of the Debtors follow in parentheses: (i) Juniper Bond Holdings I LLC (9631); (ii) Juniper Bond Holdings II LLC (9692); (iii) Juniper Bond Holdings III LLC (9765); (iv) Juniper Bond Holdings IV LLC (9836); (v) Momentive Performance Materials China SPV Inc. (8469); (vi) Momentive Performance Materials Holdings Inc. (8246); (vii) Momentive Performance Materials Inc. (8297); (viii) Momentive Performance Materials Quartz, Inc. (9929); (ix) Momentive Performance Materials South America Inc. (4895); (x) Momentive Performance Materials USA Inc. (8388); (xi) Momentive Performance Materials Worldwide Inc. (8357); and (xii) MPM Silicones, LLC (5481). The Debtors' executive headquarters are located at 260 Hudson River Road, Waterford, NY 12188.

the Bankruptcy Court's website: www.nysb.uscourts.gov (a PACER password is required). In addition, copies of the Plan and Confirmation Order are on file with the Clerk of the Bankruptcy Court, United States Bankruptcy Court for the Southern District of New York, 300 Quarropas Street, White Plains, New York 10601. Capitalized terms used but not defined herein have the meanings given them in the Plan.

2. Effective Date. On September [__], 2014, the "Effective Date" occurred with respect to the Plan.

3. Bar Date for Filing Administrative Expense Claims. Pursuant to Section 3.2 of the Plan, any Person asserting an Administrative Expense Claim other than the holder of (a) a DIP Claim, (b) a Fee Claim, (c) a 503(b)(9) Claim, (d) an Administrative Expense Claim that has been Allowed on or before the Effective Date, (e) an Administrative Expense Claim for an expense or liability incurred and payable in the ordinary course of business by a Debtor, (f) an Administrative Expense Claim on account of fees and expenses incurred on or after the Petition Date by ordinary course professionals retained by the Debtors pursuant to an order of the Bankruptcy Court, (g) an Administrative Expense Claim arising, in the ordinary course of business, out of the employment by one or more Debtors of an individual from and after the Petition Date, but only to the extent that such Administrative Expense Claim is solely for outstanding wages, commissions, accrued benefits, or reimbursement of business expenses; (h) a claim for adequate protection arising under the Final DIP Order; or (i) an Indenture Trustee Claim, must file with the Bankruptcy Court and serve on the Reorganized Debtors, KCC and the Office of the United States Trustee, proof of such Administrative Expense Claim so as to be received by **5:00 p.m. (prevailing Eastern time) no later than** thirty (30) days after the Effective Date. Such proof of Administrative Expense Claim must include at a minimum: (i) the name of the applicable Debtor that is purported to be liable for the Administrative Expense Claim, and if the Administrative Expense Claim is asserted against more than one Debtor, the exact amount asserted to be owed by each such Debtor; (ii) the name of the holder of the Administrative Expense Claim; (iii) the amount of the Administrative Expense Claim; (iv) the basis of the Administrative Expense Claim; and (v) supporting documentation for the Administrative Expense Claim.
FAILURE TO FILE AND SERVE SUCH PROOF OF ADMINISTRATIVE EXPENSE CLAIM TIMELY AND PROPERLY SHALL RESULT IN THE ADMINISTRATIVE EXPENSE CLAIM BEING FOREVER BARRED AND DISCHARGED.

4. Bar Date for Filing Fee Claims. Pursuant to Section 3.3 of the Plan and paragraph 53 of the Confirmation Order, any Professional Person seeking allowance by the Bankruptcy Court of a Fee Claim shall file with the Bankruptcy Court and serve notice of same on the Reorganized Debtors and the Office of the United States Trustee its respective final application for allowance of compensation for services rendered and reimbursement of expenses incurred prior to the Effective Date no later than forty-five (45) calendar days after the Effective Date.

5. **FAILURE TO FILE AND SERVE SUCH FEE APPLICATION TIMELY AND PROPERLY COULD RESULT IN THE FEE CLAIM BEING FOREVER BARRED AND DISCHARGED. Objections to such Fee Claims, if any, must be filed and served on the applicable Professional Person, the Reorganized Debtors and the Office of the United States Trustee by no later than sixty-five (65) calendar days after the Effective**

Date.

Dated: New York, New York

September __, 2014

WILLKIE FARR & GALLAGHER LLP
Counsel for Reorganized Debtors
787 Seventh Avenue
New York, NY 10019

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re	:	Chapter 11
	:	
MPM Silicones, LLC, et al.,[1]	:	Case No. 14-22503 (RDD)
	:	
Debtors.	:	(Jointly Administered)

JOINT CHAPTER 11 PLAN OF REORGANIZATION FOR MOMENTIVE PERFORMANCE MATERIALS INC. AND ITS AFFILIATED DEBTORS

Dated: New York, New York
September 3, 2014

WILLKIE FARR & GALLAGHER LLP
Counsel for the Debtors and Debtors in Possession
787 Seventh Avenue
New York, New York 10019
(212) 728-8000

[1] The last four digits of the taxpayer identification numbers of the Debtors follow in parentheses: (i) Juniper Bond Holdings I LLC (9631); (ii) Juniper Bond Holdings II LLC (9692); (iii) Juniper Bond Holdings III LLC (9765); (iv) Juniper Bond Holdings IV LLC (9836); (v) Momentive Performance Materials China SPV Inc. (8469); (vi) Momentive Performance Materials Holdings Inc. (8246); (vii) Momentive Performance Materials Inc. (8297); (viii) Momentive Performance Materials Quartz, Inc. (9929); (ix) Momentive Performance Materials South America Inc. (4895); (x) Momentive Performance Materials USA Inc. (8388); (xi) Momentive Performance Materials Worldwide Inc. (8357); and (xii) MPM Silicones, LLC (5481). The Debtors' executive headquarters are located at 260 Hudson River Road, Waterford, NY 12188.

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INTRODUCTION[2]

Momentive Performance Materials Inc. and the other debtors and debtors in possession in the above-captioned cases propose the following joint chapter 11 plan of reorganization for the resolution of the Claims against and Interests in the Debtors.

Reference is made to the Disclosure Statement accompanying this Plan, including the exhibits and supplements thereto, for a discussion of the Debtors' history, business, properties and operations, projections for those operations, risk factors, a summary and analysis of this Plan, and certain related matters including, among other things, certain tax matters, and the securities and other consideration to be issued and/or distributed under this Plan. Subject to certain restrictions and requirements set forth in 11 U.S.C. § 1127, Fed. R. Bankr. P. 3019 and Sections 14.6 and 14.7 of this Plan, the Debtors, with the consent of the Requisite Investors, reserve the right to alter, amend, modify, revoke or withdraw this Plan prior to its substantial consummation.

The only Persons that are entitled to vote on this Plan are the holders of 1.5 Lien Note Claims, First Lien Note Claims, Second Lien Note Claims, and Holdings PIK Note Claims. Such Persons are encouraged to read the Plan and the Disclosure Statement and their respective exhibits and schedules in their entirety before voting to accept or reject the Plan. No materials other than the Disclosure Statement, the respective schedules, notices and exhibits attached thereto and referenced therein have been authorized by the Bankruptcy Court for use in soliciting acceptances or rejections of the Plan.

ARTICLE I.

DEFINITIONS AND INTERPRETATION

A. Definitions.

The following terms shall have the meanings set forth below (such meanings to be equally applicable to both the singular and plural):

1.1 ***1.5 Lien Cash Pool*** means an amount of cash equal to the aggregate Allowed amount of 1.5 Lien Note Claims (excluding any make-whole claim, prepayment penalty, "Applicable Premium" or similar claim) set forth in Section 5.5(a) of the Plan.

1.2 ***1.5 Lien Note Claims*** means all Claims (excluding Existing Securities Law Claims) against MPM, as issuer, or any other Debtor as guarantor, arising under the 1.5 Lien Notes and the 1.5 Lien Indenture.

1.3 ***1.5 Lien Notes*** mean the 10% Senior Secured Notes due 2020, issued pursuant to the 1.5 Lien Indenture, in the aggregate principal amount of $250 million.

[2] All capitalized terms used but not defined herein have the meanings set forth in Article I herein.

1.4 ***1.5 Lien Indenture*** means that certain indenture dated as of May 25, 2012 (as amended, modified or supplemented from time to time), between MPM, as issuer, and the 1.5 Lien Indenture Trustee, related to the 1.5 Lien Notes, including all agreements, documents, notes, instruments and any other agreements delivered pursuant thereto or in connection therewith (in each case, as amended, modified or supplemented from time to time).

1.5 ***1.5 Lien Indenture Trustee*** means Wilmington Trust, N.A. solely in its capacity as indenture trustee under the 1.5 Lien Indenture.

1.6 ***1.5 Lien Indenture Trustee Claim*** means all Claims of the 1.5 Lien Indenture Trustee for reasonable and documented fees and expenses under the terms of the 1.5 Lien Indenture to the extent provided for in the Final DIP Order (including, but not limited to, the reasonable and documented fees, costs and expenses incurred by the 1.5 Lien Indenture Trustee's professionals).

1.7 ***4(a)(2) Eligible Holder*** has the meaning set forth in the 4(a)(2) Rights Offering Procedures and the corresponding subscription agreement and subscription form.

1.8 ***4(a)(2) Rights Offering*** means the rights offering of 4(a)(2) Subscription Rights to 4(a)(2) Eligible Holders to purchase 27,065,701 shares of New Common Stock to be issued by Reorganized MPM pursuant to the Plan at a price per share of $17.28, for an aggregate purchase price of the 4(a)(2) Rights Offering Amount, to be conducted in reliance upon the exemption from registration under the Securities Act provided in Section 4(a)(2) of the Securities Act.

1.9 ***4(a)(2) Rights Offering Amount*** means $467,695,313.28.

1.10 ***4(a)(2) Rights Offering Procedures*** means the procedures governing the 4(a)(2) Rights Offering, which procedures are attached as an exhibit to the Disclosure Statement, and shall be satisfactory to the Debtors and the Requisite Investors.

1.11 ***4(a)(2) Rights Offering Stock*** means the 27,065,701 shares of New Common Stock issued pursuant to the 4(a)(2) Rights Offering, including shares issued on account of the Backstop Commitment. The 4(a)(2) Rights Offering Stock shall be subject to dilution from the Management Incentive Plan Securities.

1.12 ***4(a)(2) Subscription Rights*** means the non-transferable, non-certificated subscription rights of 4(a)(2) Eligible Holders to purchase shares of 4(a)(2) Rights Offering Stock in connection with the 4(a)(2) Rights Offering on the terms and subject to the conditions set forth in the Plan and the 4(a)(2) Rights Offering Procedures.

1.13 ***503(b)(9) Claims*** means Claims that have been timely and properly filed prior to the Bar Date and that are granted administrative expense priority treatment pursuant to section 503(b)(9) of the Bankruptcy Code.

1.14 ***Ad Hoc Committee of Second Lien Noteholders*** means the ad hoc committee of certain holders of Second Lien Notes that are signatories to the Backstop Commitment Agreement or RSA represented by Milbank, Tweed, Hadley & McCloy LLP.

1.15 ***Ad Hoc Committee of Second Lien Noteholders Advisors*** means Milbank, Tweed, Hadley & McCloy LLP, as counsel to the Ad Hoc Committee of Second Lien Noteholders, Houlihan Lokey Capital, Inc., as financial advisor to the Ad Hoc Committee of Second Lien Noteholders, and other consultants and professionals to the Ad Hoc Committee of Second Lien Noteholders provided for in the Backstop Commitment Agreement or the RSA.

1.16 ***Administrative Bar Date*** has the meaning set forth in Section 3.2(a) of this Plan.

1.17 ***Administrative Expense Claim*** means any right to payment constituting a cost or expense of administration of the Reorganization Cases of the kind specified in section 503(b) of the Bankruptcy Code and entitled to priority pursuant to sections 328, 330, 363, 364(c)(1), 365, 503(b), 507(a)(2) or 507(b) of the Bankruptcy Code (other than a DIP Claim, Fee Claim or U.S. Trustee Fees) incurred during the period from the Petition Date to the Effective Date, including, without limitation: (a) any actual and necessary costs and expenses of preserving the Estates, any actual and necessary costs and expenses of operating the Debtors' business, and any indebtedness or obligations incurred or assumed by any of the Debtors during the Reorganization Cases; (b) 503(b)(9) Claims; (c) any payment to be made under this Plan to cure a default under an assumed executory contract or unexpired lease; and (d) an Indenture Trustee Claim.

1.18 ***Allowed Claim or Allowed __________ Claim*** (with respect to a specific type of Claim, if specified) means: (a) any Claim (or a portion thereof) as to which no action to dispute, deny or otherwise limit recovery with respect thereto, or alter the priority thereof (including a claim objection), has been timely commenced within the applicable period of limitation fixed by this Plan or applicable law, or, if an action to dispute, deny, equitably subordinate or otherwise limit recovery with respect thereto, or alter priority thereof, has been timely commenced, to the extent such Claim has been allowed (whether in whole or in part) by a Final Order of a court of competent jurisdiction with respect to the subject matter; or (b) any Claim or portion thereof that is allowed (i) in any contract, instrument, or other agreement entered into in connection with the Plan, (ii) pursuant to the terms of the Plan, (iii) by Final Order of the Bankruptcy Court, or (iv) with respect to an Administrative Expense Claim only (x) that was incurred by a Debtor in the ordinary course of business during the Reorganization Cases to the extent due and owing without defense, offset, recoupment or counterclaim of any kind, and (y) that is not otherwise disputed.

1.19 ***Amended By-Laws*** means the amended and restated by-laws for the applicable Reorganized Debtor, and the by-laws for Top HoldCo and Intermediate HoldCo, substantially final forms of which will be contained in the Plan Supplement.

1.20 ***Amended Certificates of Incorporation*** means the amended and restated certificates of incorporation (or articles of incorporation, as applicable) for the applicable Reorganized Debtor, substantially final forms of which will be contained in the Plan Supplement.

1.21 ***Amended Shared Services Agreement*** means (i) the amended and restated Shared Services Agreement or (ii) an amendment to the existing Shared Services Agreement.

1.22 ***Apollo*** means Apollo Global Management, LLC and its affiliates that are signatories to the RSA.

1.23 ***Applicable Premium*** means (a) with respect to the First Lien Note Claims, "Applicable Premium" as defined in the First Lien Indenture, and (b) with respect to the 1.5 Lien Note Claims, "Applicable Premium" as defined in the 1.5 Lien Indenture.

1.24 ***Backstop Commitment*** means the commitment of the Backstop Parties to purchase Unsubscribed Shares as set forth in the Backstop Commitment Agreement.

1.25 ***Backstop Commitment Agreement*** means that certain Backstop Commitment Agreement, dated May 9, 2014, by and among the Backstop Parties, MPM and Holdings (on behalf of themselves and the other Debtors) (as amended, modified and/or supplemented from time to time in accordance with the terms therein).

1.26 ***Backstop Commitment Agreement Order*** means an order of the Bankruptcy Court authorizing, approving and directing, without limitation, the Debtors' (a) entry into the Backstop Commitment Agreement and performance of their obligations thereunder, (b) payment of the Commitment Premium (as defined in the Backstop Commitment Agreement) and the expense reimbursement obligations provided for in the Backstop Commitment Agreement, and (c) incurrence of the indemnification obligations provided for in the Backstop Commitment Agreement.

1.27 ***Backstop Parties*** means Apollo and the members of the Ad Hoc Committee of Second Lien Noteholders and/or certain of their affiliates, in each case, who are signatories to the Backstop Commitment Agreement (and any Person to whom any Backstop Commitment is transferred in accordance with the terms of the Backstop Commitment Agreement or who otherwise becomes a party to the Backstop Commitment Agreement pursuant to the terms and conditions thereof).

1.28 ***Ballot*** means the form approved by the Bankruptcy Court and distributed to holders of impaired Claims entitled to vote on the Plan to be used to indicate their acceptance or rejection of the Plan.

1.29 ***Bankruptcy Code*** means title 11 of the United States Code, as amended from time to time, as applicable to the Reorganization Cases.

1.30 ***Bankruptcy Court*** means the United States Bankruptcy Court for the Southern District of New York, or any other court exercising competent jurisdiction over the Reorganization Cases or any proceeding therein.

1.31 ***Bankruptcy Rules*** means the Federal Rules of Bankruptcy Procedure, as promulgated by the United States Supreme Court under section 2075 of title 28 of the United States Code, as amended from time to time, as applicable to the Reorganization Cases, and any Local Rules of the Bankruptcy Court.

1.32 ***Bar Date*** means any deadline for filing proofs of Claim, including, without limitation, Claims arising prior to the Petition Date (including 503(b)(9) Claims) and Administrative Expense Claims, as established by an order of the Bankruptcy Court or under the Plan.

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1.33 ***Business Day*** means any day other than a Saturday, Sunday, or a "legal holiday," as defined in Bankruptcy Rule 9006(a).

1.34 ***Cash*** means the legal currency of the United States and equivalents thereof.

1.35 ***Cash Flow Facility*** means that certain revolving credit facility with maximum aggregate availability of $75 million governed by the Cash Flow Facility Credit Agreement.

1.36 ***Cash Flow Facility Administrative Agent*** means JPMorgan Chase Bank, N.A., solely in its capacity as administrative agent under the Cash Flow Facility Credit Agreement.

1.37 ***Cash Flow Facility Claims*** means all Claims arising under the Cash Flow Facility Credit Agreement.

1.38 ***Cash Flow Facility Credit Agreement*** means that certain Second Amended and Restated Credit Agreement, dated as of April 24, 2013, among Holdings, MPM, Momentive Performance Materials USA Inc., as U.S. Borrower, Momentive Performance Materials GMBH, as German Borrower, Momentive Performance Materials Nova Scotia ULC, as Canadian Borrower, General Electric Capital Corporation as Designated Lender, and the Cash Flow Facility Administrative Agent.

1.39 ***Causes of Action*** means any and all actions, causes of action (including causes of action under sections 510, 544, 545, 546, 547, 548, 549, 550 and 553 of the Bankruptcy Code), suits, accounts, controversies, obligations, judgments, damages, demands, debts, rights, agreements, promises, rights to legal remedies, rights to equitable remedies, rights to payment, and claims (as defined in section 101(5) of the Bankruptcy Code), whether known or unknown, reduced to judgment, not reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, secured, unsecured and whether asserted or assertable directly or derivatively, whether arising before, on, or after the Petition Date, in contract or tort, arising in law, equity or otherwise.

1.40 ***Claim*** means any "claim" against any Debtor as defined in section 101(5) of the Bankruptcy Code, including, without limitation, any Claim arising after the Petition Date.

1.41 ***Claims Agent*** means Kurtzman Carson Consultants LLC, or any other entity approved by the Bankruptcy Court to act as the Debtors' claims and noticing agent pursuant to 28 U.S.C. §156(c).

1.42 ***Class*** means each category of Claims or Interests established under Article IV of the Plan pursuant to sections 1122 and 1123(a)(1) of the Bankruptcy Code.

1.43 ***Collateral*** means any property or interest in property of the estates of the Debtors subject to a Lien to secure the payment or performance of a Claim, which Lien is not subject to avoidance or otherwise invalid under the Bankruptcy Code or applicable non-bankruptcy law.

1.44 ***Commitment Premium Shares*** means 1,475,652 shares of New Common Stock to be issued to and allocated among the Backstop Parties in accordance with the Backstop

Commitment Agreement pursuant to and as consideration for the obligations under the Backstop Commitment Agreement.

1.45 ***Competition Laws*** means the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended, and any other competition or merger control law.

1.46 ***Confirmation Date*** means the date on which the Clerk of the Bankruptcy Court enters the Confirmation Order on the docket of the Bankruptcy Court.

1.47 ***Confirmation Hearing*** means a hearing to be held by the Bankruptcy Court regarding confirmation of this Plan, as such hearing may be adjourned or continued from time to time.

1.48 ***Confirmation Order*** means the order of the Bankruptcy Court confirming this Plan pursuant to section 1129 of the Bankruptcy Code.

1.49 ***Creditors' Committee*** means the statutory committee of unsecured creditors appointed in the Reorganization Cases in accordance with section 1102 of the Bankruptcy Code, as the same may be constituted from time to time.

1.50 ***Creditors' Committee Parties*** means (i) the Creditors' Committee, (ii) each of the Creditors' Committee's members acting in their respective capacities as members thereof, and (iii) each of the foregoing parties' current officers, affiliates, partners, directors, employees, agents, members, representatives, advisors and professionals (including any attorneys, consultants, financial advisors, investment bankers and other professionals retained by the Creditors' Committee or by any member thereof), together with their respective successors and assigns; provided, however, that such attorneys and professional advisors shall only include those that provided services related to the Reorganization Cases.

1.51 ***Cure Amount*** has the meaning set forth in Section 10.3 of this Plan.

1.52 ***Cure Dispute*** has the meaning set forth in Section 10.3 of this Plan.

1.53 ***Cure Schedule*** has the meaning set forth in Section 10.3 of this Plan.

1.54 ***Debtor(s)*** means, individually or collectively, as the context requires: (a) Juniper Bond Holdings I LLC; (b) Juniper Bond Holdings II LLC; (c) Juniper Bond Holdings III LLC; (d) Juniper Bond Holdings IV LLC; (e) Momentive Performance Materials China SPV Inc.; (f) Holdings; (g) MPM; (h) Momentive Performance Materials Quartz, Inc.; (i) Momentive Performance Materials South America Inc.; (j) Momentive Performance Materials USA Inc.; (k) Momentive Performance Materials Worldwide Inc.; and (l) MPM Silicones, LLC.

1.55 ***DIP ABL Claims*** means all Claims or obligations held by the DIP Agent and/or the DIP Lenders arising under or pursuant to the DIP ABL Credit Agreement, including, without limitation, Claims for all principal amounts outstanding, interest, fees, reasonable and documented expenses, costs and other charges of the DIP Agent and the DIP Lenders.

1.56 ***DIP ABL Credit Agreement*** means that certain senior secured debtor in possession and exit amended and restated asset-based revolving credit agreement, dated April 15, 2014, by and

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among Holdings, MPM, Momentive Performance Materials USA Inc., as U.S. Borrower, Momentive Performance Materials GMBH, as Germany Silicone Borrower, Momentive Performance Materials Quartz GMBH, as Germany Quartz Borrower, Momentive Performance Materials Nova Scotia ULC, as Canadian Borrower, certain of the other Debtors, as guarantors, the DIP Agent, and the DIP Lenders, including any and all documents and instruments executed in connection therewith (in each case, as it or they may be amended, modified or supplemented from time to time on the terms and conditions set forth therein).

1.57 ***DIP ABL Facility*** means the debtor in possession asset-based revolving loan facility provided under the DIP ABL Credit Agreement.

1.58 ***DIP Agent*** means JPMorgan Chase Bank, N.A., solely in its capacity as administrative agent under the DIP Credit Agreements, and any of its successors or assigns.

1.59 ***DIP Claims*** means the DIP ABL Claims and the DIP Term Loan Claims.

1.60 ***DIP Credit Agreements*** means the DIP ABL Credit Agreement and the DIP Term Loan Credit Agreement.

1.61 ***DIP Lenders*** means the lenders party to the DIP Credit Agreements from time to time.

1.62 ***DIP Term Loan Claims*** means all Claims or obligations held by the DIP Agent and/or the DIP Lenders arising under or pursuant to the DIP Term Loan Credit Agreement, including, without limitation, Claims for all principal amounts outstanding, interest, fees, reasonable and documented expenses, costs and other charges of the DIP Agent and the DIP Lenders.

1.63 ***DIP Term Loan Credit Agreement*** means that certain senior secured debtor in possession term loan agreement, dated April 15, 2014, by and among Holdings, MPM, and Momentive Performance Materials USA Inc., as borrower, certain of the other Debtors, as guarantors, the DIP Agent, and the DIP Lenders, including any and all documents and instruments executed in connection therewith (in each case, as it or they may be amended, modified or supplemented from time to time on the terms and conditions set forth therein).

1.64 ***Disallowed*** means a finding of the Bankruptcy Court in a Final Order, or provision in the Plan providing, that a Disputed Claim shall not be an Allowed Claim.

1.65 ***Disbursing Agent*** means the entity or entities, which may be a Reorganized Debtor, designated by the Debtors or the Reorganized Debtors, as applicable, with the consent of the Requisite Investors, to distribute the Plan Consideration, the Commitment Premium Shares, the Rights Offering Stock and, to the extent applicable, the Replacement First Lien Notes and/or Replacement 1.5 Lien Notes. For the avoidance of doubt, the Indenture Trustees shall serve as Disbursing Agent for holders of Allowed Claims under each respective Indenture.

1.66 ***Disclosure Statement*** means the disclosure statement that relates to this Plan, including all exhibits and schedules annexed thereto or referred to therein (in each case, as it or they may be amended, modified, or supplemented from time to time), provided, that the Disclosure Statement shall be in form and substance satisfactory to the Debtors and the Requisite Investors.

1.67 ***Disclosure Statement Hearing*** means a hearing held by the Bankruptcy Court to consider approval of the Disclosure Statement as containing adequate information as required by section 1125 of the Bankruptcy Code, as the same may be adjourned or continued from time to time.

1.68 ***Disclosure Statement Order*** means an order of the Bankruptcy Court approving the Disclosure Statement as having adequate information in accordance with section 1125 of the Bankruptcy Code.

1.69 ***Disputed*** means, with respect to a Claim or Interest, that portion (including, when appropriate, the whole) of such Claim or Interest that: (a) (i) has not been scheduled by the Debtors in their Schedules, or has been scheduled in a lesser amount or priority than the amount or priority asserted by the holder of such Claim or Interest or (ii) has been scheduled as contingent, unliquidated or disputed and for which no proof of claim has been timely filed; (b) is the subject of an objection or request for estimation filed in the Bankruptcy Court which has not been withdrawn or overruled by a Final Order; and/or (c) is otherwise disputed by any of the Debtors or Reorganized Debtors in accordance with applicable law or contract, which dispute has not been withdrawn, resolved, or overruled by Final Order.

1.70 ***Distribution Date*** means: (a) with respect to Cash Flow Facility Claims, DIP Claims and Second Lien Note Claims, the Effective Date, (b) with respect to First Lien Note Claims, 1.5 Lien Note Claims and Holdings PIK Note Claims, the Effective Date (or as soon thereafter as reasonably practicable), (c) with respect to Administrative Expense Claims, Priority Non-Tax Claims, U.S. Trustee Fees, Priority Tax Claims, Other Secured Claims, and General Unsecured Claims, the date that is the latest of: (i) the Effective Date (or any date within fifteen (15) days thereafter); (ii) the date such Claim would be due and payable in the ordinary course of business; and (iii) the date that is fifteen (15) days after such Claim becomes an Allowed Claim or otherwise becomes payable under the Plan (or, if such date is not a Business Day, on the next Business Day thereafter), and (d) with respect to Fee Claims, the date (or as soon thereafter as reasonably practicable) that such Claims are allowed by Final Order.

1.71 ***Distribution Record Date*** means, with respect to all Classes for which Plan Distributions are to be made, the Effective Date.

1.72 ***DTC*** means The Depository Trust Company.

1.73 ***Effective Date*** means the date specified by the Debtors in a notice filed with the Bankruptcy Court as the date on which the Plan shall take effect, which date shall be the first Business Day on which all of the conditions set forth in Section 11.1 hereof have been satisfied or waived and no stay of the Confirmation Order is in effect.

1.74 ***ERISA*** means the Employee Retirement Income Security Act of 1974.

1.75 ***Estate*** means each estate created in the Reorganization Cases pursuant to section 541 of the Bankruptcy Code.

1.76 ***Estimation Order*** means an order or orders of the Bankruptcy Court estimating for voting and/or distribution purposes (under section 502(c) of the Bankruptcy Code) the allowed amount of any Claim. The defined term Estimation Order includes the Confirmation Order if the

Confirmation Order grants the same relief that would have been granted in a separate Estimation Order.

1.77 ***Existing Holdings Interests*** means the Interests in Holdings outstanding immediately prior to the Effective Date.

1.78 ***Existing Interests*** means the Existing Holdings Interests and the Existing MPM Interests.

1.79 ***Existing Management Agreement*** means that certain Management Fee Agreement, dated as of December 14, 2006, by and among Momentive Performance Materials Holdings Inc. and certain affiliates of Apollo.

1.80 ***Existing MPM Interests*** means the Interests in MPM outstanding immediately prior to the Effective Date.

