Docket #1485 Date Filed: 9/18/2024

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE 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
SSD INVESTMENTS LTD., *et al.*, Counterclaim Plaintiffs, *v.* **WESCO AIRCRAFT HOLDINGS, INC.**, *et al.*, Counterclaim Defendants.	

2024/2026 HOLDERS' SUPPLEMENTAL POST-TRIAL BRIEF ON TORTIOUS INTERFERENCE

[Pursuant to ECF No. 1482]

[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.

2390611240919000000000003

PRELIMINARY STATEMENT

A third party that procures a breach of contract for its own direct economic gain and to the detriment of a non-breaching party cannot escape liability for tortious interference simply by pointing to a financial interest that it has in the breaching party. To hold otherwise would let the economic interest exception swallow the rule. New York law forecloses that result.

At the upcoming closing argument on tortious interference, the Court is adjudicating only liability, not damages, since the Adversary Proceeding was bifurcated. *See* ECF 193 ¶ 4. Thus, the total quantum of harm suffered by the 2026 Holders because of the breach of the 2026 Indenture—and whether the 2026 Holders can or will be fully compensated for that harm through distributable value from the Debtors' estates—is for another day. The question now is simply whether PIMCO, Silver Point, Citadel, Platinum, or Senator (together, the "Interferers") tortiously interfered with the 2026 Indenture. The answer is yes.

This Court has found already that the 2022 Transaction breached the 2026 Indenture. The Court has also found 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," and that the board "expected PIMCO and Silver Point would use that power." *See* ECF 1474 ("Oral Ruling") at 11:15-18. The Interferers also knew that the 2022 Transaction would harm the 2026 Holders: in fact, that was the premise of PIMCO's and Silver Point's investment thesis. They admitted to acting in their own economic self-interests by trying to capture a 64% internal rate of return (as calculated by PIMCO) that would only be possible by taking a constitutionally protected property interest from excluded holders. For its part, the Platinum-controlled board, with no *bona fide* independent director, approved a transaction that would place Platinum's unsecured debt instruments ahead of the 2026 Holders, so that Platinum would be in the fulcrum of a bankruptcy.

The economic interest defense offers no safe harbor for such self-interested conduct, and the Interferers, who have the burden of proof, cannot meet it.[2]

ARGUMENT

I. The 2026 Holders have proven each affirmative element of tortious interference.

The 2022 Transaction breached a valid contract—the 2026 Indenture—and there is no dispute that the Interferers were aware of it. The "dominoes" transaction conceived of by PIMCO and Silver Point was "negotiated in its totality," *see* Oral Ruling at 15:6-11, and it could not have gone forward without the consents delivered by PIMCO and Silver Point (who also could and would block any other deal), nor could it have closed without the approval of the Platinum-dominated directors.

The question at the September 23 closing argument is thus whether the Interferers "intentional[ly] procure[d]" a breach of the 2026 Indenture without justification. *See* ECF 508 ("Summary Judgment Opinion") at 54 (quoting *Thompson v. Bosswick*, 855 F. Supp. 2d 67, 82 (S.D.N.Y. 2012)). They did. *See* ECF 1394 ("2024/2026 Holders' Post-Trial Brief") at 34-37. [3]

Under New York law, it is irrelevant whether the Interferers subjectively believed the 2022 Transaction complied with the 2026 Indenture. The New York Court of Appeals instructs that tortious interference requires only knowing about the contract and intentional interference, not the interferers' subjective understanding of the details of the contract and whether it was breached.

[2] In addition to the arguments set forth herein, the 2024/2026 Holders expressly incorporate by reference the relevant portions of their previous written submissions, including their MSJ Objection, Standing Motions, Standing Motion Replies, and their Post-trial Brief, as well as their oral and other written submissions. *See, e.g.*, ECFs 299, 1394; Main Case ECFs 652, 1235. The 2024/2026 Holders also join Langur Maize's arguments with respect to tortious interference in its post-trial briefs, *see* ECFs 1395 and 1484, except to the extent that its characterization of the 2022 Transaction accepts the Counterclaim Defendants' feigned sequencing or steps.

