Docket #1474 Date Filed: 7/17/2024

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE SOUTHERN DISTRICT OF TEXAS

HOUSTON DIVISION

WESCO AIRCRAFT HOLDINGS, INC., ET AL	§ CASE NO. 23-03091-ADV
	§ HOUSTON, TEXAS
	§ WEDNESDAY,
v	§ JULY 10, 2024
	§
SSD INVESTMENTS LTD., ET AL	§ 3:27 P.M. TO 4:25 P.M.

COURT'S ORAL RULING

BEFORE THE HONORABLE MARVIN ISGUR
UNITED STATES BANKRUPTCY JUDGE

APPEARANCES: SEE NEXT PAGE

(RECORDED VIA COURTSPEAK; NO LOG NOTES PROVIDED)

(Please see Electronic Appearances.)

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HOUSTON, TEXAS; WEDNESDAY, JULY 10, 2024; 3:27 P.M.

THE COURT: 23-3091. Appearances should have all been made electronically. I don't intend really for anybody to talk today but me, but if somebody does want to talk, I -- you'll need to stand up and come to the podium or press five-star on your phone, as well.

So, unless we have someone that has any preliminary objection or matter that they need to raise, I'm going to proceed with making the oral ruling.

MR. KIRPALANI: Your Honor, I apologize. Can we just wait two minutes. Mr. Dunne also flew in, but that's --

THE COURT: Of course.

MR. KIRPALANI: And he's just stepped out for that --

THE COURT: Of course.

MR. KIRPALANI: Thanks.

(Pause in the proceedings.)

THE COURT: And for those of you on the phone, I apologize that I'm doing this at a time when you may not have been able to fly in here for the hearing because you couldn't get a hotel room. As you know, there are about 1,300,000 homes without power in the City. And so I certainly appreciate the difficulties that the day that I picked turned out to be not a very good day for doing this, in terms of people participating.

We have jurisdiction over this adversary proceeding under 28 U.S.C., Section 1334.

Today we are going to make three principal rulings concerning core matters over which the Court exercises authority under 28 U.S.C., Section 157. I intend to announce the principal rulings and give -- and then, following that, give a brief exposition on the basis of those rulings.

The rulings today are interlocutory only. It is my intention that the final ruling will be done in a written memorandum opinion that will ultimately supplant and replace today's oral ruling in full.

The three principal rulings are as follows:

One, the rights, liens, and interests that were for the benefit of all of the holders of the 2026 notes as they existed on March 27th, 2022, remained in full force and effect on March 29th, 2022.

Two, the selection of the 2027 notes for exchange was not done in a manner permitted under the 2027 notes indenture. I do not, today, impose any remedy for this wrong.

Three, no relief is granted to the holders of the 2024 notes.

The Court reserves ruling on all monetary issues, including whether attorneys' fees and costs should be awarded, to a future date.

The debtors -- and I very much appreciated the statement that they made a week ago or so -- have stated that they intend to quickly proceed with confirmation. It is my view that the reserved matters should not delay that process even for a moment.

For the purpose of completeness, I clarify that these rulings describe the rights immediately following the March 28th, 2022 transaction; that is, the rights that existed on March 29th. Subsequent to that date, a bankruptcy was filed, this Court approved the DIP loan in the main case, the DIP loan primed some pre-petition rights, and it still does.

And now for the background and the reasons for these rulings.

This transaction is an example of the side effects of what is occurring in the developing bond market. Since the end of the Great Recession, the U.S. leveraged loan market has grown significantly. From 2010 to 2020, loan volumes have risen from approximately $500 billion to nearly $1.2 trillion.

Due to competitive market forces caused by a fast-growing market, this unprecedented access to financing from borrowers has resulted in the erosion of many lender protections. Modern loan documents often contain lighter covenants to permit distressed debtors to raise additional capital on terms that are more attractive to creditors than people my age may be used to.

Two features of this evolution in the markets deserve highlighting:

First, documents may authorize the borrower to issue new debt that is senior in priority and lien rights to existing debt. Often, this right requires a super majority vote by the holders of debt that will be primed by the new senior debt. Prior to the evolution of the bond markets, that type of subordination was generally only available with the unanimous consent of all bondholders. Things have changed.

Second, documents may allow for unequal treatment for holders of notes within the same class and under the same indenture. These processes are generally referenced as "non pro rata treatment."

When taken in combination, these rights, with appropriate documentation, could allow the holders of a super majority of notes within a class to both make a secured priming loan and to trade their existing notes into the priming loan without allowing the minority noteholders the right to participate. These transactions are commonly referred to as "grouped transactions," referenced as "uptiering transactions."

Uptiering transactions are becoming an increasingly common tool for creditors to seek advantages when facing a debtor in financial distress. With these transactions, distressed debtors seek access to new capital by amending their secured debt obligations to permit new debt with higher lien priority. These transactions typically require support of only a majority or super majority of holders, rather than 100 percent consent, and often do not even require notice to minority holders.