1.81 ***Existing Securities Law Claim*** means any Claim, whether or not the subject of an existing lawsuit: (a) arising from rescission of a purchase or sale of any debt or equity securities of any Debtor or an affiliate of any Debtor; (b) for damages arising from the purchase or sale of any such security; (c) for violations of the securities laws, misrepresentations, or any similar Claims, including, to the extent related to the foregoing or otherwise subject to subordination under section 510(b) of the Bankruptcy Code, any attorneys' fees, other charges, or costs incurred on account of the foregoing Claims; or (d) reimbursement, contribution, or indemnification on account of any such Claim.

1.82 ***Exit Facilities*** means the New ABL Facility and the New First Lien Term Loan Facility.

1.83 ***Federal Judgment Rate*** means the interest rate applicable to a judgment entered on the Petition Date that is subject to 28 U.S.C. § 1961, as determined in accordance with that statute.

1.84 ***Fee Claim*** means a Claim by a Professional Person for compensation, indemnification or reimbursement of expenses pursuant to sections 327, 328, 330, 331, 503(b) or 1103(a) of the Bankruptcy Code in connection with the Reorganization Cases, including, without limitation, in connection with final fee applications of such Professional Persons.

1.85 ***Final DIP Order*** means that certain Final Order Under 11 U.S.C. §§ 105, 361, 362, 363(c), 363(d), 364(c), 364(d), 364(e) and 507 and Bankruptcy Rules 2002, 4001 and 9014 (I) Authorizing the Debtors to Obtain Postpetition Financing, (II) Authorizing the Debtors to Use Cash Collateral, (III) Granting Adequate Protection to Prepetition Secured Lenders and (IV) Scheduling a Final Hearing Pursuant to Bankruptcy Rules 4001(b) and 4001(c) [Docket No. 253], as amended, modified or supplemented by the Bankruptcy Court from time to time.

1.86 ***Final Order*** means an order, ruling or judgment of the Bankruptcy Court (or other court of competent jurisdiction) entered by the Clerk of the Bankruptcy Court on the docket in the Reorganization Cases (or by the clerk of such other court of competent jurisdiction on the docket of such court), which has not been reversed, vacated, or stayed and as to which (i) the time to appeal, petition for certiorari, or move for a new trial, reargument, or rehearing has expired and as to which no appeal, petition for certiorari, or other proceeding for a new trial, reargument, or rehearing shall then be pending or (ii) if an appeal, writ of certiorari, new trial, reargument, or rehearing thereof has been sought, such order or judgment of the Bankruptcy Court shall have been affirmed by the highest court to which such order was appealed, or certiorari shall have been denied, or a new trial, reargument, or rehearing shall have been denied or resulted in no modification of such order, and the time to take any further appeal, petition for certiorari, or move for a new trial, reargument, or rehearing shall have expired; provided, that no order or judgment shall fail to be a Final Order solely because of the possibility that a motion under Rule 60 of the Federal Rules of Civil Procedure has been or may be filed with respect to such order or judgment; provided, further, that the susceptibility of a Claim to a challenge under section 502(j) of the Bankruptcy Code shall not render a Final Order not a Final Order.

1.87 ***First Lien Cash Pool*** means an amount of cash equal to the aggregate Allowed amount of First Lien Note Claims (excluding any make-whole claim, prepayment penalty, "Applicable Premium" or similar claim) set forth in Section 5.4(a) of the Plan.

1.88 ***First Lien Note Claims*** means all Claims (excluding Existing Securities Law Claims) against MPM, as issuer, or any other Debtor as guarantor, arising under the First Lien Notes and the First Lien Indenture.

1.89 ***First Lien Notes*** mean the 8.875% First-Priority Senior Secured Notes due 2020, issued pursuant to the First Lien Indenture, in the original aggregate principal amount of $1.1 billion.

1.90 ***First Lien Indenture*** means that certain indenture, dated as of October 25, 2012 (as amended, modified or supplemented from time to time), between MPM, as issuer, and the First Lien Indenture Trustee, related to the First Lien Notes, including all agreements, documents, notes, instruments and any other agreements delivered pursuant thereto or in connection therewith (in each case, as amended, modified or supplemented from time to time).

1.91 ***First Lien Indenture Trustee*** means BOKF, N.A., solely in its capacity as successor indenture trustee under the First Lien Indenture.

1.92 ***First Lien Indenture Trustee Claim*** means all Claims of the First Lien Indenture Trustee for reasonable and documented fees and expenses under the terms of the First Lien Indenture to the extent provided for in the Final DIP Order (including, but not limited to, the reasonable and documented fees, costs and expenses incurred by the First Lien Indenture Trustee's professionals).

1.93 ***General Unsecured Claim*** means any Claim other than: (a) a Secured Claim, including DIP Claims, Other Secured Claims, Cash Flow Facility Claims, First Lien Note Claims, and 1.5 Lien Note Claims; (b) an Administrative Expense Claim; (c) a Fee Claim; (d) a Priority Tax Claim; (e) a Priority Non-Tax Claim; (f) a Senior Subordinated Note Claim; (g) a Holdings PIK Note Claim; (h) an Intercompany Claim; (i) an Existing Securities Law Claim; (j) a Second Lien Note Claim; and (k) U.S. Trustee Fees.

1.94 ***Holdings*** means Momentive Performance Materials Holdings Inc.

1.95 ***Holdings PIK Note*** means that certain pay-in-kind unsecured 11% Senior Discount Note, dated December 4, 2006, due June 4, 2017, with an original principal amount of $400 million.

1.96 ***Holdings PIK Note Claims*** means all Claims arising under the Holdings PIK Note.

1.97 ***Incremental Facility*** means either (a) a new second lien secured bridge loan facility of no less than $250 million, or (b) senior second-priority secured notes issued by Reorganized MPM in a Rule 144A or other private placement yielding $250 million in aggregate gross cash proceeds, which the Debtors shall enter into or issue as of the Effective Date to the extent that the 1.5 Lien Note Claims are paid in Cash pursuant to Section 5.5(b)(i) hereof.

1.98 ***Indebtedness*** of a Person means (a) indebtedness for borrowed money; (b) liabilities evidenced by bonds, debentures, notes, or other similar instruments or debt securities; (c) liabilities under or in connection with interest rate swaps, collars, caps and similar hedging arrangements; (d) liabilities under or in connection with off balance sheet financing arrangements or synthetic leases; (e) the amount of all capitalized lease obligations of such Person that are required to appear on a balance sheet prepared in accordance with GAAP; and (f) any amounts guaranteed in any manner by such Person (including guarantees in the form of an agreement to repurchase or reimburse) or other amounts for which such Person is indirectly liable as guarantor, surety or otherwise.

1.99 ***Indenture Trustee Claims*** means, collectively, all 1.5 Lien Indenture Trustee Claims, First Lien Indenture Trustee Claims, and Second Lien Indenture Trustee Claims.

1.100 ***Indenture Trustees*** means collectively, the First Lien Indenture Trustee, the 1.5 Lien Indenture Trustee and the Second Lien Indenture Trustee.

1.101 ***Indentures*** means collectively, the First Lien Indenture, the 1.5 Lien Indenture and the Second Lien Indenture.

1.102 ***Insurance Contracts*** has the meaning set forth in Section 7.12(b) of this Plan.

1.103 ***Insured Claims*** has the meaning set forth in Section 7.12(b) of this Plan.

1.104 ***Intercompany Claim*** means any Claim (including an Administrative Expense Claim), Cause of Action, or remedy asserted against a Debtor by (a) another Debtor, or (b) a non-Debtor direct or indirect subsidiary of a Debtor.

1.105 ***Intercompany Interest*** means any Interest held by a Debtor in another Debtor, other than an Existing Interest.

1.106 ***Intercreditor Actions*** mean the following cases: (i) <u>BOKF, NA v. JPMorgan Chase Bank, N.A. (In re MPM Silicones, LLC)</u>, Adv. Pro. No. 14-08247 (RDD) (Bankr. S.D.N.Y.) and (ii) <u>Wilmington Trust, N.A. v. JPMorgan Chase Bank, N.A. (In re MPM Silicones, LLC),</u> Adv. Pro. No. 14-08248 (RDD) (Bankr. S.D.N.Y.).

1.107 ***Intermediate HoldCo*** means a newly formed Delaware corporation which shall be the direct parent of Reorganized MPM following the transactions effectuated pursuant to this Plan.

1.108 ***Intermediate HoldCo Certificate of Incorporation*** means the certificate of incorporation of Intermediate HoldCo.

1.109 ***Intermediate HoldCo Common Stock*** means shares of common stock in Intermediate HoldCo.

1.110 ***Interest*** means the interest (whether legal, equitable, contractual or otherwise) of any holders of any class of equity securities of any of the Debtors represented by shares of common or preferred stock or other instruments evidencing an ownership interest in any of the Debtors, whether or not certificated, transferable, voting or denominated "stock" or a similar security, or any option, warrant or right, contractual or otherwise, to acquire any such interest.

1.111 ***Lien*** has the meaning set forth in section 101(37) of the Bankruptcy Code.

1.112 ***Management Incentive Plan*** means the management equity incentive plan to be established by the Board of Reorganized MPM, with terms and conditions (including amount) satisfactory to the Requisite Investors, to be established by the Board of Top HoldCo, pursuant to which an amount of up to 7.5% of the Top HoldCo Common Stock, on a fully diluted basis, shall be reserved for issuance.

1.113 ***Management Incentive Plan Securities*** means the Top HoldCo Common Stock, or any options, warrants, or other securities convertible into Top HoldCo Common Stock, issued pursuant to the Management Incentive Plan.

1.114 ***MPM*** means Momentive Performance Materials Inc., a Delaware corporation.

1.115 ***MSC*** means Momentive Specialty Chemicals Inc., a New Jersey corporation.

1.116 ***Net Debt Amount*** means the aggregate amount of Indebtedness of Reorganized MPM and its subsidiaries, less the aggregate amount of cash, cash equivalents and marketable securities (other than cash classified as restricted cash in accordance with GAAP) of Reorganized MPM and its subsidiaries, in each case, that are projected to exist as of the time immediately following the Effective Date, calculated within [five (5)] days prior to the Effective Date.

1.117 ***New ABL Agent*** means JPMorgan Chase Bank, N.A., solely in its capacity as administrative agent under the New ABL Credit Agreement, and any of its successors or assigns.

1.118 ***New ABL Credit Agreement*** means, on and after the Effective Date, that certain senior secured debtor in possession and exit amended and restated asset-based revolving credit agreement, dated April 15, 2014, by and among Holdings, MPM, Momentive Performance Materials USA Inc., as U.S. Borrower, Momentive Performance Materials GMBH, as Germany Silicone Borrower, Momentive Performance Materials Quartz GMBH, as Germany Quartz Borrower, Momentive Performance Materials Nova Scotia ULC, as Canadian Borrower, certain of the other Debtors, as guarantors, the DIP Agent, and the DIP Lenders, including any and all documents and instruments executed in connection therewith (in each case, as it may be amended, modified or supplemented from time to time on the terms and conditions set forth therein).

1.119 ***New ABL Facility*** means the exit asset-based revolving loan facility provided under the New ABL Credit Agreement as of the Effective Date.

1.120 ***New ABL Facility Arrangers*** means the joint lead arrangers of the New ABL Facility.

1.121 ***New ABL Lenders*** means the lenders party to the New ABL Credit Agreement.

1.122 ***New Common Stock*** means, collectively, 70,000,000 shares of authorized common stock of Reorganized MPM, par value $0.01, of which an amount equaling the Total Outstanding Shares will be issued by Reorganized MPM in connection with the implementation of, and as authorized by, this Plan, and which will automatically be exchanged for Top HoldCo Common Stock pursuant to Section 7.8(a) of this Plan.

1.123 ***New First Lien Agent*** means JPMorgan Chase Bank, N.A., solely in its capacity as the administrative agent under the New First Lien Term Loan Agreement, and any of its successors or assigns.

1.124 ***New First Lien Lenders*** means the lenders party to the New First Lien Term Loan Agreement.

1.125 ***New First Lien Term Loan Agreement*** means that certain first lien term loan agreement, by and among reorganized Momentive Performance Materials USA Inc., as borrower, those entities identified as "guarantors" in the New First Lien Term Loan Agreement, the New First Lien Agent, and the New First Lien Lenders, including any and all documents and instruments executed in connection therewith, in form and substance reasonably satisfactory to the New First Lien Term Loan Facility Arrangers and the New First Lien Agent (in each case, as it or they may be amended, modified or supplemented from time to time on the terms and conditions set forth therein), to be dated as of the Effective Date, the principal terms of which shall be contained in the Plan Supplement.

1.126 ***New First Lien Term Loan Facility*** means the first lien term loan facility, the terms of which shall be set forth in the New First Lien Term Loan Agreement, which shall be in the original principal amount of $1,000,000,000 and shall be funded by the New First Lien Lenders on the Effective Date.

1.127 ***New First Lien Term Facility Arrangers*** means the joint lead arrangers of the New First Lien Term Loan Facility.

1.128 ***Other Secured Claim*** means any Secured Claim against a Debtor other than DIP Claims, Cash Flow Facility Claims, First Lien Note Claims, 1.5 Lien Note Claims, and Second Lien Note Claims.

1.129 ***Pension Plan*** means the Momentive Performance Materials Pension Plan.

1.130 ***Person*** means any individual, corporation, partnership, association, indenture trustee, limited liability company, organization, joint stock company, joint venture, estate, trust, governmental unit or any political subdivision thereof, or any other entity or organization of whatever nature.

1.131 ***Petition Date*** means April 13, 2014, the date on which the Debtors commenced the Reorganization Cases.

1.132 ***PBGC*** means the Pension Benefit Guaranty Corporation.

1.133 ***Plan*** means this joint chapter 11 plan proposed by the Debtors, including, without limitation, all applicable exhibits, supplements, appendices and schedules hereto, either in its present form or as the same may be altered, amended or modified from time to time in accordance with the provisions of the Bankruptcy Code, the Bankruptcy Rules and the terms hereof; provided, that the Plan shall be in form and substance satisfactory to the Debtors and the Requisite Investors.

1.134 ***Plan Consideration*** means Cash, New Common Stock or Top HoldCo Common Stock, as applicable, or, to the extent applicable, Replacement 1.5 Lien Notes or Replacement First Lien Notes, as the context requires.

1.135 ***Plan Distribution*** means the distribution under the Plan of Plan Consideration.

1.136 ***Plan Documents*** means the documents, other than the Plan, to be executed, delivered, assumed, and/or performed in connection with the consummation of the Plan, including, without limitation, the documents to be included in the Plan Supplement, the Backstop Commitment Agreement, any and all exhibits to the Plan and the Disclosure Statement; provided, that each of the Plan Documents shall be in form and substance satisfactory to the Debtors and the Requisite Investors.

1.137 ***Plan Enterprise Value*** means $2,200,000,000.

1.138 ***Plan Equity Value*** means the Plan Enterprise Value minus the Net Debt Amount.

1.139 ***Plan Supplement*** means the supplemental appendix to this Plan (as may be amended, modified and/or supplemented), to be filed no later than ten (10) calendar days prior to the deadline for Ballots to be received in connection with voting to accept or reject the Plan, which may contain, among other things, draft forms, signed copies, or summaries of material terms, as the case may be, of (i) the New First Lien Term Loan Agreement, (ii) the New ABL Credit Agreement, (iii) the Registration Rights Agreement, (iv) the Amended Certificates of Incorporation, the Top HoldCo Certificate of Incorporation and the Intermediate HoldCo Certificate of Incorporation, (v) the Amended By-laws, (vi) Replacement 1.5 Lien Notes, (vii) the Replacement First Lien Notes, (viii) the list of proposed officers and directors of the Reorganized Debtors, Intermediate HoldCo and Top HoldCo, (ix) the Post-Emergence Incentive Plan and (x) the Schedule of Rejected Contracts and Leases, and additional documents filed with the Bankruptcy Court before the Effective Date as amendments to the Plan Supplement; provided, that each of the documents in the Plan Supplement (whether or not set forth above) shall be in form and substance consistent with the RSA and satisfactory to the Debtors and the Requisite Investors.

1.140 ***Post-Emergence Incentive Plan*** means the bonus plan, acceptable to the Requisite Investors, which provides for the payment of certain incentive bonuses to certain employees of the Reorganized Debtors, a description of which will be filed in the Plan Supplement.

1.141 ***Prepetition Administrative Agent*** means JPMorgan Chase Bank, N.A. or any successor, in its respective capacities as administrative agent (including as the Cash Flow Facility

Administrative Agent), collateral agent, intercreditor agent, designated or authorized representative, or other agent or representative under (i) the Cash Flow Facility Credit Agreement, (ii) the Asset-Based Revolving Credit Agreement, dated as of April 24, 2013 (the ***"Prepetition ABL Credit Agreement***"), among Holdings, MPM, Momentive Performance Materials USA Inc., as U.S. Borrower, Momentive Performance Materials GMBH, as a German Borrower, Momentive Performance Materials Quartz GMBH, as a German Borrower, Momentive Performance Materials Nova Scotia ULC, as Canadian Borrower, the lenders party thereto (the "***Prepetition ABL Lenders***") and the Prepetition Administrative Agent and (iii) any loan or collateral document or intercreditor agreement related to the Cash Flow Facility Credit Agreement, the Prepetition ABL Credit Agreement, or any other indebtedness of the Debtors as applicable.

1.142 ***Priority Non-Tax Claim*** means any Claim, other than an Administrative Expense Claim, a Fee Claim or a Priority Tax Claim, entitled to priority in payment as specified in section 507(a) of the Bankruptcy Code.

1.143 ***Priority Tax Claim*** means any Claim of a governmental unit (as defined in section 101(27) of the Bankruptcy Code) of the kind entitled to priority in payment under sections 502(i) and 507(a)(8) of the Bankruptcy Code.

1.144 ***Professional Person(s)*** means all Persons retained by order of the Bankruptcy Court in connection with the Reorganization Cases, pursuant to sections 327, 328, 330 or 1103 of the Bankruptcy Code, excluding any ordinary course professionals retained pursuant to order of the Bankruptcy Court.

1.145 ***Pro Rata Share*** means with respect to any distribution on account of an Allowed Claim, a distribution equal in amount to the ratio (expressed as a percentage) that the amount of such Allowed Claim bears to the aggregate amount of all Allowed Claims in its Class.

1.146 ***Registration Rights Agreement*** means the registration rights agreement with respect to the Top HoldCo Common Stock, substantially in the form contained in the Plan Supplement.

1.147 ***Reinstated or Reinstatement*** means (a) leaving unaltered the legal, equitable, and contractual rights to which a Claim entitles the holder of such Claim in accordance with section 1124 of the Bankruptcy Code, or (b) if applicable under section 1124 of the Bankruptcy Code: (i) curing all prepetition and postpetition defaults other than defaults relating to the insolvency or financial condition of the applicable Debtor or its status as a debtor under the Bankruptcy Code; (ii) reinstating the maturity date of the Claim; (iii) compensating the holder of such Claim for damages incurred as a result of its reasonable reliance on a provision allowing the Claim's acceleration; and (iv) not otherwise altering the legal, equitable or contractual rights to which the Claim entitles the holder thereof.

1.148 ***Released Parties*** means, collectively, and each solely in its capacity as such: (a) the Debtors and their respective non-Debtor subsidiaries; (b) the DIP Agent; (c) the DIP Lenders; (d) the Ad Hoc Committee of Second Lien Noteholders and each current and former member thereof; (e) each current and former party to the RSA; (f) each current and former Backstop Party; (g) Apollo; (h) MSC; (i) Momentive Performance Materials Holdings LLC; (j) the New

ABL Facility Arrangers, the New ABL Agent and the New ABL Lenders; (k) the New First Lien Term Loan Facility Arrangers, the New First Lien Agent and the New First Lien Lenders; (l) the Second Lien Indenture Trustee; (m) the Creditors' Committee Parties; (n) the Prepetition Administrative Agent and the Prepetition ABL Lenders; and (o) each of the foregoing parties' current officers, affiliates, partners, directors, employees, agents, managers, members, advisors and professionals (including any attorneys, consultants, financial advisors, investment bankers and other professionals retained by such Persons and, for the avoidance of doubt, the Ad Hoc Committee of Second Lien Noteholders Advisors), together with their respective successors and assigns; provided, however, that such attorneys and professional advisors shall only include those that provided services related to the Reorganization Cases and the transactions contemplated by the Plan; provided, further, that no Person shall be a Released Party if it objects to and/or opts out of the releases provided for in Article XII of this Plan. A non-exclusive list of certain Released Parties not identified by name in this Section 1.147 is annexed hereto as Schedule 1, which Schedule 1 may be supplemented with additional Released Parties in an amendment or addendum to the Plan Supplement or otherwise prior to the Effective Date.

1.149 ***Reorganization Cases*** means the jointly-administered cases under chapter 11 of the Bankruptcy Code commenced by the Debtors on the Petition Date in the Bankruptcy Court and captioned *In re MPM Silicones, LLC, et al.*, No. 14-22503 (RDD) (Jointly Administered).

1.150 ***Reorganized Debtor*** means the applicable reorganized Debtor or any successors thereto by merger, consolidation or otherwise, on and after the Effective Date, after giving effect to the restructuring transactions occurring on the Effective Date in accordance with this Plan.

1.151 ***Reorganized MPM*** means MPM on and after the Effective Date.

1.152 ***Replacement 1.5 Lien Notes*** means notes bearing interest at a fixed rate equal to the Treasury Rate (as defined in the term sheet for the Replacement 1.5 Lien Notes, which is Exhibit 8 to the Disclosure Statement) plus 2.75% that may be issued by the Debtors or Reorganized Debtors to the holders of the 1.5 Lien Note Claims on terms, to be disclosed in the Plan Supplement and otherwise acceptable to the Requisite Investors.

1.153 ***Replacement First Lien Notes*** means notes bearing interest at a fixed rate equal to the Treasury Rate (as defined in the term sheet for the Replacement First Lien Notes, which is Exhibit 7 to the Disclosure Statement) plus 2.00% that may be issued by the Debtors or Reorganized Debtors to the holders of the First Lien Note Claims on terms, to be disclosed in the Plan Supplement and otherwise acceptable to the Requisite Investors.

1.154 ***Requisite Investors*** means (a) members of the Ad Hoc Committee of Second Lien Noteholders holding at least a majority of the aggregate Backstop Commitments provided by all members of the Ad Hoc Committee of Second Lien Noteholders as of the date on which the consent of such members is solicited; and (b) Apollo; provided that in the case of a consent to changes in respect of Selected Economic Terms (as defined in the Backstop Commitment Agreement), "Requisite Investors" means solely members of the Ad Hoc Committee of Second Lien Noteholders holding a majority of the aggregate of the Backstop Commitments provided by all members of the Ad Hoc Committee of Second Lien Noteholders as of the date on which the consent of such members is solicited; provided further, that for the purposes of this definition, each Backstop Party shall be deemed to hold the Backstop Commitments held by such Backstop Party's Related Purchasers (as defined in the Backstop Commitment Agreement).

1.155 ***Rights Exercise Price*** means the purchase price for each share of Rights Offering Stock, as set forth in the applicable Rights Offering Procedures and approved by the Bankruptcy Court. The Rights Exercise Price for the Rights Offering Stock will be set at $17.28 per share of New Common Stock.

1.156 ***Rights Offerings*** means the Section 1145 Rights Offering and the 4(a)(2) Rights Offering.

1.157 ***Rights Offering Amount*** means $600 million, consisting of $132,304,682.88, as the Section 1145 Rights Offering Amount, and $467,695,313.28, as the 4(a)(2) Rights Offering Amount.

1.158 ***Rights Offering Procedures*** means the Section 1145 Rights Offering Procedures and the 4(a)(2) Rights Offering Procedures.

1.159 ***Rights Offering Stock*** means the Section 1145 Rights Offering Stock and the 4(a)(2) Rights Offering Stock.

1.160 ***RSA*** means that certain Restructuring Support Agreement dated April 13, 2014, inclusive of all exhibits thereto, by and among the Debtors, Apollo and the members of the Ad Hoc Committee of Second Lien Noteholders and any other Person that may become a party to such agreement pursuant to its terms.

1.161 ***RSA Order*** means an order of the Bankruptcy Court authorizing and directing the Debtors to assume the RSA.

1.162 ***Schedule of Rejected Contracts and Leases*** means a schedule of the contracts and leases to be rejected pursuant to section 365 of the Bankruptcy Code and Section 10.1 hereof, which shall be contained in the Plan Supplement.

1.163 ***Schedules*** means the schedules of assets and liabilities filed in the Reorganization Cases, as amended or supplemented from time to time.

1.164 ***Second Lien Indenture*** means that certain indenture dated as of November 5, 2010 (as amended, modified or supplemented from time to time), between MPM, as issuer, and the Second Lien Indenture Trustee, related to the Second Lien Notes, including all agreements, documents, notes, instruments and any other agreements delivered pursuant thereto or in connection therewith (in each case, as amended, modified or supplemented from time to time).

1.165 ***Second Lien Indenture Trustee*** means Wilmington Savings Fund Society, FSB, solely in its capacity as indenture trustee under the Second Lien Indenture.

1.166 ***Second Lien Indenture Trustee Claim*** means all Claims of the Second Lien Indenture Trustee for reasonable and documented fees and expenses under the terms of the Second Lien

Indenture (including, but not limited to, the reasonable and documented fees, costs and expenses incurred by the Second Lien Indenture Trustee's professionals).

1.167 ***Second Lien Intercreditor Agreement*** means that certain intercreditor agreement dated November 16, 2012, to which JPMorgan Chase Bank, N.A. (or any successor agent), and MPM are party.

1.168 ***Second Lien Note Claims*** means all Claims (excluding Existing Securities Law Claims) against MPM, as issuer, or any other Debtor as guarantor, arising under the Second Lien Notes and the Second Lien Indenture (and related documents).

1.169 ***Second Lien Notes*** mean the $1,161,000,000 of 9% Second-Priority Springing Lien Notes due 2021 and €133,000,000 9.5% Second-Priority Springing Lien Notes due 2021, issued pursuant to the Second Lien Indenture, plus any accrued and unpaid interest arising prior to the Petition Date.

1.170 ***Second Lien Notes Equity Distribution*** means New Common Stock to be issued by Reorganized MPM on the Effective Date to the holders of Allowed Second Lien Note Claims pursuant to the Plan, equaling the Total Outstanding Shares, minus the total number of shares constituting the Rights Offering Stock and the Commitment Premium Shares, subject to dilution by the Management Incentive Plan Securities.

1.171 ***Section 1145 Eligible Holder*** has the meaning set forth in the Section 1145 Rights Offering Procedures and the corresponding subscription agreement and subscription form.

1.172 ***Section 1145 Rights Offering*** means the offering of Section 1145 Subscription Rights to Section 1145 Eligible Holders to purchase 7,656,521 shares of New Common Stock to be issued by Reorganized MPM pursuant to the Plan at a price per share of $17.28, for an aggregate purchase price of the Section 1145 Rights Offering Amount, to be conducted in reliance upon the exemption from registration under the Securities Act provided in section 1145 of the Bankruptcy Code.

1.173 ***Section 1145 Rights Offering Amount*** means $132,304,682.88.

1.174 ***Section 1145 Rights Offering Procedures*** means the procedures governing the Section 1145 Rights Offering, which procedures are attached as an exhibit to the Disclosure Statement, and shall be satisfactory to the Debtors and the Requisite Investors.

1.175 ***Section 1145 Rights Offering Stock*** means the 7,656,521 shares of New Common Stock issued pursuant to the Section 1145 Rights Offering, including shares issued on account of the Backstop Commitment. The Section 1145 Rights Offering Stock shall be subject to dilution from the Management Incentive Plan Securities.

1.176 ***Section 1145 Subscription Rights*** means the non-transferable, non-certificated subscription rights of Section 1145 Eligible Holders to purchase shares of Section 1145 Rights Offering Stock in connection with the Section 1145 Rights Offering on the terms and subject to the conditions set forth in the Plan and the Section 1145 Rights Offering Procedures.

1.177 ***Secured Claim*** means a Claim: (a) that is secured by a valid, perfected and enforceable Lien on Collateral, to the extent of the value of the Claim holder's interest in such Collateral as of the Confirmation Date; or (b) to the extent that the holder thereof has a valid right of setoff pursuant to section 553 of the Bankruptcy Code.

1.178 ***Securities Act*** means the Securities Act of 1933, as amended.

1.179 ***Senior Subordinated Indenture*** means that certain indenture dated as of December 4, 2006 (as amended, modified or supplemented from time to time), between MPM, as issuer, and the Senior Subordinated Indenture Trustee, related to the Senior Subordinated Notes, including all agreements, documents, notes, instruments and any other agreements delivered pursuant thereto or in connection therewith (in each case, as amended, modified or supplemented from time to time).

1.180 ***Senior Subordinated Indenture Trustee*** means U.S. Bank National Association, solely in its capacity as indenture trustee under the Senior Subordinated Indenture.

