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.

LANGUR MAIZE'S MOTION TO STRIKE AND RESPONSE TO DEFENDANTS' SUPPLEMENTAL POST-TRIAL BRIEF

Langur Maize moves to strike all portions of *Platinum, Carlyle, and Senator's Supplemental Post-Trial Brief Concerning Langur Maize Claims* (the "Defendants' Brief") [ECF No. 1480] that do not address consequences of the Court's July 10, 2024, ruling (the "July Ruling").

The parties filed what were supposed to be comprehensive post-closing briefs on June 17, 2024.[2] In a conference after the July Ruling on August 13, 2024, counsel for Platinum argued that additional briefing was necessary to "get a chance to alter our briefing based on what [the Court] said," in the July Ruling, to address "a number of issues that are going to flow out of" the July Ruling, and "obviously not [to add] a bunch of new issues other than as needed to address what happened in Your Honor's first ruling."[3] That is the only additional briefing that the Court allowed. That is not the briefing the Defendants filed.

The Defendants' Brief restates old arguments and adds new arguments completely unrelated to the July Ruling. All such portions of the Defendants' Brief, including the entirety of Section I (which addresses standing — an issue wholly unrelated to the July Ruling), paragraphs 18-23 (addressing the economic interest defense), and paragraphs 35-38 (addressing issues of causation unrelated to the July Ruling), should be stricken.[4]

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[2] On May 16, 2024, the Court permitted the parties to file a post-closing brief that addressed all of the open issues before the Court to be followed by a round of briefing limited solely to the impact of the July Ruling on the remaining claims. May 16, 2024, Tr. 194:18-24.

[3] Aug. 13, 2024, Tr. 66:14-25.

[4] Courts routinely strike party submissions that do not comply with Court orders. *E.g., Ronaldo Designer Jewelry, Inc. v. Prinzo*, 2015 WL 3678113, at *1 (S.D. Miss. June 12, 2015) (striking pleading when defendant failed to comply with Court's order); *Metzger v. Hussman*, 682 F. Supp. 1109, 1110-11 (D. Nev. 1988) (striking opposition when party failed to comply with Court rules); *Hanover Ins. Grp. v. Singles Roofing Co., Inc*., 2012 WL 2368328, at *9 (N.D. Ill. June 21, 2012) (striking supplemental briefing when pleading violated Court's order). The Court possesses the inherent power "to protect the efficient and orderly administration of justice and . . . to command respect for the Court's orders, judgments, procedures, and authority." *In re Stone*, 986 F.2d 898, 902 (5th Cir. 1993). This includes "the ability to strike documents as part of its inherent power to control the docket." *Garza v. Lumpkin*,

Nonetheless, to avoid prejudice, Langur Maize addresses these arguments here.

A. Langur Maize Has Standing to Pursue Claims Against the Defendants.

Section I of the Defendants' Brief rehashes prior arguments about standing. Those arguments neither relate to the July Ruling nor are improved by repetition. This entire section should be stricken. Langur Maize refers the Court to its prior briefing on these issues[5] but responds to certain misstatements and erroneous arguments advanced in the Defendants' Brief.

First, the Defendants falsely assert that the Depository Trust Company (together with its nominee, Cede & Co., the "DTC") does not have the right to pursue remedies or tort claims under the Indenture. This ignores the plain language of the Indenture, Global Note, and Preliminary Offering Memorandum (the "POM").[6] The Indenture defines the "Holder" as the DTC.[7] And the Global Note states that "only registered Holders have rights under the Indenture."[8] The Indenture also states:

> . . . with respect to any Global Note, nothing herein shall prevent the Issuer, the Trustee, or any agent of the Issuer or the Trustee from giving effect to any . . . authorization furnished by any Depositary [*i.e.,* the DTC] (or its nominee), as a Holder, with respect to such Global Note or shall impair, as between such Depositary and owners of beneficial interests in such Global Note, the operation of customary practices ***governing the exercise of the rights of such Depositary [i.e.,* the *DTC] (or its nominee) as***

2023 WL 6385557, at *15 (S.D. Tex. June 1, 2023)*; see also Fisher v. Whitlock*, 784 Fed. App'x 711, 712 (11th Cir. 2019) (affirming district court's striking of "a party's pleading for failure to follow court orders").