Aggressive structures have limited participation to certain preferred types of noteholders -- "preferred" with a small "p". These participating preferred noteholders obtain new debt and roll up their existing loans into the new superior lien tranche of debt. Nonparticipating noteholders' debt may be left subordinated to both the new debt and debt that was previously on equal or inferior footing.

This case -- or I should say, maybe more importantly, this decision does not challenge the legality of uptiering transactions, and for good reason. Parties are free to contract and to take risks within their contracts. This case does, however, challenge whether the uptiering transactions in this case were authorized under the parties' documents. As a Court interpreting and determining the effects of these financing arrangements, it is important that the Court respect agreements between creditors and borrowers and address the documents as they are written.

The holdings of this case are derived from applying the terms of the governing indentures. The 2022 transaction failed in certain ways to comply with the 2026 indenture. This necessitates a finding that the 2022 transaction was not effective to diminish the liens and rights of all of the 2026 holders.

The Court notes that this decision does not invalidate the March 28th transaction between the parties. It just means that the March 28th transaction is subject to the rights of others; that is, the 2026 noteholders, that could not be illegally diminished without their consent in this case. The Court notes the gravity of the situation confronting the debtor and the difficulty of the decision that the Court must make.

The participating noteholders' decision to engage in a non pro rata uptier exchange resulted in the forced release of liens held by the nonparticipating noteholders. It's well settled under New York law that a lien is a constitutionally protected property interest. And a lien was held for the benefit of those noteholders.

The transaction attempted to include the uncontested release -- un-consented release -- excuse me -- of property rights held for the benefit of the nonparticipating noteholders. The Court takes this situation very seriously. It is inconceivable that the Court would not order strict compliance with the terms of the 2026 indenture and then let the chips fall where they may. Those terms require a two-thirds vote of the 2026 noteholders to consent to an amendment that would have the effect of releasing noteholder property rights. The third supplemental indenture to the 2026 notes, which was executed as part of the March 28th, 2022 transaction, was intended to have such an effect.

As I detail more below, Wesco needed to raise approximately $250 million in new capital to remain viable. Two major hedge funds, PIMCO and Silver Point, approached Wesco and offered to provide the required financing in an uptier transaction.

It's worth noting that the March 28th, '22 transaction was originally contemplated to have been undertaken by a super majority vote. In February 2022, PIMCO and Silver Point believed that they and the group that they had formed owned in excess of the required two-thirds vote that would have allowed the contemplated uptiering transaction.

However, a group represented by Akin Gump intentionally entered the open market and acquired in excess of one-third of the 2026 notes. Despite extensive maneuvering by the parties, a game of chess, as described by one of the counsel, the end result was that the PIMCO/Silver Point group did not have the required two-thirds super majority.

That resulted in a last-minute change of plans for $250 million worth of new financing. The parties decided that they could issue additional notes on par with the existing 2026 notes, and the new $250 million would increase both the total bonds held by the PIMCO/Silver Point group and the total amount of outstanding 2026 bonds. Although both the numerator and the denominator would be increased with the issuance of the new $250 million, it would give PIMCO/Silver Point in excess of two-thirds of the 2026 bonds.

The key to this change was that PIMCO, Silver Point, and Wesco believed that the additional $250 million in bonds could be authorized with a simple majority vote. It turns out that they were wrong about that. And here is the background:

Two hundred and fifty million dollars in new money was much needed. Although there may have been substantially better theoretical offers to finance Wesco's need for immediate liquidity, none that were available were also actionable. The record does not show the existence of any better alternative to the 2022 transaction. Wesco and Platinum believed, in good faith, that the 2022 transaction was the best available alternative to stop the bankruptcy filing.

In the months leading up to the 2022 transaction, Wesco faced a major liquidity crisis. Wesco might not have been able to make the November 2021 interest payments on its outstanding debt, and it was reaching a point where it would need new money.

At the end of October 2021, Platinum, the parent, the sponsor of Wesco, learned of Silver Point's and PIMCO's interest in participating in a potential financing transaction.

In December 2021, the company received a proposal for a new money investment by a group formed by PIMCO and Silver Point. PIMCO and Silver Point sent the majority group's initial proposal, indicating that they were willing to work with the board to provide $200 million as new super senior debt and an extension on the maturities of their then-held notes.

In early 2022, Wesco's cash situation continued to get tighter and tighter. Wesco became increasingly concerned about its ability to make the 2022 -- the May 2022 interest payment on its outstanding debt.

Katsumi, a factoring company, had also pulled out of its factoring agreement with Wesco. So Wesco faced pressures of paying back approximately $40 million Katsumi had already loaned the company. Wesco repaid Katsumi in early 2022.

Wesco was also concerned about getting an unfavorable result on its upcoming audit in the United Kingdom. If there was a negative audit result, Wesco's asset-based lending agreement would be in default. When Wesco's CFO spoke to the auditors, they indicated that a cash injection in the two-hundred-and-fifty-million-dollar range would be required to issue a clean audit opinion.

Wesco was also concerned, in early 2022, about vendors shortening their payment periods. For every day that a vendor reduced its payables, Wesco was $5 million shorter in cash.

