Docket #1442 Date Filed: 6/28/2024

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

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

[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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LANGUR MAIZE'S RESPONSE TO CARLYLE'S SUBMISSION

After the close of the evidence and even after the conclusion of closing argument on Langur Maize's[2] contract claims, Carlyle argues for the first time that the Selected Sellers implicitly waived compliance with Section 3.02 of the Indenture. *Carlyle and Spring Creek's Submission Regarding Waiver of Compliance with Section 3.02* [ECF 1435] ("Carlyle Submission"). No other Selected Seller has joined Carlyle in this argument. It has no merit and, in any event, was forfeited long ago.

I. There Was No Waiver of 3.02.

A. The Right to Payment in Connection with a Required Offer to Purchase was Not Waivable without the Consent of all 2027 Noteholders.

Carlyle states that "Section 3.02 is not a sacred right."[3] This is wrong. The right to receive payment in connection with an offer to purchase (such as the Selective Exchange) ***is*** a sacred right.

Waivers under Section 9.02 are made expressly "***subject to Sections 6.04 and 6.07 hereof***" (emphasis added). Section 6.07 of the Indenture states:

> Section 6.07 *Rights of Holders of Notes to Receive Payment.*
>
> Notwithstanding any other provision of this Indenture***, the right of any Holder of an Unsecured Note to receive payment of principal*** of, or interest on, the Unsecured Note, on or after the respective due dates expressed or provided for in the Unsecured Note (***including in connection with an offer to purchase***), or to bring suit for the enforcement of any such payment on or after such respective dates, ***shall not be impaired or affected without the consent of such Holder***.

(Emphasis added.)

[2] Capitalized terms not defined herein have the meaning ascribed to those terms in *Langur Maize's Post-Trial Brief* [ECF 1395].

[3] Carlyle Submission at 3.

One of Langur Maize's fundamental claims in this case is that all holders of 2027 Notes had a right to receive ratable payment in connection with the Selective Exchange, which was an "offer to purchase." This was a sacred right. It was not waivable without the consent of each impaired or affected noteholder.[4]

Carlyle asserts that "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.'"[5] Carlyle attempts to mislead the Court, cutting off the quote before the parenthetical "(including in connection with an offer to purchase)."[6] That parenthetical demonstrates that Section 6.07 decidedly applies to payments in connection with offers to purchase such as the Selective Exchange. But in any event, the Selected Sellers ***were*** paid their principal and interest in the Selective Exchange. Section 2.02(a)(iii) of the Exchange Agreement[7] confirms this:

> (A) [E]ach Existing 2027 Notes Holder hereby agrees to deliver to the Issuer, at the Exchange Closing, the Exchanged Unsecured Notes held by such Holder (which amount is set forth opposite such Holder's name on Schedule III under the heading "Principal Amount of the Exchanged Unsecured Notes"), 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,*** with the aggregate principal amount of New 1.25 Lien Notes delivered to such Holder being in minimum denominations of $2,000 and integral multiples of $1,000 in excess thereof (which amount is set forth opposite such Holder's name on Schedule III under the heading "Principal Amount of the New 1.25 Lien Notes Received") (the transactions described above in clauses

[4] *See also* Indenture § 9.02(4) (requiring consent of each affected holder to "waive a Default or Event of Default in the payment of principal of, premium on, if any, or interest, if any, on, the Unsecured Notes") and § 6.01 (defining an Event of Default to include "default in the payment when due (at maturity, ***upon redemption, offer to purchase or otherwise***) of the principal of, or premium, if any, on, the Unsecured Notes") (emphasis added).

[5] Carlyle Submission at 7.

[6] *Id.*

[7] ECF 604-19.

> (i) through (iii) of this Section 2.02(a) are collectively referred to in this Agreement as, the "Exchange").

(Emphasis added.) There can be no question that Langur Maize here seeks to enforce the right to have 2027 Notes similarly paid (*pro rata*, by lot, or by some other fair and appropriate manner) in connection with the offer to purchase (whether that purchase was or was not a redemption) made to Carlyle, Wolverine TopCo and others in the Selective Exchange.