[5] *See Langur Maize's Post-Trial Brief* [ECF No. 1395] (the "LM Closing Brief"); *Langur Maize's Response to Order Regarding DTC Documents* [ECF No. 1410] (the "LM Standing Letter").

[6] *See* ECF No. 560-1 at pg. 427 ("So long as the Notes are held in global form, DTC (or its nominees) will be considered the sole holder of the Global Notes for all purposes under the Indentures. In addition, participants must rely on the procedures of DTC, and indirect participants must rely on the procedures of DTC and the participants through which they own Book-Entry Interests, to transfer their interests or to exercise any rights of holders under the Indentures.").

[7] Section 1.01 of the Indenture defines "Holder" as "a Person in whose name an Unsecured Note is registered" and Section 2.08 provides that the registered holders "shall be the [DTC] in the case of the Global Note." *See also* Section 2.03 ("The Issuer initially appoints The Depository Trust Company ('DTC') to act as Depository with respect to the Global Notes.").

[8] ECF No. 538-3 (Global Note) § (11).

Holder of such Global Note.

Indenture § 2.08 (emphasis added). It is clear as day — the DTC, as Holder, has rights under the Indenture and Global Note and may authorize beneficial owners to exercise those rights.

The DTC's rights include the right to pursue remedies for tort claims. Section 6.06 of the Indenture allows the "Holder" (*i.e.,* the DTC) to "pursue ***any remedy with respect to this Indenture or the Unsecured Notes***," so long as certain conditions are met. The nearly identical term "any available remedy" has been interpreted by the New York courts to mean "all remedies available at law and in equity," including tort claims. *See Cortlandt St. Recovery Corp. v. Bonderman ("Cortlandt")*, 96 N.E.3d 191, 198 (N.Y. 2018) (permitting plaintiff to sue for fraudulent conveyances, which are torts under New York law); LM Closing Brief at 32-35.

And where a clause refers to "both the indenture and the securities[,] the securityholder's claims are subject to the terms of the clause, ***whether those claims be contractual in nature and based on the indenture agreement, or arise from common law and statute***." *Quadrant Structured Prods. Co. v. Vertin ("Quadrant")*, 16 N.E.3d 1165, 1173 (N.Y. 2014) (emphasis added). Section 6.06 refers to "both the indenture and the securities" because it refers to both the Indenture and the Unsecured Notes. That Section, therefore, grants the DTC the right to assert common law tort claims such as tortious interference.[9] All of these authorities were cited by Langur Maize in its Closing Brief. That the Defendants have chosen to ignore them only confirms that they control and cannot be rebutted.[10]

[9] *Niche Music Grp., LLC v. Orchard Enters., Inc*., 137 N.Y.S.3d 6, 7 (App. Div. 2020), cited by Defendants, does nothing to advance their argument. There, the court simply observed that a tortious interference claim is not a contract claim for choice of law purposes. *See id.* ("The cause of action for tortious interference with contract . . . is not governed by California law because it does not arise under the parties' contract . . . ."). *Niche Music* did not involve an indenture or notes and cannot alter the controlling principles of *Cortlandt* or *Quadrant*.

[10] The Defendants assert that Section 6.06 does not vest rights in the DTC. *See* Defendants' Brief at fn.3. But they provide absolutely no explanation for why this is, or why the Court should ignore the plain language of

Second, the Defendants choose to ignore the fact (explained in the LM Closing Brief and in the LM Standing Letter) that the DTC Rules, By-Laws and Organization Certificate (the "DTC Rules")[11] expressly provide for the assignment to Langur Maize of the "entire interest" in the 2027 Notes — which interest includes tort claims.

The purchase and sale of beneficial interests (or "security entitlements") in a Global Note is accomplished through a procedure called "Delivery versus Payment."[12] Every transaction effected through Delivery versus Payment follows a sequence: (1) security entitlements are transferred to the DTC's account from the seller's account; (2) the seller's account is credited, and the DTC's account is debited for the payment; and (3) the payment is debited from the buyer's account and credited to the DTC's account, and the security entitlements are transferred to the buyer's account.