1.181 ***Senior Subordinated Note Claims*** means all Claims (excluding Existing Securities Law Claims) against MPM, as issuer, or any other Debtor as guarantor, arising under the Senior Subordinated Notes and the Senior Subordinated Indenture (and related documents).

1.182 ***Senior Subordinated Notes*** mean the 11.5% Senior Subordinated Notes due 2016, in an aggregate principal amount of approximately $382 million, issued pursuant to the Senior Subordinated Indenture.

1.183 ***Shared Services Agreement*** means that certain Amended and Restated Shared Services Agreement, dated as of March 17, 2011, between MPM and MSC.

1.184 ***SIR Claim*** means the unsatisfied portion of any self-insured retention as of the date a Claim is Allowed to the extent the Debtors have insurance with respect to such Claim.

1.185 ***Subscription Rights*** means Section 1145 Subscription Rights and the 4(a)(2) Subscription Rights.

1.186 ***Subsidiary*** means any corporation, association or other business entity of which at least the majority of the securities or other ownership interest is owned or controlled by a Debtor and/or one or more subsidiaries of the Debtor.

1.187 ***Top HoldCo*** means a newly formed Delaware corporation which shall be the direct parent of Intermediate HoldCo following the transactions effectuated pursuant to this Plan.

1.188 ***Top HoldCo Certificate of Incorporation*** means the certification of incorporation of Top HoldCo.

1.189 ***Top HoldCo Common Stock*** means, collectively, 70,000,000 shares of authorized common stock of Top HoldCo, par value $0.01, of which an amount equaling the Total Outstanding Shares will be issued by Top HoldCo in connection with the implementation of, and as authorized by, this Plan, including Section 7.8(a).

1.190 ***Total Outstanding Shares*** means a number of shares, which shall equal the Plan Equity Value, divided by $20.33, rounded to the nearest whole share.

1.191 ***U.S. Trustee*** means the United States Trustee for the Southern District of New York.

1.192 ***U.S. Trustee Fees*** means fees arising under 28 U.S.C. § 1930(a)(6) and, to the extent applicable, accrued interest thereon arising under 31 U.S.C. § 3717.

1.193 ***Unsubscribed Shares*** means shares of Rights Offering Stock that are not timely, duly and validly subscribed and paid for by the holders of Allowed Second Lien Note Claims in accordance with the applicable Rights Offering Procedures.

B. Interpretation; Application of Definitions and Rules of Construction.

Unless otherwise specified, all section or exhibit references in this Plan are to the respective section in, or exhibit to, this Plan. The words "herein," "hereof," "hereto," "hereunder," and other words of similar import refer to this Plan as a whole and not to any particular section, subsection, or clause contained therein. Whenever from the context it is appropriate, each term, whether stated in the singular or the plural, will include both the singular and the plural. Any term that is not otherwise defined herein, but that is used in the Bankruptcy Code or the Bankruptcy Rules, shall have the meaning given to that term in the Bankruptcy Code or the Bankruptcy Rules, as applicable. The rules of construction contained in section 102 of the Bankruptcy Code shall apply to the construction of this Plan. The captions and headings in this Plan are for convenience of reference only and shall not limit or otherwise affect the provisions hereof. Any reference to an entity as a holder of a Claim or Interest includes that entity's successors and assigns.

C. Appendices and Plan Documents.

All Plan Documents and appendices to the Plan are incorporated into the Plan by reference and are a part of the Plan as if set forth in full herein. The documents contained in the exhibits and Plan Supplement shall be approved by the Bankruptcy Court pursuant to the Confirmation Order. Holders of Claims and Interests may inspect a copy of the Plan Documents, once filed, in the Office of the Clerk of the Bankruptcy Court during normal business hours, or via the Claims Agent's website at www.kccllc.net/MPM, or obtain a copy of the Plan Documents by a written request sent to the Claims Agent at the following address:

Kurtzman Carson Consultants
2335 Alaska Avenue
El Segundo, CA 90245
Telephone: 888-249-2792

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ARTICLE II.

CERTAIN INTER-CREDITOR AND INTER-DEBTOR ISSUES

2.1. ***Settlement of Certain Inter-Creditor Issues.***

The treatment of Claims and Interests under this Plan represents, among other things, the settlement and compromise of certain potential inter-creditor disputes.

2.2. ***Formation of Debtor Groups for Convenience Purposes.***

The Plan groups the Debtors together solely for purposes of describing treatment under the Plan, confirmation of the Plan and making Plan Distributions in respect of Claims against and Interests in the Debtors under the Plan. Such groupings shall not affect any Debtor's status as a separate legal entity, change the organizational structure of the Debtors' business enterprise, constitute a change of control of any Debtor for any purpose, cause a merger or consolidation of any legal entities, nor cause the transfer of any assets; and, except as otherwise provided by or permitted in the Plan, all Debtors shall continue to exist as separate legal entities.

2.3. ***Intercompany Claims.***

Notwithstanding anything to the contrary herein, on the Effective Date, with the consent of the Requisite Investors, or after the Effective Date, any and all Intercompany Claims will be reinstated, adjusted (including by contribution, distribution in exchange for new debt or equity, or otherwise), paid, continued, cancelled or discharged to the extent reasonably determined appropriate by the Reorganized Debtors, subject to the terms of the Exit Facilities. Any such transaction may be effected on the Effective Date, with the consent of the Requisite Investors, or subsequent to the Effective Date without any further action by the Bankruptcy Court or by the stockholders of any of the Reorganized Debtors. Notwithstanding the foregoing, any claims of Holdings against any other Debtors shall only be released, cancelled or discharged following payment by Holdings of all amounts required by Section 5.9 of this Plan.

ARTICLE III.

ADMINISTRATIVE EXPENSE CLAIMS, FEE CLAIMS, U.S. TRUSTEE FEES AND PRIORITY TAX CLAIMS

The Plan constitutes a joint plan of reorganization for all of the Debtors. All Claims and Interests, except DIP Claims, Administrative Expense Claims, Fee Claims, U.S. Trustee Fees and Priority Tax Claims, are placed in the Classes set forth in Article IV below. In accordance with section 1123(a)(1) of the Bankruptcy Code, DIP Claims, Administrative Expense Claims, Fee Claims, U.S. Trustee Fees and Priority Tax Claims have not been classified, and the holders thereof are not entitled to vote on this Plan. A Claim or Interest is placed in a particular Class only to the extent that such Claim or Interest falls within the description of that Class and is classified in other Classes to the extent that any portion of the Claim or Interest falls within the description of such other Classes.

A Claim or Interest is placed in a particular Class for all purposes, including voting, confirmation and distribution under this Plan and under sections 1122 and 1123(a)(1) of the Bankruptcy Code. However, a Claim or Interest is placed in a particular Class for the purpose of receiving Plan Distributions only to the extent that such Claim or Interest is an Allowed Claim or Allowed Interest and has not been paid, released or otherwise settled prior to the Effective Date.

3.1. *DIP Claims.*

(a) DIP Term Loan Claims.

The DIP Term Loan Claims shall be deemed to be Allowed Claims under the Plan. In full satisfaction, settlement, release and discharge of the Allowed DIP Term Loan Claims, on the Effective Date, all Allowed DIP Term Loan Claims shall be paid in full in Cash. Upon payment and satisfaction in full of all Allowed DIP Term Loan Claims, all Liens and security interests granted to secure such obligations, whether Claims in the Reorganization Cases or otherwise, shall be terminated and of no further force or effect. All of the Debtors' contingent or unliquidated obligations under the DIP Term Loan Credit Agreement, including, without limitation, under Sections 2.15, 2.16, 2.17 and 9.05, to the extent any such obligation has not been paid in full in Cash on the Effective Date, shall survive the Effective Date and shall not be released or discharged pursuant to the Plan or Confirmation Order, notwithstanding any provision hereof or thereof to the contrary.

(b) DIP ABL Claims.

The DIP ABL Claims shall be deemed to be Allowed Claims under the Plan. The DIP ABL Claims shall be satisfied in full by either: (a) the conversion on the Effective Date of the DIP ABL Facility into the New ABL Facility in accordance with the terms and conditions of the DIP ABL Credit Agreement; or (b) the termination of all commitments, payment in full in Cash of all outstanding obligations and cash collateralization, return or backstopping of all letters of credit issued thereunder in a manner satisfactory to the DIP Agent. If the DIP ABL Claims are satisfied in full pursuant to clause (b) of the immediately preceding sentence, (i) all Liens and security interests granted to secure such obligations, whether Claims in the Reorganization Cases or otherwise, shall be terminated and of no further force or effect and (ii) all of the Debtors' contingent or unliquidated obligations under the DIP ABL Credit Agreement, including, without limitation, under Section 2.15, 2.16, 2.17 and 9.05, to the extent any such obligation has not been paid in full in Cash on the Effective Date, shall survive the Effective Date and shall not be released or discharged pursuant to the Plan or Confirmation Order, notwithstanding any provision hereof or thereof to the contrary.

3.2. *Administrative Expense Claims.*

(a) Time for Filing Administrative Expense Claims.

The holder of an Administrative Expense Claim, other than the holder of:

(i) a DIP Claim;

(ii) a Fee Claim;

(iii) a 503(b)(9) Claim;

(iv) an Administrative Expense Claim that has been Allowed on or before the Effective Date;

(v) an Administrative Expense Claim for an expense or liability incurred and payable in the ordinary course of business by a Debtor;

(vi) an Administrative Expense Claim on account of fees and expenses incurred on or after the Petition Date by ordinary course professionals retained by the Debtors pursuant to an order of the Bankruptcy Court;

(vii) an Administrative Expense Claim arising, in the ordinary course of business, out of the employment by one or more Debtors of an individual from and after the Petition Date, but only to the extent that such Administrative Expense Claim is solely for outstanding wages, commissions, accrued benefits, or reimbursement of business expenses;

(viii) a claim for adequate protection arising under the Final DIP Order; or

(ix) an Indenture Trustee Claim

must file with the Bankruptcy Court and serve on the Debtors or Reorganized Debtors (as the case may be), the Claims Agent, and the Office of the U.S. Trustee, proof of such Administrative Expense Claim **within thirty (30) days after the Effective Date** (the "***Administrative Bar Date***"). Such proof of Administrative Expense Claim must include at a minimum: (i) the name of the applicable Debtor that is purported to be liable for the Administrative Expense Claim and if the Administrative Expense Claim is asserted against more than one Debtor, the exact amount asserted to be owed by each such Debtor; (ii) the name of the holder of the Administrative Expense Claim; (iii) the asserted amount of the Administrative Expense Claim; (iv) the basis of the Administrative Expense Claim; and (v) supporting documentation for the Administrative Expense Claim. **FAILURE TO FILE AND SERVE SUCH PROOF OF ADMINISTRATIVE EXPENSE CLAIM TIMELY AND PROPERLY SHALL RESULT IN SUCH CLAIM BEING FOREVER BARRED AND DISCHARGED.**

(b) Treatment of Administrative Expense Claims.

Except to the extent that a holder of an Allowed Administrative Expense Claim agrees to a different treatment, on, or as soon thereafter as is reasonably practicable, the later of the Effective Date and the first Business Day after the date that is thirty (30) calendar days after the date an Administrative Expense Claim becomes an Allowed Claim, the holder of such Allowed Administrative Expense Claim shall receive from the applicable Reorganized Debtor Cash in an amount equal to such Allowed Claim; provided, however, that Allowed Administrative Expense Claims representing liabilities incurred in the ordinary course of business by any of the Debtors, as debtors in possession, shall be paid by the applicable Debtor or Reorganized Debtor in the ordinary course of business, consistent with past practice and in accordance with the terms and subject to the conditions of any orders or agreements governing, instruments evidencing, or other documents relating to, such liabilities.

Any Claim related to fees and expenses, contribution or indemnification obligations, payable or owing by the Debtors to Apollo or the Ad Hoc Committee of Second Lien Noteholders, its members or the Backstop Parties under the RSA and Backstop Commitment Agreement shall constitute an Allowed Administrative Expense Claim and shall be paid in Cash on the Effective Date without the need to file a proof of such Claim with the Bankruptcy Court in accordance with Section 3.2(a) hereof and without further order of the Bankruptcy Court.

In the case of Indenture Trustee Claims, such Claims will be paid in the ordinary course of business (subject to the Debtors' prior receipt of invoices and reasonable documentation in connection therewith and without the requirement to file a fee application with the Bankruptcy Court, with copies to be provided to the Backstop Parties) but no later than the Effective Date; provided, that such fees, costs and expenses must be reimbursable under the terms of the applicable indenture; and provided, further, that the applicable indenture trustee will receive payment in the ordinary course of business (subject to the Reorganized Debtors' prior receipt of invoices and reasonable documentation in connection therewith) for all reasonable fees, costs, and expenses incurred after the Effective Date only in connection with the implementation of any provisions of this Plan, and for no other purpose. In the event of a dispute with respect to all or a portion of an Indenture Trustee Claim, the Debtors shall pay the undisputed amount of such Indenture Trustee Claim, and segregate Cash in the amount of the remaining portion of such Claim until such dispute is resolved by the parties or by the Bankruptcy Court.

3.3. *Fee Claims.*

(a) Time for Filing Fee Claims.

Any Professional Person seeking allowance of a Fee Claim shall file, with the Bankruptcy Court, its final application for allowance of compensation for services rendered and reimbursement of expenses incurred prior to the Effective Date and in connection with the preparation and prosecution of such final application no later than forty-five (45) calendar days after the Effective Date. Objections to such Fee Claims, if any, must be filed and served pursuant to the procedures set forth in the Confirmation Order no later than sixty-five (65) calendar days after the Effective Date or such other date as established by the Bankruptcy Court.

(b) Treatment of Fee Claims.

All Professional Persons seeking allowance by the Bankruptcy Court of a Fee Claim shall be paid in full in Cash in such amounts as are approved by the Bankruptcy Court: (i) upon the later of (x) the Effective Date, and (y) fourteen (14) calendar days after the date upon which the order relating to the allowance of any such Fee Claim is entered, or (ii) upon such other terms as may be mutually agreed upon between the holder of such Fee Claim and the

Reorganized Debtors. On the Effective Date, to the extent known, the Reorganized Debtors shall reserve and hold in a segregated account Cash in an amount equal to all accrued but unpaid Fee Claims as of the Effective Date, which Cash shall be disbursed solely to the holders of Allowed Fee Claims with the remainder to be reserved until all Fee Claims have been either Allowed and paid in full or Disallowed by Final Order, at which time any remaining Cash in the segregated account shall become the sole and exclusive property of the Reorganized Debtors.

3.4. *U.S. Trustee Fees.*

The Debtors or Reorganized Debtors, as applicable, shall pay all outstanding U.S. Trustee Fees of a Debtor on an ongoing basis on the date such U.S. Trustee Fees become due, until such time as a final decree is entered closing the applicable Reorganization Case, the applicable Reorganization Case is converted or dismissed, or the Bankruptcy Court orders otherwise.

3.5. *Priority Tax Claims.*

Except to the extent that a holder of an Allowed Priority Tax Claim agrees to different treatment, each holder of an Allowed Priority Tax Claim shall receive, with the consent of the Requisite Investors, in the Debtors' or Reorganized Debtors' discretion, either: (a) on, or as soon thereafter as is reasonably practicable, the later of the Effective Date and the first Business Day after the date that is thirty (30) calendar days after the date a Priority Tax Claim becomes an Allowed Claim, Cash in an amount equal to such Claim; or (b) deferred Cash payments following the Effective Date, over a period ending not later than five (5) years after the Petition Date, in an aggregate amount equal to the Allowed amount of such Priority Tax Claim (with any interest to which the holder of such Priority Tax Claim may be entitled calculated in accordance with section 511 of the Bankruptcy Code); provided, however, that all Allowed Priority Tax Claims that are not due and payable on or before the Effective Date shall be paid in the ordinary course of business as they become due.

ARTICLE IV.

CLASSIFICATION OF CLAIMS AND INTERESTS

4.1. *Classification of Claims and Interests.*

The following table designates the Classes of Claims against and Interests in the Debtors, and specifies which Classes are: (a) impaired or unimpaired by this Plan; (b) entitled to vote to accept or reject this Plan in accordance with section 1126 of the Bankruptcy Code; and (c) deemed to accept or reject this Plan.

Class	Designation	Impairment	Entitled to Vote
Class 1	Priority Non-Tax Claims	No	No (Deemed to accept)
Class 2	Other Secured Claims	No	No (Deemed to accept)

Class	Designation	Impairment	Entitled to Vote
Class 3	Cash Flow Facility Claims	No	No (Deemed to accept)
Class 4	First Lien Note Claims	Yes[3]	Yes
Class 5	1.5 Lien Note Claims	Yes[4]	Yes
Class 6	Second Lien Note Claims	Yes	Yes
Class 7	General Unsecured Claims	No	No (Deemed to accept)
Class 8	Senior Subordinated Note Claims	Yes	No (Deemed to reject)
Class 9	Holdings PIK Note Claims	Yes	Yes
Class 10	Existing Securities Law Claims	Yes	No (Deemed to reject)
Class 11	Existing Interests	Yes	No (Deemed to reject)

4.2. *Unimpaired Classes of Claims.*

The following Classes of Claims are unimpaired and, therefore, deemed to have accepted this Plan and are not entitled to vote on this Plan under section 1126(f) of the Bankruptcy Code:

(a) Class 1: Class 1 consists of all Priority Non-Tax Claims.

(b) Class 2: Class 2 consists of all Other Secured Claims.

(c) Class 3: Class 3 consists of all Cash Flow Facility Claims.

(d) Class 7: Class 7 consists of all General Unsecured Claims.

4.3. *Impaired Classes of Claims.*

(a) The following Classes of Claims are impaired and entitled to vote on this Plan:

(i) Class 4: Class 4 consists of all First Lien Note Claims.

(ii) Class 5: Class 5 consists of all 1.5 Lien Note Claims.

(iii) Class 6: Class 6 consists of all Second Lien Note Claims.

(iv) Class 9: Class 9 consists of all Holdings PIK Note Claims.

(b) The following Classes of Claims and Interests are impaired and deemed to have rejected this Plan and, therefore, are not entitled to vote on this Plan under section 1126(g) of the Bankruptcy Code:

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[3] The Debtors reserve the right to assert that the treatment provided to holders of First Lien Note Claims and 1.5 Lien Note Claims pursuant to Sections 5.4 and 5.5 of the Plan renders such holders unimpaired.

[4] See footnote 3.

(i) Class 8: Class 8 consists of all Senior Subordinated Note Claims.

(ii) Class 10: Class 10 consists of all Existing Securities Law Claims.

(iii) Class 11: Class 11 consists of all Existing Interests.

4.4. *Separate Classification of Other Secured Claims.*

Although all Other Secured Claims have been placed in one Class for purposes of nomenclature, each Other Secured Claim, to the extent secured by a Lien on Collateral different than that securing any additional Other Secured Claims, shall be treated as being in a separate sub-Class for the purpose of receiving Plan Distributions.

ARTICLE V.

TREATMENT OF CLAIMS AND INTERESTS

5.1. *Priority Non-Tax Claims (Class 1).*

(a) Treatment: The legal, equitable and contractual rights of the holders of Priority Non-Tax Claims are unaltered by this Plan. Except to the extent that a holder of an Allowed Priority Non-Tax Claim agrees to a different treatment, on the applicable Distribution Date, each holder of an Allowed Priority Non-Tax Claim shall receive Cash from the applicable Reorganized Debtor in an amount equal to such Allowed Claim.

(b) Voting: The Priority Non-Tax Claims are not impaired Claims. In accordance with section 1126(f) of the Bankruptcy Code, the holders of Priority Non-Tax Claims are conclusively presumed to accept this Plan and are not entitled to vote to accept or reject the Plan, and the votes of such holders will not be solicited with respect to such Allowed Priority Non-Tax Claims.

5.2. *Other Secured Claims (Class 2).*

(a) Treatment: The legal, equitable and contractual rights of the holders of Other Secured Claims are unaltered by this Plan. Except to the extent that a holder of an Allowed Other Secured Claim agrees to a different treatment, on the applicable Distribution Date each holder of an Allowed Other Secured Claim shall receive, at the election of the Reorganized Debtors: (i) Cash in an amount equal to such Allowed Claim; or (ii) such other treatment that will render such Other Secured Claim unimpaired pursuant to section 1124 of the Bankruptcy Code; provided, however, that Other Secured Claims incurred by a Debtor in the ordinary course of business may be paid in the ordinary course of business in accordance with the terms and conditions of any agreements relating thereto, in the discretion of the applicable Debtor or Reorganized Debtor, without further notice to or order of the Bankruptcy Court. Each holder of an Allowed Other Secured Claim shall retain the Liens securing its Allowed Other Secured Claim as of the Effective Date until full and final satisfaction of such Allowed Other Secured Claim is made as provided herein. On the full payment or other satisfaction of each Allowed Other Secured Claim in accordance with the Plan, the Liens securing such Allowed Other Secured Claim shall be deemed released, terminated and extinguished, in each case without further notice to or order of the Bankruptcy Court, act or action under applicable law, regulation, order or rule or the vote, consent, authorization or approval of any Person.

(b) Voting: The Other Secured Claims are not impaired Claims. In accordance with section 1126(f) of the Bankruptcy Code, the holders of Other Secured Claims are conclusively presumed to accept this Plan and are not entitled to vote to accept or reject the Plan, and the votes of such holders will not be solicited with respect to such Allowed Other Secured Claims.

(c) Deficiency Claims: To the extent that the value of the Collateral securing any Other Secured Claim is less than the Allowed amount of such Other Secured Claim, the undersecured portion of such Allowed Claim shall be treated for all purposes under this Plan as an Allowed General Unsecured Claim and shall be classified in Class 7.

5.3. *Cash Flow Facility Claims (Class 3).*

(a) Allowance: On the Effective Date, the Cash Flow Facility Claims shall be deemed Allowed Claims in the amount of $20,700,000, plus any accrued and unpaid counsel or advisors' fees or accrued and unpaid interest from the Petition Date through the Effective Date at the non-default interest rate provided under the Cash Flow Credit Agreement, and shall not be subject to any avoidance, reductions, setoff, offset, recoupment, recharacterization, subordination (whether equitable, contractual, or otherwise), counterclaims, cross-claims, defenses, disallowance, impairment, objection, or any other challenges under any applicable law or regulation by any Person.

(b) Treatment: On the Effective Date, or as soon as practicable thereafter, each holder of an Allowed Cash Flow Facility Claim shall receive, subject to the terms of this Plan, in full satisfaction, settlement, release and discharge of, and in exchange for, such Claim, its Pro Rata Share of Cash in an aggregate amount equal to the Allowed Cash Flow Facility Claims.

(c) Voting: The Cash Flow Facility Claims are unimpaired Claims. In accordance with section 1126(f) of the Bankruptcy Code, the holders of Cash Flow Facility Claims are conclusively presumed to accept this Plan and are not entitled to vote to accept or reject the Plan, and the votes of such holders will not be solicited with respect to such Allowed Cash Flow Facility Claims.

5.4. *First Lien Note Claims (Class 4).*

(a) On the Effective Date, the First Lien Note Claims shall be deemed Allowed Claims in the amount of $1,100,000,000, plus any accrued and unpaid interest from the Petition Date through the Effective Date at the non-default interest rate provided under the First Lien Indenture, and shall not be subject to any avoidance, reductions, setoff, offset, recoupment, recharacterization, subordination (whether equitable, contractual, or otherwise), counterclaims, cross-claims, defenses, disallowance, impairment, objection, or any other challenges under any applicable law or regulation by any Person. No Applicable Premium, prepayment penalty, "make-whole" or similar claim shall be Allowed with respect to the First Lien Note Claims pursuant to this Section 5.4(a) of the Plan.

(b) Treatment: On the Effective Date, or as soon as practicable thereafter, each holder of an Allowed First Lien Note Claim shall receive, subject to the terms of this Plan, in full satisfaction, settlement, release and discharge of, and in exchange for, such Claim, its Pro Rata Share of:

(i) **If Class 4 votes to accept the Plan or is presumed to have accepted the Plan**: Cash in an aggregate amount equal to such holder's Pro Rata portion of the First Lien Cash Pool.

(ii) **If Class 4 votes to reject the Plan**: Replacement First Lien Notes with a present value equal to the Allowed amount of such holder's First Lien Note Claim (which may include, in addition to the First Lien Note Claims Allowed pursuant to Section 5.4(a) hereof, any applicable make-whole claim, prepayment penalty, or Applicable Premium to the extent Allowed by the Bankruptcy Court).

(c) Voting: The First Lien Note Claims are impaired Claims. Holders of such Claims are entitled to vote to accept or reject the Plan, and the votes of such holders will be solicited with respect to such Allowed First Lien Note Claims; provided that the Debtors reserve the right to assert that the treatment provided to the First Lien Note Claims pursuant to this Section 5.4 renders such Claims unimpaired.

5.5. ***1.5 Lien Note Claims (Class 5)***

(a) On the Effective Date, the 1.5 Lien Note Claims shall be deemed Allowed Claims in the amount of $250,000,000, plus any accrued and unpaid interest from the Petition Date through the Effective Date at the non-default interest rate provided under the 1.5 Lien Indenture, and shall not be subject to any avoidance, reductions, setoff, offset, recoupment, recharacterization, subordination (whether equitable, contractual, or otherwise), counterclaims, cross-claims, defenses, disallowance, impairment, objection, or any other challenges under any applicable law or regulation by any Person. No Applicable Premium, prepayment penalty, "make-whole" or similar claim shall be Allowed with respect to the 1.5 Lien Note Claims pursuant to this Section 5.5(a) of the Plan.

(b) Treatment: On the Effective Date, or as soon as practicable thereafter, each holder of an Allowed 1.5 Lien Note Claim shall receive, subject to the terms of this Plan, in full satisfaction, settlement, release and discharge of, and in exchange for, such Claim, its Pro Rata Share of:

(i) **If Class 5 votes to accept the Plan or is presumed to have accepted the Plan**: Cash in an aggregate amount equal to such holder's Pro Rata portion of the 1.5 Lien Cash Pool.

(ii) **If Class 5 votes to reject the Plan**: Replacement 1.5 Lien Notes with a present value equal to the Allowed amount of such holder's 1.5 Lien Note Claim (which may include, in addition to the 1.5 Lien Note Claims Allowed pursuant to Section 5.5(a) hereof, any applicable make-whole claim, prepayment penalty, or Applicable Premium to the extent Allowed by the Bankruptcy Court).

(c) Voting: The 1.5 Lien Note Claims are impaired Claims. Holders of such Claims are entitled to vote to accept or reject the Plan, and the votes of such holders will be solicited with respect to such Allowed 1.5 Lien Note Claims; provided that the Debtors reserve the right to assert that the treatment provided to the 1.5 Lien Note Claims pursuant to this Section 5.5 renders such Claims unimpaired.

5.6. ***Second Lien Note Claims (Class 6).***

(a) Allowance: On the Effective Date, the Second Lien Note Claims shall be deemed Allowed Claims for all purposes in an amount of no less than $1,161,000,000 plus €133,000,000 (plus any accrued and unpaid interest arising prior to the Petition Date), and shall not be subject to any avoidance, reductions, setoff, offset, recoupment, recharacterization, subordination (whether equitable, contractual, or otherwise), counterclaims, cross-claims, defenses, disallowance, impairment, objection, or any other challenges under any applicable law or regulation by any Person.

(b) Treatment: On the Effective Date, or as soon thereafter as reasonably practicable, each holder of an Allowed Second Lien Note Claim shall receive, subject to the terms of the Plan and in full satisfaction, settlement, release, and discharge of, and in exchange for, such Claim its Pro Rata Share of:

(i) the Second Lien Notes Equity Distribution; and

(ii) the Subscription Rights; provided that only 4(a)(2) Eligible Holders shall be entitled to participate in the 4(a)(2) Rights Offering.

(c) Voting: The Second Lien Note Claims are impaired Claims. Holders of such Claims are entitled to vote to accept or reject the Plan, and the votes of such holders will be solicited with respect to such Allowed Second Lien Note Claims.

(d) Unsecured Amount of Second Lien Note Claims and Turnover: As part of the settlements and compromises set forth in this Plan, the holders of Second Lien Note Claims shall forgo receiving certain value with respect to the unsecured amount of their Second Lien Note Claims, which unsecured amount shall be no less than $991 million. Notwithstanding the foregoing and for the avoidance of doubt, the Plan shall effect, and the holders of Second Lien Note Claims shall not waive, the benefits of any and all subordination and "pay over" provisions set forth in the Senior Subordinated Indenture. In addition, the holders of Second Lien Notes shall retain their right to receive Plan Consideration payable or otherwise distributable as a result of any such subordination and "pay over" provisions and shall retain the right to be paid in full in Cash or otherwise prior to holders of Senior Subordinated Note Claims receiving any payments or distributions from the Debtors or Reorganized Debtors.