By mid February 2022, another group of noteholders organized; that was the Akin group. And at that point, the Akin group did not have a financial advisor. By March, the Akin group made an offer to Wesco. The Akin proposal evolved and eventually provided for $250 million backed by a third-party letter of credit.

But Wesco reasonably concluded that the proposal would have to be backed by assets in excess of what Wesco could provide. It also reasonably concluded that none of the Akin proposals were actionable. Even if the money somehow could be found and the collateral could be found, they were reasonably concerned that PIMCO and Silver Point were in a power position that would allow them to prevent the company from getting the financing from other sources. The board expected PIMCO and Silver Point would use that power.

By mid March 2022, Wesco's liquidity situation was stressed. Wesco wanted to wait to file their financial statements until they received a cash injection. But the United Kingdom would be willing to strike the company off the records if Wesco did not file its statements. That would have made it illegal for Wesco to do business in the United Kingdom and been devastating for the corporation.

The company engaged with and considered the Akin group's proposal, but it found the proposal inferior to the majority group's proposal. It carried significant risks. It was unclear whether the proposal could close in a timely manner.

The Platinum managing director who advised Wesco testified that the majority group's proposal was superior, in terms of maturity extensions, amortization reductions, and cash interest reductions. The proposal provided the most liquidity for the longest period of time. Wesco was also able to get, as a result of the Akin proposal, more meaningful concessions from the majority group through additional negotiations.

On March 24th of 2022, the board unanimously voted to approve the majority group's proposal, the PIMCO/Silver Point proposal. At the time of the vote, everyone left the meeting, other than the board's advisors and Patrick Bartels.

The company had brought Mr. Bartels on as an independent director, but it does not appear to the Court that Bartels acted as a truly independent director. Despite this, the company and its advisors sincerely believed the 2022 transaction would be in the company's best interests.

However, there is an absence of evidence in the record that the board accounted for the risk that the 2022 transaction was illegal under the documents. Because attorney/client privilege applied to many documents, and they related to this issue, the Court does not know what advice the board members or other parties received from their attorneys, and the Court makes no finding on whether the board believed that the 2022 transaction was legal or illegal.

The Court does conclude, however, that, if the transaction was legal, it was in Wesco's best interest. Nevertheless, the fact that the 2022 transaction theoretically would benefit the company does not permit the company to breach its obligations and did not permit the company to breach its obligations to the 2026 holders.

Not all actions taken in the best interests of a party are done in good faith. One can conceive of a situation in which an act might be in the parties' best interests, but is not taken in good faith. Here, the company acted in what it sincerely believed was its best interest, and the Court makes no finding as to whether the company's actions were taken in good faith or in bad.

Even if the company did act in good faith, New York law is clear that a breach of contract done in good faith is still a breach. Even though the company enacted in what it may have believed was its best interest, the company breached the 2026 indenture by entering the 2022 transaction. The company's and the majority group's mental states have no effect on any contract-based claims.

Wesco's entry into the third supplemental indenture to the 2026 indenture was not permitted. The amendment had the effect of releasing all or substantially all of the collateral to the liens created pursuant to the security documents for the 2026 indenture. That release of collateral required a two-thirds acceptance by the holders of the then-outstanding 2026 notes. Wesco did not have the two-thirds acceptance required by the 2026 indenture when executing the third supplemental indenture.

After the failed attempt by Silver Point and PIMCO to acquire a two-thirds super majority, the parties redesigned the 2022 transaction to be comprised of a series of agreements, each of which would trigger the next, a domino agreement. While this domino agreement perhaps invites the application of the collapsing doctrine or similar doctrines under New York law, the Court need not and will not cross that bridge. The Court expresses no opinion on the application of those doctrines.

The transaction was designed to be automatically self-implementing. Prior to the closing, the parties each held fully executed copies of all closing documents. No further signatures were required. The release of each of those documents would occur in a planned, but automatic sequence. As the sequence was established, once the transaction commenced, it was concluded at the same time by the automaticity of the release of the fully executed documents.

Wesco's CFO, who authorized the board to execute the 2022 transaction, testified that the 2022 transaction was, quote:

"-- a singular transaction that was negotiated in its totality."

The moment the third supplemental indenture was executed, the rest of the documentation would be effective automatically through a series and instantaneously. The documents would topple like dominoes.

There were five principal sets of relevant documents. The company prepared three nearly identical versions of the third supplemental indenture, one for each of the 2024, 2026, and 2027 indentures. The third supplemental indenture was designed to expand Wesco's ability to raise additional 2026 notes. The third supplemental indenture for each of the indentures did three things:

One, it added new definitions of "additional 2026 secured notes" and "note purchase agreement."

Two, it amended the definition of "permitted liens" to include liens securing the additional 2026 notes.

And three, it amended Section 4.09 to allow the incurrence of the additional 2026 notes.

A consent letter accompanied each of the third supplemental indenture copies. There was also the HoldCo PIK notes consent letter, first supplemental indenture, and the ABL amendment.

The third supplemental indenture authorized the addition -- the issuance of the additional 2026 notes. It was supposed to then trigger the note purchase agreement.