During the time when the security entitlements are held in DTC's account, the DTC Rules define the transaction as an "Incomplete Transaction." The DTC Rules provide:

> [DTC] shall hold the ***entire interest*** in, and shall have the authority of a holder of Securities to act, in its sole discretion, with respect to any Securities Delivered Versus Payment, which are the subject of an Incomplete Transaction, to issue or transfer the entire interest in such Securities . . . .

DTC Rules, Rule 9(B) § 2 (emphasis added). The transfer of the "entire interest" to the DTC protects the DTC in the event that it does not obtain payment from the purchaser after it has received delivery of the securities from the seller — it ensures that the DTC is not left holding only a partial interest in the delivered securities after having paid for them. And the DTC then

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Section 6.06 that permits the Holder (*i.e.*, the DTC) to "pursue any remedy with respect to this Indenture or the Unsecured Notes."

[11] ECF No. 1356-1.

[12] *See* LM Standing Letter at 2.

transfers what it holds — the "entire interest" — to a purchaser.

The Second Circuit has held that in determining whether tort claims have been assigned to a purchaser of notes, the relevant inquiry is whether the "***entire interest*** in the notes" has been assigned. *Pa. Pub. Sch. Emps.' Retirement Sys. v. Morgan Stanley & Co., Inc*., 772 F.3d 111, 122-23 (2d Cir. 2014) (emphasis added); *Cortlandt St. Recovery Corp. v. Hellas Telecomms., S.a.r.l*, 790 F.3d 411, 418 (2d Cir. 2015) ("A would-be assignor need not use any particular language to validly assign its claim so long as the language manifests [the assignor's] intention to transfer at least title or ownership, *i.e.*, to accomplish a completed transfer of the ***entire interest*** of the assignor in the particular subject of assignment.") (emphasis added). Thus, to the extent that Langur Maize's predecessor beneficial owner held any rights under the 2027 Notes, those rights were part of the "entire interest" in the 2027 Notes that was transferred and assigned to the DTC and subsequently to Langur Maize pursuant to the DTC Rules.

Contradicted by the case law and DTC Rules, the Defendants' interpretation of the intermediated holding system also would render it dysfunctional. Seventy-plus years ago (when the rule expressed in N.Y. G.O.L. § 13-107 was enacted), notes were traded in paper form between a buyer and a seller. Today, however, a more efficient system has been enshrined in market practice and in law. *See* N.Y. U.C.C. Law §§ 8-102(7); 8-102(14); 8-102(17); LM Standing Letter at 2. There is no need and no practical or efficient way for a buyer of an interest in a global note to discover the identity of a seller. The bond market would be disrupted and the efficiencies of the DTC system undermined if each buyer had to find and contact each seller to negotiate an express assignment every time an interest in a global note was purchased.

B. The Economic Interest Defense is Unavailable to the Defendants.

The Court should strike paragraphs 18-23 of the Defendants' Brief. Nothing in these paragraphs has anything to do with the July Ruling. They merely repeat tired arguments in

violation of this Court's directives.

First, the economic interest defense applies only where a defendant "acted to protect its own legal or financial stake in the ***breaching party's*** business." *Jordan's Ladder Legal Placements, LLC v. Major, Lindsey & Afr., LLC*, 2022 WL 1500772, at *8 (S.D.N.Y. May 12, 2022) (citation omitted) (emphasis in original); *see also Bausch & Lomb Inc. v. Mimetogen Pharms., Inc.*, 2016 WL 2622013, at *11 (W.D.N.Y. May 5, 2016) ("[A]n interferer acting to protect ***its own*** direct interests, rather than its interests in the breaching party, may not raise the economic interest defense.") (emphasis in original).

Section 3.02 of the Indenture states that the "***Trustee*** will select [2027 Notes] for redemption or purchase *pro rata*, by lot or by such method as it shall deem fair and appropriate . . ." (emphasis added). The trustee, WSFS, admitted that it did not do so.[13] As such, the Defendants must show that they had an economic interest in ***WSFS*** — the breaching party.[14]

Platinum and Senator both admitted in discovery that they have no economic interest in WSFS.[15] Carlyle refused to answer the request for admission, but presented no evidence of an economic interest in WSFS.[16] This should end the economic interest inquiry.