Thus, the default asserted in this adversary proceeding could not be waived without each impaired or affected noteholder's consent. No noteholder who was left out of the Selective Exchange (and whose right to payment was therefore impaired and affected) gave or consented to a waiver of Section 3.02.

B. Carlyle Ratified Section 3.02.

Carlyle has not proved that it intended to waive a known right under Section 3.02; instead, Carlyle expressly ratified it. A waiver of a contract right "is the voluntary abandonment or relinquishment of a known [contract] right. It is essentially a matter of intent which must be proved." *Jefpaul Garage Corp. v. Presbyterian Hosp.,* 61 N.Y.2d 442, 446, 474 N.Y.S.2d 458, 462 N.E.2d 1176 (1984) (citations omitted); *Nassau Tr. Co. v. Montrose Concrete Prods. Corp.,* 56 N.Y.2d 175, 184, 451 N.Y.S.2d 663, 436 N.E.2d 1265 (1982) ("[W]aiver requires . . . the voluntary and intentional abandonment of a known [contract] right which, but for the waiver, would have been enforceable." (citation omitted)); *see also Champion Spark Plug Co. v. Auto. Sundries Co.,* 273 F. 74, 79–80 (2d Cir.1921) ("Waiver [of a contract right] depends upon the intention of the party who is charged with the waiver. It is an intentional abandonment or relinquishment of a known right or advantage.").

Waiver of a contract right requires a "clear manifestation of an intent . . . to relinquish [a party's] known right." *Courtney–Clarke v. Rizzoli Int'l Publ'n, Inc*., 251 A.D.2d 13, 676

N.Y.S.2d 529 (1st Dep't 1998). This requires an evidentiary record. "[T]he intent to waive is usually a question of fact . . . ." *Jefpaul Garage Corp*., 61 N.Y.2d at 448, 474 N.Y.S.2d 458, 462 N.E.2d 1176; *see also Champion Spark Plug Co*., 273 F. at 80 ("So much depends upon the intention of the parties that, where such intent is disputed, it necessarily becomes a question for the determination of a jury.").

Carlyle neither adequately pled nor proved its newly advanced waiver theory. And the exhibits to which it refers cannot aid its cause.

Far from manifesting a clear intent to waive Section 3.02, Carlyle ***ratified*** Section 3.02 in the Fourth Supplemental Indenture. Section 15 of the Fourth Supplemental Indenture[8] states:

> 15. RATIFICATION OF INDENTURE; FOURTH SUPPLEMENTAL INDENTURE PART OF INDENTURE. ***Except as expressly amended hereby, the Indenture is in all respects ratified and confirmed and all the terms, conditions and provisions thereof shall remain in full force and effect***. This Fourth Supplemental Indenture shall form a part of the Indenture for all purposes, and each note issued thereunder heretofore or hereafter authenticated and delivered shall be bound hereby.

(Emphasis added.)[9] By identifying those provisions of the Indenture that are "expressly amended" and ratifying and confirming all others, the Fourth Supplemental Indenture disclaims any implied terms or waivers. Nowhere in the Fourth Supplemental Indenture is Section 3.02 mentioned, let alone amended.

Carlyle's argument that it did not need to amend or delete Section 3.02 in the Fourth Supplemental Indenture to waive it, misses the point: Section 15 affirmatively and expressly

[8] ECF 601-33.

[9] The same language appears in the Third Supplemental Indenture, which likewise does not mention or amend Section 3.02. ECF 604-18 § 12.

ratifies and reaffirms Section 3.02. Section 15 of the Fourth Supplemental Indenture thus proves that there was no intent to waive Section 3.02.

Carlyle's insistence that Section 3.02 was waived by the Exchange Agreement fares no better. Section 4.02 of the Exchange Agreement contains the conditions to closing for holders:

> The obligation of each Holder to exchange the Exchanged Notes for the New Notes on the Closing Date is subject solely to the satisfaction or waiver (in accordance with Section 9.01) of the following conditions prior to or substantially contemporaneously with the Exchange Closing:
>
> . . . .
>
> (k) Exchange Consent Documents. On the Closing Date, following the Note Purchase Closing and prior to the Exchange Closing, . . . (v) the . . . Existing 2027 Notes Fourth Supplemental Indenture . . . shall have been duly executed and delivered by all parties thereto, and ***shall be effective in accordance with their respective terms***.