The note purchase agreement was designed to sell $250 million worth of new *pari passu* notes to the PIMCO/Silver Point group. The additional notes were the additional 2026 notes that were acknowledged in the third supplemental indenture.

The note purchase agreement was supposed to trigger the fourth supplemental agreement -- indenture, quote:

"-- as soon as such notes purchase agreement was consummated."

The fourth supplemental indentures were designed to release all liens securing to the 2024 and 2026 notes. The fourth supplemental indenture for the 2026 indenture states:

"The indenture obligations, as defined in the security agreement, shall no longer be secured by the liens on the collateral. And such liens, solely with respect to the indenture obligations under the indenture to the 2026 notes and the 2026 guarantees are hereby released, terminated, and discharged."

The fourth supplemental indenture to the 2024 notes contains the same language. And the fourth supplemental indenture to the 2027 notes does not contain lien release language, as the notes were unsecured, but contains, otherwise, the same amendments.

The fourth supplemental indentures were also accompanied by consent letters, the HoldCo PIK notes exchanged consent letter, and the second supplemental indenture.

The fourth supplemental indenture was supposed to trigger the amended and restated note security agreement.

The amended and restated note security agreement was designed to grant security interests for the holders of the new 1L notes and release those security obligations from the existing 2024 and 2026 notes. At that point, the exchange agreement was effective.

The exchange agreement was designed to exchange the participating noteholders' 2024 and 2026 notes for 1L notes and the 2027 unsecured notes and 2023 promissory note for 1.25L notes due in 2027.

Set forth in more detail below, on the day of the closing, March 28th, 2022, the parties agreed to release, quote:

"-- all signature pages, without any further action by any party for each of the relevant set of documents."

It is important to reiterate that all parties already had in their possession all of the fully executed documents before the March 28th, 2022 closing call.

The 2026 noteholders assert that there was a breach of the 2026 indenture under Section 9.02. Section 9.02 of the 2026 indenture provides:

"In addition, without the consent of the holders of at least 66 and two-thirds percent in aggregate principal amount of the 2026 secured notes then outstanding, including, without limitation, consents obtained in connection with the purchase of or tender offer or exchange offer for the 2026 secured notes, no amendment, supplement, or waiver may, one, have the effect of releasing all or substantially all of the collateral in the liens created pursuant to the security documents, except as permitted by the terms of this indenture and the security documents or the intercreditor agreements, or changing or altering the priority of the security agreements" --

Excuse me.

"-- security interests of the holders of the 2026 secured notes and the collateral under the ABL intercreditor agreement or the *pari passu* intercreditor agreement."

The authorization of additional notes through the third supplemental indenture would have been permitted by a simple majority of the holders, unless the amendment, quote:

"-- had the effect of releasing all or substantially all of the collateral from the liens created pursuant to the security documents."

If it had the effect of releasing all or substantially all of the collateral, a two-thirds vote was required. Because a two-thirds vote was not obtained for the execution of the third supplemental indenture, if the third supplemental indenture fell within the super majority consent requirements, it could not be effectively implemented adversely to the 2026 holders. The parties' dispute the meaning of the term "effect."

Under New York law, a court should interpret a contract based on the language of the agreement to construe it in accordance with the parties' intent. Courts should aim to give full effect to all of the contract's provisions. Courts should read contracts as a whole to ensure that the contract's general purpose is given effect. And a party may not pick and choose which provisions to respect and which to disregard.

"Effect" means something produced by an agent or cause, a result, outcome, or consequence. That's under <u>Black's Law Dictionary</u>. It also means, under that same dictionary, to bring about or make happen.

Under Section 9.02, a two-thirds vote of the outstanding 2026 notes would be required to have an amendment -- to make an amendment that would cause or bring about a release of all or substantially all of the collateral from the liens held by the 2026 noteholders. The record is clear and the parties do not dispute that, prior to the March 28th, 2022 transaction, the participating noteholders did not have the two-thirds vote to amend the indenture.

The Court is limited to the four corners of the documents in interpreting an ambiguous contract. However, whether the third supplemental indenture had the effect of releasing collateral from liens is not a matter of contractual interpretation. It is not possible to determine what effect the amendment had without looking beyond the contract to the surrounding circumstances. The Court must consider the environment in which the third amendment was executed. That environment is one of the domino agreement. Once the third amendment was executed, the other dominoes would inexorably continue to fall.

PIMCO and Silver Point only offered the new $250 million on the contingency that the entire transaction would take place. PIMCO and Silver Point were unwilling to provide new money on a *pari passu* basis; rather, they expected super senior first lien debt. The transactions would not have worked, from Silver Point's perspective, without elevated lien status because the participating noteholders were providing new money at a lower interest rate than they would have lent it if the new money were issued on a *pari passu* basis.

PIMCO and Silver Point's group was also unwilling to open a transaction to all secured noteholders through a prorated transaction. In fact, there is no evidence that PIMCO, Silver Point, or Citadel strongly considered the possibility of purchasing *pari passu* additional 2026 notes.