Defendants nevertheless cite *Bank of N.Y. Mellon v. Cart 1, Ltd.*, 2021 WL 2358695, at *4 (S.D.N.Y. June 9, 2021) ("*Cart 1*") for the proposition that they have an economic interest in

[13] June 3, 2024, Trial Tr. (Healy) 142:23-25 (testifying that "WSFS [did not] select any notes for redemption in connection with the 2022 [T]ransaction"). And the evidence showed that WSFS was chosen for the role it would play. Bank of New York Mellon resigned as the Indenture Trustee 14 days before the 2022 Transactions, and WSFS took on the role knowing that the transaction had been described publicly as perpetrating "creditor on creditor violence." ECF No. 1306-3. Its Head of Global Capital Markets confirmed both WSFS's knowledge and that this type of "violence" is what WSFS does. June 3, 2024, Trial Tr. (Healy) 214:20-215:4.

[14] The Court's finding that WSFS was exculpated does not prevent Langur Maize from alleging WSFS's breach in support of its tortious interference claim. *See* LM Closing Brief at 13, n.27.

[15] *See* ECF No. 538-97 (Platinum) at RFA 21; ECF No. 534-136 (Senator) at RFA 10.

[16] *See* ECF No. 538-98 (Carlyle) at RFA 10.

WSFS by virtue of its role as the former trustee under the Indenture. Not so. In *Cart 1*, a noteholder requested that a trustee withhold a payment of funds to a swap counterparty because the counterparty allegedly had breached certain swap agreements.[17] In doing so, the noteholder acted to protect an extant economic interest in the corpus of funds withheld by the trustee (which funds would have been residually due to the noteholder). Here, by contrast, the Defendants were not acting to "protect" any identified corpus of funds to which they had an asserted right, much less any other jeopardized legitimate economic interest in WSFS, an independent financial institution. Instead, the Defendants were acting to obtain new benefits for themselves by inducing WSFS to issue them new senior secured notes in violation of the Indenture. They had and have no legally protected economic interest in WSFS.

The Defendants assert that there is no proof that they induced a breach by WSFS. But the record is replete with evidence[18] that the Defendants caused the exclusion of other 2027 Noteholders from the Selective Exchange in breach of Section 3.02 — which evidence will be reviewed at oral argument. And the Exchange Agreement itself — which was negotiated[19] and executed by each of the Defendants — includes closing conditions ***requiring*** Wesco to cause WSFS to deliver new 1.25 Lien Notes to the Defendants and cancel the Defendants' old 2027 Notes.[20]

Second, to the extent that any Defendant posits that equity ownership in Wesco by itself

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[17] *See Bank of New York Mellon, London Branch v. CART 1, Ltd.*, No. 18-CV-6093 (JPO), 2019 WL 4256362, at *5 (S.D.N.Y. Sept. 9, 2019), opinion vacated in part on reconsideration, No. 18-CV-6093 (JPO), 2020 WL 7048182 (S.D.N.Y. Nov. 30, 2020), clarified on denial of reconsideration, No. 18-CV-6093 (JPO), 2021 WL 2358695 (S.D.N.Y. June 9, 2021)

[18] *See* LM Closing Brief at 13-18.

[19] *See* Feb. 8 2024, Trial Tr. (Hou) 129:19-20 ("We negotiated the exchange agreement, and, you know, the documents related to the exchange."); Feb. 9, 2024, Trial Tr. (Smith) 213:20-214:7.

[20] *See* Exchange Agreement [ECF No. 604-19] §§ 4.01 and 4.02(m).

gives rise to the economic interest defense, that Defendant is again flatly wrong. The economic interest defense applies only where the interfering actions are aligned with the interests of the breaching party and is not applicable where the party has acted to protect its own interest to the detriment of the breaching party.[21]

Here, the relevant breach is the violation of Section 3.02 of the Indenture, which required WSFS to "select [2027 Notes] for redemption or purchase *pro rata*, by lot or by such method as it shall deem fair and appropriate . . . ." The act of interference was thus inducing ***WSFS to select only the Defendants' 2027 Notes in the Selective Exchange***. That act did not benefit Wesco. To the contrary, it harmed Wesco as demonstrated at trial and detailed in Langur Maize's briefing. *See* LM Closing Brief 21-29.