[3] Unless otherwise indicated, all citations to briefs, motions, and stipulations filed in the above-captioned matter and on the main case docket cite to the relevant paragraph, section number, or internal page number. Likewise, citations to transcripts on the docket cite to the relevant internal page number and line number. All citations to other documents on the docket cite to the relevant page number assigned by the Court's electronic filing system.

See Guard-Life Corp. v. S. Parker Hardware Mfg. Corp., 406 N.E.2d 445, 449-450 (N.Y. 1980) (recognizing that interferers often lack knowledge of the details of breached agreements). The Interferers are thus liable because they "commit[ted] intentional act[s] whose probable and foreseeable outcome" was the breach. *@Wireless Enters., Inc. v. AI Consulting, LLC*, No. 05–CV–6176 CJS(P), 2011 WL 1871214, at *11 (W.D.N.Y. May 16, 2011) (citation omitted); *Restatement (Second) of Torts* § 766 cmt. j (interferer has intent even if it "does not act for the purpose of interfering with the contract or desire it but knows that the interference is certain or substantially certain to occur as a result").

In any event, PIMCO and Silver Point only pursued the more profitable (lower loan-to-value ratio) "additional notes" path *after* they had tried and failed to attain a genuine two-thirds supermajority through the so-called "co-op" path. The only credible explanation for this pivot by these highly sophisticated, self-interested investment professionals is that they knew the peril of proceeding without a two-thirds supermajority but their investment return was predicated on the discharge of the 2026 Notes' liens, so they used their coercive power to induce the breach anyway. The Interferers, moreover, cannot rely on self-serving assertions of their subjective understanding given the volume of information that PIMCO and Silver Point withheld from production on the basis that it included internal economic analysis (*see, e.g.*, ECF 620 ¶¶ 1, 5-6 (motion to preclude evidence)), as well as on grounds of attorney-client privilege (*see, e.g.,* Oral Ruling at 12:23-13:18). *See also Offshore Marine Contractors, Inc. v. Palm Energy Offshore, LLC*, No. CIV.A. 10-4151, 2013 WL 5530273, at *12 (E.D. La. Oct. 7, 2013) (case history omitted) (finding that evidence contemporaneous to the events "is significantly more probative than evidence of the parties' after-the-fact machinations").

Tortious interference strikes a balance between freedom of action and a bedrock commercial principle in New York: "respect for the integrity of contractual relationships[.]" *Guard-Life*, 406 N.E.2d at 448. And while New York courts impose a high burden on claims for tortious interference with *prospective* economic relationships, "greater protection" is given to *existing* contracts. *White Plains Coat & Apron Co. v. Cintas Corp.*, 867 N.E.2d 381, 383 (N.Y. 2007) (quoting *Guard-Life*, 406 N.E.2d at 449). The tortious interference doctrine is thus at its strongest when protecting the 2026 Holders' existing, bargained-for rights under the 2026 Indenture, and it applies here.

II. The Interferers' economic interest defenses fail.

None of the Interferers met their burden of establishing an economic interest defense. *See Momentive Performance Materials USA, Inc. v. AstroCosmos Metallurgical, Inc.*, No. 107–CV–567, 2009 WL 1514912, at *8 (N.D.N.Y. June 1, 2009) (burden on interferer). As the New York Court of Appeals has explained, the Interferers' motivation and the nature of their relationship determine the availability of the economic interest defense. *See Guard-Life,* 406 N.E.2d at 447-448 (adopting *Restatement (Second) of Torts* § 767); *accord White Plains Coat & Apron Co.*, 867 N.E.2d at 383 & n.4, 394 n.11 (citing *Restatement* §§ 766, 768).

Here, the Interferers' investment theses relied on creating new economic positions in the Company—New 1L and New 1.25L Notes—at the involuntary expense of the 2026 Holders and with the intention of harming them. The Interferers did not protect existing economic interests in the 2024, 2026, and 2027 Notes, which were exchanged for different instruments, but they now ask the Court to expand the economic interest defense to protect *any* breach procured for *any* benefit. The economic interest defense cannot be stretched this far.