(Emphasis added.) The Selected Sellers' obligations under the Exchange Agreement were thus conditioned on the Fourth Supplemental Indenture being effective in accordance with its terms — including Section 15 of the Fourth Supplemental Indenture, which ratified Section 3.02 of the Indenture. Again, the intent is clear: Carlyle and its fellow holders expressly ratified Section 3.02 before the consummation of the purchase of their 2027 Notes.

And, Carlyle and the other parties to the Exchange Agreement could not have waived any rights after the purchase closed. Only persons excluded from the purchase evidenced by the Exchange Agreement had 2027 Notes after the Exchange Agreement transactions closed. Those holders did not waive anything.

Carlyle's and the other Selected Sellers' affirmation of the force, rather than the waiver of, Section 3.02 is also established by the positions they took and the evidence they adduced or sponsored during this case. The record is replete with examples of Carlyle insisting that its

"understanding" and its legal position was that Section 3.02 was not implicated in the Selective Exchange. Even in the instant submission, Carlyle states, "no redemption occurred ***and Section 3.02 was not implicated*** . . . ."[10] Elsewhere:

- "Section 3.02's terms did not apply.**"** *Debtor's Motion for Summary Judgment* [ECF 199] at 59 (incorporated by reference into *Carlyle Global Credit Investment Management, L.L.C., CCOF Onshore Coborrower LLC, CSP IV Acquisitions, L.P., CCOF Master, L.P., The Unnamed Carlyle Funds, and Spring Creek Capital, LLC's Motion for Summary Judgment and Supporting Memorandum of Law* [ECF 214] at 8).

- "In short, the 2022 Transaction did not implicate, much less violate, Section 3.02." *Carlyle Global Credit Investment Management, L.L.C., CCOF Onshore Coborrower LLC, CSP IV Acquisitions, L.P., CCOF Master, L.P., and the Unnamed Carlyle Funds' Memorandum of Law in Opposition to Langur Maize, LLC's Motion for Summary Judgment* [ECF 279] at 4.

- "[The Selective Exchange] wasn't really viewed as a redemption at all because we were negotiating the terms of it." Feb. 8, 2024, Trial Tr. (Hou) at 157:24-158:1.

- "Section 3.02 does not apply because the [Selective Exchange] was not a redemption. It was a purchase pursuant to Section 3.0[7](h)." June 25, Trial Tr. (Rough) at 202:19-22 (Carlyle's counsel).

The undisputed evidence — much of which was elicited by Carlyle itself — that Carlyle thought Section 3.02 was not implicated by the Selective Exchange is irreconcilable with and refutes its new factual contention that Carlyle intended to waive the application of Section 3.02. Although one can plead alternatives and sometimes argue alternatives, one cannot prove alternative facts. Thus, Carlyle cannot sponsor witnesses to swear that Carlyle did not believe that Section 3.02 applied and then disingenuously argue at closing that Carlyle intended to waive Section 3.02.

[10] Carlyle Submission at 2.

That no waiver was ever given is further established by the fact that there is no evidence whatsoever in the record of any notice of waiver. This despite the following requirement in Section 9.02:

> After an amendment, supplement or waiver under this Section 9.02 becomes effective, the Issuer will mail (or with respect to Global Notes, to the extent permitted or required by applicable DTC procedures or regulations, send electronically) to the Holders of Unsecured Notes affected thereby a notice briefly describing the amendment, supplement or waiver.

No party has ever produced, let alone introduced into evidence, any evidence that any notice of waiver of Section 3.02 was sent or received by or to anyone.[11]

C. The Language in the 2027 Consent Letter is Distinct from the Language in the 2024 Consent Letter and 2026 Consent Letter.