The other uptiering cases cited by the Defendants are readily distinguishable. In each, a private equity sponsor acted to benefit its portfolio company and received a benefit from the challenged transactions through its equity ownership of the portfolio company. Certainly, in none of those cases did a sponsor act to benefit itself in its capacity ***as a creditor*** by exchanging its existing debt for new senior debt, and in doing so, ***demonstrably harm*** its portfolio company, as was the case here.[22]

The Defendants also argue that the July Ruling would rule out a finding of malice

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[21] *See Bausch & Lomb Inc.*, 2016 WL 2622013, at *11 (W.D.N.Y. May 5, 2016); *Dell's Maraschino Cherries Co. v. Shoreline Fruit Growers, Inc.*, 887 F. Supp. 2d 459, 484 (E.D.N.Y. 2012) (economic interest defense "only applies when the alleged interfering parties have acted to protect their interest in the breaching party's business . . . not their own"); *Wells Fargo Bank, N.A. v. ADF Op. Co.*, 855 N.Y.S.2d 68, 69 (App. Div. 2008) (economic interest defense not applicable where defendant acted "to profit themselves to the detriment" of the breaching party); *Hudson Bay Master Fund Ltd. v. Patriot Nat'l, Inc.*, 2019 WL 1649983, at *16 (S.D.N.Y. Mar. 28, 2019) ("New York courts have clearly established that interference is justified only where a shareholder acts based on interests that are ***aligned*** with those of the breaching party — that is, where the shareholder acts to protect the breaching party's business and thereby preserve the value of her interests therein.") (emphasis in original).

[22] For further discussion of these uptiering cases, *see Langur Maize's Response to the Platinum Defendants' Renewed Motion for Summary Judgment* [ECF No. 898] pgs. 8-10.

because the Court found that the company and its advisors "believed the 2022 transaction would be in the company's best interests." The Court need not reach the issue of malice because the Defendants cannot satisfy their burden to show that the economic interest defense applies. (Malice is an exception to the economic interest defense.) If the Court, however, were to consider the issue, the fact that the Selected Sellers stripped covenants from the 2027 Notes just before exchanging for new 1.25 lien notes having essentially the same covenants shows malice.[23]

Moreover, the Court's discussion of Wesco's best interests in the July Ruling was based on the company's need for new money in the context of the Secured Exchange. And even in that context, the Court expressly noted that "[n]ot all actions taken in the best interests of a party are done in good faith." July Ruling at 13:12-13. In the context of the Selective Exchange, the evidence shows that the Defendants acted with malice because they had no good faith reason to exclude the other 2027 Noteholders. The Defendants could have obtained 1.25L Notes even if the exchange had been offered to all holders or ratably to all holders.

C. The Breach Procured by the Defendants Harmed Langur Maize.

The Defendants assert new causation arguments, several of which (at paragraphs 35-38 of the Defendants' Brief) are unrelated to the July Ruling and should be stricken. They now argue that Langur Maize has not established causation because it has not shown that the excluded 2027 Noteholders sustained damages as a result of the Defendants' actions. But the parties have stipulated that remedies will be determined in further proceedings after liability has been determined.[24] Any argument regarding the quantum of damages, therefore, is premature.

Moreover, the fact of harm or damages is clear. A plaintiff must establish that the fact of

[23] *See* 601-33 § 2 (Fourth Supplemental Indenture stripping covenants from the 2027 Indenture).

[24] *Stipulated Comprehensive Scheduling Order* at ¶4 [ECF 193].

damage is "reasonably certain." *Tractebel Energy Mktg., Inc. v. AEP Power Mktg., Inc.*, 487 F.3d 89, 110 (2d Cir. 2007). Damages are assessed with reference to the time of breach, not in hindsight. *See Simon v. Electrospace Corp.*, 269 N.E.2d 21, 26 (N.Y. 1971) ("The proper measure of damages for breach of contract is determined by the loss sustained or gain prevented at the time and place of breach."); *Lucente v. IBM*, 310 F.3d 243, 262 (2d Cir. 2004) ("New York courts have rejected awards based on what the actual economic conditions and performance were in light of hindsight.") (citations and internal quotations omitted).