PIMCO and Silver Point stated, quote:

"We are funding new money and need to know that all consents get delivered and the exchange actually happens. Having certainty that everyone performs under each document once this thing gets started has been a fundamental point for us from day one." End quote.

PIMCO and Silver Point also indicated that they were, quote, "not ever going to be okay removing specific performance" because it was, quote, a "key deal point" for them.

PIMCO and Silver Point, it turns out, in my view, were mistaken in reliance on the specific performance provision because the provision was in the exchange agreement, not the third supplemental indenture. But specific performance was guaranteed, nonetheless, because of the domino agreement.

On March 28th, 2022, the closing call commenced at approximately 8:15 in the morning. Prior to the closing call, every party to the domino agreement possessed fully executed documents for the 2022 transaction. By agreement, the parties held the fully executed documents until the closing call.

At 12:53 in the morning, prior to the closing, the fully executed exchange agreement was circulated and escrowed pending release.

At 5:06 in the morning, Wesco's counsel circulated fully executed copies of the transaction documents in escrow, pending release, and requested confirmation of release and signature pages.

At 7:18 in the morning, PIMCO and Silver Point's counsel sent executed versions of the exchange agreement and the note purchase agreement to representatives of Silver Point, PIMCO, and Citadel.

PIMCO and Silver Point's counsel indicated they had, quote, "execution versions for all documents," end quote, at that point. The documents included signatures on behalf of Wesco Aircraft Holdings, Wolverine Top Holdings, Senator, Spring Creek, Carlyle, PIMCO, Silver Point, Citadel.

On March 28th, 2022, after every party to the domino agreement had possession of the fully executed transaction documents, the closing call commenced at 8:15 in the morning. It only lasted about ten minutes. The closing call agenda was read as a script on the call, states that the call would confirm representatives of each of the firms were, quote:

"-- ready to close and that their clients authorized the release of all of their signature pages in the following order, in accordance with the exchange agreement." End quote.

And the, quote:

"-- authorization would be to release all signature pages in the following order, without any further action by any party."

Each law firm was asked to confirm that their clients are ready to close and authorize release of their client's signature pages, quote:

"-- which release will be without any further action by any party."

The release without any further action meant the signatures did not depend on further releases by the parties. The release of signatures depended on the happening of certain events, not the confirmation of those events. The transaction was automatic.

Following the closing call, the dominoes fell. The closing call ended at around 8:25 in the morning, at which point the third amendment and then the notes purchase agreement signatures were released automatically in that order.

By 8:26 in the morning, one minute later, PIMCO and Silver Point's counsel confirmed the release of the funds from escrow and signature pages. An email was sent by PIMCO and Silver Point's counsel to representatives of Silver Point, PIMCO, and Citadel.

Also at 8:26 in the morning, a Citadel internal email indicated the transaction has officially closed.

And at 8:27, two minutes later, WSFS's counsel confirmed the escrowed funds were to be released.

The dominoes continued to fall, such that, by 8:53 a.m., the parties confirmed the finality of the transaction. At 8:53 a.m., a representative of Carlyle emailed members of Spring Creek to confirm the transaction closed this morning and that all sig. pages were released and wires released.

The signature releases continued after the note purchase was consummated without any action by any parties. The exchange documents got released without further action once the purchase of the notes was consummated.

Silver Point and PIMCO did not believe that their two-hundred-and-fifty-million-dollar investment into the purchase of the additional 2026 notes was at risk for not being exchanged for new first lien 1L notes through the exchange agreement. They were correct. But they argue in court that there was no legal obligation for their counterparties to exchange the notes at the time the signatures were released because counterparty signatures, under New York law, could have been rescinded. Silver Point and PIMCO further argue that, because there was no legal obligation to exchange the notes, the lien's release was not an inevitable result from the execution of the third supplemental indenture.

I'm not at all confident that inevitability is the standard, and I don't know that it's that high. But in this case, I think there was inevitability. The third supplemental indenture could not have had the effect of releasing collateral from liens, according to PIMCO and Silver Point. But this is not the law in New York when you have escrow agreements and principles of agency law.

The execution of the 2022 transaction became irrevocable once the fully executed transaction documents were possessed by the parties and the funds were released. At that point, all actions necessary for the effectiveness of the 2022 transaction had been taken and each step of the 2022 transaction was automatically effective, without further action by any party. This created a legal right in the beneficiaries of the 2022 transaction, the Silver Point and PIMCO group, to enforce the transaction. All of this occurred prior to the execution of the third supplemental indenture.

Thus, when PIMCO and Silver Point went at risk, they immediately possessed a legal right to enforce all steps to the 2022 transaction, including the fourth supplemental indenture, which authorized the lien strip. The third supplemental indenture had the irrevocable effect of releasing collateral in the liens. The two-thirds vote provision was thereby triggered as a consequence of the effectiveness of the third supplemental indenture.

