Docket #1435 Date Filed: 6/26/2024

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

In re **WESCO AIRCRAFT HOLDINGS, INC.**, *et al.*,[1] Debtors.	Case No. 23-90611 (MI) Chapter 11 (Jointly Administered)
WESCO AIRCRAFT HOLDINGS, INC., *et al.*, Plaintiffs, v. **SSD INVESTMENTS LTD.**, *et al.*, Defendants.	Adv. Pro. No. 23-03091 (MI)
SSD INVESTMENTS LTD., *et al.*, Counterclaim Plaintiffs, v. **WESCO AIRCRAFT HOLDINGS, INC.**, *et al.*, Counterclaim Defendants.	
LANGUR MAIZE, LLC, Crossclaim Plaintiff, v. **PLATINUM EQUITY ADVISORS, LLC**, *et al.*, Crossclaim Defendants.	
LANGUR MAIZE, LLC, Third-Party Plaintiff, v. **WESCO UNNAMED PLATINUM FUNDS C/O PLATINUM EQUITY ADVISORS, LLC**, *et al.*,	

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

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Third-Party Defendants.
LANGUR MAIZE, LLC, Counterclaim Plaintiff, v. **WESCO AIRCRAFT HOLDINGS, INC.**, *et al*., Counterclaim Defendants.

CARLYLE AND SPRING CREEK'S SUBMISSION REGARDING WAIVER OF COMPLIANCE WITH SECTION 3.02

During the hearing on June 25, 2024, the Court invited Carlyle and Spring Creek to make a submission by 5 PM CT on June 26, 2024, regarding whether the Participating Unsecured Holders waived compliance with Section 3.02 of the Unsecured Indenture in the Unsecured Exchange. Carlyle and Spring Creek respectfully submit this response to the Court's order.[2]

Although no redemption occurred and Section 3.02 was not implicated, in the alternative, Carlyle and Spring Creek waived compliance with Section 3.02 of the Unsecured Indenture through their entry into the Exchange Agreement and the Consent Letters to the Fourth Supplemental Indenture. *See* ECF 604-19, § 2.02(iii) (Exchange Agreement); ECF 603-13 at 7-8 (CSP IV Acquisitions, L.P. Consent Letter); ECF 603-29 at 7-8 (CCOF Onshore Co-Borrower LLC Consent Letter); ECF 604-1 at 7-8 (CCOF Master, L.P. Consent Letter); ECF 604-17 at 7-8 (Spring Creek Capital, LLC Consent Letter). They thereby used the flexible "majority rules" waiver provision of Section 9.02, in full compliance with the terms of the Unsecured Indenture. All documents reflecting the necessary majority consents are in the evidentiary record, as set forth below.

[2] The terms "Carlyle" and "Spring Creek" have the meanings given to them in Carlyle and Spring Creek's Motion for Summary Judgment, ECF 214.

A. Majority Consent to the Fourth Supplemental Indenture and Exchange Agreement Waived Compliance with Section 3.02 of the Unsecured Indenture

Under Section 9.02 of the Unsecured Indenture, "compliance with any provision of this Indenture, the Escrow Agreement, the Unsecured Notes or the Unsecured Note Guarantees, may be waived with the consent of the Holders of at least a majority in aggregate principal amount of the then outstanding Unsecured Notes other than the Unsecured Notes beneficially owned by the Issuer or its Affiliates." ECF 601-7, § 9.02. Section 9.02 further states that "[i]t is not necessary for the consent of the Holders of Unsecured Notes under this Section 9.02 to approve the particular form of any proposed amendment, supplement or waiver, but *it is sufficient if such consent approves the substance thereof*." *Id.* (emphasis added).

In other words, with the exception of sacred rights, majority rules, and the exercise of that majority right need not be expressed in any particular form. The majority may waive compliance with any provision of the Indenture on any occasion by giving their consent. Carlyle and Spring Creek held a majority in aggregate principal amount of the Unsecured Notes, and Section 3.02 is not a sacred right. Carlyle and Spring Creek were thus empowered to waive compliance with it. They did so in the Exchange Agreement, the Fourth Supplemental Indenture, and the Consent Letters to the Fourth Supplemental Indenture because, if the Unsecured Exchange was a redemption (it was not), those documents unambiguously manifested an intent to effect the transaction without using the mechanism set forth in Section 3.02.

Langur Maize contends that Section 3.02 required that any Notes to be redeemed be selected pro rata, by lot, or by another method selected by WSFS and subject to applicable DTC procedures. But Carlyle and Spring Creek expressly entered the Exchange Agreement and the Consent Letters to the Fourth Supplemental Indenture to effect a privately negotiated purchase of their Notes by Wesco, without the participation of WSFS or DTC and without any selection of

Notes pro rata, by lot, or by another method selected by those entities. At that time, they inarguably held a majority of the principal amount of the Unsecured Notes. This selection of an exchange mechanism that in no way resembles the procedure of Section 3.02 proves the Participating Unsecured Holders' intent to effectuate the Unsecured Exchange without complying with Section 3.02 (to the extent Section 3.02 is deemed to apply). Under New York law, that constitutes a waiver of compliance.

The language of the transaction documents and consent by the majority thereto proves waiver. The Exchange Agreement states that "each Existing 2027 Notes Holder," defined as the Participating Unsecured Holders (which included the majority of holders), "hereby agrees to deliver to the Issuer, at the Exchange Closing, the Exchanged Unsecured Notes held by such Holder . . . , and (B) in consideration therefor, the Issuer hereby agrees to issue to such Holder a principal amount of New 1.25 Lien Notes equal to 101.125% of (x) the principal amount of such Holder's Exchanged Unsecured Notes, plus (y) all unpaid interest on such Exchanged Unsecured Notes accrued to, but excluding, the Closing Date." ECF 604-19, § 2.02(iii). This is not a selection by WSFS or DTC; it is a contractual commitment at closing for the majority of Unsecured Holders to consummate a privately negotiated exchange with the Issuer, requiring the Issuer to furnish the exchange consideration directly to the Participating Unsecured Holders.