At the end of closing argument on June 25, 2024, the Court found that language in the 2026 Consent Letter[12] was a waiver of Section 3.02 of the 2026 Indenture. Quoting from the 2026 Consent Letter, the Court stated:

> THE COURT: "Each beneficial owner consents to the amendments, the issuance of the new senior secured personally PIK notes in currency obligation to the liens." And they make a request of delivery. How is that not a waiver?[13]

The language quoted by the Court, however, does ***not*** appear in the 2027 Consent Letter.[14] The 2027 Consent Letter is a consent only to the narrowly drafted specific express amendments to the Indenture "to become operative ***solely as specified in . . . the Fourth Supplemental***

[11] Section 9.02 provides that the failure to deliver such a notice will not impair or affect the validity of a waiver, but there is no evidence of any notice of waiver, which supports the lack of any intent by the Selected Sellers to waive Section 3.02.

[12] ECF 603-10.

[13] June 25, 2024, Trial Tr. (Rough) at 458:7-12.

[14] *See* ECF 603-29 (CCOF Onshore Co-Borrower LLC and Carlyle Global Credit Investment Management L.L.C.'s Consent Letter to the 2027 Fourth Supplemental Indenture).

Indenture."[15] As discussed above, the Fourth Supplemental Indenture does not amend Section 3.02, but instead ratifies Section 3.02 and disclaims any other amendments or implications of waiver. When discussing the 2026 Consent Letter, the Court said, "If you instruct someone to do something and they do it, it's a pretty knowing and intentional act."[16] The Fourth Supplemental Indenture does not instruct the Trustee to select 2027 Notes for redemption or purchase in violation of Section 3.02. Nothing in the 2027 Consent Letter evidences an intent to waive Section 3.02.

D. Holders of a Majority of Notes Were Not Able to Waive Compliance by WSFS.

Carlyle's Submission cites to the first paragraph of Section 9.02 of the Indenture to establish its ability to waive Section 3.02.[17] The first paragraph of Section 9.02, however, begins by outlining the ability of "the Issuer, the Guarantors and the Trustee" to amend or supplement the Indenture, and goes on to say that "compliance with any provision of this Indenture . . . ***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." The actor that is the subject of this second provision (i.e., the entity that is doing the waiving) is clearly not the majority holders — it is one of the Issuer, the Guarantors, or the Trustee, any of whom may waive compliance "with the consent of" the majority holders.

The fourth paragraph of Section 9.02, by contrast, addresses what the majority holders themselves may waive:

> Subject to Sections 6.04 and 6.07 hereof, the Holders of a majority in aggregate principal amount of the Unsecured Notes then outstanding voting as a single class may waive compliance in a

[15] *Id.*

[16] June 25, 2024, Trial Tr. (Rough) at 461:23-25.

[17] Carlyle Submission at 3.

> particular instance ***by the Issuer or Guarantors*** with any provision of this Indenture, the Unsecured Notes, any Unsecured Note Guarantees or the Escrow Agreement.

Thus, the majority holders may only waive compliance "by the Issuer or Guarantors." They may ***not*** waive compliance by the Trustee.[18] As Langur Maize has consistently alleged, WSFS (the trustee) breached Section 3.02 by failing to select 2027 Notes "for redemption or purchase" either *pro rata*, by lot, or by some other fair and appropriate method.

II. Carlyle Forfeited Any Waiver Argument.

A. Carlyle Did Not Give Langur Maize Fair Notice of Its Waiver Argument.

Carlyle forfeited any waiver argument.[19] Waiver is an affirmative defense that must be stated "specifically and with factual particularity" in a responsive pleading. *Rogers v. McDorman*, 521 F.3d 381, 385 (5th Cir. 2008) ("A defendant must plead an affirmative defense with enough specificity or factual particularity to give the plaintiff fair notice of the defense that is being advanced.") (quotation omitted).