New York Courts create a legally enforceable right to the execution of a transaction when all escrowed documents are complete. Quote:

"From the time the deposit is made, the escrow agent becomes the trustee of both the party making the same and of the one for whose benefit it is made. If the deposit is made under and upon conditions to be fulfilled by another and without original consideration, it is doubtless true that the person making the same may revoke his proposition at any time before the opposite party has complied with the conditions to be by him performed. Upon the other hand, when such opposite parties has complied with the conditions and obligations under which the deposit was made, he becomes entitled to the property deposited for his benefit."

That's a 1902 *Mechanics' National Bank* New York opinion. It was affirmed in *Mechanics' National Bank of Providence v. Jones* in 1903.

"We think that, under these principles, even if defendants originally had the right to revoke the escrow agreement and withdraw their instruments of transfer, the plaintiffs had complied with the conditions by them to be performed prior to the service of the notice of January 25th and that their rights had thereby become fixed."

Similarly, under a 1991 New York opinion, quote:

"The law regards the escrow relationship as a fiduciary. Consequently, upon acceptance of the agreement, [the escrow agent] has the duty of strict execution of its terms and conditions."

New York Courts create an enforceable obligation, that maybe we are all more familiar with from law school, to execute a transaction with an agency power coupled with an interest, as it was here. That's a 2022 New York opinion, affirmed in 2021.

New York Courts have adopted the Restatement's common law standard for revocation of signatures. The Restatement Third of Agency, Section 3.12(1) states:

"A power given as security is a power to affect the legal relations of its creator that is created in the form of a manifestation of actual authority and held for the benefit of the holder or a third person. This power is given to protect a legal or equitable title or to secure the performance of a duty apart from any duties owed the holder of the power by its creator that are incident to a relationship of agency under Section 1.01. It is given upon the creation of the duty or title for consideration. It is distinct from actual authority that the holder may exercise if the holder is an agent of the creator of the power."

Comment B to Section 3.12 states:

"If the creator of a validly created power given a security purports to revoke the holder's authority contrary to the agreement pursuant to which the creator granted the power, specific performance of the holder's rights is an appropriate remedy subject to the Court's discretion in granting an equitable remedy."

Comment B also provides that the power may be created and held for the benefit of a third party other than the holder of the power. The creator of the power and the holder have the ability to create an enforceable right in a third party to benefit from the power, just as two parties to a contract have the ability to create a right in a third-party beneficiary, under both escrow obligations, principles, and agency duties, and the belief of the parties at the time.

PIMCO and Silver Point had an irrevocable right to the complete execution of all steps of the 2022 transaction at the time the third supplemental indenture was executed. As a result, the entire series of transactions were an inevitable and irrevocable result of the execution of the third supplemental indenture. The two-thirds vote provision was, therefore, triggered at that time, but did not exist.

The existence of the additional notes authorized by the third supplemental indenture was required to be able to obtain the two-thirds vote. Because the additional notes and their votes did not exist at the time the third supplemental indenture was executed, the third supplemental indenture could not have been effective as against the 2026 holders.

This negates the effectiveness against the 2026 holders of every subsequent step in that series. And as to any effect on the 2026 holders the March 28th, 2022 transaction failed at the execution of the very first necessary document, the third supplemental indenture.

I will note, if there is any ambiguity, that I am not holding that the parties to the transaction, which did not include the complaining 2026 noteholders, may very well be bound by it. That's not before me, I'm assuming they're bound by it.

I will also note that, when I am saying that the rights are held for all 2026 bondholders, I specifically mean to include the largest of the 2026 bondholders, PIMCO and Silver Point. All of their rights were preserved as they existed on March 27th of 2022.

Moving to the 2027 indentures, I find that the 2022 transaction impermissibly violated Section 3.02 of the 2027 indentures, to the extent of Platinum's involvement.

Section 3.02 and 3.07 of the 2027 indentures required purchases of notes through privately negotiated transactions with third parties to be offered pro rata to other holders.

Platinum's interpretation of Section 3.07(h) of the 2027 indenture is fraught with difficulties.

First, Platinum asks the Court to interpret the first and second sentences as giving Wesco carte blanche to do any transaction without review. Here are the sentences of that, unedited:

"The issuer to affiliates may, at any time and from time to time, purchase unsecured notes. Any such purchases may be made through open market or privately negotiated transactions with third parties or pursuant to one or more tender or exchange offers or otherwise upon such terms and at such prices, as well as with such consideration as the issuer or any such affiliates may determine."

Platinum, in my view, offers an internally contradictory interpretation of these two sentences. First, it says that the first sentence grants unbridled authority to purchase unsecured notes. Second, it says the second sentence is merely an unrestricted list of examples of what the first sentence might mean. And third, it says that the word "otherwise" contained in that second sentence means that any purchase at all is just okay.

At closing arguments, the Court held that that's not what "otherwise" meant. "Otherwise" was defining the prior series -- was defined by the prior series. One day later, one day after the otherwise argument was made, the same argument was addressed by the Supreme Court in *Purdue Pharma*.

Rejecting an over-broad interpretation of 1123(b)(6), *Purdue* teaches that a catchall must be interpreted in light of its surrounding context and read only to embrace objects similar in nature to the specific examples preceding it. And then, to my shock, one day after *Purdue*, the Supreme Court applied the same logic in *Fischer*, when it considered what did the word "otherwise" mean. And the Supreme Court held that "otherwise" had the same meaning as set forth in *Purdue* when you have a list.