New York law specifically distinguishes situations where the interferer's sole benefit is derivative of the breaching party and those where interferers are acting to benefit their own, direct

interests. For this reason, "an interferer acting to protect *its own* direct interests, rather than its interests in the breaching party, may not raise the economic interest defense." *Hudson Bay Master Fund Ltd. v. Patriot Nat'l Inc.*, No. 16 Civ. 2767, 2019 WL 1649983, at *16 (S.D.N.Y. Mar. 28, 2019) (emphasis in original) (citation omitted). Or, as another court explained, an interferer is liable when it is "motivated" by the opportunity "to increase its own profits" rather than "acting to protect its" existing indirect interest in the breaching party. *RBG Mgmt. Corp. v. Vill. Super Mkt., Inc.*, 692 F. Supp. 3d 135, 145 (S.D.N.Y. 2023).

In this case, the Interferers had preexisting economic interests in the form of 2024, 2026, and 2027 Notes, but their inducement of the 2022 Transaction was not intended to protect or benefit those positions. Instead, PIMCO and Silver Point coerced the breach because, in order to attain an outsized rate of return, they needed to create new positions secured by collateral wrongfully taken away from other noteholders.[4] Platinum, meanwhile, intended to benefit by leapfrogging the 2026 Holders in the event of a bankruptcy.[5] All of the Interferers thus exchanged their preexisting notes for new ones, and an interferer cannot assert an economic defense when it divests itself of that interest. *See Wells Fargo Bank, N.A. v. ADF Operating Corp.*, 855 N.Y.S.2d 68, 69 (N.Y. App. Div. 1st Dep't 2008) (rejecting economic interest defense where interferers sold their shares of the breaching party).

New York's appellate courts also have long recognized that third parties are not immune from liability when they induce a breach for a direct financial benefit. In *Hoag v. Chancellor, Inc.*, for example, corporate officers deprived their former colleagues of compensation, and the trial

[4] ECF 1394 at 34. ECF 700-58 at 3 (Sept. 28, 2021 PIMCO deck on Incora); *see also* ECF 955 (Dostart, Feb. 28 Tr.) at 198:14-25, 199:21-200:4, 226:14-227:5; ECF 710-54 at 2; ECF 1013 (Prager, Feb. 12 Tr.) at 81:1-83:6; ECF 700-58 at 3 ("attach remains at ~15% LTV").

[5] ECF 1394 at 34-35. ECF 623-5 at 15 ("Non-AHG Secured Noteholder net attach increased from 2.4x to 12.8x;" "Participating Unsecured Noteholder net attach / detach improved from 12.7x and 16.4x to 9.2x and 12.8x"); *see* ECF 595-2 at 2; ECF 697 (Vorderwuelbecke, Feb. 1 Tr.) at 126:1-8, 144:4-8, 179:9-16.

court wrongly dismissed a tortious interference claim on the basis that the breach helped the company financially. 677 N.Y.S.2d 531, 533-34 (N.Y. App. Div. 1st Dep't 1998). As the Appellate Division explained in reversing the trial court, "a corporate officer could be 'held accountable, regardless of whether he acted in furtherance of the interests of [the] corporation' in part because he acted 'in his own best interests.'" *Id.* at 534 (quoting *Herald Hotel Assocs. v. Ramada Franchise Sys.*, 595 N.Y.S.2d 28, 29 (N.Y. App. Div. 1st Dep't 1993) and collecting authorities); *see also Wells Fargo Bank, N.A.*, 855 N.Y.S.2d at 69.

Applying this principle, courts thus deny the economic interest defense to self-interested interferers even where the breaching party's interests were also advanced by the breach. In *Bausch & Lomb v. Mimetogen Pharmaceuticals*, for example, the interferer saved the breaching party from paying a substantial exit fee, but the court rejected the economic interest defense because the interferer's "reason for inducing a breach of the [a]greement was to protect *its own expected interest in*" another company, "not to protect its interest in" the breaching party. No. 14-CV-6640-FPG, 2016 WL 2622013, at *12 (W.D.N.Y. May 5, 2016) (emphasis in original). Similarly, in *Dell's Maraschino Cherries Co. v. Shoreline Fruit Growers, Inc.*, the interferers' actions helped the breaching company profit by selling cherries for a higher price than it would have received under an installment contract. 887 F. Supp. 2d 459, 467, 484 (E.D.N.Y. 2012). The economic interest defense was nonetheless "inapplicable" because the interferers induced the breach to avoid a "financially ruinous" outcome for *their* business, not the company's. *Id.* at 484. *See also N. Shore Window & Door, Inc. v. Andersen Corp.*, No. 19-cv-6194, 2021 WL 4205196, at *11 (E.D.N.Y. Aug. 3, 2021) (denying economic interest defense despite benefit to breaching party).