Merely reciting the name of doctrine in an affirmative defense in an answer, without providing any indication of the factual predicate for application of the doctrine, is insufficient. *See Woodfield v. Bowman,* 193 F.3d 354, 362 (5th Cir. 1999) ("Nationwide's baldly 'naming' the broad affirmative defenses of . . . 'waiver and/or release' falls well short of the minimum particulars needed to identify the affirmative defense in question and thus notify Planet of Nationwide's intention to rely on the specific, contractual defense of requiring the Woodfields to obtain the insurer's consent before settling with Planet."); *Trevino v. RDL Energy Servs*., L.P.,

[18] And indeed, WSFS was not a party to the Exchange Agreement, and WSFS's witness testified that he never even reviewed it or received any written report about it from anyone. June 3, 2024 Tr. (Healy) at 224:4-10.

[19] *See Hamer v. Neighborhood Hous. Servs*., 583 U.S. 17, 20 n.1 (2017) ("'[F]orfeiture is the failure to make the timely assertion of a right . . . .'" (quoting *United States v. Olano*, 507 U. S. 725, 733 (1993)); *see also Shambaugh & Son, L.P. v. Steadfast Ins. Co*., 91 F.4th 364, 369 n.3 (5th Cir. 2024) (same).

2017 WL 1167160, at *4 (S.D. Tex. Mar. 29, 2017) ("A number of cases have concluded that, as with affirmative defenses like waiver, release and unclean hands, the simple listing of estoppel falls well short of the minimum particulars needed to identify the affirmative defense in question.") (citing a string of cases for the same proposition) (quotation omitted); *Novikova v. Puig*, 2012 WL 13026809, at *1 (N.D. Tex. Mar. 9, 2012) (defendants' "recitation of a series of nineteen affirmative defenses constitutes a failure to meet the notice requirement").

In its answer[20] Carlyle's thirteenth affirmative defense says only this: "Langur Maize's claims are barred, in whole or in part, by estoppel and/or waiver."[21] This falls far short of the factual particularity required to identify the waiver defense that is for the first time outlined in Carlyle's Submission. Likewise, Carlyle's assertion in its Submission that it cursorily denied, without explanation, Langur Maize's allegation that Section 3.02 was not and could not have been waived is insufficient to identify the waiver defense that Carlyle raises for the first time now.

Allowing Carlyle to pursue this argument, which was raised after the close of evidence and is unsupported by any evidence, would result in prejudice because Langur Maize had no opportunity to affirmatively develop evidence to rebut the argument. *See NewCSI, Inc. v. Staffing 360 Sols., Inc.*, 865 F.3d 251, 260 (5th Cir. 2017) (barring defendant from raising affirmative defense because "[defendant's] failure to raise the defense until after trial prevented [plaintiff] from developing facts that could have aided in contesting the defense, [defendant's] timing prejudiced [plaintiff's] ability to respond").

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[20] *Answer Of Crossclaim Defendants Carlyle Noteholders And Third-Party Defendant Carlyle Global Credit Investment Management, L.L.C.* [ECF 166] at 53.

[21] The use of the passive voice in this affirmative defense prevents the reader from understanding which party Carlyle alleges did the act of waiver. This statement in no way suggests that Carlyle itself was the party that waived any breaches alleged by Langur Maize through the Fourth Supplemental Indenture or Exchange Agreement.

That Carlyle never before asserted this argument is readily shown. After Debtors' counsel raised a different waiver argument[22] with respect to the 2026 Notes at the June 25, 2024, closing argument session, the Court asked counsel for Carlyle: "do you believe the waiver argument does apply to the 2027 notes?"[23] Counsel for Carlyle responded,

> Your Honor, I apologize. I think the -- so I would like to be able to respond to that, ***but I'm actually not in a complete position to respond to it right now***. What I can say is the specific language that is in the consent letter in the 2024 and 2026 notes is not in the consent letter for the 2027 notes, so there's a difference in language. I have not been able, in the time that we have here, to identify any other –[24]

(Emphasis added.) Even in the last minutes of rebuttal on the closing argument on Langur Maize's breach of contract claims, Carlyle — which requested that it be permitted to argue first — ***did not know*** if the waiver argument applied to the 2027 Notes. In addition to establishing a forfeiture of the argument, it also conclusively establishes that Carlyle never intended to waive Section 3.02 — Carlyle ***did not know*** whether it was asserting a waiver argument even more than a year after this adversary proceeding was commenced and after all evidence was closed and closing argument on Langur Maize's breach claims was in its final minutes.[25] It certainly did not knowingly intend to waive Section 3.02 in March 2022 (and again, the Fourth Supplemental Indenture proves that Carlyle in fact intended to ***ratify and affirm*** Section 3.02).