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5.7. *General Unsecured Claims (Class 7).*

(a) Treatment: Each Allowed General Unsecured Claim shall, at the discretion of the Reorganized Debtors, and to the extent that such Allowed General Unsecured Claim was not previously paid pursuant to an order of the Bankruptcy Court, be: (i) Reinstated as of the Effective Date as an obligation of the applicable Reorganized Debtor, and paid in accordance with the ordinary course terms for such Claim; (ii) paid in full in Cash on the applicable Distribution Date, plus postpetition interest at the rate of (x) the Federal Judgment Rate, computed daily from the Petition Date through the applicable Distribution Date and compounded annually, or (y) to the extent the holder of the General Unsecured Claim notifies the Debtors within five (5) business days prior to the Effective Date, and the Debtors agree or, in the absence of agreement, the Bankruptcy Court determines, that such holder is contractually entitled to an alternate interest rate, then such alternate rate, computed from the Petition Date through the applicable Distribution Date and compounded (if at all) in accordance with the applicable contract; or (iii) receive such other treatment as may be agreed between such holder and the Reorganized Debtors.

(b) Voting: The General Unsecured Claims are unimpaired Claims. In accordance with section 1126(f) of the Bankruptcy Code, the holders of General Unsecured Claims are conclusively presumed to accept this Plan and are not entitled to vote to accept or reject the Plan, and the votes of such holders will not be solicited with respect to such Allowed General Unsecured Claims.

(c) Preference Waiver: Notwithstanding any other provision of the Plan, neither the Debtors, the Reorganized Debtors, nor any other representative of or successor to the Debtors' Estates shall retain, and each of them is hereby deemed to waive and release, any and all claims, causes of action and other rights against the holders of Class 7 Claims based on section 547 of the Bankruptcy Code or any similar law providing for the avoidance and/or recovery of preferences.

5.8. *Senior Subordinated Note Claims (Class 8).*

(a) Treatment: Pursuant to section 510 of the Bankruptcy Code and the provisions of the Senior Subordinated Indenture, holders of Senior Subordinated Note Claims shall not receive any Plan Distributions on account of such Claims and any Plan Distribution to which they would have otherwise been entitled on account of such Claims, if any, shall constitute a portion of the recovery of holders of Second Lien Note Claims, and be retained by the Reorganized Debtors, in order to augment the value of the New Common Stock to be received by holders of Second Lien Note Claims.

(b) Voting: The Senior Subordinated Note Claims are impaired Claims. In accordance with section 1126(g) of the Bankruptcy Code, the holders of Senior Subordinated Note Claims are conclusively presumed to reject this Plan and are not entitled to vote to accept or reject the Plan, and the votes of such holders will not be solicited with respect to such Senior Subordinated Note Claims.

5.9. ***Holdings PIK Note Claims (Class 9).***

(a) Treatment: On the Effective Date, or as soon thereafter as reasonably practicable, each holder of an Allowed Holdings PIK Note Claim shall receive, subject to the terms of the Plan and in full satisfaction, settlement, release, and discharge of, and in exchange for, such Claim its Pro Rata Share of $8.938 million, minus any amounts attributable to Holdings' share of Administrative Expense Claims or U.S. Trustee Fees; which amounts shall include 100% of amounts owed by Holdings to advisors of the holders of the Holdings PIK Note Claims (as such amount may be agreed upon by such advisors and the applicable holders of the Holdings PIK Note Claims).

(b) Voting: The Holdings PIK Note Claims are impaired Claims. Holders of such Claims are entitled to vote to accept or reject the Plan, and the votes of such holders will be solicited with respect to such Allowed Holdings PIK Note Claims.

5.10. ***Existing Securities Law Claims (Class 10).***

(a) Treatment: Holders of Existing Securities Law Claims shall not receive or retain any distribution under the Plan on account of such Existing Securities Law Claims.

(b) Voting: The Existing Securities Law Claims are impaired Claims. In accordance with section 1126(g) of the Bankruptcy Code, the holders of Existing Securities Law Claims are conclusively presumed to reject this Plan and are not entitled to vote to accept or reject the Plan, and the votes of such holders will not be solicited with respect to such Existing Securities Law Claims.

5.11. ***Existing Interests (Class 11).***

(a) Treatment: Existing Interests shall be cancelled and holders thereof shall not receive or retain any distribution under the Plan on account of such Existing Interests.

(b) Voting: The Existing Interests are impaired Interests. In accordance with section 1126(g) of the Bankruptcy Code, the holders of Existing Interests are conclusively presumed to reject this Plan and are not entitled to vote to accept or reject the Plan, and the votes of such holders will not be solicited with respect to such Existing Interests.

ARTICLE VI.

ACCEPTANCE OR REJECTION OF THE PLAN; EFFECT OF REJECTION BY ONE OR MORE CLASSES OF CLAIMS OR INTERESTS

6.1. ***Class Acceptance Requirement.***

A Class of Claims shall have accepted the Plan if it is accepted by at least two-thirds (2/3) in dollar amount and more than one-half (1/2) in number of holders of the Allowed Claims in such Class that have voted on the Plan.

6.2. ***Tabulation of Votes on a Non-Consolidated Basis.***

All votes on the Plan shall be tabulated on a non-consolidated basis by Class and by Debtor for the purpose of determining whether the Plan satisfies sections 1129(a)(8) and/or (10) of the Bankruptcy Code. Notwithstanding the foregoing, the Debtors, with the consent of the Requisite Investors, reserve the right to seek to substantively consolidate any two or more Debtors, provided that, such substantive consolidation does not materially and adversely impact the amount of the Plan Distributions to any Person.

6.3. ***Confirmation Pursuant to Section 1129(b) of the Bankruptcy Code or "Cramdown."***

Because certain Classes are deemed to have rejected this Plan, the Debtors will request confirmation of this Plan, as it may be modified and amended from time to time, under section 1129(b) of the Bankruptcy Code with respect to such Classes. Subject to Section 14.6 of the Plan, the Debtors, with the consent of the Requisite Investors, reserve the right to alter, amend, modify, revoke or withdraw this Plan or any Plan Document in order to satisfy the requirements of section 1129(b) of the Bankruptcy Code, if necessary. Subject to Sections 14.6 and 14.7 of the Plan (including the consent of the Requisite Investors), the Debtors also reserve the right to request confirmation of the Plan, as it may be modified, supplemented or amended from time to time, with respect to any Class that affirmatively votes to reject the Plan.

6.4. ***Elimination of Vacant Classes.***

Any Class of Claims or Interests that does not have a holder of an Allowed Claim or Allowed Interest or a Claim or Interest temporarily Allowed as of the date of the Confirmation Hearing shall be deemed eliminated from the Plan for purposes of voting to accept or reject the Plan and for purposes of determining acceptance or rejection of the Plan pursuant to section 1129(a)(8) of the Bankruptcy Code.

6.5. ***Voting Classes; Deemed Acceptance by Non-Voting Classes.***

If a Class contains Claims or Interests eligible to vote and no holders of Claims or Interests eligible to vote in such Class vote to accept or reject the Plan, the Plan shall be deemed accepted by such Class.

6.6. ***Confirmation of All Cases.***

Except as otherwise specified herein, the Plan shall not be deemed to have been confirmed unless and until the Plan has been confirmed as to each of the Debtors; provided, however, that, the Debtors may at any time waive this Section 6.6 with the consent of the Requisite Investors.

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ARTICLE VII.

MEANS FOR IMPLEMENTATION

7.1. *Continued Corporate Existence and Vesting of Assets in Reorganized Debtors.*

(a) Except as otherwise provided in this Plan, the Debtors shall continue to exist after the Effective Date as Reorganized Debtors in accordance with the applicable laws of the respective jurisdictions in which they are incorporated or organized and pursuant to the Amended Certificates of Incorporation and Amended By-Laws, for the purposes of satisfying their obligations under the Plan and the continuation of their businesses. On or after the Effective Date, each Reorganized Debtor, in its discretion, may take such action as permitted by applicable law and such Reorganized Debtor's organizational documents, as such Reorganized Debtor may determine is reasonable and appropriate, including, but not limited to, causing: (i) a Reorganized Debtor to be merged into another Reorganized Debtor, or its Subsidiary and/or affiliate; (ii) a Reorganized Debtor to be dissolved; (iii) the legal name of a Reorganized Debtor to be changed; or (iv) the closure of a Reorganized Debtor's case on the Effective Date or any time thereafter. For the avoidance of doubt, the Amended Certificates of Incorporation, Intermediate HoldCo Certificate of Incorporation and Top HoldCo Certificate of Incorporation shall, among other things, prohibit the issuance of non-voting equity securities to the extent required by section 1123(a)(6) of the Bankruptcy Code.

(b) Except as otherwise provided in this Plan, on and after the Effective Date, all property of the Estates, including all claims, rights and Causes of Action and any property acquired by the Debtors under or in connection with this Plan, shall vest in each respective Reorganized Debtor free and clear of all Claims, Liens, charges, other encumbrances and Interests. Subject to Section 7.1(a) hereof, on and after the Effective Date, the Reorganized Debtors may operate their businesses and may use, acquire and dispose of property and prosecute, compromise or settle any Claims (including any Administrative Expense Claims) and Causes of Action without supervision of or approval by the Bankruptcy Court and free and clear of any restrictions of the Bankruptcy Code or the Bankruptcy Rules other than restrictions expressly imposed by this Plan or the Confirmation Order. Without limiting the foregoing, the Reorganized Debtors may pay the charges that they incur on or after the Effective Date for Professional Persons' fees, disbursements, expenses or related support services without application to the Bankruptcy Court.

(c) On the Effective Date or as soon as reasonably practicable thereafter, the Reorganized Debtors may take all actions that may be necessary or appropriate to effectuate any transaction described in, approved by, contemplated by, or necessary to effectuate the Plan, including: (1) the execution and delivery of appropriate agreements or other documents of merger, consolidation, restructuring, conversion, disposition, transfer, dissolution or liquidation containing terms that are consistent with the terms of the Plan and that satisfy the requirements of applicable law and any other terms to which the applicable entities may agree; (2) the execution and delivery of appropriate instruments of transfer, assignment, assumption or delegation of any asset, property, right, liability, debt or obligation on terms consistent with the terms of the Plan and having other terms for which the applicable parties agree; (3) the filing of appropriate certificates or articles of incorporation, reincorporation, merger, consolidation,

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conversion or dissolution pursuant to applicable state law; and (4) all other actions that the applicable entities determine to be necessary or appropriate, including making filings or recordings that may be required by applicable law.

7.2. *Plan Funding.*

The Plan Distributions to be made in Cash under the terms of this Plan shall be funded from: (a) the Debtors' Cash on hand as of the Effective Date; (b) the proceeds of the New First Lien Term Loan Facility; (c) the proceeds of the Rights Offerings; (d) the proceeds of the New ABL Facility and (e) the proceeds of the Incremental Facility, to the extent necessary.

7.3. *Cancellation of Existing Securities and Agreements.*

Except for the purpose of evidencing a right to distribution under this Plan, including the enforcement of any subordination and "pay over" provisions in the Senior Subordinated Notes Indenture, and except as otherwise set forth herein, on the Effective Date all agreements, instruments, and other documents evidencing, related to or connected with any Claim or Interest (excluding the Second Lien Intercreditor Agreement), other than Intercompany Interests, and any rights of any holder in respect thereof, shall be deemed cancelled, discharged and of no force or effect. The holders of or parties to such cancelled instruments, securities and other documentation will have no rights arising from or relating to such instruments, securities and other documentation or the cancellation thereof, except the rights provided for pursuant to this Plan. Notwithstanding anything to the contrary herein, each of the First Lien Indenture, 1.5 Lien Indenture, Second Lien Indenture and the Senior Subordinated Indenture shall continue in effect solely to the extent necessary to: (a) permit holders of Allowed First Lien Note Claims, Allowed 1.5 Lien Note Claims and Allowed Second Lien Note Claims, respectively, to receive Plan Distributions in accordance with the terms of this Plan; (b) effectuate and preserve any subordination and "pay over" provisions set forth in the Senior Subordinated Indenture; (c) permit the Reorganized Debtors, the First Lien Indenture Trustee, the 1.5 Lien Indenture Trustee and the Second Lien Indenture Trustee to make Plan Distributions on account of the Allowed First Lien Note Claims, Allowed 1.5 Lien Note Claims and Allowed Second Lien Note Claims, respectively, and deduct therefrom such compensation, fees, and expenses due thereunder or incurred in making such distributions, including by effectuating any charging liens permitted under the First Lien Indenture, 1.5 Lien Indenture and the Second Lien Indenture, respectively; and (d) permit the First Lien Indenture Trustee, the 1.5 Lien Indenture Trustee, and the Second Lien Indenture Trustee, respectively, to seek compensation and/or reimbursement of fees and expenses in accordance with the terms of this Plan. Except as provided pursuant to this Plan, upon the satisfaction of the Allowed First Lien Note Claims, Allowed 1.5 Lien Note Claims and Allowed Second Lien Note Claims, each of the First Lien Indenture Trustee, 1.5 Lien Indenture Trustee, the Second Lien Indenture Trustee and the Senior Subordinated Indenture Trustee and their respective agents, successors and assigns shall be discharged of all of their obligations associated with the First Lien Notes, 1.5 Lien Notes, Second Lien Notes and Senior Subordinated Notes, respectively. For the avoidance of doubt and notwithstanding any provision of the Plan to the contrary, nothing herein shall be deemed to impair or negatively impact any charging lien permitted under the Indentures.

7.4. *Boards of Directors.*

(a) On the Effective Date, the initial board of directors of each of the Reorganized Debtors, Intermediate HoldCo and Top HoldCo shall consist of those individuals identified in the Plan Supplement, selected in accordance with the terms set forth in the RSA.

(b) Unless reappointed pursuant to Section 7.4(a) of the Plan, the members of the board of directors of each Debtor prior to the Effective Date shall have no continuing obligations to the Reorganized Debtors in their capacities as such on and after the Effective Date and each such member shall be deemed to have resigned or shall otherwise cease to be a director of the applicable Debtor on the Effective Date. Commencing on the Effective Date, each of the directors of each of the Reorganized Debtors shall serve pursuant to the terms of the applicable organizational documents of such Reorganized Debtor and may be replaced or removed in accordance with such organizational documents.

7.5. *Management.*

(a) <u>New Management</u>. As of the Effective Date, the Chief Executive Officer, Chief Financial Officer, General Counsel and other management positions, if any, to be determined with the consent of the Requisite Investors, of the Reorganized Debtors shall consist of those individuals selected by and acceptable to the Requisite Investors, as set forth in the Plan Supplement. The compensation arrangement for any insider of the Debtors that shall become an officer of a Reorganized Debtor shall be in form and substance acceptable to the Requisite Investors and disclosed in the Plan Supplement to be filed with the Bankruptcy Court on or before the date of the Confirmation Hearing.

(b) <u>Management Incentive Plan</u>. The board of directors of Top HoldCo will adopt the Management Incentive Plan as of the Effective Date. The Management Incentive Plan Securities shall dilute all other Top HoldCo Common Stock to be issued pursuant to this Plan.

(c) <u>Post-Emergence Incentive Plan</u>. Top HoldCo and the Reorganized Debtors shall adopt the Post-Emergence Incentive Plan, effective as of the Effective Date.

7.6. *Corporate Action.*

(a) The Reorganized Debtors shall serve on the U.S. Trustee quarterly reports of the disbursements made by each Reorganized Debtor on an entity-by-entity basis until such time as a final decree is entered closing the applicable Reorganization Case or the applicable Reorganization Case is converted or dismissed, or the Bankruptcy Court orders otherwise. Any deadline for filing Administrative Expense Claims shall not apply to U.S. Trustee Fees.

(b) On the Effective Date, the Amended Certificates of Incorporation and Amended By-Laws, and any other applicable amended and restated corporate organizational documents of each of the Reorganized Debtors shall be deemed authorized in all respects.

(c) On or prior to the Effective Date, the Debtors shall cause Intermediate HoldCo and Top HoldCo to be incorporated under the laws of Delaware.

(d) Any action under the Plan to be taken by or required of the Debtors, the Reorganized Debtors, Intermediate HoldCo or Top HoldCo, including, without limitation, the adoption or amendment of certificates of incorporation and by-laws, the issuance of securities and instruments, the implementation of the Management Incentive Plan, or the selection of officers or directors, shall be authorized and approved in all respects, without any requirement of further action by any of the Debtors', Reorganized Debtors', Intermediate HoldCo's or Top HoldCo's stockholders, sole members, boards of directors or boards of managers, or similar body, as applicable.

(e) The Debtors, the Reorganized Debtors, Intermediate HoldCo and Top HoldCo shall be authorized to execute, deliver, file, and record such documents (including the Plan Documents), contracts, instruments, releases and other agreements and take such other action as may be necessary to effectuate and further evidence the terms and conditions of the Plan, without the necessity of any further Bankruptcy Court, corporate, board or shareholder approval or action. In addition, the selection of the Persons who will serve as the initial directors, officers and managers of the Reorganized Debtors, Intermediate HoldCo and Top HoldCo as of the Effective Date shall be deemed to have occurred and be effective on and after the Effective Date without any requirement of further action by the board of directors, board of managers, or stockholders of the applicable Reorganized Debtor, Intermediate HoldCo or Top HoldCo.

7.7. ***Registration Rights Agreement.***

On and as of the Effective Date, Top HoldCo shall enter into and deliver the Registration Rights Agreement to each entity that is intended to be a party thereto and such agreement shall be deemed to be valid, binding and enforceable in accordance with its terms, and each party thereto shall be bound thereby, in each case without the need for execution by any party thereto other than Top HoldCo.

7.8. ***Authorization, Issuance and Delivery of Top HoldCo Common Stock.***

(a) As soon as reasonably practicable following the Effective Date, but effective as of the Effective Date, and without any further action or consent required by any holder of New Common Stock or any other Person (i) each share of New Common Stock will automatically be exchanged for one share of Top HoldCo Common Stock and (ii) Top HoldCo, as the resulting holder of the shares of New Common Stock, will contribute such shares of New Common Stock to Intermediate HoldCo for Intermediate HoldCo Common Stock.

(b) As of the Effective Date, after the automatic exchange of New Common Stock for Top HoldCo Common Stock, but subject to the terms of the Registration Rights Agreement, the Top HoldCo Common Stock shall not be registered under the Securities Act, and shall not be listed for public trading on any securities exchange. Distribution of Top HoldCo Common Stock may be made by delivery of one or more certificates representing such shares as described herein, by means of book-entry registration on the books of the transfer agent for shares of Top HoldCo Common Stock or by means of book-entry exchange through the facilities of DTC in accordance with the customary practices of DTC, as and to the extent practicable, as provided in Section 8.5 hereof.

(c) In the period following the Effective Date and pending distribution of the Top HoldCo Common Stock to any holder entitled pursuant to this Plan to receive Top HoldCo Common Stock, such holder shall be entitled to exercise any voting rights and receive any dividends or other distributions payable in respect of such holder's Top HoldCo Common Stock (including receiving any proceeds of permitted transfers of such Top HoldCo Common Stock) and to exercise all other rights in respect of the Top HoldCo Common Stock (so that such holder shall be deemed for tax purposes to be the owner of the Top HoldCo Common Stock).

(d) On the Effective Date, each of Reorganized MPM, Intermediate HoldCo and Top HoldCo is authorized to issue or cause to be issued the equity securities contemplated by this Plan, including the New Common Stock, the Top HoldCo Common Stock and any equity interests in Intermediate HoldCo, for distribution in accordance with the terms of this Plan and the Amended Certificate of Incorporation of Reorganized MPM, the Top HoldCo Certificate of Incorporation and the Intermediate HoldCo Certificate of Incorporation, as applicable, without the need for any further corporate, judicial or shareholder action.

(e) As soon as reasonably practicable after the Effective Date and, in any event, within seventy-five (75) days of the Effective Date, Top HoldCo shall file, and shall use its reasonable best efforts to cause to be declared effective as promptly as practicable, a registration statement registering for resale all of the shares of Top HoldCo Common Stock issued to the Backstop Parties and holders of Second Lien Notes pursuant to this Plan and the Rights Offerings.

(f) The receipt by holders of Second Lien Notes pursuant to the Plan of New Common Stock and the right to participate in the Rights Offerings is intended to be treated as a recapitalization pursuant to Section 368(a)(1)(E) of the Internal Revenue Code of 1986, and that the transfer of the New Common Stock to Top HoldCo in exchange for Top HoldCo Common Stock is intended to be treated as a reorganization within the meaning of Section 368(a)(1)(B) of the Internal Revenue Code of 1986. It is intended that this Plan be treated as a plan of reorganization within the meaning of United States Treasury Regulations sections 1.368-2(g) and 1.368-3 in respect of both transactions.

7.9. *New First Lien Term Loan Facility, New ABL Facility and Incremental Facility.*

On the Effective Date, without any requirement of further action by stockholders or directors of the Debtors, each of the Reorganized Debtors shall be authorized to enter into the New First Lien Term Loan Facility, the New ABL Facility, and, to the extent necessary, the Incremental Facility, as well as any notes, documents or agreements in connection therewith, including, without limitation, any documents required in connection with the creation or perfection of the Liens on any Collateral securing the New First Lien Term Loan Facility, New ABL Facility and the Incremental Facility.

7.10. *Rights Offerings.*

(a) <u>Purpose</u>. The proceeds of the sale of the Rights Offering Stock shall be used to provide an aggregate of $600 million in capital to the Reorganized Debtors, which shall be available to fund payments required under this Plan and for ordinary course operations and general corporate purposes of the Reorganized Debtors. The Rights Offering Stock will be issued pursuant to the Section 1145 Rights Offering and the 4(a)(2) Rights Offering.

(b) Rights Offerings.

(i) Section 1145 Rights Offering. In accordance with the Section 1145 Rights Offering Procedures and the Backstop Commitment Agreement, each Section 1145 Eligible Holder shall receive Section 1145 Subscription Rights to acquire its respective Pro Rata Share of Section 1145 Rights Offering Stock pursuant to the terms set forth in this Plan and in the Section 1145 Rights Offering Procedures. Each Section 1145 Subscription Right shall represent the right to acquire one share of Section 1145 Rights Offering Stock for the Rights Exercise Price. The total number of shares of Section 1145 Rights Offering Stock to be issued in connection with the Section 1145 Rights Offering (including shares issued on account of the Backstop Commitment) will be 7,656,521.

(ii) 4(a)(2) Rights Offering. In accordance with the 4(a)(2) Rights Offering Procedures and the Backstop Commitment Agreement, each 4(a)(2) Eligible Holder shall receive 4(a)(2) Subscription Rights to acquire its respective Pro Rata Share of 4(a)(2) Rights Offering Stock pursuant to the terms set forth in this Plan and in the 4(a)(2) Rights Offering Procedures. Each 4(a)(2) Subscription Right shall represent the right to acquire one share of 4(a)(2) Rights Offering Stock for the Rights Exercise Price. The total number of shares of 4(a)(2) Rights Offering Stock to be issued in connection with the 4(a)(2) Rights Offering (including shares issued on account of the Backstop Commitment) will be 27,065,701.

(c) Backstop Commitment. Subject to the terms, conditions and limitations set forth in the Backstop Commitment Agreement, and as further described below, upon exercise of its put option, Reorganized MPM will have the right to require the Backstop Parties, severally and not jointly, to purchase their applicable portion of the Unsubscribed Shares (as set forth in the Backstop Commitment Agreement). Notwithstanding anything to the contrary in the Plan or Confirmation Order, (i) the Debtors' obligations under the Backstop Commitment Agreement shall remain unaffected and shall survive following the Effective Date in accordance with the terms thereof, (ii) any such obligations shall not be discharged under the Plan, and (iii) none of the Reorganized Debtors shall terminate any such obligations.

(d) In the event that eligible holders have not subscribed to purchase Rights Offering Stock representing the entire Rights Offering Amount, upon exercise of its put option, Reorganized MPM will have the right to require to each Backstop Party to purchase up to the amount of Rights Offering Stock representing its Backstop Commitment, allocated pro rata among all Backstop Parties based upon their respective Backstop Commitments.

(e) Commitment Premium. In consideration for the obligations described in Section 7.10(c) above, on the Effective Date, Reorganized MPM shall issue to the Backstop Parties the Commitment Premium Shares (without payment of any additional consideration therefor) pursuant to the terms of the Backstop Commitment Agreement. For the avoidance of doubt, the Commitment Premium shall be payable in Cash under certain circumstances set forth in Section 9.4 of the Backstop Commitment Agreement.

(f) Securities Law. The Section 1145 Rights Offering Stock will be exempt from the registration requirements of the Securities Act pursuant to section 1145 of the Bankruptcy Code. The 4(a)(2) Rights Offering Stock will be exempt from the registration requirements of the Securities Act pursuant to section 4(a)(2) of the Securities Act. Only 4(a)(2) Eligible Holders that are "accredited investors" (as defined in Rule 501(a) promulgated under Regulation D under the Securities Act) will receive 4(a)(2) Subscription Rights and be eligible to participate in the 4(a)(2) Rights Offering. The 4(a)(2) Rights Offering Stock will be "restricted securities" (within the meaning of Rule 144 under the Securities Act), subject to the transfer restrictions applicable thereto.

7.11. *Intercompany Interests.*

No Intercompany Interests shall be cancelled pursuant to this Plan, and all Intercompany Interests shall be unaffected by the Plan and continue in place following the Effective Date, solely for the administrative convenience of maintaining the existing corporate structure of the Debtors and the Reorganized Debtors.

7.12. *Insured Claims.*

(a) Notwithstanding anything to the contrary contained herein, to the extent the Debtors have insurance with respect to any Allowed General Unsecured Claim or Allowed Existing Securities Law Claim, the holder of such Allowed Claim shall (i) have an Allowed Claim in its applicable Class for any SIR Claim, (ii) be paid any amount in excess of any SIR Claim from the proceeds of insurance to the extent that the Claim is insured, and (iii) to the extent not duplicative of (i), receive the treatment provided for in this Plan to the extent the applicable insurance policy does not provide coverage with respect to any portion of the Claim.

(b) Notwithstanding anything to the contrary in the Disclosure Statement, the Plan, the Plan Documents, the Plan Supplement, the Confirmation Order, any other document related to any of the foregoing or any other order of the Bankruptcy Court (including, without limitation, any other provision that purports to be preemptory or supervening or grants an injunction or release, including, but not limited to, the injunctions set forth in Article XII of the Plan): (i) on the Effective Date, the Reorganized Debtors shall assume all insurance policies issued at any time to the Debtors, their affiliates or predecessors of any of the foregoing and all agreements related thereto (collectively, the "**Insurance Contracts**"); (ii) nothing in the Disclosure Statement, the Plan, the Plan Documents, the Plan Supplement or the Confirmation Order alters, modifies or otherwise amends the terms and conditions of (or the coverage provided by) any of the Insurance Contracts, except that as of the Effective Date, the Reorganized Debtors shall become and remain liable for all of the Debtors' obligations and liabilities thereunder regardless of whether such obligations and liabilities arise before or after the Effective Date; (iii) nothing in the Disclosure Statement, the Plan, the Plan Documents, Plan Supplement, the Confirmation Order, any prepetition or administrative claim bar date order (or notice) or claim objection order alters or modifies the duty, if any, that the insurers or third party administrators have to pay claims covered by the Insurance Contracts and their right to seek payment or reimbursement from the Debtors (or after the Effective Date, the Reorganized Debtors) or draw on any collateral or security therefor; (iv) insurers and third party administrators shall not need to nor be required to file or serve a Cure Dispute or a request, application, claim, proof of claim or motion for payment and shall not be subject to the any Bar Date or similar deadline governing Cure Amounts or Claims; and (v) the automatic stay of section 362(a) of the Bankruptcy Code and the injunctions set forth in Article XII of the Plan, if and to the extent applicable, shall be deemed lifted without further order of the Bankruptcy Court, solely to permit: (A) claimants with valid claims covered by any of the Insurance Contracts ("**Insured Claims**") to proceed with their claims; (B) insurers and/or third party administrators to administer, handle, defend, settle, and/or pay, in the ordinary course of business and without further order of the Bankruptcy Court, (1) all Insured Claims, and (2) all costs in relation to each of the foregoing; (C) the insurers and/or third party administrators to draw against any or all of any collateral or security provided by or on behalf of the Debtors (or the Reorganized Debtors, as applicable) at any time and to hold the proceeds thereof as security for the obligations of the Debtors (and the Reorganized Debtors, as applicable) to the applicable insurers and/or third party administrators and/or apply such proceeds to the obligations of the Debtors (and the Reorganized Debtors, as applicable) under the Insurance Contracts, in such order as the applicable insurers and/or third party administrators may determine, but solely in accordance with the terms of such Insurance Contracts; and (D) the insurers and/or third party administrators to (1) cancel any policies under the Insurance Contracts, and (2) take other actions relating thereto, to the extent permissible under applicable non-bankruptcy law, each in accordance with the terms of the Insurance Contracts. For the avoidance of doubt, no holder of an Insured Claim that did not file a proof of claim prior to the applicable Bar Date (unless otherwise subject to an exception in the order governing Bar Dates) shall be deemed to have an Allowed Claim, including a SIR Claim, against the Debtors arising from this provision.