Here, the catchall word "otherwise" is preceded by a series of examples that denote that the pricing of the purchase of unsecured notes would be governed by market forces. These specific examples are open market transactions, privately negotiated transactions with third parties, pursuant to tender offers, pursuant to exchange offers. Each example reflects market pricing.

Platinum makes a strained argument to the contrary. It argues that Platinum, the 100 percent shareholder, the entity that selects directors, and the entity whose employees and officers dominate Wesco's board, was a third party to Wesco. The Court is asked to ignore the common usage of the term "third parties" for two reasons:

First, that Platinum is an affiliate, and that "affiliate" is a defined term in the indenture. Platinum argues that, if the drafters intended to include Platinum, the phrase should have said "non-affiliates," rather than "third parties." That argument, of course, ignores that affiliates are merely one part of a larger group who may or may not be a third party.

The second argument is that "third parties" actually means non-signatories to the indenture.

The use of the term "third party," in common legal writings, is uniformly used in a manner that excludes affiliates.

In *Oppenheimer*, a 1937 case of the Supreme Court:

"The bank had power to sell the stock in question whether acquired by it in accordance with or contrary to Section 83, and whether the stock belonged to it, the affiliate, or a third party."

The Fifth Circuit in 2006:

"The Government contended, however, that the sale was a sham because Enron executives orally promised Merrill a flat fee of $250,000 and a guaranteed 15 percent annual rate of return over the six-month period of Merrill's investment; Enron executives allegedly promised that Enron or an affiliate would buy back Merrill's interest in the barges if no third party could be found."

Justice Scalia, dissenting in the *Kmart* case:

"That same phenomenon renders inexplicable Justice Brennan's perception that all affiliated trademark holders are less in need of, or less deserving of, 526(a) protection against the products of their foreign affiliates. It is not the affiliates who are doing the damage, but third parties."

Of course, Platinum's argument is frivolous. It would be possible to use the term "third party" to refer to a non-signatory. Nevertheless, the indenture contains no such inference. Read in context, Platinum is not a third party.

Platinum's second argument I also find unavailing. It alleges that the first sentence is not modified by the second sentence. This argument creates a strange marriage with the first. Why give examples if the examples do not explain anything at all?

Under Platinum's reading, the first sentence of the paragraph would authorize any purchase from anyone, at any time, and at any price. That allegation, if accurate, unhinges Section 3.07(h) from any restriction of any kind.

That would turn out to be true if we also accept Platinum's interpretation of Section 3.02 of the indenture. Platinum alleges that 3.02 applies only to redemptions and never to purchases. The argument divorces redemptions from purchases.

Platinum's argument, for better or worse, provides no explanation, despite repeated questions from the Court on this subject, as to why the words "purchase" or "purchased" are used 14 times in Section 3.02, when Platinum can attribute no meaning to those words. The answer, as explained below, is that 3.02 imposes a market test on all purchases. So, even if the first sentence is a standalone sentence, unmodified by the second sentence, it is still subject to a market test.

Langur Maize provides a cogent explanation that that is the only rational interpretation of Section 3.02. The first sentence of Section 3.02 reads:

"If less than all the unsecured notes would be redeemed pursuant to the provisions of Section 3.07 hereof, the trustee will select unsecured notes for redemption or purchase, pro rata, by lot or by such method as it shall deem fair and appropriate."

The Court will use a few hypothetical examples to explain how Section 3 of the indenture works.

All parties in the court agree that Section 3.07 of the indenture regulates redemptions of bonds. If a redemption occurs, the price, terms, and conditions of the redemptions are specified in Section 3.07. If a redemption of all of the bonds occurs in accordance with Section 3, there is no need for a further regulatory paragraph, everyone got redeemed on the same terms. The terms for the 100 percent redemption are clear and undisputed.

But what if what occurs is a partial redemption or a sale, on what terms can these events occur? Those terms are set forth in Section 3.02. The opening clause of Section 3.02 makes clear that it only applies if less than 100 percent of the bonds are redeemed. It reads:

"If less than all of the unsecured notes are to be redeemed pursuant to the provisions of Section 3.07 hereof."

When a purchase or a redemption occurs, there are four general possibilities: All of the notes could be redeemed, some of the notes could be redeemed, all of the notes could be purchased, some of the notes could be purchased. Section 3.02's opening clause merely provides that it is applicable only in the second, third, and fourth of that list of possibilities. It does not apply in the first possibility listed above.

But when Section 3.02 does apply, it mandates fairness in the selection of the notes to be purchased, whether by redemption or otherwise. It allows for a random selection of bonds, a pro rata purchase, or any other similar method that the trustee shall deem fair and appropriate.

Section 3.02's first sentence does not say if less than all of the notes are redeemed are purchased. It says, if less than all of the unsecured notes are to be redeemed pursuant to the provisions of Section 8.07 hereof. To read the "less than all" to include none would mean the Court would be reading 3.02 to include more than just redemptions. It could also include a purchase under 3.07, if 3.07(h) were a type of purchase that was not a type of redemption.