Carlyle has never raised this waiver argument before — not in its opening argument at trial, not in briefing, and not elsewhere. Carlyle argues in its Submission that it joined in a

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[22] As noted in Section 1.C *supra*, the Debtors' argument was based on language in the 2026 Consent Letter that is not present in the 2027 Consent Letter.

[23] June 25, 2024, Trial Tr. (Rough) at 455:6-7.

[24] *Id.* at 455:8-19.

[25] Even if counsel for Carlyle had known that Carlyle was asserting a waiver argument, it would have been improper to do so for the first time on rebuttal.

waiver argument made by the Debtors on summary judgment. Carlyle mischaracterizes that argument. The colloquy on the argument for summary judgment went as follows:

> MR. KIRPALANI: 3.02 is not a sacred right, and so the majority would have the right to waive any breach even if one did occur. We don't think it applies. We don't think -- we think pretty clearly 3.02 doesn't apply, and I'm going to explain and probably end with why.
>
> THE COURT: Can I interrupt you for just one second?
>
> MR. KIRPALANI: Yeah, of course.
>
> THE COURT: ***So if it turns out that there was a breach of 3.02 by the trustee, because that's the argument, and you're asserting that it was then -- if there was a breach, it was then subsequently ratified***.
>
> MR. KIRPALANI: ***Uh-huh***.[26]

Even if this were sufficient to put Langur Maize on notice of the argument made at the summary judgment hearing (it is not), it is a ***different*** argument. The argument made at summary judgment was that, "if it turns out that there was a breach of 3.02 by the trustee," the Selected Sellers would "have the right to waive" or "***subsequently*** ratif[y]" that breach. (Emphasis added.) Carlyle's Submission, by contrast, argues that Section 3.02 was waived ***prior*** to the breach. The argument at summary judgment is, therefore, irrelevant.

As noted above, even to the extent that Carlyle were improperly to attempt now to press the argument made at summary judgment, the breach of Section 3.02 ***cannot be subsequently ratified***. Once the Selective Exchange occurred (which act constituted the breach of Section

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[26] Oct. 11, 2023, Hrg. Tr. 256:10-21 (emphasis added). Counsel for Langur Maize noted that this line of argument was inappropriate on the basis that no one had ever made this argument previously.

> THE COURT: I don't remember -- I don't remember the trustee making this argument.
> MR. KIRPALANI: This argument.
> THE COURT: Yeah.
> MR. KIRPALANI: Well, on summary judgment if --
> [MR. BENNETT]: Your Honor, no one has, and I reply it's completely inappropriate.
> THE COURT: I know that. I'm just -- let me creep along. It's my style.

3.02), the Selected Sellers no longer held any of, much less a majority of 2027 Notes and, thus, did not have the requisite voting power under Section 9.02 to waive any provision of the Indenture or ratify any breach by WSFS.

B. Any Waiver Argument was Forfeited Under this Court's Ruling at the May 16, 2024 Hearing.

At the request of counsel to Carlyle,[27] the parties, in advance of filing closing briefs, exchanged "issues lists" identifying the issues to be briefed. Counsel to Carlyle asserted that this was necessary to avoid "surprise issues" because "there was not a joint pretrial order."[28] The Court made clear that the issues lists were required to contain all issues to be briefed:

> COURT: . . . So I do think it's reasonable, if we're going to do briefing in anticipation of closing arguments, that everyone knows what the other side is going to brief. So I am going to require a meet-and-confer. No one can stop you from briefing anything.
>
> MR. ROSENBAUM: Uh-huh.
>
> THE COURT: But you have to put it on the list of what you want to brief. Hopefully, you all can negotiate down what that list is. But if you want to brief New York law on authentication of notes, and they don't want you to brief that, no, you get to brief authentication of notes.
>
> MR. ROSENBAUM: Uh-huh.
>
> THE COURT: But I'm hoping you all can agree on the right measure. But if not, I just want it disclosed, so that the topic of the briefs doesn't surprise anyone, so we don't need rebuttal briefs.[29]

The list of issues sent by Carlyle described the issues relating to Section 3.02 in full as follows:

> b. Whether Section 3.02 was breached. Count I.