7.13. *Comprehensive Settlement of Claims and Controversies.*

Pursuant to Bankruptcy Rule 9019 and in consideration for the Plan Distributions and other benefits provided under this Plan, the provisions of this Plan will constitute a good faith compromise and settlement of all Claims and controversies relating to the rights that a holder of a Claim or Interest may have with respect to any Allowed Claim or Allowed Interest or any Plan Distribution on account thereof. The entry of the Confirmation Order will constitute the Bankruptcy Court's approval, as of the Effective Date, of the compromise or settlement of all such claims or controversies and the Bankruptcy Court's finding that all such compromises or settlements are: (a) in the best interest of the Debtors, the Estates, the Reorganized Debtors, and their respective property and stakeholders; and (b) fair, equitable and reasonable.

ARTICLE VIII.

DISTRIBUTIONS

8.1. ***Distributions.***

The Disbursing Agent shall make all Plan Distributions to the appropriate holders of Allowed Claims in accordance with the terms of this Plan. Distributions to holders of Allowed First Lien Note Claims, Allowed 1.5 Lien Note Claims and Allowed Second Lien Note Claims shall be made by the applicable Indenture Trustee and, with the consent of the Reorganized Debtors and the Requisite Investors, deemed completed when made to the applicable Indenture Trustee as Disbursing Agent. For the avoidance of doubt, distributions made by the Indenture Trustees the record holders of First Lien Note Claims, 1.5 Lien Note Claims and Second Lien Note Claims shall be made (as it relates to the identity of recipients) in accordance with the applicable Indenture and the policies and procedures of DTC, to the extent applicable.

8.2. ***No Postpetition Interest on Claims.***

Other than as specifically provided in the Plan for DIP Claims, Cash Flow Facility Claims, First Lien Note Claims, 1.5 Lien Note Claims and General Unsecured Claims, or as otherwise specifically provided for in the Plan, Confirmation Order or other order of the Bankruptcy Court, or required by applicable bankruptcy or non-bankruptcy law, postpetition interest shall not accrue or be paid on any prepetition Claim, and no holder of a prepetition Claim shall be entitled to interest accruing on such Claim on or after the Petition Date.

8.3. ***Date of Distributions.***

Unless otherwise provided herein, any Plan Distributions and deliveries to be made hereunder shall be made on the applicable Distribution Date, provided that the Reorganized Debtors may utilize periodic distribution dates to the extent that use of a periodic distribution date does not delay payment of the Allowed Claim more than thirty (30) days. In the event that any payment or act under this Plan is required to be made or performed on a date that is not a Business Day, then the making of such payment or the performance of such act may be completed on or as soon as reasonably practicable after the next succeeding Business Day, but shall be deemed to have been completed as of the required date.

8.4. ***Distribution Record Date.***

As of the close of business on the Distribution Record Date, the various lists of holders of Claims in each of the Classes, as maintained by the Debtors, or their agents, shall be deemed closed and there shall be no further changes in the record holders of any of the Claims after the Distribution Record Date. Neither the Debtors nor the Disbursing Agent shall have any obligation to recognize any transfer of Claims occurring after the close of business on the Distribution Record Date. Additionally, with respect to payment of any Cure Amounts or any Cure Disputes in connection with the assumption and/or assignment of the Debtors' executory contracts and unexpired leases, neither the Debtors nor the Disbursing Agent shall have any obligation to recognize or deal with any party other than the non-Debtor party to the applicable executory contract or unexpired lease, even if such non-Debtor party has sold, assigned or otherwise transferred its Claim for a Cure Amount.

8.5. ***Disbursing Agent.***

(a) Powers of Disbursing Agent.

The Disbursing Agent shall be empowered to: (i) effectuate all actions and execute all agreements, instruments, and other documents necessary to perform its duties under this Plan; (ii) make all applicable Plan Distributions or payments contemplated hereby; (iii) employ professionals to represent it with respect to its responsibilities; and (iv) exercise such other powers as may be vested in the Disbursing Agent by order of the Bankruptcy Court (including any order issued after the Effective Date), pursuant to this Plan, or as deemed by the Disbursing Agent to be necessary and proper to implement the provisions hereof.

(b) Expenses Incurred on or After the Effective Date.

Except as otherwise ordered by the Bankruptcy Court, and subject to the written agreement of the Reorganized Debtors, with the consent of the Requisite Investors, the amount of any reasonable and documented fees and expenses incurred by the Disbursing Agent on or after the Effective Date (including, without limitation, taxes) and any reasonable compensation and expense reimbursement Claims (including, without limitation, reasonable attorney and other professional fees and expenses) of the Disbursing Agent shall be paid in Cash by the Reorganized Debtors and will not be deducted from Plan Distributions made to holders of Allowed Claims by the applicable Disbursing Agent. The foregoing fees and expenses shall be paid in the ordinary course, upon presentation of invoices to the Reorganized Debtors and the Backstop Parties and without the need for approval by the Bankruptcy Court, as set forth in Section 3.2(b) of this Plan. In the event that the applicable Disbursing Agent, the Reorganized Debtors and the Backstop Parties are unable to resolve a dispute with respect to the payment of the applicable Disbursing Agent's fees, costs and expenses, the applicable Disbursing Agent may elect to submit any such dispute to the Bankruptcy Court for resolution.

(c) Bond.

The Disbursing Agent shall not be required to give any bond or surety or other security for the performance of its duties unless otherwise ordered by the Bankruptcy Court and, in the event that the Disbursing Agent is so otherwise ordered, all costs and expenses of procuring any such bond or surety shall be borne by the Reorganized Debtors. Furthermore, any such entity required to give a bond shall notify the Bankruptcy Court and the U.S. Trustee in writing before terminating any such bond that is obtained.

(d) Cooperation with Disbursing Agent.

The Reorganized Debtors shall use all commercially reasonable efforts to provide the Disbursing Agent with the amount of Claims and the identity and addresses of holders of Claims, in each case, as set forth in the Debtors' and/or Reorganized Debtors' books and records. The Reorganized Debtors will cooperate in good faith with the Disbursing Agent to comply with the reporting and withholding requirements outlined in Section 8.14 hereof.

8.6. ***Delivery of Distribution.***

Subject to the provisions contained in this Article VIII, the applicable Disbursing Agent will issue, or cause to be issued, and authenticate, as applicable, all Plan Consideration, and subject to Bankruptcy Rule 9010, make all Plan Distributions or payments to any holder of an Allowed Claim as and when required by this Plan at: (a) the address of such holder on the books and records of the Debtors or their agents; or (b) at the address in any written notice of address change delivered to the Debtors or the applicable Disbursing Agent, including any addresses included on any filed proofs of Claim or transfers of Claim filed with the Bankruptcy Court. In the event that any Plan Distribution to any holder is returned as undeliverable, no distribution or payment to such holder shall be made unless and until the applicable Disbursing Agent has been notified of the then current address of such holder, at which time or as soon as reasonably practicable thereafter such Plan Distribution shall be made to such holder without interest, provided, however, such Plan Distributions or payments shall be deemed unclaimed property under section 347(b) of the Bankruptcy Code at the expiration of the later of one year from: (i) the Effective Date; and (ii) the first Distribution Date after such holder's Claim is first Allowed.

With respect to the New Common Stock or Top HoldCo Common Stock, as applicable, to be distributed to holders of Allowed Second Lien Note Claims, all of the shares of the New Common Stock or Top HoldCo Common Stock, as applicable, shall, to the extent such shares are permitted to be held through DTC's book-entry system, be issued in the name of such holder or its nominee(s) in accordance with DTC's book-entry exchange procedures; provided that to the extent such shares of New Common Stock or Top HoldCo Common Stock, as applicable, are not eligible for distribution in accordance with DTC's customary practices, Reorganized MPM or Top HoldCo, as applicable, will take all such reasonable actions as may be required to cause distributions of New Common Stock or Top HoldCo Common Stock, as applicable, to holders of Allowed Second Lien Note Claims, such distributions to be made by delivery of one or more certificates representing such shares as described herein or by means of book-entry registration on the books of the transfer agent for shares of New Common Stock or Top HoldCo Common Stock, as applicable.

8.7. ***Unclaimed Property.***

One year from the later of: (i) the Effective Date, and (ii) the date that a Claim is first Allowed, all unclaimed property or interests in property distributable hereunder on account of such Claim shall revert to the Reorganized Debtors or the successors or assigns of the Reorganized Debtors, and any claim or right of the holder of such Claim to such property or interest in property shall be discharged and forever barred. The Reorganized Debtors and the Disbursing Agent shall have no obligation to attempt to locate any holder of an Allowed Claim other than by reviewing the Debtors' books and records, and the proofs of Claim filed against the Debtors, as reflected on the claims register maintained by the Claims Agent.

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8.8. *Satisfaction of Claims.*

Unless otherwise provided herein, any Plan Distributions and deliveries to be made on account of Allowed Claims hereunder shall be in complete settlement, satisfaction and discharge of such Allowed Claims.

8.9. *Manner of Payment Under Plan.*

Except as specifically provided herein, at the option of the Reorganized Debtors, any Cash payment to be made hereunder may be made by a check or wire transfer or as otherwise required or provided in applicable agreements or customary practices of the Debtors or Reorganized Debtors.

8.10. *Fractional Shares/De Minimis Cash Distributions.*

Neither the Reorganized Debtors, Top HoldCo nor the Disbursing Agent shall have any obligation to make a Plan Distribution that is less than one (1) share of New Common Stock or Top HoldCo Common Stock, as applicable, or $50.00 in Cash. No fractional shares of New Common Stock or Top HoldCo Common Stock, as applicable, shall be distributed. When any Plan Distribution would otherwise result in the issuance of a number of shares of New Common Stock or Top HoldCo Common Stock, as applicable, that is not a whole number, the shares of the New Common Stock or Top HoldCo Common Stock, as applicable, subject to such Plan Distribution will be rounded to the next higher or lower whole number as follows: (i) fractions equal to or greater than ½ will be rounded to the next higher whole number; and (ii) fractions less than ½ will be rounded to the next lower whole number; provided, that the foregoing shall not apply to any rounding of the Rights Offering Stock, the distribution of which shall be governed by the applicable Rights Offering Procedures and Section 7.10 of this Plan. The total number of shares of New Common Stock or Top HoldCo Common Stock, as applicable, to be distributed on account of Allowed Claims will be adjusted as necessary to account for the rounding provided for in this Plan. No consideration will be provided in lieu of fractional shares that are rounded down. Fractional shares of New Common Stock or Top HoldCo Common Stock, as applicable, that are not distributed in accordance with this Section 8.10 shall be cancelled.

8.11. *No Distribution in Excess of Amount of Allowed Claim.*

Notwithstanding anything to the contrary herein, no holder of an Allowed Claim shall, on account of such Allowed Claim, receive a Plan Distribution of a value in excess of the Allowed amount of such Claim plus any postpetition interest on such Claim, to the extent such interest is permitted by Section 8.2 of this Plan.

8.12. *Exemption from Securities Laws.*

The issuance of and the distribution under the Plan of the New Common Stock and Top HoldCo Common Stock and the exchange of New Common Stock for Top HoldCo Common Stock (a) with respect to the Second Lien Notes Equity Distribution, the Section 1145 Rights Offering Stock and the Section 1145 Subscription Rights will be exempt from registration under the Securities Act and any other applicable securities laws pursuant to section 1145 of the

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Bankruptcy Code and (b) with respect to the 4(a)(2) Subscription Rights, the 4(a)(2) Rights Offering Stock and the Commitment Premium Shares will be exempt from registration under the Securities Act and any other applicable securities laws pursuant to Section 4(a)(2) of the Securities Act and Regulation D promulgated thereunder. Subject to any transfer restrictions contained in the Top HoldCo Certificate of Incorporation, (a) the Top HoldCo Common Stock issued in exchange for (i) Section 1145 Rights Offering Stock and (ii) New Common Stock issued pursuant to the Second Lien Notes Equity Distribution may be resold by the holders thereof without restriction, except to the extent that any such holder is deemed to be an "underwriter" as defined in section 1145(b)(1) of the Bankruptcy Code (in which case, such Top HoldCo Common Stock may be resold by the holders thereof pursuant to registration under, or applicable exemptions from registration under, the Securities Act), and (b) the Top HoldCo Common Stock issued in exchange for the 4(a)(2) Rights Offering Stock and the Commitment Premium Shares may be resold by the holders thereof pursuant to registration under, or applicable exemptions from registration under, the Securities Act.

8.13. ***Setoffs and Recoupments.***

Except as expressly provided in this Plan, each Reorganized Debtor may, pursuant to section 553 of the Bankruptcy Code set off and/or recoup against any Plan Distributions to be made on account of any Allowed Claim, any and all claims, rights and Causes of Action that such Reorganized Debtor may hold against the holder of such Allowed Claim to the extent such setoff or recoupment is either (a) agreed in amount among the relevant Reorganized Debtor(s) and holder of Allowed Clam or (b) otherwise adjudicated by the Bankruptcy Court or another court of competent jurisdiction; <u>provided</u>, <u>however</u>, that neither the failure to effectuate a setoff or recoupment nor the allowance of any Claim hereunder shall constitute a waiver or release by a Reorganized Debtor or its successor of any and all claims, rights and Causes of Action that such Reorganized Debtor or its successor may possess against the applicable holder; <u>provided</u>, <u>further</u> that the Reorganized Debtors shall be deemed to waive and shall have no right of setoff or recoupment against the holders of the Second Lien Note Claims.

8.14. ***Withholding and Reporting Requirements.***

In connection with this Plan and all Plan Distributions hereunder, the Reorganized Debtors shall comply with all withholding and reporting requirements imposed by any federal, state, local or foreign taxing authority, and all Plan Distributions hereunder shall be subject to any such withholding and reporting requirements. The Reorganized Debtors shall be authorized to take any and all actions that may be necessary or appropriate to comply with such withholding and reporting requirements, including, without limitation, liquidating a portion of any Plan Distribution to generate sufficient funds to pay applicable withholding taxes or establishing any other mechanisms the Debtors, Reorganized Debtors or the Disbursing Agent believe are reasonable and appropriate, including requiring a holder of a Claim to submit appropriate tax and withholding certifications. Notwithstanding any other provision of this Plan: (a) each holder of an Allowed Claim that is to receive a Plan Distribution under this Plan shall have sole and exclusive responsibility for the satisfaction and payment of any tax obligations imposed by any governmental unit, including income, withholding and other tax obligations on account of such distribution; and (b) no Plan Distributions shall be required to be made to or on behalf of such holder pursuant to this Plan unless and until such holder has made arrangements satisfactory to the Reorganized Debtors for the payment and satisfaction of such tax obligations or has, to the Reorganized Debtors' satisfaction, established an exemption therefrom.

8.15. *Hart-Scott Rodino Antitrust Improvements Act.*

Any New Common Stock or Top HoldCo Common Stock, as applicable, to be distributed under the Plan to an entity required to file a Premerger Notification and Report Form under the Competition Laws shall not be distributed until the notification and waiting periods applicable under such Competition Laws to such entity shall have expired or been terminated or any applicable authorizations, approvals, clearances or consents have been obtained. In the event any applicable notification or filing is made and any authorization, approval, clearance, consent or expiration of any applicable waiting period is not obtained, their agent shall, in their sole discretion, be entitled to sell such entity's shares of New Common Stock or Top HoldCo Common Stock, as applicable, that were to be distributed under the Plan to such entity, and thereafter shall distribute the proceeds of the sale to such entity.

ARTICLE IX.

PROCEDURES FOR RESOLVING CLAIMS

9.1. *Objections to Claims.*

Other than with respect to Fee Claims, only the Reorganized Debtors shall be entitled to object to Claims after the Effective Date. Any objections to those Claims (other than Administrative Expense Claims), shall be served and filed on or before the later of: (a) the date that is 180 days after the Effective Date; and (b) such other date as may be fixed by the Bankruptcy Court, whether fixed before or after the date specified in clause (a) hereof. Any Claims filed after the Bar Date or Administrative Bar Date, as applicable, shall be deemed disallowed and expunged in their entirety without further order of the Bankruptcy Court or any action being required on the part of the Debtors or the Reorganized Debtors, unless the Person wishing to file such untimely Claim has received the Bankruptcy Court's authorization to do so. Notwithstanding any authority to the contrary, an objection to a Claim shall be deemed properly served on the claimant if the objecting party effects service in any of the following manners: (a) in accordance with Federal Rule of Civil Procedure 4, as modified and made applicable by Bankruptcy Rule 7004; (b) by first class mail, postage prepaid, on the signatory on the proof of claim as well as all other representatives identified in the proof of claim or any attachment thereto; or (c) if counsel has agreed to or is otherwise deemed to accept service, by first class mail, postage prepaid, on any counsel that has appeared on the claimant's behalf in the Reorganization Cases (so long as such appearance has not been subsequently withdrawn). From and after the Effective Date, the Reorganized Debtors may settle or compromise any Disputed Claim without approval of the Bankruptcy Court.

9.2. *Amendment to Claims.*

From and after the Effective Date, no proof of Claim may be amended to increase or assert additional claims not reflected in a previously timely filed Claim (or Claim scheduled on the applicable Debtor's Schedules, unless superseded by a filed Claim), and any such Claim shall be deemed disallowed and expunged in its entirety without further order of the Bankruptcy Court or any action being required on the part of the Debtors or the Reorganized Debtors unless the claimant has obtained the Bankruptcy Court's prior approval to file such amended or increased Claim.

9.3. ***Disputed Claims.***

Disputed Claims shall not be entitled to any Plan Distributions unless and until they become Allowed Claims.

9.4. ***Estimation of Claims.***

The Debtors and/or Reorganized Debtors may request that the Bankruptcy Court enter an Estimation Order with respect to any Claim, pursuant to section 502(c) of the Bankruptcy Code, for purposes of determining the Allowed amount of such Claim regardless of whether any Person has previously objected to such Claim or whether the Bankruptcy Court has ruled on any such objection, and the Bankruptcy Court shall retain jurisdiction to estimate any Claim at any time (including during the pendency of any appeal with respect to the allowance or disallowance of such Claims). In the event that the Bankruptcy Court estimates any contingent or unliquidated Claim for allowance purposes, that estimated amount will constitute either the Allowed amount of such Claim or a maximum limitation on such Claim, as determined by the Bankruptcy Court. If the estimated amount constitutes a maximum limitation on such Claim, the objecting party may elect to pursue any supplemental proceedings to object to any ultimate allowance of such Claim. All of the objection, estimation, settlement, and resolution procedures set forth in the Plan are cumulative and not exclusive of one another. Claims may be estimated and subsequently compromised, settled, resolved or withdrawn by any mechanism approved by the Bankruptcy Court.

9.5. ***Expenses Incurred On or After the Effective Date.***

Except as otherwise ordered by the Bankruptcy Court, and subject to the written agreement of the Reorganized Debtors, the amount of any reasonable fees and expenses incurred by any Professional Person or the Claims Agent on or after the Effective Date in connection with implementation of this Plan, including without limitation, reconciliation of, objection to, and settlement of Claims, shall be paid in Cash by the Reorganized Debtors.

ARTICLE X.

EXECUTORY CONTRACTS AND UNEXPIRED LEASES

10.1. ***General Treatment.***

As of and subject to the occurrence of the Effective Date and the payment of any applicable Cure Amount, all executory contracts and unexpired leases of the Debtors shall be deemed assumed, except that: (a) any executory contracts and unexpired leases that previously have been assumed or rejected pursuant to a Final Order of the Bankruptcy Court shall be treated as provided in such Final Order; (b) any executory contracts and unexpired leases listed on the

Schedule of Rejected Contracts and Leases, shall be deemed rejected as of the Effective Date; and (c) all executory contracts and unexpired leases that are the subject of a separate motion to assume or reject under section 365 of the Bankruptcy Code pending on the Effective Date shall be treated as provided for in the Final Order resolving such motion. Subject to the occurrence of the Effective Date, entry of the Confirmation Order by the Bankruptcy Court shall constitute approval of the assumptions and rejections described in this Section 10.1 pursuant to sections 365(a) and 1123 of the Bankruptcy Code. Each executory contract and unexpired lease assumed pursuant to this Section 10.1 shall revest in and be fully enforceable by the applicable Reorganized Debtor in accordance with its terms, except as modified by the provisions of the Plan, or any order of the Bankruptcy Court authorizing and providing for its assumption, or applicable federal law.

10.2. ***Claims Based on Rejection of Executory Contracts or Unexpired Leases.***

Except as otherwise explicitly set forth in the Plan, all Claims arising from the rejection of executory contracts or unexpired leases, if evidenced by a timely filed proof of claim, will be treated as General Unsecured Claims. Upon receipt of the Plan Distribution provided in Section 5.7 of the Plan, all such Claims shall be discharged as of the Effective Date, and shall not be enforceable against the Debtors, the Estates, the Reorganized Debtors or their respective properties or interests in property. In the event that the rejection of an executory contract or unexpired lease by any of the Debtors pursuant to the Plan results in damages to the other party or parties to such contract or lease, a Claim for such damages, if not evidenced by a timely filed proof of claim, shall be forever barred and shall not be enforceable against the Debtors or the Reorganized Debtors, or their respective properties or interests in property as agents, successors or assigns, unless a proof of claim is filed with the Bankruptcy Court and served upon counsel for the Debtors and the Reorganized Debtors on or before the date that is thirty (30) days after the effective date of such rejection (which may be the Effective Date, the date on which the Debtors reject the applicable contract or lease as provided in Section 10.3(c) below, or pursuant to an order of the Bankruptcy Court).

10.3. ***Cure of Defaults for Assumed Executory Contracts and Unexpired Leases.***

(a) Except to the extent that less favorable treatment has been agreed to by the non-Debtor party or parties to each such executory contract or unexpired lease to be assumed pursuant to the Plan, any monetary defaults arising under such executory contract or unexpired lease shall be satisfied, pursuant to section 365(b)(1) of the Bankruptcy Code, by payment of the appropriate amount (the "***Cure Amount***") in full in Cash on the later of thirty (30) days after: (i) the Effective Date; or (ii) the date on which any Cure Dispute relating to such Cure Amount has been resolved (either consensually or through judicial decision).

(b) No later than ten (10) calendar days prior to the commencement of the Confirmation Hearing, the Debtors shall file a schedule (the "***Cure Schedule***") setting forth the Cure Amount, if any, for each executory contract and unexpired lease to be assumed pursuant to Section 10.1 of the Plan, and serve such Cure Schedule on each applicable counterparty. Any party that fails to object to the applicable Cure Amount listed on the Cure Schedule within fifteen (15) calendar days of the filing thereof, shall be forever barred, estopped and enjoined from disputing the Cure Amount set forth on the Cure Schedule (including a Cure Amount of $0.00) and/or from asserting any Claim against the applicable Debtor or Reorganized Debtor arising under section 365(b)(1) of the Bankruptcy Code except as set forth on the Cure Schedule.

(c) In the event of a dispute (each, a "Cure Dispute") regarding: (i) the Cure Amount; (ii) the ability of the applicable Reorganized Debtor to provide "adequate assurance of future performance" (within the meaning of section 365 of the Bankruptcy Code) under the contract or lease to be assumed; or (iii) any other matter pertaining to the proposed assumption, the cure payments required by section 365(b)(1) of the Bankruptcy Code shall be made following the entry of a Final Order resolving such Cure Dispute and approving the assumption. To the extent a Cure Dispute relates solely to the Cure Amount, the applicable Debtor may assume and/or assume and assign the applicable contract or lease prior to the resolution of the Cure Dispute provided that such Debtor reserves Cash in an amount sufficient to pay the full amount asserted as the required cure payment by the non-Debtor party to such contract or lease (or such smaller amount as may be fixed or estimated by the Bankruptcy Court). To the extent the Cure Dispute is resolved or determined against the applicable Debtor or Reorganized Debtor, as applicable, such Debtor or Reorganized Debtor, as applicable, may reject the applicable executory contract or unexpired lease after such determination, and the counterparty may thereafter file a proof of claim in the manner set forth in Section 10.2 hereof.

10.4. *Compensation and Benefit Programs.*

(a) Except as otherwise expressly provided hereunder, in a prior order of the Bankruptcy Court or to the extent subject to a motion pending before the Bankruptcy Court as of the Effective Date, with the consent of the Requisite Investors, all employment and severance policies, and all compensation and benefit plans, policies, and programs of the Debtors applicable to their respective employees, retirees and non-employee directors including, without limitation, all savings plans, unfunded retirement plans, healthcare plans, disability plans, severance benefit plans, incentive plans, and life, accidental death and dismemberment insurance plans are treated as executory contracts under the Plan and on the Effective Date will be assumed pursuant to the provisions of sections 365 and 1123 of the Bankruptcy Code. Each of the Reorganized Debtors may, prior to the Effective Date and with the consent of the Requisite Investors, enter into employment agreements with employees that become effective on or prior to the Effective Date and survive consummation of this Plan. Any such agreements (or a summary of the material terms thereof) shall be in form and substance acceptable to the Requisite Investors and be included in the Plan Supplement or otherwise filed with the Bankruptcy Court on or before the date of the Confirmation Hearing. For the avoidance of doubt, all workers' compensation policies issued at any time to the Debtors, their affiliates or predecessors of any of the foregoing and all agreements related thereto shall be treated in accordance with Section 7.12 of the Plan.

(b) All collective bargaining agreements to which one or more of the Debtors is a party shall be treated as executory contracts under this Plan and on the Effective Date will be assumed by the applicable Reorganized Debtors pursuant to the provisions of section 365 of the Bankruptcy Code.

10.5. *Amended Shared Services Agreement.*

The Shared Services Agreement, as amended, shall be assumed pursuant to this Plan, with such assumption being deemed effective upon and contingent on the occurrence of the Effective Date. On the Effective Date, Reorganized MPM and MSC shall enter into the Amended Shared Services Agreement.

10.6. *Existing Management Agreement.*

The Existing Management Agreement shall be terminated as of the Petition Date or as soon thereafter as practicable by mutual agreement of the parties thereto. Any Claims thereunder shall be waived and no payments or distributions shall be made on account of such Claims.

10.7. *Warranty Obligations.*

All obligations of a Debtor to its customers pursuant to ordinary course written warranty agreements with such customers shall be expressly assumed by the applicable Reorganized Debtor as of the Effective Date, regardless of whether such customer filed a proof of claim form against the Debtors by the relevant Bar Date.

ARTICLE XI.