The Fourth Supplemental Indenture to the Unsecured Indenture likewise states that "the Issuer has entered into that certain Exchange Agreement, dated as of the date hereof (the 'Exchange Agreement'), by and among the Issuer, the Guarantors, certain beneficial owners and record holders (collectively, the 'Exchanging Holders') of 2027 Notes, . . . pursuant to which, the Issuer has agreed, subject to the execution, delivery and effectiveness of this Fourth Supplemental Indenture, to exchange . . . the Exchanging Holders' 2027 Notes specified therein for new

13.125% Senior Secured 1.25 Lien PIK Notes due 2027 (the 'New l.25L Notes')." ECF 601-33 at 1. It further states that "the Exchanging 2027 Holders have executed and delivered to the Issuer and the Trustee that certain Consent Letter . . . providing for Consents, by or on behalf of Holders of at least a majority in aggregate principal amount of the issued and outstanding 2027 Notes . . . to the issuance of the New 1.25L Notes, including the incurrence of the Obligations and the Liens in respect thereof, in exchange for the Exchanged Unsecured Notes, as defined in and in accordance with the Exchange Agreement." *Id.* at 1-2; *see also* ECF 603-13 at 7-8 (CSP IV Acquisitions, L.P. Consent Letter); ECF 603-29 at 7-8 (CCOF Onshore Co-Borrower LLC Consent Letter); ECF 604-1 at 7-8 (CCOF Master, L.P. Consent Letter); ECF 604-17 at 7-8 (Spring Creek Capital, LLC Consent Letter). This too is not the mechanism of Section 3.02.

It is of no moment that Carlyle and Spring Creek's waiver was not expressly articulated using the word "waiver" or "waive." Under Section 9.02, "[i]t is not necessary for the consent of the Holders of Unsecured Notes under this Section 9.02 to approve the particular form of any proposed amendment, supplement or waiver, but it is sufficient if such consent approves the substance thereof." Thus, consenting to a transaction that did not use the mechanism of Section 3.02, regardless of the form of such consent, was sufficient to waive compliance with that provision—no magic words were required.

B. This Waiver Issue Was Preserved

Carlyle and Spring Creek's position on waiver has been preserved since the outset of Langur Maize's counterclaims. In its Counterclaims, Langur Maize alleged, "The majority holders did not attempt to waive Section 3.02, and nor could they have. . . . Section 3.02 thus remained in full force and effect during the Insider Exchange." ECF 142 ¶ 63. Counterclaim-Defendants denied that allegation in their Answers. ECF 166 ¶ 63; ECF 167 ¶ 63; ECF 171 ¶ 63.

The parties thereby joined issue on this subject, and Langur Maize had every opportunity to respond to Counterclaim-Defendants' denial that compliance with Section 3.02 was waived. Additionally, Carlyle and Spring Creek joined in the Debtors' summary judgment arguments regarding the contract claims, ECF 214 at 8, and the Debtors expressly argued that "[t]he consents that were given by the majority of unsecured noteholders, the 2027 unsecureds for the exchange, ratified and consented to that transaction. And because we're not talking about a sacred right here, that consent would cure or waive any alleged breach of Section 3.02. 3.02 is not a sacred right, and so the majority would have the right to waive any breach even if one did occur." ECF 372 at 256:5-11. Carlyle and Spring Creek thereby preserved this argument throughout this action.

Langur Maize's pleading contended that there was no waiver because "the Fourth Supplemental Indenture expressly confirms that '[e]xcept as specifically amended above, the Indenture shall remain in full force and effect and is hereby ratified and confirmed.'" ECF 142 ¶ 63. That is wrong. Section 9.02 nowhere requires that a waiver of "compliance with any provision of this Indenture" delete the provision entirely. In fact, Section 9.02's use of the phrase "amendment, supplement or waiver" confirms that a waiver need not be an amendment to the Indenture—otherwise, it would be superfluous to mention a "waiver." Likewise, Langur Maize's reading would render the portion of Section 9.02 allowing waiver of "compliance" superfluous, as it too would simply mean an amendment. Instead, the better reading is that waiving "compliance with any provision" means waiving compliance on one or more occasions without amending the Indenture to delete that provision. *See generally, e.g.*, *In re TPC Grp., Inc.*, 2022 WL 2498751, at *2 (Bankr. D. Del. July 6, 2022) (describing identical waiver provision as "[i]n addition" to identical amendment provision). That is exactly what happened here.

Langur Maize also contends that waiver was impossible because Section 9.02 is subject to Section 6.07. ECF 142 ¶ 63. Not so. Section 6.07 merely protects "the right of any Holder of an Unsecured Note to receive payment of principal of, or interest on, the Unsecured Note." As set forth further in Counterclaim-Defendants' post-trial brief, the Unsecured Exchange in no way affected Langur Maize or its predecessor's right to receive payment of principal and interest on the Notes. ECF 1398 at 89-91. Carlyle and Spring Creek could and did waive compliance with Section 3.02.

For the foregoing reasons, should the Court conclude that the Unsecured Exchange was subject to the selection mechanics of Section 3.02 (it was not), compliance with Section 3.02 in that transaction was waived by holders of a majority in aggregate principal amount of the Unsecured Notes, and thus no breach occurred.

Respectfully submitted this 26th day of June 2024.

GRAY REED

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 26th day of June 2024, he caused a true and correct copy of the foregoing document to be served via the Court's CM/ECF system.

/s/ Jason S. Brookner
Jason S. Brookner