Here, the Defendants orchestrated a non-*pro rata* uptier of their own 2027 Notes in violation of the Indenture. All other 2027 Noteholders were left holding unsecured notes that now sat behind the Defendants' new senior secured claim on Wesco's assets. The harm is manifest.

And evidence adduced at trial confirms well beyond a reasonable certainty that the excluded 2027 Noteholders were harmed at the time of breach:

- PJT's witness testified[25] that:
  - At the time of the Selective Exchange, PJT thought that the 1.25L Notes would be "in-the-money."
  - PJT believed that "giving [the Defendants] a collateralized position had greater economic value than leaving them in an unsecured position."
  - "The exchange into the [1.25L Notes] would put that debt tranche above the other tranches . . . . So there is value in that context."
  - Carlyle and Senator would be "strongly incentivized to support and participate in the [Selective Exchange] as their position in the capital structure [would change] from unsecured to super senior second out . . . ."
- Platinum's witness testified[26] that:
  - The Selective Exchange "doesn't feel like it's fair."
  - "[T]he reality was that net net, accepting the limitations of this deal . . . obviously meant that some people were unfairly treated . . . ."

[25] Feb. 21, 2024, Trial Tr. (O'Connell) 69:14-70:1; 68:19-69:3; 66:24-67:67:2; 63:3-16.

[26] Feb. 1, 2024, Trial Tr. (Vorderwuelbecke) 57:13-17; 57:23-58:1.

- Silver Point's witness testified[27] that:
  - Excluded holders "would be relatively worse off the day after than the day before."
  - The Defendants would experience a "windfall" by uptiering their 2027 Notes into New 1.25L Notes.
  - In a March 14, 2022 email, Silver Point employees recognized that the Selective Exchange would result in "a very good outcome for Carlyle" due to "uptiering bonds trading in the 20s for a 2L the desk values at ~ 70."

Willfully ignoring this evidence and declining to exercise common sense, the Defendants advance spurious arguments for why their actions somehow did not cause harm.[28]

First, the Defendants argue that Section 3.02 permitted WSFS to select 2027 Notes for purchase by lottery, and thus it is speculative to suggest that any of Langur Maize's predecessor's 2027 Notes would have been selected if a lottery had been used. This is absurd. The probability that only the Defendants' 2027 Notes, and none of the 2027 Notes held by Langur Maize's predecessor, would have been selected if WSFS had run a lottery is infinitesimal. But what is certain is that the Defendants' actions precluded WSFS from selecting 2027 Notes at all, thereby ***guaranteeing*** that the excluded noteholders would suffer injury. Illusory counterfactuals cannot defeat actual evidence of harm. By depriving all other 2027 Noteholders of the opportunity to participate in the Selective Exchange, the Defendants caused the ***certain result*** that the other 2027 Noteholders would be injured.

Second, the Defendants argue that it is speculative whether the Selective Exchange would have occurred if the Secured Exchange had not occurred. Again, this is counterfactual and

[27] Feb. 12, 2024, Trial Tr. (Prager) 187:1-6; Feb. 13, 2024, Trial Tr. (Prager) 72:18-4; 74:22-76:17; ECF Nos. 782-10 (3/10/2022 email from Prager to Zinman); 563-1 (3/14/2022 email from Zinman to Montague).

[28] The Defendants also argue that the value of the 2027 Notes increased after the announcement of the Selective Exchange. *See* Defendants' Brief at 13 fn.9. The Defendants cite a chart prepared by Joseph Denham, the Committee's expert. That chart, however, was admitted only for the purpose of impeaching the witness's choice of a time period for his analysis. May 16, 2024, Trial Tr. (Denham) 103:24-104:4. The chart also shows that the price of the 2027 Notes decreased from 64.03 cents on December 27, 2021, to 39.23 cents on April 28, 2022. The Defendants have not introduced any evidence that would allow the Court to interpret these data points. Langur Maize will introduce evidence of the measure of damages at the damages phase of this trial.

irrelevant. The Selective Exchange ***did*** occur, it was orchestrated by the Defendants, and it caused injury to the excluded 2027 Noteholders at the time of the breach.