CONDITIONS PRECEDENT TO <u>CONSUMMATION OF THE PLAN</u>

11.1. *Conditions Precedent to the Effective Date.*

The occurrence of the Effective Date is subject to:

(a) the RSA having not been terminated and remaining in full force and effect and the RSA Order, in form and substance acceptable to the Debtors and the Requisite Investors, having become a Final Order and remaining in full force and effect;

(b) the Backstop Commitment Agreement having not been terminated and remaining in full force and effect and the Backstop Commitment Agreement Order, in form and substance acceptable to the Debtors and the Requisite Investors, having become a Final Order;

(c) the Disclosure Statement Order, in form and substance acceptable to the Debtors and the Requisite Investors, having been entered by the Bankruptcy Court and remaining in full force and effect;

(d) the Confirmation Order, in form and substance acceptable to the Debtors and the Requisite Investors, having become a Final Order and remaining in full force and effect;

(e) the Allowed amount of the 1.5 Lien Note Claims having been determined by Final Order of the Bankruptcy Court and any settlement with respect to the Allowed amount or treatment of the 1.5 Lien Note Claims pursuant to the Plan being satisfactory in form and substance to the Debtors and the Requisite Investors;

(f) the Allowed amount of the First Lien Note Claims having been determined by Final Order of the Bankruptcy Court and any settlement with respect to the Allowed amount or treatment of the First Lien Note Claims pursuant to the Plan being satisfactory in form and substance to the Debtors and the Requisite Investors;

(g) the Plan Documents, including the Plan Supplement, in form and substance satisfactory to the Debtors and the Requisite Investors, being executed and delivered, and any conditions (other than the occurrence of the Effective Date or certification by a Debtor that the Effective Date has occurred) contained therein, including the conditions precedent set forth in the Backstop Commitment Agreement, having been satisfied or waived in accordance therewith;

(h) an Event of Default under the DIP ABL Facility or DIP Term Loan Facility (that has not otherwise been cured or waived in accordance with the terms thereof) having not occurred;

(i) an acceleration of the obligations or termination of commitments under the DIP ABL Facility and DIP Term Loan Facility having not occurred;

(j) a chapter 11 trustee, a responsible officer, or an examiner with enlarged powers relating to the operation of the businesses of any of the Debtors (powers beyond those set forth in section 1106(a)(3) and (4) of the Bankruptcy Code) not having been appointed in any of the Debtors' chapter 11 cases;

(k) all fees and expenses payable or owed by the Debtors under the RSA and Backstop Commitment Agreement having been paid;

(l) all material governmental, regulatory and third party approvals, authorizations, certifications, rulings, no-action letters, opinions, waivers and/or consents required in connection with the Plan, if any, having been obtained and remaining in full force and effect, and there existing no claim, action, suit, investigation, litigation or proceeding, pending or threatened in any court or before any arbitrator or governmental instrumentality, which would prohibit the consummation of the Plan;

(m) the New First Lien Term Loan Agreement (to the extent the Replacement First Lien Notes are not issued), the Incremental Facility (to the extent the Replacement 1.5 Lien Notes are not issued) and the New ABL Credit Agreement and all related documents provided for therein or contemplated thereby, in each case in form and substance satisfactory to the Debtors and the Requisite Investors, having been duly and validly executed and delivered by all parties thereto and consummated, and being in full force and effect (with all conditions precedent to such agreement having occurred or otherwise been satisfied or waived);

(n) the Amended Certificates of Incorporation, in form and substance satisfactory to the Debtors and the Requisite Investors, shall have been filed with the applicable authorities of the relevant jurisdictions of incorporation and shall have become effective in accordance with such jurisdictions' corporation laws;

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(o) the global certificate representing the Top HoldCo Common Stock having been delivered to DTC;

(p) the transactions that are contemplated by the Backstop Commitment Agreement and Rights Offerings having been consummated; and

(q) the Shared Services Agreement having been assumed pursuant to this Plan and the Amended Shared Services Agreement, in form and substance satisfactory to the Debtors and the Requisite Investors, having been duly and validly executed and delivered by all parties thereto and consummated, and being in full force and effect (with all conditions precedent to such agreement having occurred or otherwise been satisfied or waived); and

(r) the Debtors' good faith estimate (in consultation with the Backstop Parties and the Creditors' Committee) of the ultimate amount of interest payable pursuant to Section 5.7(a) of the Plan to holders of General Unsecured Claims which will ultimately be Allowed equaling no more than $400,000.

11.2. *Satisfaction and Waiver of Conditions Precedent.*

Except as otherwise provided herein, any actions taken on the Effective Date shall be deemed to have occurred simultaneously and no such action shall be deemed to have occurred prior to the taking of any other such action. Any of the conditions set forth in Sections 11.1, other than 11.1(p) may be waived in whole or part by the Debtors, with the consent of the Requisite Investors, without notice and a hearing, and the Debtors' benefits under the "mootness doctrine" shall be unaffected by any provision hereof. The failure to satisfy or waive any condition may be asserted by the Debtors regardless of the circumstances giving rise to the failure of such condition to be satisfied (including, without limitation, any act, action, failure to act or inaction by the Debtors). The failure of the Debtors to assert the non-satisfaction of any such conditions shall not be deemed a waiver of any other rights hereunder, and each such right shall be deemed an ongoing right that may be asserted or waived (as set forth herein) at any time or from time to time.

11.3. *Effect of Failure of Conditions.*

If all of the conditions to effectiveness have not been satisfied or duly waived (as provided in Section 11.2 above) and the Effective Date has not occurred on or before the first Business Day that is more than 60 days after the Confirmation Date, or by such later date as set forth by the Debtors in a notice filed with the Bankruptcy Court prior to the expiration of such period, then the Debtors, with the consent of the Requisite Investors, may file a motion to vacate the Confirmation Order. Notwithstanding the filing of such a motion, the Confirmation Order shall not be vacated if all of the conditions to consummation set forth in Section 11.1 hereof are either satisfied or duly waived before the Bankruptcy Court enters an order granting the relief requested in such motion. If the Confirmation Order is vacated pursuant to this Section 11.3, this Plan shall be null and void in all respects, the Confirmation Order shall be of no further force or effect, no Plan Distributions shall be made, the Debtors and all holders of Claims and Interests shall be restored to the *status quo ante* as of the day immediately preceding the Confirmation Date as though the Confirmation Date had never occurred, and upon such occurrence, nothing

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contained in this Plan shall: (a) constitute a waiver or release of any Claims against or Interests in the Debtors; (b) prejudice in any manner the rights of the holder of any Claim against or Interest in the Debtors; or (c) constitute an admission, acknowledgment, offer or undertaking by any Debtor or any other Person with respect to any matter set forth in the Plan.

ARTICLE XII.

EFFECT OF CONFIRMATION

12.1. ***Binding Effect.***

Except as otherwise provided in section 1141(d)(3) of the Bankruptcy Code and subject to the occurrence of the Effective Date, on and after the Confirmation Date, the provisions of this Plan shall bind any holder of a Claim against, or Interest in, the Debtors and inure to the benefit of and be binding on such holder's respective successors and assigns, whether or not the Claim or Interest of such holder is impaired under this Plan and whether or not such holder has accepted this Plan.

12.2. ***Discharge of Claims Against and Interests in the Debtors.***

Upon the Effective Date and in consideration of the Plan Distributions, except as otherwise provided herein or in the Confirmation Order, each Person that is a holder (as well as any trustees and agents on behalf of such Person) of a Claim or Interest shall be deemed to have forever waived, released, and discharged the Debtors, to the fullest extent permitted by section 1141 of the Bankruptcy Code, of and from any and all Claims, Interests, rights, and liabilities that arose prior to the Effective Date. Except as otherwise provided herein, upon the Effective Date, all such holders of Claims and Interests shall be forever precluded and enjoined, pursuant to sections 105, 524, 1141 of the Bankruptcy Code, from prosecuting or asserting any such discharged Claim against or terminated Interest in any Debtor or any Reorganized Debtor.

12.3. ***Term of Pre-Confirmation Injunctions or Stays.***

Unless otherwise provided herein, all injunctions or stays arising prior to the Confirmation Date in accordance with sections 105 or 362 of the Bankruptcy Code, or otherwise, and in existence on the Confirmation Date, shall remain in full force and effect until the Effective Date.

12.4. ***Injunction.***

(a) Except as otherwise provided in this Plan or the Confirmation Order, as of the Confirmation Date, but subject to the occurrence of the Effective Date, all Persons who have held, hold or may hold Claims against or Interests in the Debtors or the Estates are, with respect to any such Claims or Interests, permanently enjoined after the Confirmation Date from: (i) commencing, conducting or continuing in any manner, directly or indirectly, any suit, action or other proceeding of any kind (including, without limitation, any proceeding in a judicial, arbitral, administrative or other forum) against or affecting the Debtors, the Reorganized Debtors, the Estates or any of their property, or any direct or indirect transferee of any property of, or direct or indirect successor in interest to, any of the foregoing Persons or any property of any such transferee or successor; (ii) enforcing, levying, attaching (including, without limitation, any pre-judgment attachment), collecting or otherwise recovering by any manner or means, whether directly or indirectly, any judgment, award, decree or order against the Debtors, the Reorganized Debtors, or the Estates or any of their property, or any direct or indirect transferee of any property of, or direct or indirect successor in interest to, any of the foregoing Persons, or any property of any such transferee or successor; (iii) creating, perfecting or otherwise enforcing in any manner, directly or indirectly, any encumbrance of any kind against the Debtors, the Reorganized Debtors, or the Estates or any of their property, or any direct or indirect transferee of any property of, or successor in interest to, any of the foregoing Persons (iv) acting or proceeding in any manner, in any place whatsoever, that does not conform to or comply with the provisions of this Plan to the full extent permitted by applicable law; and (v) commencing or continuing, in any manner or in any place, any action that does not comply with or is inconsistent with the provisions of this Plan; provided, however, that nothing contained herein shall preclude such Persons from exercising their rights, or obtaining benefits, pursuant to and consistent with the terms of this Plan.

(b) By accepting Plan Distributions, each holder of an Allowed Claim or Interest will be deemed to have specifically consented to the Injunctions set forth in this Section.

12.5. *Releases.*

(a) Releases by the Debtors. For good and valuable consideration, the adequacy of which is hereby confirmed, and except as otherwise provided in this Plan or the Confirmation Order, as of the Effective Date, the Debtors and Reorganized Debtors, in their individual capacities and as debtor in possession, shall be deemed to forever release, waive and discharge all claims, obligations, suits, judgments, damages, demands, debts, rights, Causes of Action and liabilities (other than the rights of the Debtors or Reorganized Debtors to enforce this Plan and the contracts, instruments, releases, indentures and other agreements or documents delivered thereunder) against the Released Parties, whether liquidated or unliquidated, fixed or contingent, matured or unmatured, known or unknown, foreseen or unforeseen, then existing or thereafter arising, in law, equity or otherwise that are based in whole or in part on any act, omission, transaction, event or other occurrence taking place on or prior to the Effective Date in any way relating to the Debtors, the Reorganized Debtors, the parties released pursuant to this Section 12.5, the Reorganization Cases, or this Plan or the Disclosure Statement, and that could have been asserted by or on behalf of the Debtors or their Estates or Reorganized Debtors, whether directly, indirectly, derivatively or in any representative or any other capacity, other than claims, obligations, suits, judgments, damages, demands, debts, rights, Causes of Action and liabilities arising out of or relating to any act or omission of a Released Party or a former officer or director of the Debtors that constitutes gross negligence, fraud, willful misconduct or breach of fiduciary duty (if any).

(b) Releases by Holders of Claims and Interests. Except as otherwise provided in this Plan or the Confirmation Order, on the Effective Date: (i) each of the Released Parties; (ii) each holder of a Claim or Interest entitled to vote on this Plan that did not "opt out" of the releases provided in Section 12.5 of the Plan in a timely submitted Ballot; and (iii) to the fullest extent permissible under applicable law, as such law may be extended or interpreted subsequent to the Effective Date, all holders of Claims and Interests, in consideration for the obligations of the Debtors and Reorganized Debtors under this Plan, the Plan Consideration and other contracts, instruments, releases, agreements or documents executed and delivered in connection with this Plan, and each entity (other than the Debtors) that has held, holds or may hold a Claim or Interest, as applicable, will be deemed to have consented to this Plan for all purposes and the restructuring embodied herein and deemed to forever release, waive and discharge all claims, demands, debts, rights, Causes of Action or liabilities (other than the right to enforce the obligations of any party under this Plan and the contracts, instruments, releases, agreements and documents delivered under or in connection with this Plan) against the Released Parties, whether liquidated or unliquidated, fixed or contingent, matured or unmatured, known or unknown, foreseen or unforeseen, then existing or thereafter arising, in law, equity or otherwise that are based in whole or in part on any act or omission, transaction, event or other occurrence taking place on or prior to the Effective Date in any way relating to the Debtors, the Reorganized Debtors, the Reorganization Cases, or this Plan or the Disclosure Statement; provided, however, that nothing in clause (iii) of this Section 12.5(b) of the Plan shall release, waive or discharge the Intercreditor Actions or the Causes of Action asserted therein.

(c) Notwithstanding anything to the contrary contained herein: (i) except to the extent permissible under applicable law, as such law may be extended or interpreted subsequent to the Effective Date, the releases provided for in this Section 12.5 of the Plan shall not release any non-Debtor entity from any liability arising under (x) the Internal Revenue Code or any state, city or municipal tax code, or (y) any criminal laws of the United States or any state, city or municipality; and (ii) the releases set forth in this Section 12.6 shall not release any (x) any claims against any Person to the extent such Person asserts a crossclaim, counterclaim and/or claim for setoff which seeks affirmative relief against a Debtor or any of its officers, directors, or representatives and (y) claims against any Person arising from or relating to such Person's gross negligence, fraud, willful misconduct or breach of fiduciary duty (if any), each as determined by a Final Order of the Bankruptcy Court.

(d) As to any Governmental Unit (as defined by section 101(27) of the Bankruptcy Code), nothing in the Plan or Confirmation Order shall limit or expand the scope of discharge, release or injunction to which the Debtors or Reorganized Debtors are entitled under the Bankruptcy Code, if any. The discharge, release and injunction provisions contained in the Plan and Confirmation Order are not intended and shall not be construed to bar any Governmental Unit from, subsequent to the Confirmation Order, pursuing any police or regulatory action, except to the extent that such police or regulatory action involves pursuing a "claim" within the meaning of section 101(5) of the Bankruptcy Code that is discharged or enjoined by the Plan and Confirmation Order.

(e) Accordingly, notwithstanding anything contained in the Plan or Confirmation Order to the contrary, nothing in the Plan or Confirmation Order shall discharge, release, impair or otherwise preclude: (1) any liability to a Governmental Unit that is not a "claim" within the meaning of section 101(5) of the Bankruptcy Code; (2) any Claim of a Governmental Unit arising on or after the Confirmation Date; (3) any valid right of setoff or recoupment of a Governmental Unit against any of the Debtors; or (4) any liability of the Debtors or Reorganized Debtors under applicable environmental law or the Americans With Disabilities Act to any Governmental Unit as the owner or operator of any property that such entity owns or operates after the Effective Date, but only to the same extent and subject to the same limitations as an entity that purchased such property on the Effective Date. Nor shall anything in the Plan or Confirmation Order: (i) enjoin or otherwise bar any Governmental Unit from asserting or enforcing, outside the Bankruptcy Court, any liability described in the preceding sentence; or (ii) divest any court, commission, or tribunal of jurisdiction to determine whether any liabilities asserted by the United States or any Governmental Unit are discharged or otherwise barred by the Plan, Confirmation Order, or the Bankruptcy Code.

(f) Moreover, nothing in the Plan or Confirmation Order shall release or exculpate any non-debtor, including any Released Parties, from any liability to any Governmental Unit, including but not limited to any liabilities arising under the Internal Revenue Code, the environmental laws, or the criminal laws against the Released Parties, nor shall anything in the Plan or Confirmation Order enjoin any Governmental Unit from bringing any claim, suit, action or other proceeding against the Released Parties for any liability whatsoever; provided, however, that the foregoing sentence shall not limit the scope of discharge granted to the Debtors under sections 524 and 1141 of the Bankruptcy Code.

12.6. *Exculpation and Limitation of Liability.*

To the extent permissible under applicable law, none of the Released Parties shall have or incur any liability to any holder of any Claim or Interest or any other Person for any act or omission in connection with, or arising out of the Debtors' restructuring, including without limitation, the negotiation, implementation and execution of this Plan, the Reorganization Cases, the Disclosure Statement, the solicitation of votes for and the pursuit of confirmation of this Plan, the consummation of this Plan, or the administration of this Plan or the property to be distributed under this Plan, including, without limitation, all documents ancillary thereto (including the RSA and the Backstop Commitment Agreement), all decisions, actions, inactions and alleged negligence or misconduct relating thereto and all activities leading to the promulgation and confirmation of this Plan except for gross negligence or willful misconduct, each as determined by a Final Order of the Bankruptcy Court.

12.7. *Injunction Related to Releases and Exculpation.*

The Confirmation Order shall permanently enjoin the commencement or prosecution by any Person or entity, whether directly, derivatively or otherwise, of any claims, obligations, suits, judgments, damages, demands, debts, rights, Causes of Action or liabilities released pursuant to this Plan, including but not limited to the claims, obligations, suits, judgments, damages, demands, debts, rights, Causes of Action or liabilities released in Sections 12.5 and 12.6 of this Plan.

12.8. *Retention of Causes of Action/Reservation of Rights.*

Subject to Section 12.5 of this Plan and except as expressly set forth herein (including Section 5.7(c) herein), nothing contained in this Plan or the Confirmation Order shall be deemed to be a waiver or relinquishment of any rights, claims or Causes of Action, rights of setoff, or other legal or equitable defenses that the Debtors had immediately prior to the Effective Date on behalf of the Estates or of themselves in accordance with any provision of the Bankruptcy Code or any applicable non-bankruptcy law. The Reorganized Debtors shall have, retain, reserve, and be entitled to assert all such claims, Causes of Action, rights of setoff, or other legal or equitable defenses as fully as if the Reorganization Cases had not been commenced, and all of the Debtors' legal and/or equitable rights respecting any Claim left unimpaired, as set forth in Section 4.2 herein, may be asserted after the Confirmation Date to the same extent as if the Reorganization Cases had not been commenced.

12.9. ***Indemnification Obligations.***

Notwithstanding anything to the contrary contained herein, including Section 10.1 of the Plan, subject to the occurrence of the Effective Date, the obligations of the Debtors to indemnify, defend, reimburse, exculpate, advance fees and expenses to, or limit the liability of directors or officers who were directors or officers of any of the Debtors at any time after the Petition Date, against any Causes of Action, remain unaffected thereby after the Effective Date and are not discharged. On and after the Effective Date, none of the Reorganized Debtors shall terminate or otherwise reduce the coverage under any directors' and officers' insurance policies in effect on the Petition Date, and all directors and officers of the Debtors at any time shall be entitled to the full benefits of any such policy for the full term of such policy, regardless of whether such directors and/or officers remain in such positions after the Effective Date.

ARTICLE XIII.

RETENTION OF JURISDICTION

Pursuant to sections 105(c) and 1142 of the Bankruptcy Code and notwithstanding entry of the Confirmation Order and the occurrence of the Effective Date, on and after the Effective Date, the Bankruptcy Court shall retain exclusive jurisdiction, pursuant to 28 U.S.C. §§ 1334 and 157, over all matters arising in, arising under, or related to the Reorganization Cases for, among other things, the following purposes:

(a) To hear and determine applications for the assumption or rejection of executory contracts or unexpired leases and the Cure Disputes resulting therefrom;

(b) To hear and determine the Intercreditor Actions, the Causes of Action asserted therein, and any other similar Causes of Action arising under or in connection with, or otherwise related to, the Second Lien Intercreditor Agreement, whether asserted against a Released Party or any other Person;

(c) To determine any motion, adversary proceeding, application, contested matter, and other litigated matter pending on or commenced after the Confirmation Date;

(d) To hear and resolve any disputes arising from or relating to (i) any orders of the Bankruptcy Court granting relief under Bankruptcy Rule 2004, or (ii) any protective orders entered by the Bankruptcy Court in connection with the foregoing;

(e) To ensure that Plan Distributions to holders of Allowed Claims are accomplished as provided herein;

(f) To consider Claims or the allowance, classification, priority, compromise, estimation, or payment of any Claim, including any Administrative Expense Claim;

(g) To enter, implement, or enforce such orders as may be appropriate in the event the Confirmation Order is for any reason stayed, reversed, revoked, modified, or vacated;

(h) To issue and enforce injunctions, enter and implement other orders, and take such other actions as may be necessary or appropriate to restrain interference by any Person with the consummation, implementation, or enforcement of this Plan, the Confirmation Order, or any other order of the Bankruptcy Court;

(i) To hear and determine any application to modify this Plan in accordance with section 1127 of the Bankruptcy Code, to remedy any defect or omission or reconcile any inconsistency in this Plan, the Disclosure Statement, or any order of the Bankruptcy Court, including the Confirmation Order, in such a manner as may be necessary to carry out the purposes and effects thereof;

(j) To hear and determine all Fee Claims;

(k) To resolve disputes concerning any reserves with respect to Disputed Claims or the administration thereof;

(l) To hear and determine disputes arising in connection with the interpretation, implementation, or enforcement of this Plan, the Confirmation Order, any transactions or payments contemplated hereby, or any agreement, instrument, or other document governing or relating to any of the foregoing;

(m) To take any action and issue such orders, including any such action or orders as may be necessary after occurrence of the Effective Date and/or consummation of the Plan, as may be necessary to construe, enforce, implement, execute, and consummate this Plan, including any release or injunction provisions set forth herein, or to maintain the integrity of this Plan following consummation;

(n) To determine such other matters and for such other purposes as may be provided in the Confirmation Order;

(o) To hear and determine matters concerning state, local, and federal taxes in accordance with sections 346, 505, and 1146 of the Bankruptcy Code;

(p) To hear and determine any other matters related hereto and not inconsistent with the Bankruptcy Code and title 28 of the United States Code;

(q) To resolve any disputes concerning whether a Person had sufficient notice of the Reorganization Cases, the Disclosure Statement Hearing, the Confirmation Hearing, any applicable Bar Date, or the deadline for responding or objecting to a Cure Amount, for the purpose of determining whether a Claim or Interest is discharged hereunder, or for any other purpose;

(r) To recover all assets of the Debtors and property of the Estates, wherever located; and

(s) To enter a final decree closing each of the Reorganization Cases.

As of the Effective Date, notwithstanding anything in this Article XIII to the contrary, the Exit Facilities shall be governed by the respective jurisdictional provisions therein.

ARTICLE XIV.

MISCELLANEOUS PROVISIONS

14.1. *Exemption from Certain Transfer Taxes.*

To the fullest extent permitted by applicable law, all sale transactions consummated by the Debtors and approved by the Bankruptcy Court on and after the Confirmation Date through and including the Effective Date, including any transfers effectuated under this Plan, the sale by the Debtors of any owned property pursuant to section 363(b) of the Bankruptcy Code, and any assumption, assignment, and/or sale by the Debtors of their interests in unexpired leases of non-residential real property or executory contracts pursuant to section 365(a) of the Bankruptcy Code, shall constitute a "transfer under a plan" within the purview of section 1146 of the Bankruptcy Code, and shall not be subject to any stamp, real estate transfer, mortgage recording, or other similar tax.

14.2. *Retiree Benefits.*

On and after the Effective Date, pursuant to section 1129(a)(13) of the Bankruptcy Code, the Reorganized Debtors shall continue to pay all retiree benefits (within the meaning of, and subject to the limitations of, section 1114 of the Bankruptcy Code), if any, at the level established in accordance with section 1114 of the Bankruptcy Code, at any time prior to the Confirmation Date, for the duration of the period for which either Debtor had obligated itself to provide such benefits. Nothing herein shall: (a) restrict the Debtors' or the Reorganized Debtors' right to modify the terms and conditions of the retiree benefits, if any, as otherwise permitted pursuant to the terms of the applicable plans, non-bankruptcy law, or section 1114(m) of the Bankruptcy Code; or (b) be construed as an admission that any such retiree benefits are owed by the Debtors.

14.3. *Defined Benefit Pension Plan.*

(a) The Pension Plan shall not be modified (absent consent) or affected by any provision of the Plan and shall be continued by Reorganized MPM after the Effective Date in accordance with its terms. Nothing herein or in the Confirmation Order shall relieve or discharge any requirement that MPM or Reorganized MPM (i) satisfy the minimum funding standards pursuant to 26 U.S.C. §§ 412, 430, and 29 U.S.C. § 1082, 1083, (ii) is liable for the payment of PBGC premiums in accordance with 29 U.S.C. §§ 1306 and 1307 subject to any and all applicable rights and defenses of MPM, and (iii) administer the Pension Plan in accordance with the provisions of ERISA and the Internal Revenue Code. In the event that the Pension Plan terminates after the Effective Date, Reorganized MPM and each of its controlled group members

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will be responsible, subject to any and all applicable rights and defenses, for the liabilities imposed by Title IV of ERISA to the extent set forth therein.

(b) Notwithstanding any provision of the Plan or the Confirmation Order to the contrary, including but not limited to the releases set forth in Article XII of the Plan, neither the Plan nor the Confirmation Order will release, discharge or exculpate the Debtors, the Reorganized Debtors, or any Person, in any capacity, from any liability or responsibility with respect to the Pension Plan, subject to any and all applicable rights and defenses of such parties, under ERISA or the Internal Revenue Code. Subsequent to the Effective Date, the PBGC and the Pension Plan shall not be enjoined or precluded from enforcing such liability or responsibility by any of the provisions of the Plan or the Confirmation Order.

14.4. *Dissolution of Creditors' Committee*.

The Creditors' Committee shall be automatically dissolved on the Effective Date and, on the Effective Date, each member of the Creditors' Committee (including each officer, director, employee, agent, consultant or representative thereof) and each Professional Person retained by the Creditors' Committee shall be released and discharged from all rights, duties, responsibilities and obligations arising from, or related to, the Debtors, their membership on the Creditors' Committee, the Plan or the Reorganization Cases, except with respect to any matters concerning any Fee Claims held or asserted by any Professional Persons retained by the Creditors' Committee.

14.5. *Termination of Professionals.*

On the Effective Date, the engagement of each Professional Person retained by the Debtors and the Creditors' Committee, if any, shall be terminated without further order of the Bankruptcy Court or act of the parties; provided, however, such Professional Persons shall be entitled to prosecute their respective Fee Claims and represent their respective constituents with respect to applications for allowance and payment of such Fee Claims and the Reorganized Debtors shall be responsible for the reasonable and documented fees, costs and expenses associated with the prosecution of such Fee Claims. Nothing herein shall preclude any Reorganized Debtor from engaging a former Professional Person on and after the Effective Date in the same capacity as such Professional Person was engaged prior to the Effective Date.

14.6. *Amendments.*

This Plan may be amended, modified, or supplemented by the Debtors, with the consent of the Requisite Investors, in the manner provided for by section 1127 of the Bankruptcy Code or as otherwise permitted by law, without additional disclosure pursuant to section 1125 of the Bankruptcy Code, except as otherwise ordered by the Bankruptcy Court. In addition, after the Confirmation Date, so long as such action does not materially and adversely affect the treatment of holders of Allowed Claims pursuant to this Plan, the Debtors may, with the consent of the Requisite Investors, make appropriate technical adjustments, remedy any defect or omission or reconcile any inconsistencies in this Plan, the Plan Documents and/or the Confirmation Order, with respect to such matters as may be necessary to carry out the purposes and effects of this Plan, and any holder of a Claim or Interest that has accepted this Plan shall be deemed to have accepted this Plan as amended, modified, or supplemented.

14.7. ***Revocation or Withdrawal of this Plan.***

The Debtors reserve the right, with the consent of the Requisite Investors, to revoke or withdraw this Plan prior to the Effective Date. If the Debtors revoke or withdraw this Plan, in accordance with the preceding sentence, prior to the Effective Date as to any or all of the Debtors, or if confirmation or consummation as to any or all of the Debtors does not occur, then, with respect to such Debtors: (a) this Plan shall be null and void in all respects; (b) any settlement or compromise embodied in this Plan (including the fixing or limiting to an amount certain any Claim or Interest or Class of Claims or Interests), assumption or rejection of executory contracts or leases affected by this Plan, and any document or agreement executed pursuant to this Plan shall be deemed null and void; and (c) nothing contained in this Plan shall (i) constitute a waiver or release of any Claims by or against, or any Interests in, such Debtors or any other Person, (ii) prejudice in any manner the rights of such Debtors or any other Person or (iii) constitute an admission of any sort by the Debtors or any other Person.

14.8. ***Allocation of Plan Distributions Between Principal and Interest.***

To the extent that any Allowed Claim entitled to a distribution under the Plan consists of indebtedness and other amounts (such as accrued but unpaid interest thereon), such distribution shall be allocated first to the principal amount of the Claim (as determined for federal income tax purposes) and then, to the extent the consideration exceeds the principal amount of the Claim, to such other amounts.

14.9. ***Severability.***

If, prior to the entry of the Confirmation Order, any term or provision of this Plan is held by the Bankruptcy Court to be invalid, void, or unenforceable, the Bankruptcy Court, at the request of the Debtors (and subject to the consent of the Requisite Investors) shall have the power to alter and interpret such term or provision to make it valid or enforceable to the maximum extent practicable, consistent with the original purpose of the term or provision held to be invalid, void, or unenforceable, and such term or provision shall then be applicable as altered or interpreted. Notwithstanding any such holding, alteration, or interpretation, the remainder of the terms and provisions of this Plan will remain in full force and effect and will in no way be affected, impaired, or invalidated by such holding, alteration, or interpretation. The Confirmation Order shall constitute a judicial determination and shall provide that each term and provision of this Plan, as it may have been altered or interpreted in accordance with the foregoing, is valid and enforceable pursuant to its terms.

14.10. ***Governing Law.***

Except to the extent that the Bankruptcy Code or other U.S. federal law is applicable, or to the extent a Plan Document or exhibit or schedule to the Plan provides otherwise, the rights, duties, and obligations arising under this Plan and the Plan Documents shall be governed by, and construed and enforced in accordance with, the laws of the State of

New York, without giving effect to the principles of conflict of laws thereof to the extent such principles would result in the application of the laws of any other jurisdiction.