But 3.02 does not only refer to redemptions in later parts of that section. Instead, 14 times throughout that section, the unsecured indenture states "redeem" or "purchase." This implies that there must be some type of purchase that could trigger 3.02 under Section 3.07. That purchase, whether or not it is a purchase that is also a type of redemption, must be included in Section 3.07.

If "less than all" does not include none, and there must be at least the redemption of one note under Section 3.07 to trigger Section 3.02, the words "or purchase," which the drafters included 14 times, would be rendered useless. In other words, if "less than all" did not include none, then any amount of partial redemption, that no purchases under Section 3.07 would trigger Section 3.02, requiring a fair method of selection for redeeming the notes. But this reading would make the words "or purchase" superfluous times 14.

There must be reading of some reading of 3.02 that would trigger the "or purchase" language, and that reading occurs only if none of the notes are redeemed; that is, if there is a purchase of any of the notes, it must be done by fair method. The Court should not read the unsecured indenture so as to render a phrase meaningless, especially a phrase that has been deliberately repeated many times within a single section.

Reading "less than all" to include none is awkward, but it's an awkward reading that fits within the only rational interpretation of the original intent of the drafters. The

Court's job is to read the document to strictly comply with what it believes and the evidence shows is the intended meaning of the provisions that the drafters wrote. The drafters could not possibly have meant to insert the phrase "or purchase" without meaning.

The Court does not need to reach whether 3.07(h)'s "private purchase" is also a type of redemption because, regardless, a transaction under 3.07(h), unless all of the notes were redeemed, which they were not here, triggers Section 3.02's application.

I do not, at this time, impose any remedy for the declaration that that was a breach. That is reserved for a future hearing.

With respect to the 2024 notes, the participating 2024 noteholders voted in favor of the transaction by a two-thirds vote. That is what was required for uptiering. And the Court found on the record, on June 25th, 2024, compliance with Section 3.02 of the 2024 indenture was waived. Therefore, I grant no relief to the 2024 noteholders.

The Court now declares the following:

One, the rights, liens, and interests that were for the benefit of all of the holders of the 2026 notes, as they existed on March 27th, 2022, remained in full force and effect on March 29th, 2022.

Two, the selection of the 2027 notes for exchange was not done in a manner permitted by the 2027 notes indenture.

Three, no relief is granted to the holders of the 2024 notes.

The parties have requested a separate hearing if we need to have damages or some other matter considered by the Court. I know that this opinion is probably not what anyone expected, so I'm going to ask the parties promptly to file a request for a hearing, if one is required, and the parties cannot agree on remaining issues to be decided.

In the meantime, I'm going to hold the expectation that the debtors are going to go ahead and proceed now to act on what their capital structure has now been declared to be. I'm not precluding you from appealing it at all, please don't get me wrong. But I took your statement to say that, once things were clear, you're moving ahead. I think things are now clear enough.

MR. DUNNE: First of all, thank you, Your Honor, for the speed at which you and the Court delivered the opinion today because you're right, the touchstone for the company has been to figure out a path forward, after this trial.

I think it's all true that you've given us a lot all to kind of reflect on, in terms of the contours of the ruling that we heard today. But that should be the cornerstone of how we move forward and hopefully continue discussions among the key constituents to find a path as soon as possible to exit Chapter 11.

THE COURT: I appreciate the comment. Thank you, Mr. Dunne. Thank you all. We're in recess.

(Proceedings concluded at 4:25 p.m.)

* * * * *

I certify that the foregoing is a correct transcript to the best of my ability produced from the electronic sound recording of the proceedings in the above-entitled matter.

/S./ MARY D. HENRY

*CERTIFIED BY THE AMERICAN ASSOCIATION OF ELECTRONIC REPORTERS AND TRANSCRIBERS, CET**337*

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JTT TRANSCRIPT #68857

DATE FILED: JULY 17, 2024

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF TEXAS

In Re: Wesco Aircraft Holdings, Inc. and Official Committee Of Unsecured Creditors Debtor	Case No.: 23−90611 Chapter: 11

Wesco Aircraft Holdings, Inc.,
Plaintiff(s),
vs. Adversary No.: 23−03091
SSD Investments Ltd.,
Defendant(s).

NOTICE OF FILING OF OFFICIAL TRANSCRIPT

An official transcript has been filed in this case and it may contain information protected under the E-Government Act of 2002, and Fed. R. Bank. P. 9037.

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If redaction is necessary, the parties must file a statement of redaction listing the items to be redacted, citing the transcript's docket number, the item's location by page and line, and including only the following portions of the protected information. This statement must be filed within 21 days of the transcript being filed. A suggested form for the statement of redaction is available at https://www.txs.uscourts.gov/.

- the last four digits of the social security number or taxpayer identification number;
- the year of the individual's birth;
- the minor's initials;
- the last four digits of the financial account number; and
- the city and state of the home address.

Any additional redaction requires a separate motion and Court approval.

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Nathan Ochsner
Clerk of Court