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[27] May 16, 2024, Trial Tr. at 187:1-16.

[28] Issues not identified in a joint pretrial order are waived. *Elvis Presley Enters. v. Capece*, 141 F.3d 188, 206 (5th Cir. 1998) ("Once the pretrial order is entered, it controls the course and scope of the proceedings under Federal Rule of Civil Procedure 16(e), and if a claim or issue is omitted from the order, it is waived, even if it appeared in the complaint.")

[29] *Id.* at 191:6-21.

1. Whether the 2022 Transaction was a redemption.

2. Transactions pursuant to 3.07(h) are not subject to Section 3.02 pursuant to the 2027 Indenture/Global Note.[30]

There was no mention of a waiver argument anywhere in the issues list.

At the May 16 hearing, the Court further stated:

> ***[I]f you don't put it in your opening brief, then you don't have the argument for the trial***. So I mean, you get to change it, depending upon how I rule. ***What you can't do is not brief it or you're going to, I think, under Fifth Circuit law, waive the argument if you omit it from you brief***, and I don't want to stick people with that, with a comprehensive brief.[31]

There is no mention of a waiver argument anywhere in the Selected Sellers' Closing Brief. The argument was forfeited.[32]

CONCLUSION

Langur Maize respectfully requests that the Court deny the waiver affirmative defense raised by Carlyle for the first time in its Submission.

[30] *See Debtor & Counterclaim Defendants' Proposed Issues List* (attached as Exhibit 1).

[31] May 16, 2024, Trial Tr. at 199:22-200:3.

[32] No other party filed a submission and thus no other party is asserting a waiver argument. Even if any other party had joined the Submission (which no other party did) Langur Maize believes the arguments in this Response apply with at least equal force to all other parties, including Platinum, Wolverine TopCo, and Senator.

DATED: June 28, 2024

JONES DAY

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was filed on this June 28, 2024, with the Clerk of the Court using the CM/ECF system, which will then send a notification of such filing to all counsel of record.

/s/ Michael C. Schneidereit
Michael C. Schneidereit (*pro hac vice*)

EXHIBIT 1

DEBTOR & COUNTERCLAIM DEFENDANTS' PROPOSED ISSUES LIST

I. 2024/2026 Holders Issues

Contract Claims – Original 2024 and 2026 Indentures

1. Whether the Company issued the Additional 2026 Secured Notes for a legitimate business purpose

2. Whether the Original 2026 Indenture prohibits the issuance of additional notes for dilution

3. Whether the Company obtained the requisite consents pursuant to the 2024 and 2026 Indentures to effectuate their respective Third and Fourth Supplemental Indentures

4. Whether the 2022 Transaction breached sections 2.01, 4.09, 4.12, and/or 9.02 of the Original 2024 and 2026 Indentures

5. Whether the parties complied with the authentication requirements set forth in section 2.02 of the Original 2026 Indenture and, to the extent they did not, whether the Fourth Supplemental Indentures were nevertheless effective and binding under the Original Indentures, including by virtue of sections 9.01, 9.02, and 9.04 of the Original Indentures, waiver, reformation, ratification, intent of the parties, subsequent performance, lack of standing, or operation of law

6. Whether the 2022 Transaction breached section 9.02(10) of the Original 2024 and 2026 Indentures

7. Whether the steps of the 2022 Transaction should be respected, including whether the Original 2024 and 2026 Indentures and governing law permit consents in connection with purchases or issuance of notes

8. Whether the Third and Fourth Supplemental Indentures are effective and binding in accordance with their terms under section 9.04 of the Original 2024 and 2026 Indentures