14.11. ***Section 1125(e) of the Bankruptcy Code.***

The Debtors have, and upon confirmation of this Plan shall be deemed to have, solicited acceptances of this Plan in good faith and in compliance with the applicable provisions of the Bankruptcy Code, and the Debtors and the Backstop Parties (and each of their respective affiliates, agents, directors, officers, employees, advisors, and attorneys) participated in good faith and in compliance with the applicable provisions of the Bankruptcy Code in the offer, issuance, sale, solicitation and/or purchase of the securities offered and sold under this Plan, and therefore are not, and on account of such offer, issuance, sale, solicitation, and/or purchase will not be, liable at any time for the violation of any applicable law, rule, or regulation governing the solicitation of acceptances or rejections of this Plan or offer, issuance, sale, or purchase of the securities offered and sold under this Plan.

14.12. ***Inconsistency.***

In the event of any inconsistency among the Plan, the Disclosure Statement, the Plan Documents, any exhibit to the Plan or any other instrument or document created or executed pursuant to the Plan, the provisions of the Plan shall govern.

14.13. ***Time.***

In computing any period of time prescribed or allowed by this Plan, unless otherwise set forth herein or determined by the Bankruptcy Court, the provisions of Bankruptcy Rule 9006 shall apply.

14.14. ***Exhibits.***

All exhibits to this Plan are incorporated and are a part of this Plan as if set forth in full herein.

14.15. ***Notices.***

In order to be effective, all notices, requests, and demands to or upon the Debtors shall be in writing (including by facsimile transmission) and, unless otherwise provided herein, shall be deemed to have been duly given or made only when actually delivered or, in the case of notice by facsimile transmission, when received and telephonically confirmed, addressed as follows:

Momentive Performance Materials Inc.
260 Hudson River Road
Waterford, New York 12188
Attn: Douglas A. Johns, Esq.
Telephone: (518) 233-3933
Facsimile: (614) 225-4127

-and-

Willkie Farr & Gallagher LLP
787 Seventh Avenue
New York, New York 10019-6099
Attn: Matthew A. Feldman, Esq.
Jennifer J. Hardy, Esq..
Telephone: (212) 728-8000
Facsimile: (212) 728-8111

Counsel to the Debtors

14.16. *Filing of Additional Documents.*

On or before substantial consummation of the Plan, the Debtors shall file with the Bankruptcy Court such agreements and other documents as may be necessary or appropriate to effectuate and further evidence the terms and conditions of the Plan.

14.17. *Reservation of Rights.*

Except as expressly set forth herein, the Plan shall have no force or effect unless the Bankruptcy Court shall enter the Confirmation Order. None of the filing of this Plan, any statement or provision contained herein, or the taking of any action by the Backstop Parties or the Debtors with respect to this Plan shall be or shall be deemed to be, an admission or waiver of any rights of the Backstop Parties or the Debtors with respect to any Claims or Interests prior to the Effective Date.

Dated: September 3, 2014
Waterford, New York

Respectfully submitted,

Momentive Performance Materials Inc.
on behalf of itself and its affiliated Debtors

By: /s/ William H. Carter
William H. Carter
Director, Chief Financial Officer, and
Executive Vice President of Momentive
Performance Materials Inc. and Momentive
Performance Holdings Inc.

Counsel:

WILLKIE FARR & GALLAGHER LLP

Matthew A. Feldman, Esq.
Rachel C. Strickland, Esq.
Jennifer J. Hardy, Esq.
787 Seventh Avenue
New York, NY 10019
(212) 728-8000

Counsel for the Debtors and Debtors in Possession

Schedule 1

Ares Management LLC
Ares SSF Riopelle, L.P.
Ares Special Situations Fund III, L.P.
Ares Senior Loan Trust
Ares Multi-Strategy Credit Fund V (H), L.P.
ASIP (Holdco) IV S.A.R.L.
Aristeia Capital, LLC
Aristeia Horizons L.P.
Black Diamond Offshore Ltd.
Carlson Capital, L.P.
Compass ESMA LP
Compass TSMA LP
Double Black Diamond Offshore Ltd.
D.E. Shaw Galvanic Portfolios, L.L.C.
Fortress Investment Group LLC
Fortress Credit Advisors LLC
FS Global Credit Opportunities Fund
GSO Aiguille Des Grands Montets Fund I LP
GSO Aiguille Des Grands Montets Fund II LP
GSO Aiguille Des Grands Montets Fund III LP
GSO Capital Partners LP
GSO Coastline Credit Partners LP
GSO Credit – A Partners LP
GSO Palmetto Opportunistic Investment Partners LP
GSO Special Situations Fund LP
GSO Special Situations Overseas Master Fund Ltd.
Jura Limited
LMA SPC - MAP 98 Segregated Portfolio
Manulife Global Focused Balance Fund
Napier Park Global Capital US L.P. and those funds it manages that hold Second Lien Notes
Oaktree Capital Management, L.P.
Oceana Master Fund Ltd.
OCM OPPS MTIV Holdings, LLC
Ontario Public Service Employees Union Pension Plan Trust Fund
Pentwater Capital Management, LP
Pentwater Credit Opportunities Master Fund Ltd.
Pentwater Equity Opportunities Master Fund Ltd
Pentwater Event Driven Cayman Fund Limited
Pentwater Event Equity Reflection Fund
Pentwater Merger Aritage Master Fund Ltd
PPF Nominee 1 B.V.
PWCM Master Fund Ltd
RSUI Indemnity Company
Steamboat Credit Opportunities Master Fund LP

Third Avenue Management LLC
Third Avenue High Yield Credit Fund
Third Avenue Focused Credit Fund
Third Avenue Value Income Fund,LP
Transatlantic Reinsurance Company
Wellpoint, Inc.
Windermere Ireland Fund PLC

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
--X
In re:

MPM SILICONES, LLC, et al.

Debtors.
--X
U.S. BANK NATIONAL ASSOCIATION,
as Indenture Trustee,

Appellants,

14 CIVIL 7471 (VB)
14 CIVIL 7472 (VB)

-against-

JUDGMENT

WILMINGTON SAVINGS FUND SOCIETY, FSB, as Indenture Trustee, MOMENTIVE PERFORMANCE MATERIALS INC., MOMENTIVE PERFORMANCE MATERIALS WORLDWIDE INC., MOMENTIVE PERFORMANCE MATERIALS USA INC., JUNIPER BOND HOLDINGS I LLC, JUNIPER BOND HOLDINGS II LLC, JUNIPER BOND HOLDINGS III LLC, JUNIPER BOND HOLDINGS IV LLC, MOMENTIVE PERFORMANCE MATERIALS QUARTZ, INC., MPM SILICONES, LLC, MOMENTIVE PERFORMANCE MATERIALS SOUTH AMERICA INC., MOMENTIVE PERFORMANCE MATERIALS CHINA SPV INC.,

Appellees.
--X

Appellants having appealed from Orders of the United States Bankruptcy Court for the Southern District of New York, and the matter having come before the Honorable Vincent Briccetti, United States District Judge, and the Court thereafter, on May 4, 2015, having rendered its Memorandum Decision (Doc. #25) affirming the September 9 and September 11, 2014 Orders of the Bankruptcy Court and terminating as moot, Debtors' motions to dismiss the appeals, it is,

ORDERED, ADJUDGED AND DECREED: That for the reasons stated in the Court's Memorandum Decision, (Doc. #25) dated May 4, 2015, the Orders of the Bankruptcy Court are hereby affirmed; accordingly, the case is closed.

Dated: White Plains, New York
May 5, 2015

RUBY J. KRAJICK
Clerk of Court

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

--x

In Re:

MPM SILICONES, LLC, et al.,
Debtors.

MEMORANDUM DECISION

--x

U.S. BANK NATIONAL ASSOCIATION, as Indenture Trustee,
Appellant,

14 CV 7471 (VB)
14 CV 7472 (VB)

v.

WILMINGTON SAVINGS FUND SOCIETY, FSB, as Indenture Trustee, MOMENTIVE PERFORMANCE MATERIALS INC., MOMENTIVE PERFORMANCE MATERIALS WORLDWIDE INC., MOMENTIVE PERFORMANCE MATERIALS USA INC., JUNIPER BOND HOLDINGS I LLC, JUNIPER BOND HOLDINGS II LLC, JUNIPER BOND HOLDINGS III LLC, JUNIPER BOND HOLDINGS IV LLC, MOMENTIVE PERFORMANCE MATERIALS QUARTZ, INC., MPM SILICONES, LLC, MOMENTIVE PERFORMANCE MATERIALS SOUTH AMERICA INC., MOMENTIVE PERFORMANCE MATERIALS CHINA SPV INC.,
Appellees.

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In Re:

MPM SILICONES, LLC, et al.,
Debtors.

14 CV 7492 (VB)

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BOKF, NA, solely as Trustee for the MPM Escrow LLC and MPM Finance Escrow Corp. 8.875% First Priority Senior Secured Notes due 2020; WILMINGTON TRUST, NATIONAL ASSOCIATION, solely as Trustee for the Momentive Performance Materials Inc. 10%

Senior Secured Notes due 2020, :
Appellants, :
:
v. :
:
MOMENTIVE PERFORMANCE MATERIALS INC., MOMENTIVE PERFORMANCE MATERIALS WORLDWIDE INC., MOMENTIVE PERFORMANCE MATERIALS USA INC., JUNIPER BOND HOLDINGS I LLC, JUNIPER BOND HOLDINGS II LLC, JUNIPER BOND HOLDINGS III LLC, JUNIPER BOND HOLDINGS IV LLC, MOMENTIVE PERFORMANCE MATERIALS QUARTZ, INC., MPM SILICONES, LLC, MOMENTIVE PERFORMANCE MATERIALS SOUTH AMERICA INC., and MOMENTIVE PERFORMANCE MATERIALS CHINA SPV INC., :
Appellees. :
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Briccetti, J.:

This case involves related appeals from proceedings in the United States Bankruptcy Court for the Southern District of New York (Robert D. Drain, Judge), during which the Joint Chapter 11 Plan (the "Plan") of Reorganization for Momentive Performance Materials Inc. ("MPM") and its affiliated debtors (collectively with MPM, the "Debtors") was confirmed.

The Debtors filed a Chapter 11 petition on April 13, 2014. After several months of negotiations, Judge Drain held a multi-day confirmation hearing and issued a bench decision on August 26, 2014, which was later corrected and modified in a bench decision on September 9, 2014. On September 11, 2014, Judge Drain issued a written order to effectuate the bench decisions. These appeals stem from the September 9, 2014, bench decision and the September 11, 2014, written order (the "Orders").

Appellant U.S. Bank National Association ("U.S. Bank") contends the Bankruptcy Court erred in confirming the Plan despite the Plan's failure to provide any distributions to holders of subordinated notes (the "Subordinated Notes") issued pursuant to an indenture agreement dated December 4, 2006 (the "2006 Indenture").

Appellants BOKF, N.A., and Wilmington Trust, National Association, contend the Bankruptcy Court chose the wrong cramdown interest rate and erred in confirming the Plan despite the Plan's failure to provide a "make-whole" payment to holders of senior lien notes issued pursuant to indentures dated May 25 and October 25, 2012 (the "2012 Indentures").

For the following reasons, the Bankruptcy Court's Orders are AFFIRMED.

The Court has subject matter jurisdiction pursuant to 28 U.S.C. § 158(a).

BACKGROUND

MPM, together with its Debtor and non-Debtor subsidiaries (collectively, the "Company"), is one of the world's largest producers of silicones and silicone derivatives, which are used in the manufacture of a myriad of industrial and household products. The Company began as the Advanced Materials business of General Electric Company ("GE"). In 2006, investment funds affiliated with Apollo Global Management, LLC (collectively, "Apollo"), acquired the Company from GE.

I. <u>Facts Leading up to Bankruptcy</u>

At the time Apollo acquired the Company, the Debtors issued substantial debt obligations, including the Subordinated Notes. The Subordinated Notes were issued pursuant to the 2006 Indenture,[1] which describes the relative ranking of the Subordinated Notes in comparison with other debt obligations issued by the Debtors. The 2006 Indenture provides that

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[1] U.S. Bank is the Indenture Trustee for the Subordinated Noteholders under the 2006 Indenture.

the Subordinated Notes are "subordinated in right of payment . . . to the prior payment in full of all existing and future Senior Indebtedness of the Company." (U.S. Bank Ex. D, § 10.01). Senior Indebtedness is defined, in relevant part, as:

> all Indebtedness . . . unless the instrument creating or evidencing the same or pursuant to which the same is outstanding expressly provides that such obligations are subordinated in right of payment to any other Indebtedness of the Company[;] [the "Base Definition"] . . . provided, however, that Senior Indebtedness shall not include, as applicable:
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> 4) any Indebtedness or obligation of the Company . . . that by its terms is subordinate or junior in any respect to any other Indebtedness or obligation of the Company . . . including any Pari Passu Indebtedness.

(Id., § 1.01).

In 2010, the Debtors issued springing second lien notes (the "Second Lien Notes"). The Second Lien Notes were unsecured when issued, but would become secured if all second lien notes issued in 2009 were redeemed. When the Second Lien Notes were issued, the Debtors stated that "[p]rior to and following the Springing Lien Trigger Date, the [Second Lien] Notes . . . will be senior indebtedness" and rank "senior in right of payment to . . . the Company's existing subordinated notes." (Debtors' Subordinated Notes Ex. 3). In November 2012, the Second Lien Notes became secured by a junior lien—that is, the lien "sprung"—because all of the second lien notes issued in 2009 were redeemed.

In 2012, the Debtors issued two additional classes of senior secured notes—the 1.5 Lien Notes and the First Lien Notes (collectively, the "Senior Lien Notes"). The 1.5 Lien Notes were issued at an interest rate of 10% pursuant to an indenture dated May 25, 2012, and the First Lien

Notes were issued at an interest rate of 8.875% pursuant to an indenture dated October 25, 2012.[2] The Senior Lien Notes had a maturity date of October 15, 2020.

In addition, the Senior Lien Notes provide for the payment of a "make-whole" premium if the Senior Lien Notes are redeemed before October 15, 2015:

> [P]rior to October 15, 2015, the Issuer may redeem the [Senior Lien] Notes at its option, in whole at any time or in part from time to time . . . at a redemption price equal to 100% of the principal amount of the [Senior Lien] Notes redeemed plus the Applicable Premium as of, and accrued and unpaid interest and Additional Interest, if any, to the applicable redemption date.

(Senior Lien Appellants Ex. C1(A), ¶ 5).[3] The Applicable Premium is the make-whole payment.

However, the 2012 Indentures, which govern the Senior Lien Notes, contain an acceleration provision. The acceleration provision is triggered upon an "Event of Default," which includes the voluntary commencement of a bankruptcy proceeding. (Senior Lien Appellants Ex. C1, §§ 6.01(f), 6.02). If such an Event of Default is triggered, "the principal of, premium, if any, and interest on all the [Senior Lien] Notes shall ipso facto become and be immediately due and payable." (Id., § 6.02).

The Senior Lien Notes, along with certain other debt (collectively, the "Senior Secured Loans") are secured by the same collateral (the "Common Collateral") as the Second Lien Notes. An intercreditor agreement (the "Intercreditor Agreement") governs the relationship between the classes of notes. The Intercreditor Agreement provides that the Second Lien Notes are subordinated to the Senior Secured Loans with respect to their position in the Common

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[2] BOKF is the Indenture Trustee for the First Lien Noteholders, and Wilmington Trust is the Indenture Trustee for the 1.5 Lien Noteholders.

[3] The indentures and notes governing the First Lien Notes and 1.5 Lien Notes are identical in all parts relevant to the disputes at issue in this case. The Senior Lien Notes are attached as Exhibit A to each of the 2012 Indentures.

Collateral. (See U.S. Bank Ex. F § 2). Moreover, the Intercreditor Agreement provides that it does not alter the Second Lien Noteholders' rights as unsecured creditors. (Id. § 5.4).

II. The Plan

The Plan provides no distributions to the holders of the Subordinated Notes.

The Plan also provides that if the holders of the Senior Lien Notes vote in favor of the plan, all outstanding principal and accrued interest on the Senior Lien Notes would be paid in cash to the Senior Lien Noteholders on the effective date of the Plan. (U.S. Bank Ex. A §§ 5.4(a), (b)(i); 5.5(a), (b)(1)).[4] However, no make-whole premium would be allowed. (Id. §§ 5.4(a); 5.5(a)). According to the Plan, if the holders of the Senior Lien Notes vote against the Plan, they would receive "Replacement . . . Notes [the "Replacement Notes"] with a present value equal to the Allowed amount of such holder's Claim," which could—at the Bankruptcy Court's discretion—include a make-whole premium. (Id. §§ 5.4(b)(ii); 5.5(b)(ii)). The Senior Lien Noteholders voted against the Plan. The Bankruptcy Court then determined the Senior Lien Noteholders were not entitled to a make-whole premium.

DISCUSSION

I. Legal Standard

The Court has jurisdiction to hear these appeals pursuant to 28 U.S.C. § 158(a). A district court reviews a bankruptcy court's conclusions of law de novo and its findings of fact under a clearly erroneous standard. See In re Ames Dep't Stores, Inc., 582 F.3d 422, 426 (2d Cir. 2009) (citing Momentum Mfg. Corp. v. Emp. Creditors Comm., 25 F.3d 1132, 1136 (2d Cir. 1994)).

[4] To ensure the Debtors would have been prepared to cash-out the holders of the Senior Lien Notes had they voted to approve the Plan, the Debtors obtained financing that would have allowed them to do so.

II. Subordination Dispute

On behalf of the Subordinated Noteholders, U.S. Bank contends the Plan violates Section 1129(b) of the Bankruptcy Code, which requires that a plan must be "fair and equitable[] with respect to each class of claims or interests that is impaired under, and has not accepted, the plan." 11 U.S.C. § 1129(b)(1). "One of the attributes of a fair and equitable plan is that if an unsecured creditor is not paid in full, 'the holder of any claim or interest that is junior to the claims of [the unsecured creditor] class will not receive or retain under the plan on account of such junior claim or interest any property.'" In re Coltex Loop Cent. Three Partners, L.P., 138 F.3d 39, 42 (2d Cir. 1998) (quoting 11 U.S.C. § 1129(b)(2)(B)(ii)).

The Subordinated Noteholders—unsecured creditors who were not paid in full under the Plan—contend the Plan violates Section 1129(b) by denying them any recovery while providing distributions to the Second Lien Noteholders. Whether the Second Lien Noteholders are entitled to recovery ahead of the Subordinated Noteholders turns on whether the Second Lien Notes are Senior Indebtedness under the 2006 Indenture (which governs the Subordinated Notes).

The 2006 Indenture provides that the Subordinated Notes are "subordinated in right of payment . . . to the prior payment in full of all existing and future Senior Indebtedness of the Company." (U.S. Bank Ex. D, § 10.01). Senior Indebtedness is defined as:

> all Indebtedness . . . unless the instrument creating or evidencing the same or pursuant to which the same is outstanding expressly provides that such obligations are subordinated in right of payment to any other Indebtedness of the Company[;] [the "Base Definition"] . . . provided, however, that Senior Indebtedness shall not include, as applicable:
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> 4) any Indebtedness or obligation of the Company or any Restricted Subsidiary that by its terms is subordinate or junior in

> any respect to any other Indebtedness or obligation of the Company . . . including any Pari Passu Indebtedness.

(Id., § 1.01).

U.S. Bank argues that according to the plain language of the Indenture, Senior Indebtedness cannot include debt that is "subordinated in right of payment" (the "in right of payment" clause) or "subordinate or junior in any respect" to any other debt (the "in any respect" clause). Because the Second Lien Notes are secured by a junior lien, U.S. Bank argues they cannot be Senior Indebtedness under the "in any respect" clause. The Debtors argue, and the Bankruptcy Court held, that both clauses exclude payment subordination—rather than lien subordination—from the definition of Senior Indebtedness, and thus the Second Lien Notes are Senior Indebtedness.

The Court agrees with the Debtors and the Bankruptcy Court.

The "interpretation of Indenture provisions is a matter of basic contract law." In re AMR Corp., 730 F.3d 88, 98 (2d Cir. 2013) (internal brackets omitted), cert. denied, 134 S. Ct. 1888 (2014). The parties agree New York law governs this contract dispute. When interpreting a contract, "the intent of the parties governs." Crane Co. v. Coltec Indus., Inc., 171 F.3d 733, 737 (2d Cir. 1999) (quoting Am. Express Bank Ltd. v. Uniroyal, Inc., 164 A.D.2d 275, 277 (1st Dep't 1990)). Intent is ascertained from the "plain meaning" of the language employed. PaineWebber Inc. v. Bybyk, 81 F.3d 1193, 1199 (2d Cir. 1996) (quoting Tigue v. Commercial Life Ins. Co., 219 A.D.2d 820, 821 (4th Dep't 1995)). When analyzing intent, "[t]he rules of contract construction require [the Court] to adopt an interpretation which gives meaning to every provision of the contract." Paneccasio v. Unisource Worldwide, Inc., 532 F.3d 101, 111 (2d Cir. 2008).

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"In a dispute over the meaning of a contract, the threshold question is whether the contract is ambiguous." Lockheed Martin Corp. v. Retail Holdings, N.V., 639 F.3d 63, 69 (2d Cir. 2011). "Contract language is not ambiguous if it has a definite and precise meaning . . . concerning which there is no reasonable basis for a difference of opinion." Bayerische Landesbank, N.Y. Branch v. Aladdin Capital Mgmt. LLC, 692 F.3d 42, 53 (2d Cir. 2012) (internal quotation marks omitted). "If the parties' intent is unambiguously conveyed by the plain meaning of the agreement[], then interpretation is a matter of law." Crane Co. v. Coltec Indus., Inc., 171 F.3d at 737 (internal quotation marks omitted).

Before delving into the language of the 2006 Indenture, it is important to understand the difference between lien subordination and payment subordination. Under a lien subordination agreement, "the subordinating party agrees to demote the priority of its lien to that of another secured creditor, thereby delaying its recourse to the identified collateral until the other party's secured claim has been satisfied." Ryan E. Manns & Camisha L. Simmons, Safeguarding Enforcement of Lien Subordination Agreements, 32 AM. BANKR. INST. J. 52, 52 (2013). In contrast, payment, or debt, subordination, "entitles the senior creditor to full satisfaction of its superior debt before the subordinated creditor receives payment on its debt." In re First Baldwin Bancshares, Inc., 2013 WL 5429844, at *7 (S.D. Ala. Sept. 30, 2013). A recent article explains the difference between the two types of subordination:

> Lien subordination involves two senior creditors with security interests in the same collateral, one of which has lien priority over the other. To the extent of any value derived from the collateral (e.g., its liquidation proceeds upon a sale), the senior lien lender is repaid first from collateral proceeds, and the junior lien lender collects only from any remaining collateral value. If the collateral proceeds are insufficient to repay the senior lender in full, then both the senior lien and junior lien lenders, and all other unsecured senior creditors, rank equally in their right to repayment of their remaining debt from the other assets or resources of the borrower.

> By contrast, in payment subordination, the senior lender enjoys the right to be paid first from all assets of the borrower or any applicable guarantor, whether or not constituting collateral security for the senior or subordinated lenders. Because payment subordination depends only on the amount owed and not on the value of any particular collateral, it is a more fundamental form of subordination and is generally more advantageous to a senior lender.

Robert L. Cunningham & Yair Y. Galil, Lien Subordination and Intercreditor Agreements, THE REV. OF BANKING & FIN. SERVICES, May 2009, at 49, 50.

An examination of the plain language of the definition of Senior Indebtedness reveals that only indebtedness subject to payment subordination, and not indebtedness subject to lien subordination, is excluded. The Base Definition of Senior Indebtedness excludes debt that is "subordinated in right of payment" to any other debt. The words "in right of payment" clearly refer only to payment subordination; thus, the Base Definition excludes only indebtedness subordinated by payment from the definition of Senior Indebtedness.

Six provisos follow the Base Definition. The fourth of those provisos—the "in any respect" clause—provides Senior Indebtedness cannot include debt that is "subordinate or junior in any respect" to other debt. U.S. Bank rests much of its argument on this clause, as upon first glance, it appears to be as broad as possible, thus encompassing both payment and lien subordination. However, closer consideration reveals this is not the case.

First, the six provisos appended to the Base Definition of Senior Indebtedness must be read in conjunction with the Base Definition. See, e.g., Adams v. Suozzi, 433 F.3d 220, 228 (2d Cir. 2005) ("A written contract will be read as a whole, and every part will be interpreted with reference to the whole"). As described above, the Base Definition excludes debt subordinated by payment from the definition of Senior Indebtedness. The provisos can only clarify or augment the Base Definition; they are not a substitute for the Base Definition. See Friedman v. CT Gen.

Life Ins. Co., 9 N.Y.3d 105, 114 (2007) ("The purpose of a proviso is to restrain the enacting clause, to except something which would otherwise have been within it, or in some measure to modify it"); White v. United States, 191 U.S. 545, 551 (1903) (the usual purpose of a proviso is to "restrain generality, and to prevent misinterpretation"). Thus, when looking to determine the meaning of the "in any respect" clause, the Court is mindful of the words the drafters of the 2006 Indenture chose to use in the Base Definition.

With that in mind, the "in any respect" clause unambiguously clarifies the Base Definition by ensuring the exclusion of indebtedness that is subordinated by payment to other indebtedness "by its terms," even if the instrument creating the indebtedness does not expressly create that subordination. See In re MPM Silicones, LLC, 2014 WL 4436335, at *7 (Bankr. S.D.N.Y. Sept. 9, 2014).[5] The "in right of payment" clause excludes indebtedness expressly subordinated in right of payment, while the "in any respect" clause excludes indebtedness subordinated in right of payment "by its terms."

Second, as the Bankruptcy Court correctly noted, if the "in any respect" clause is read—as U.S. Bank contends it must be—to encompass both payment and lien subordination, it would entirely subsume the exclusion of indebtedness "subordinated in right of payment" contained in the Base Definition. Such a construction violates bedrock principles of contract interpretation. See Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52, 63 (1995) ("a document should be read to give effect to all of its provisions and to render them consistent with each other");

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[5] This interpretation is strengthened by the reference to "Indebtedness" at the start of the "in any respect" clause. As the Bankruptcy Court correctly noted, "the parties distinguished liens, which secure indebtedness, from indebtedness itself in several instances in the indenture, including in the definition of 'Indebtedness' and 'Lien.'" In re MPM Silicones, LLC, 2014 WL 4436335, at *4. By excluding only "Indebtedness" subordinated "by its terms . . . in any respect" from the definition of Senior Indebtedness, the "in any respect" clause makes clear it applies only to payment subordination.

Galli v. Metz, 973 F.2d 145, 149 (2d Cir. 1992) ("Under New York law an interpretation of a contract that has the effect of rendering at least one clause superfluous or meaningless . . . is not preferred and will be avoided if possible" (internal quotation marks omitted)). The structure of the definition of Senior Indebtedness renders this interpretation even more implausible; only a tortured interpretation of a contract could read a proviso as entirely subsuming language contained in the Base Definition.

U.S. Bank faults this interpretation of the "in any respect" clause, arguing it fails to give meaning to the words "in any respect." U.S. Bank is wrong. The "in any respect" clause excludes from the definition of Senior Indebtedness "any Indebtedness or obligation of the Company . . . that by its terms is subordinate or junior in any respect to any other Indebtedness." (U.S. Bank Ex. D, § 1.01). "In any respect," placed in context, makes clear that all types of payment subordination—no matter how that payment subordination is created—precludes an obligation from being Senior Indebtedness. It makes perfect sense that the drafters of the Indenture would have included the words "in any respect" when seeking to emphasize that all debt subordinated by right of payment through any non-explicit means is excluded from the definition of Senior Indebtedness.

U.S. Bank next argues this interpretation of Senior Indebtedness—just like the interpretation U.S. Bank proposes—also violates principles of contract construction by rendering the "in right of payment" clause superfluous. U.S. Bank contends debt subordinated in right of payment "by its terms" must include debt "expressly" subordinated in right of payment. However, this type of surplusage—if any exists—is far easier to swallow than that created by the interpretation U.S. Bank proposes. Reading the "in any respect" clause to apply to both lien and payment subordination substitutes the proviso entirely for the Base Definition. Reading the "in any respect" clause to add ways in which payment subordination can be expressed allows the proviso to augment the Base Definition.

Thus, the plain language of the definition of Senior Indebtedness unambiguously provides that Senior Indebtedness excludes only debt subordinated by payment, and not debt secured by a junior lien. The "in any respect" clause augments the Base Definition, clarifying that the instrument creating the debt does not have to render that debt explicitly subordinated by right of payment to other debt; the debt is still excluded from the definition of Senior Indebtedness if it is "by its terms . . . in any respect" subordinated by right of payment.