Nevertheless, the Defendants confusingly suggest that "Langur Maize seeks retroactive inclusion in a transaction that, per the Court's Phase One Ruling, could not and did not happen." Defendants' Brief at ¶ 33. But the Court has never ruled that the Selective Exchange did not happen. To the extent that the Defendants are improperly conflating the Selective Exchange with the Secured Exchange, their argument makes no sense. The Secured Exchange was a separate transaction from the Selective Exchange; the Exchange Agreement itself references the "transactions" in the plural.[29] And the Court's July Ruling did not even unwind the entire Secured Exchange — it simply held that the additional 2026 Notes were not issued while granting no relief to the excluded 2024 Noteholders. If the Defendants' argument were correct, then the new first lien notes that were exchanged for old 2024 Notes would not exist.[30]

Moreover, the Defendants cannot advantage themselves by arguing that their own wrongdoing in orchestrating the Selective Exchange and Secured Exchange created uncertainty with respect to Langur Maize's damages. *See Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 563 (1931) ("Where the tort itself is of such a nature as to preclude the ascertainment of the amount of damages with certainty, it would be a perversion of fundamental principles of justice to deny all relief to the injured person."); *Bigelow v. RKO Radio Pictures*,

[29] Exchange Agreement [ECF No. 604-19] at § 2.02(a)(iii) ("the ***transactions*** described above . . . are collectively referred to in this Agreement as, 'the Exchange'") (emphasis added).

[30] The Defendants' "public policy" argument fails for the same reasons. The cases cited by the Defendants are wholly inapplicable and do not advance the argument. *See Benjamin v. Koeppel*, 85 N.Y.2d 549, 553 (1995) (attorney-plaintiff was entitled to recovery despite not having complied with registration requirements); *Naimo v. La Fianza*, 369 A.2d 987, 992 (N.J. Super. Ct. Ch. Div. 1976) (plaintiff could not sue upon an agreement that was "made in part to induce plaintiff to engage in illicit intercourse and adultery"); *Zollinger v. Carrol*, 49 P.3d 402, 405 (Idaho 2002) (dismissing promissory estoppel claim because plaintiff was not third party beneficiary to unlawful shareholder agreement).

327 U.S. 251, 265-66 (1946) ("Difficulty of ascertainment is no longer confused with right of recovery for a proven invasion of the plaintiff's rights."). A defendant "cannot complain" about a plaintiff's damages being uncertain when its "own wrong . . . rendered it impossible for [the] plaintiff to prove [its] damages with more certainty" because "[a]ny other rule would enable the wrongdoer to profit by his wrongdoing at the expense of his victim." *See Spitz v. Lesser*, 302 N.Y. 490, 494 (1951) (quoting *Bigelow*). The Defendants bear the risk of any uncertainty regarding damages owed to Langur Maize resulting from their own wrongful conduct.

Third, the Defendants argue that there is reason to doubt that Langur Maize's predecessors would have chosen to participate in the Selective Exchange if it had been offered to them. Again, this is an irrelevant counterfactual assertion. The excluded holders would have been just as "strongly incentivized" as the Defendants to obtain a secured claim that PJT believed was "in-the-money;" they were never even given the option to decide.[31] Even options have value, and options that are "in the money" at the time they can be exercised are valuable indeed.

Fourth, the Defendants argue that Langur Maize's predecessors might not have attempted to sell 1.25L Notes even if they had received them. This is irrelevant because damages are ascertained at the time of breach. *See LG Cap. Funding, LLC v. CardioGenics Holdings, Inc*., 787 Fed. App'x 2, 3 (2d Cir. 2019) ("Where the breach involved the deprivation of an item with a determinable market value, the market value at the time of the breach is the measure of damages.") (citation omitted). Whether or not the 1.25L Notes could, in hindsight, have been sold at some later time does not change the fact of damages at the time of breach.

The evidence establishes that Langur Maize was harmed. Langur Maize will establish the amount of its damages in the next phase of this case.

[31] *See supra* note 25 and accompanying text.