9. Whether the Secured Exchange violated section 3.02 of the Original 2024 and 2026 Indentures

Tort Claims

1. Whether the 2024/2026 Holders have established the elements of tortious interference with contract

2. Whether the economic interest doctrine bars the 2024/2026 Holders' tortious interference claim

Proposed Claims (2024/2026 Holders' Standing Motion)[1]

1. Whether the 2024/2026 Holders' equitable lien and equitable subordination claims are colorable

2. Whether the 2024/2026 Holders' TUFTA-based claims are property of the estate

3. Whether the 2024/2026 Holders' TUFTA-based claims are colorable

Subject Matter Jurisdiction

1. Whether SSD Investments has Article III standing to pursue its claims against non-parties to the Original 2024 and 2026 Indentures

2. Whether the Court lacks subject matter jurisdiction over Citadel

3. Whether the 2024/2026 Holders lack recourse against Platinum under Section 13.05 of the 2024 and 2026 Indentures and/or corresponding global notes

II. Langur Maize Issues:

1. Whether Langur Maize has Article III standing to sue Carlyle, Platinum, and Senator, notwithstanding N.Y. Gen. Ob. L. 13-107

   a. Whether Langur Maize suffered any direct injury

   b. Whether Langur Maize was assigned claims belonging to prior beneficial holders, either by operation of the 2027 Indenture/Global Note, or by DTC/Cede & Co. (Langur Maize has asserted no other basis for standing)

   c. Whether the Global Note disclaims the existence of claims against Platinum such that no such claims travel with or arise under the Global Note

   d. Whether beneficial holders of 2027 Unsecured Notes at the time of the 2022 Transaction suffered any injury as a result of non-participation in the Unsecured Exchange

   e. Whether prior beneficial holders of 2027 notes that sold their holdings can assert third-party claims against Platinum, Carlyle, and Senator

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[1] For the avoidance of doubt, the Debtors and Counterclaim Defendants reserve all rights concerning (i) the propriety of the settlement of any estate claims deemed colorable, (ii) the merits of any claims as to which standing is granted, and (iii) any potential remedies associated with such claims.

2. Whether Langur Maize has established a breach of the 2027 Indenture/global note, pursuant to Counts I-III of its operative complaint

    a. No contractual privity. Beneficial holders such as Platinum, Senator, and Carlyle do not have contractual obligations under the indenture or global note.

    b. Whether Section 3.02 was breached. Count I.

        1. Whether the 2022 Transaction was a redemption.

        2. Transactions pursuant to Section 3.07(h) are not subject to Section 3.02 pursuant to the 2027 Indenture/Global Note.

    c. Whether Section 6.05 was breached. Count II.

        1. Amendments were effectuated pursuant to Sections 9.02, 13.02 and 13.03 of the 2027 Indenture.

    d. Whether Section 9.02(10) was breached. Count III.

    e. Langur Maize is not arguing any other breaches of the 2027 Indenture or global note.

    f. Whether section 13.05 of the 2027 Indenture or the terms of the Global Note bars recovery against Platinum.

3. Whether Langur Maize has established tortious interference by Platinum, Senator, and Carlyle. Count IV.

    a. Elements not established. LM has not proven any elements of tortious interference, including no breach by WSFS or Wesco of sections 3.02, 6.05, or 9.02(10), no inducement (either of WSFS or of Wesco), no contract to which Langur Maize or its assignor is a party, no damages. This includes without limitation whether actions taken by the Company's board can be attributed to Platinum. It also includes whether LM or prior beneficial holders of 2027 notes were injured.

    b. Application of the economic interest doctrine to Platinum, Carlyle, and Senator. Defendants all argue the economic interest doctrine precludes liability and LM has not shown malice, fraud, or illegality sufficient to meet its burden to overcome the economic interest doctrine.

4. Whether defendants engaged in an actionable conspiracy to commit tortious interference with contract. Count VII.

5. Whether the validity of the Additional 2026 Notes affects the validity of the Third and Fourth Supplemental Indentures to the 2027 Indentures, or Unsecured Exchange.

6. Counts V and VI were disposed of on summary judgment and will not be the basis for further briefing or argument.

The Debtors and Counterclaim Defendants reserve the right to address any other issue identified by any other party as well as any defenses to such issues.