Other considerations also militate in favor of this interpretation. The 2006 Indenture contains an anti-layering provision, which precludes the Debtors from incurring debt that is "subordinate in right of payment" to any other debt issued by Debtors, unless it is "pari passu" with or "subordinate in right of payment" to the Subordinated Notes. (U.S. Bank Ex. D § 4.13). Nothing contained in the anti-layering covenant prevents the Debtors from issuing debt that is secured by a junior lien but ranks senior in right of payment to the Subordinated Notes. It makes little sense that the anti-layering covenant itself would not prohibit Debtors from issuing such layered debt, but a proviso within the definition of Senior Indebtedness would provide that very same prohibition.[6]

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[6] U.S. Bank relies upon an article published by Fitch Ratings in February 2006 to support its contention that the "in any respect" clause excludes debt secured by a junior lien from the definition of Senior Indebtedness. The article noted that, at the time, most anti-layering covenants did not preclude issuers from layering senior debt secured by a junior lien. (U.S. Bank Ex. L at 4-5). The article suggested that parties employ the phrase "subordinated in any respect" in anti-layering covenants should they wish to preclude the layering of such debt. However, that is not what the parties here did. Had the parties intended to follow this advice, logic dictates they would have done so in the anti-layering covenant itself—as the article suggests—rather than in a proviso to the definition of Senior Indebtedness. Moreover, there is no evidence in the record that the parties relied on the Fitch Ratings article, or any other source cited by U.S. Bank, when drafting the 2006 Indenture. And, as Judge Drain correctly pointed out, these sources date from

Moreover, U.S. Bank concedes that if the lien securing the Second Lien Notes had never sprung, those Notes would constitute Senior Indebtedness. In U.S. Bank's view, the Second Lien Notes were senior to the Subordinated Notes when they were unsecured, but became pari passu with the Subordinated Notes when the junior lien sprang. As the Bankruptcy Court correctly noted, this is an absurd result that should be avoided. See InterDigital Commc'ns Corp. v. Nokia Corp., 407 F. Supp. 2d 522, 530 (S.D.N.Y. 2005) ("'A contract should not be interpreted to produce a result that is absurd, commercially unreasonable or contrary to the reasonable expectations of the parties'" (quoting In re Lipper Holdings, LLC, 1 A.D.3d 170, 171 (1st Dep't 2003)).

Thus, the 2006 Indenture provides that Senior Indebtedness unambiguously excludes only debt subordinated by payment; it does not exclude debt secured by a junior lien.[7]

U.S. Bank also contends the Second Lien Notes are subordinated by payment to the Senior Secured Loans by the Intercreditor Agreement. The Court does not agree. The Intercreditor Agreement addresses only the relative priorities of the liens securing the Senior Secured Loans and the Second Lien Notes. (See U.S. Bank Ex. F § 2 (entitled "Lien

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just a few months before the issuance of the Subordinated Notes; thus, "there was no well established standard form that might add a meaningful context to the [2006 I]ndenture's plain terms and internal consistency." In re MPM Silicones, LLC, 2014 WL 4436335, at *8.

[7] Even though the language of the Indenture is unambiguous, if the Court were to find the definition of "Senior Indebtedness" lacked definite and precise meaning, the extrinsic evidence in the record demonstrates the parties believed the Second Lien Notes were Senior Indebtedness. The Debtors stated in multiple filings with the Securities and Exchange Commission—both at the time of the issuance of the Second Lien Notes and thereafter—that the Second Lien Notes were Senior Indebtedness; no Subordinated Noteholder—nor U.S. Bank—objected to this characterization. This evidence demonstrates the parties considered the Second Lien Notes to be Senior Indebtedness, and further supports the Court's ruling.

Priorities")). Further, the Intercreditor Agreement provides that it does not alter the Second Lien Noteholders' rights as unsecured creditors. (Id. § 5.4).

Finally, U.S. Bank contends the "primary feature of the [Second Lien Noteholders'] subordination is the requirement that they must wait in line to have their debt paid as to a substantial portion of the Debtor's assets," that is, the Common Collateral. (U.S. Bank Mem. at 11). Thus, even in the provisions of the Intercreditor Agreement that U.S. Bank contends connote payment subordination, "[t]he focus still is on the collateral that was agreed to be secured by the liens." In re MPM Silicones, LLC, 2014 WL 4436335, at * 9. That describes lien—not payment—subordination.

Because the Second Lien Notes are Senior Indebtedness, the Plan—which provides no distributions to the holders of the Subordinated Notes—does not run afoul of Section 1129(b)'s fair and equitable requirement.[8]

III. The Cramdown Interest Rate Dispute

BOKF, as Trustee for the First Lien Noteholders, and Wilmington Trust, as Trustee for the 1.5 Lien Noteholders (collectively, the "Senior Lien Appellants") also contend the Plan violates Section 1129(b)'s fair and equitable requirement. See 11 U.S.C. § 1129(b). To be "fair

[8] Nor does the Plan violate the absolute priority rule by preserving certain intercompany interests without paying the Subordinated Noteholders in full. The "technical preservation of equity is a means to preserve the corporate structure that does not have any economic substance and that does not enable any junior creditor or interest holder to retain or recover any value under the Plan. The Plan's retention of intercompany equity interests for holding company purposes constitutes a device utilized to allow the Debtors to maintain their organizational structure and avoid the unnecessary cost of having to reconstitute that structure." In re Ion Media Networks, Inc., 419 B.R. 585, 601 (Bankr. S.D.N.Y. 2009). That the Second Circuit has rejected the "gifting" doctrine does not undermine this reasoning; the court in In re Ion cited the "gifting" doctrine only "[t]o the extent the preservation of the intercompany equity interests may be deemed an allocation of value" to inappropriate interest holders. Id. at 601 n.22. Moreover, the Court is not convinced—as Judge Drain pointed out—that the Subordinated Noteholders even have standing to raise this issue.

and equitable" to fully secured creditors such as the Senior Lien Appellants, a plan must allow the objecting class to "retain the liens" securing its claim and receive "deferred cash payments totaling at least the allowed amount of such claim, of a value, as of the effective date of the plan, of at least the value of such holder's interest in the estate's interest in such property." Id. §1129(b)(2)(A)(i); see also In re Cellular Info. Sys, Inc., 171 B.R. 926, 937 (Bankr. S.D.N.Y. 1994) ("At minimum, a fully secured creditor is treated fairly and equitably if it retains the lien securing its claim and receives deferred cash payments which have a present value equal to the amount of its claim.").

The Senior Lien Appellants contend the Plan violates Section 1129(b) by using the "formula approach" to calculate the cramdown interest rate, and, in the alternative, by calculating the cramdown interest rate under the formula approach incorrectly.

A. Interest Rate Approach

Under the Plan, the Senior Lien Appellants will receive deferred cash payments; thus, they are entitled to interest payments "to ensure that, over time, [they] receive[] disbursements whose total present value equals or exceeds that of the allowed claim." Till v. SCS Credit Corp., 541 U.S. 465, 469 (2004); see also Rake v. Wade, 508 U.S. 464, 472 n.8 (1993) ("When a claim is paid off pursuant to a stream of future payments, a creditor receives the 'present value' of its claim only if the total amount of the deferred payments includes the amount of the underlying claim plus an appropriate amount of interest to compensate the creditor for the decreased value of the claim caused by the delayed payments."). The parties dispute the appropriate cramdown interest rate.

The Senior Lien Appellants contend the Court should determine the interest rate using an "efficient market" approach. Under the efficient market approach, the cramdown interest rate is based on the interest rate the market would pay on such a loan, in this case measured by "the rates on the exit and bridge financing the Debtors actually obtained." (Senior Lien Appellants' Mem. at 16). The Debtors contend the Court should use the formula approach laid out by the Supreme Court in Till v. SCS Credit Corp., 541 U.S. 465 (2004). Under the formula approach, the cramdown interest rate is calculated by augmenting a risk-free (or low risk) base rate "to account for the risk of nonpayment posed by borrowers in the[] financial position" of the debtor. Id. at 471.

The Court agrees with the Debtors and the Bankruptcy Court.

Although the Senior Lien Appellants correctly point out Till was decided in the context of a Chapter 13 bankruptcy—rather than a Chapter 11 bankrupcty—the Court finds much of Till's reasoning applicable in the Chapter 11 context. In Till, the Supreme Court rejected the efficient market approach because it "imposes significant evidentiary costs, and aims to make each individual creditor whole rather than to ensure the debtor's payments have the required present value." Till v. SCS Credit Corp., 541 U.S. at 477. Additionally, the Court noted the efficient market approach "overcompensates creditors because the market lending rate must be high enough to cover factors, like lenders' transaction costs and overall profits, that are no longer relevant in the context of court-administered and court-supervised cramdown loans." Id.

The Second Circuit, in a pre-Till opinion also in the Chapter 13 context, signaled its agreement with this reasoning. In In re Valenti, 105 F.3d 55 (2d Cir. 1997), the Second Circuit rejected the efficient market approach, stating that courts adopting such an "approach misapprehend the 'present value' function of the interest rate." Id. at 63. The court explained that the cramdown interest rate is meant "to put the creditor in the same economic position that it would have been in had it received the value of its claim immediately. The purpose is not to put the creditor in the same position that it would have been in had it arranged a 'new' loan." Id. at 63-64. The court continued: "[T]he value of a creditor's allowed claim does not include any degree of profit. There is no reason, therefore, that the interest rate should account for profit. . . . Otherwise, the creditor will receive more than the present value of its allowed claim." Id. at 64.

The Court finds the Second Circuit's reasoning in Valenti applicable in the Chapter 11 context. In fact, in Till, the Supreme Court explicitly stated: "We think it likely that Congress intended bankruptcy judges and trustees to follow essentially the same approach when choosing an appropriate interest rate" under any of the various provisions of the Bankruptcy Code requiring a court to "discount a stream of deferred payments back to their present dollar rate." Till v. SCS Credit Corp., 541 U.S. at 474 (internal brackets and quotation marks omitted). The Senior Lien Appellants have provided no good reason why the cramdown interest rate should place Chapter 11 creditors—but not Chapter 13 creditors—in the same position they would have been in had they arranged a new loan. Similarly, the Senior Lien Appellants have provided no good reason why the cramdown interest rate should allow Chapter 11 creditors—but not Chapter 13 creditors—to "receive more than the present value of [their] allowed claim." In re Valenti, 105 F.3d at 64.

The Senior Lien Appellants attempt to distinguish Till and Valenti by pointing to a footnote in Till, which states that "when picking a cramdown rate in a Chapter 11 case, it might make sense to ask what rate an efficient market would produce." Till v. SCS Credit Corp., 541 U.S. at 476 n.14. The Senior Lien Appellants argue that the Till Court itself acknowledged its reasoning might not apply as forcefully in the Chapter 11 context because unlike in the Chapter 13 context, there may be a "free market of willing cramdown lenders." Id. However, whether the market for a loan is truly efficient or not has no bearing on the Second Circuit's mandate in Valenti that the Bankruptcy Code does not intend to put creditors in the same position they would have been in had they arranged a new loan. Moreover, the language in the Till footnote certainly does not require the application of the efficient market approach in Chapter 11 proceedings. All the footnote can fairly be read to suggest is that a court may want to consider market rates in the Chapter 11 context.

The Senior Lien Appellants also point to precedent from other Circuits, such as the Sixth Circuit in In re American HomePatient, 420 F.3d 559 (6th Cir. 2005), cert. denied, 549 U.S. 942 (2006), in which courts chose to apply the efficient market rate in the Chapter 11 context. See id. at 568 (declining "to blindly adopt Till's endorsement of the formula approach for Chapter 13 cases in the Chapter 11 context" and instead holding if an efficient market exists, then the market rate should apply). However, as Judge Drain correctly pointed out, prior to Till, the Sixth Circuit—unlike the Second Circuit—had applied the efficient market approach in determining the appropriate cramdown rate. Id. at 565-66; see also In re MPM Silicones, LLC, 2014 WL 4436335, at *28. Because Till did not explicitly require the abandonment of the efficient market approach in the Chapter 11 context, the Sixth Circuit decided to continue to use its previous approach. In re Am. HomePatient, 420 F.3d at 567-68 (finding Till did not hold the formula approach is required in the Chapter 11 context). Just as the Sixth Circuit filled the gaps in Till using previous Sixth Circuit precedent, this Court must fill those same gaps by reference to Second Circuit precedent.[9]

[9] The Court is aware other bankruptcy and district courts in this Circuit have followed the American HomePatient approach, concluding that when an efficient market exists for comparable financing, that rate should be considered when determining the appropriate cramdown interest rate. However, these cases do not mandate that a bankruptcy court choose the efficient market rate; they simply hold courts should consider whether an efficient market rate

The Senior Lien Appellants ask the Court to require the Bankruptcy Court to choose a cramdown interest rate that would put them in the same position they would have been in had they arranged a new loan. This is contrary to both Till and Valenti and, thus, the Court declines to do so.

B. Interest Rate Calculation

The Senior Lien Appellants next contend the Bankruptcy Court erred in applying the formula approach because it chose to use the 7-year Treasury rate, rather than the national prime rate used by the Supreme Court in Till, as the base risk-free rate. Judge Drain chose the Treasury rate because it is "often used as a base rate for longer-term corporate debt such as the [R]eplacement [N]otes." In re MPM Silicones, LLC, 2014 WL 4436335, at *31. In contrast, the prime rate may be "a more appropriate base rate for consumers, although [the Second Circuit in] Valenti chose the Treasury rate." Id. The Court agrees with Judge Drain that Till does not obligate a bankruptcy court to choose the national prime rate as the risk-free base rate. See, e.g., In re Vill. at Camp Bowie I, L.P., 454 B.R. 702, 713 (Bankr. N.D. Tex. 2011) (noting "Till's direction to use a formula approach to fixing an interest rate does not require, from case to case, use of the prime rate"); see also Mercury Capital Corp. v. Milford CT Assocs. L.P., 354 B.R. at 13 (remanding for bankruptcy court to consider whether it is "appropriate to use the national

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exists before determining the cramdown interest rate. See, e.g., In re 20 Bayard Views, LLC, 445 B.R. 83, 107-08 (Bankr. E.D.N.Y. 2011) (explaining "[c]ourts in this Circuit have concluded that the two-step analysis described in American HomePatient is an appropriate way to determine the interest rate that should apply in a Chapter 11 cramdown situation" but finding no efficient market existed (emphasis added)); Mercury Capital Corp. v. Milford CT Assocs., L.P., 354 B.R. 1, 12 (D. Conn. 2006) (holding the bankruptcy court "did not necessarily err as a matter of law" in applying the formula approach but remanding for consideration of whether an efficient market existed). Judge Drain did, in fact, consider whether an efficient market rate exists in this case, and concluded such a rate does not exist because the financing obtained by the Debtors necessarily included a "built-in profit element" and "recovery for costs and fees." See In re MPM Silicones, LLC, 2014 WL 4436335, at *29.

prime rate or some other rate"). Thus, Judge Drain's choice of the 7-year Treasury rate is appropriate.[10]

Similarly, the risk premiums chosen by Judge Drain for both the First Lien Notes and the 1.5 Lien Notes are well within the bounds of reasonableness. The Senior Lien Appellants correctly point out that neither Till nor Valenti requires a risk premium of 1 to 3%. However, Judge Drain did not construe those cases to require that the risk premium fall in a specific range; instead, he stated he thought a risk premium of 1 to 3% is appropriate "unless there are extreme risks that . . . do not exist here." In re MPM Silicones, LLC, 2014 WL 4436335, at *31. Thus, Judge Drain considered whether to apply a risk premium higher than 3%, but decided not to do so. This Court will not disturb his well-reasoned determination of the proper rate to apply.

IV. The Make-Whole Dispute

The Senior Lien Appellants additionally contend the Bankruptcy Court erred in failing to award them a "make-whole" premium. Whether the Senior Lien Appellants are owed a make-whole premium turns on language in both the 2012 Indentures and the Senior Lien Notes themselves. The Senior Lien Notes provide for the payment of a make-whole premium if the Senior Lien Notes are redeemed before October 15, 2015. However, the 2012 Indentures, which govern the Senior Lien Notes, contain an acceleration clause triggered by the voluntary commencement of a bankruptcy proceeding. (Senior Lien Appellants Ex. C1, §§ 6.01(f), 6.02).

[10] In fact, Judge Drain added an additional amount "to the risk premium in light of the fact that the [D]ebtors used Treasury rates [rather than the prime rate] as the base rate." In re MPM Silicones, LLC, 2014 WL 4436335, at *32. He stated the adjustment "adequately [took] into account risks inherent in the [D]ebtors' performance of the [R]eplacement [N]otes above the essentially risk-free Treasury note base rates." Id.

The acceleration clause provides that in the event of a bankruptcy proceeding, "the principal of, premium, if any, and interest on all the [Senior Lien] Notes shall ipso facto become and be immediately due and payable." (Id., § 6.02).

The Senior Lien Appellants contend the Debtors' commencement of the Chapter 11 proceeding constituted a redemption of the Senior Lien Notes prior to October 15, 2015, such that the Senior Lien Noteholders are entitled to a make-whole payment. The Debtors contend that the acceleration provision was triggered when they filed for bankruptcy, negating the Senior Lien Appellants' right to a make-whole premium.

The Court agrees with the Debtors and the Bankruptcy Court that the Senior Lien Appellants are not entitled to a make-whole premium.

As described above, the "[i]nterpretation of Indenture provisions is a matter of basic contract law." In re AMR Corp., 730 F.3d at 98 (internal quotation marks omitted), cert. denied, 134 S. Ct. 1888 (2014). The parties agree New York law governs the interpretation of the 2012 Indentures and the Senior Lien Notes.

Section 6.01(f) of the 2012 Indentures provides that the commencement of a Chapter 11 proceeding is an Event of Default. See 2012 Indentures § 6.01(f) ("An 'Event of Default occurs if . . . the Company or any Significant Subsidiary pursuant to or within the meaning of any Bankruptcy Law commences a voluntary case."). Further, a Section 601(f) Event of Default triggers the acceleration clause contained in Section 6.02 of the 2012 Indentures. That acceleration clause provides:

> If an Event of Default (other than an Event of Default specified in Section 601(f) . . .) occurs and is continuing, the Trustee or the Holders of at least 25% in principal amount of outstanding [Senior Lien] Notes, by notice to the Company may declare the principal of, premium, if any, and accrued but unpaid interest on all the [Senior Lien] Notes to be due and payable. . . . If an Event of

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> Default specified in Section 6.01(f) . . . occurs, the principal of, premium, if any, and interest on all the [Senior Lien] Notes shall ipso facto become and be immediately due and payable without any declaration or other act on the part of the Trustee or any Holders. The Holders of a majority in principal amount of outstanding [Senior Lien] Notes by notice to the Trustee may rescind any such acceleration with respect to the Notes and its consequences.

(2012 Indentures § 6.02). Thus, acceleration can be invoked at the noteholders' option for non-bankruptcy events, but acceleration is mandatory in the case of the voluntary filing of a bankruptcy petition. See In re AMR Corp., 730 F.3d at 98-99 (finding a similar acceleration clause provided noteholders with an option to invoke acceleration as a remedy for a non-bankruptcy default but was mandatory with regard to the voluntary filing of a bankruptcy petition).

Having determined the filing of the bankruptcy case triggered an automatic acceleration of the Senior Lien debt, the Court must determine whether a make-whole payment is due to the Senior Lien Noteholders under such circumstances. Under New York law, "[g]enerally, a lender forfeits the right to a prepayment consideration by accelerating the balance of the loan. The rationale most commonly cited for this rule is that acceleration of the debt advances the maturity date of the loan, and any subsequent payment by definition cannot be a prepayment." U.S. Bank Nat'l Ass'n v. S. Side House, LLC, 2012 WL 273119, at *4 (E.D.N.Y. Jan. 30, 2012) (internal citations omitted). However, courts recognize an exception to this rule "when a clear and unambiguous clause . . . calls for payment of the prepayment premium." Id. at *5 (internal quotation marks omitted).

Two separate clauses of the agreements potentially provide for a make-whole provision in the context of an acceleration of debt: first, the acceleration clause, and second, the make-whole provision itself.

The acceleration clause does not clearly and unambiguously call for the payment of the make-whole premium in the event of an acceleration of debt. To the contrary, the acceleration clause provides the "premium, if any" shall become immediately payable upon the triggering of the acceleration clause. (2012 Indentures § 6.02). This language is not sufficient to create an unambiguous right to a make-whole payment. Courts allowing make-whole payments under these circumstances have largely required the contract to provide explicitly for a make-whole premium in the event of an acceleration of debt or a default. See, e.g., U.S. Bank Nat'l Ass'n v. S. Side House, LLC, 2012 WL 273119, at *7 (citing with approval a case in which "the court permitted prepayment premiums where the Note provided that '[u]pon the Lender's exercise of any right of acceleration . . . Borrower shall pay to Lender, in addition to the entire unpaid principal balance outstanding . . . (B) the prepayment premium.").

Neither does the make-whole provision contained in paragraph 5 of the Senior Lien Notes clearly and unambiguously call for the payment of the make-whole premium upon acceleration of debt. The Senior Lien Appellants contend that, under the make-whole provision, regardless of whether the voluntary commencement of the bankruptcy case was an Event of Default triggering a mandatory acceleration of the debt, the early payment of the debt constituted a redemption prior to October 15, 2015.

However, under New York law, the payment of debt pursuant to an acceleration clause does not constitute an early redemption. Instead, the automatic acceleration of the debt under Section 6.02 of the 2012 Indentures "changed the date of maturity from some point in the future . . . to an earlier date based on the debtor's default under the contract." In re AMR Corp., 730 F.3d at 103 (internal quotation marks and brackets omitted). Thus, "[w]hen the event of default occurred and the debt accelerated, the new maturity date for the debt was [the date of the filing of the bankruptcy case].” Id. Consequently, the repayment of the debt in connection with the bankruptcy proceeding is not a redemption because “‘[p]repayment can only occur prior to the maturity date.’” Id. (citing In re Solutia Inc., 379 B.R. 473, 488 (Bankr. S.D.N.Y. 2007)).[11]

Next, the Senior Lien Appellants argue the make-whole provision satisfies the explicitness requirement because it contains a date certain—October 15, 2015—before which redemption triggers the make-whole payment. They contrast this with a hypothetical provision that would condition the triggering of a make-whole payment upon redemption before maturity, and cite In re Chemtura Corp., 439 B.R. 561 (Bankr. S.D.N.Y. 2010), in support of this distinction. However, the provision at issue in Chemtura required a make-whole payment if the debt was repaid prior to its original maturity date. In re Chemtura Corp., 439 B.R. at 601. That is specific enough to meet the clear and unambiguous requirement. See Scott K. Charles & Emil A. Kleinhaus, Prepayment Clauses in Bankruptcy, 15 AM. BANKR. INST. L. REV. 537, 556 (2007)

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[11] The Senior Lien Appellants contend “prepayment” is different than “redemption” because a redemption is not limited to payments before maturity but “refers simply to the payment of notes, without regard to maturity.” (Senior Lien Appellants Mem. at 33). However, the provisions at issue in In re AMR Corp. also provided for a make-whole premium if the debt was “redeem[ed]” early, see In re AMR Corp., 730 F.3d at 94 n.8, 103, but when the debt was automatically accelerated due to default, the court there held that the “post-maturity payment [was] not a voluntary redemption.” Id. at 103; see also id. at 97 (noting the law in this Circuit “supports the conclusion that a payment of debt due upon acceleration is different from voluntary redemption”). Thus, the Second Circuit has rejected the very distinction the Senior Lien Appellants attempt to draw.

To be sure, the provisions at issue in In re AMR Corp. are different from those at issue here in one important respect: there, the make-whole provision signals that the acceleration clause controls when it applies. In re AMR Corp., 730 F.3d at 103 (noting the voluntary redemption payment provision “states that it operates ‘[e]xcept as otherwise provided in [the acceleration clause]’” (emphasis in In re AMR)). By contrast, here, the make-whole provision does not refer to the acceleration clause at all. This difference does not change the Court’s conclusion that the repayment of the debt pursuant to the acceleration clause is not a redemption because “‘[p]repayment can only occur prior to the maturity date.” In re AMR Corp., 730 F.3d at 103 (citing In re Solutia Inc., 379 B.R. at 488).

(noting that for lenders who would like to ensure their right to a make-whole payment in the event of acceleration of debt due to bankruptcy, "the optimal strategy is to negotiate a provision that requires the borrower to pay a prepayment fee whenever debt is repaid prior to its original maturity"). By contrast, the make-whole provision at issue here does not require a make-whole payment if the debt is repaid prior to its original maturity.

The Senior Lien Appellants contend such a result "makes no commercial sense, contrary to the tenet of New York contract law that courts should avoid interpretations that would be absurd, commercially unreasonable, or contrary to the reasonable expectations of the parties." (Senior Lien Appellants Mem. at 26 (internal quotation marks omitted)). However, this result is exactly what the Senior Lien Appellants bargained for under the 2012 Indentures. The Senior Lien Appellants agreed to accelerate the debt owed to them in the event of a default, establishing they "'preferred, sensibly no doubt, accelerated payment over the 'opportunity' to earn interest from the . . . loan over a period of years.'" U.S. Bank Nat'l Ass'n v. S. Side House, LLC, 2012 WL 273119, at *4 (quoting In re LHP Realty Corp., 726 F.2d 327, 331 (7th Cir. 1984)). Here, the Senior Lien Appellants bargained for the acceleration of debt in the event of a default, and must live with the consequences of their bargain.[12]

Neither the 2012 Indentures nor the Senior Lien Notes themselves clearly and unambiguously provide that the Senior Lien Noteholders are entitled to a make-whole payment in the event of an acceleration of debt caused by the voluntary commencement of a bankruptcy

[12] It matters not that the Senior Lien Noteholders' right to rescind the acceleration of the debt was canceled by the application of the automatic stay pursuant to Section 362 of the Bankruptcy Code. The Debtors correctly point out that all contracts signed among the parties operate against the backdrop of the relevant Bankruptcy Code provisions. The potential for an automatic stay upon the filing of a bankruptcy case is a part of the bargain to which the parties agreed.

case. Thus, the Bankruptcy Court correctly held that the Senior Lien Noteholders are not entitled to a make-whole payment.[13]

[13] Neither are the Senior Lien Noteholders entitled to damages in the amount of the make-whole premium under the perfect tender rule. First, the existence of the make-whole provision modified the perfect tender rule such that the common law remedy is unavailable. See, e.g., U.S. Bank Nat. Ass'n v. S. Side House, LLC, 2012 WL 273119, at *4; Charles & Kleinhaus, Prepayment Clauses in Bankruptcy, 15 AM. BANKR. INST. L. REV. at 543 ("While a no-call memorializes the common law default rule that prepayment is not permitted absent lender consent, a prepayment fee effectively opts out of that default rule."). Second, the Senior Lien Appellants claim these damages "for breach of contract," which occurred "when the Debtors redeemed the Notes and prevented the [Senior Lien] Noteholders from exercising their right to rescind acceleration." (Senior Lien Appellants Mem. at 39). However, the automatic stay—and not the Debtors—prevented the Senior Lien Appellants from exercising their right to rescind. The Court is not convinced such a circumstance can lead to liability for breach of contract on the part of the Debtors. See, e.g., HSBC Bank USA Nat'l Ass'n v. Calpine Corp., 2010 WL 3835200, at *4 (S.D.N.Y. Sept. 15, 2010) ("Because Debtor's bankruptcy filing rendered the no-call provision in the notes unenforceable and liability cannot be incurred pursuant to an unenforceable contractual provision, Debtor did not incur any liability for repaying the notes." (collecting cases)).

CONCLUSION

The Bankruptcy Court's Orders of September 9 and September 11, 2014, are AFFIRMED.

The Clerk is instructed to terminate as moot the Debtors' motions to dismiss the appeals. (Doc. #11 in 14-cv-7471, Doc. #11 in 14-cv-7472, and Doc. #18 in 14-cv-7492).[14]

The Clerk is further instructed to terminate the pending appeals and close these cases.

Dated: May 4, 2015
White Plains, NY

SO ORDERED:

Vincent L. Briccetti
United States District Judge

[14] The Debtors have moved to dismiss these appeals as equitably moot. However, the motions to dismiss the appeals as equitably moot are themselves mooted by this Court's decision to affirm the Orders of the Bankruptcy Court. See In re Metromedia Fiber Network, Inc., 416 F.3d 136, 144 (2d Cir. 2005) ("Because equitable mootness bears only upon the proper remedy, and does not raise a threshold question of our power to rule, a court is not inhibited from considering the merits before considering equitable mootness.").