D. The Court Correctly Held that Section 3.02 Applies to Purchases.

The Defendants argue that they were prejudiced by the Court's finding that Section 3.02 applies to purchases because the Court had reached a different conclusion in its summary judgment opinion. This same argument was properly rejected during closing argument when the Court stated: "[the summary judgment order is] an interlocutory order and I've got to figure out the right answer now."[32] The Court was and is correct. The summary judgment order was interlocutory, and the Court was free to reconsider it at any point and for any reason prior to entering final judgment. *See Saqui v. Pride Cent. Am., LLC*, 595 F.3d 206, 210-11 (5th Cir. 2010) (A court "is free to reconsider and reverse [an interlocutory order] for any reason it deems sufficient, even in the absence of new evidence or an intervening change in or clarification of the substantive law.") (citations and internal quotations omitted); *In re Ramirez*, 2010 WL 1528880, at *1 (Bankr. S.D. Tex. June 24, 2010) (A court "may review, modify, or rescind an interlocutory partial summary judgment order at any time before final decree.").

The Defendants point to two pieces of extrinsic evidence to claim that they were prejudiced by the July Ruling:[33] (i) the POM; and (ii) a prior version of the Indenture. But Section 3.02 is not ambiguous, and thus parol evidence cannot be considered. *See Wayland Inv. Fund, LLC v. Millenium Seacarriers, Inc.*, 111 F. Supp. 2d 450, 454 (S.D.N.Y. 2000) ("The parol evidence rule bars the consideration of extrinsic evidence of the meaning of a complete written agreement if the terms of the agreement, considered in isolation, are clear and unambiguous.");

[32] June 25, 2024, Trial Tr. 297:7-10.

[33] The Defendants cite to a Second Circuit case, *Leddy v. Standard Drywall, Inc.*, 875 F.2d 383, 386 (2d Cir. 1989), for the proposition that a court must always notify the parties when revising an interlocutory order and allow the parties to present evidence on the revised issue. While the Fifth Circuit has referenced the rule from *Leddy*, it has not accepted it as suggested by the Defendants. *F.D.I.C. v. Massingill*, 24 F.3d 768, 774 (5th Cir. 1994). In *F.D.I.C.*, the Fifth Circuit held that the district court did not abuse its discretion when it revisited an interlocutory order despite the fact that "the court did not ask explicitly whether the parties wished to present evidence" regarding the revised issue. *Id.*

M&T Bank Corp. v. LaSalle Bank Nat'l Ass'n, 852 F. Supp. 2d 324, 332 (W.D.N.Y. 2012) ("Because the Indenture is an integrated document and the challenged language is unambiguous, the parol evidence rule precludes consideration of the [offering memorandum]."). Platinum itself produced these materials before the Defendants drafted their 145-page summary judgment briefs. There is no prejudice.

Even if the POM were available to aid the Court in interpreting Section 3.02, it provides only additional support for the July Ruling. As the Defendants point out, the POM did not contain the word "purchase" in the equivalent section to Section 3.02. The fact that it appears in the Indenture (which is not "***preliminary***," is dated 14 days after the POM, and controls in the event of any inconsistency)[34] thus means that the parties intentionally added it to Section 3.02. As the Court said, "[t]he drafters [of Section 3.02] could not possibly have meant to insert the phrase 'or purchase' without meaning."[35] And certainly not 14 times.

At closing, the Court asked Defendants' counsel why the word "purchase" was included in Section 3.02 if the provision did not apply to purchases. Defendants' counsel had no answer then, and they still have no answer. This confirms that the Court reached the correct conclusion.

CONCLUSION

For these reasons, Langur Maize requests that the Court enter a finding of liability against the Defendants on Langur Maize's tort claims.

[34] *See* POM pg. iii ("The initial purchasers make no representation or warranty, express or implied, as to the accuracy or completeness of the information set forth in this [POM], and nothing contained in this [POM] is, nor should you rely upon it as, a promise or representation, whether as to the past or the future."); pg. i ("You should not assume that the information contained in this offering memorandum is accurate as of any date other than the date on the front cover of this offering memorandum. Neither the delivery of this offering memorandum nor any sale made hereunder shall under any circumstances imply that the information herein is correct as of any date subsequent to the date on the front cover of this offering memorandum").

[35] July 10, 2024, Hr'g Tr. 37:3-5.

DATED: September 16, 2024

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was filed on this September 16, 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
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