A. The economic interest defense does not allow a bondholder to interfere with an issuer's contractual obligations to another bondholder.

The economic interest defense does not protect secured creditors who induce a breach to wrongfully strip collateral rights from someone else for their own direct economic benefit. Yet, that is the perverse result the Interferers seek.

On rare occasions, New York's appellate courts have found that creditors may assert an economic interest defense. But they have done so sparingly and in markedly different circumstances than those here. In *Ultramar Energy v. Chase Manhattan Bank*, for example, a secured creditor exercised a *bona fide* contractual right to seize certain collateral which, in turn, caused the borrower to breach a separate contractual obligation owed to a third party. 579 N.Y.S.2d 353, 354 (N.Y. App. Div. 1st Dep't 1992). The Appellate Division found that the creditor's actions were justified by its economic interest in the collateral and, thus, upheld the dismissal of a tortious interference claim. *See id*. Likewise, *Abele Tractor & Equip. Co. v. Schaeffer* applied the economic interest defense to secured creditor who validly repossessed goods that debtor had agreed to sell to plaintiff. 91 N.Y.S.3d 548, 552 (N.Y. App. Div. 3rd Dep't 2018).

The Interferers here side-step that limited application of the economic interest defense to secured creditors, and instead they rely on a handful of inapposite federal trial court decisions that applied the economic interest defense to bondholders purporting to protect their right to payment of principal and interest on existing debts. *See Bank of New York Mellon, London Branch v. Cart 1, Ltd.*, No. 18-CV-6093 (JPO), 2021 WL 2358695, at *4 (S.D.N.Y. June 9, 2021); *U.S. Bank Nat'l Ass'n v. Triaxx Asset Mgmt. LLC*, No. 18-CV-04044 (VM), 2019 WL 4744220, at *9 (S.D.N.Y. Aug. 26, 2019) (breach of service agreements resulted in more funds to pay debts). Those cases are readily distinguishable because, unlike the defendants there, the Interferers did not

exercise any *bona fide* contractual rights against collateral; rather, they induced the breach to create new notes, secured by someone else's rights to collateral.

For the economic interest doctrine to attach, interferers "must" exercise a right that is "'equal or superior' to" that of the non-breaching party for a court to "conclude that [they] were acting with 'just cause or excuse.'" *Green Star Energy Sols., LLC v. Edison Properties, LLC*, No. 21-CV-2682 (LJL), 2022 WL 16540835, at *16 (S.D.N.Y. Oct. 28, 2022) (quoting *Felsen v. Sol Cafe Mfg. Corp*., 249 N.E.2d 459, 461 (N.Y. 1969)). The Interferers here, however, were not exercising any contractual or other right when they coerced the Company to breach the 2026 Indenture by purporting to strip away the 2026 Holders' constitutionally protected property interest in the collateral.

The Interferers also rely on three trial-court decisions addressing different liability management transactions, but those rulings are easily distinguishable. *See* ECF 1398 at 76-77 (discussing *TriMark*, *Boardriders*, and *Mitel*). Each of the transactions involved credit agreements, not bond indentures, and the excluded holders' claims against participating holders relied on breach of contract and breach of the implied covenant of good faith and fair dealing. The tortious interference claims thus lay principally against the sponsor.[6] And here, unlike those motion to dismiss decisions, this Court has a trial record establishing that Platinum sought to improve its own direct interests by getting into the fulcrum position in the event of a bankruptcy, improving its lien priority, and rolling up an illusory promissory note, without providing any new capital.[7] Platinum's participation is thus distinct from the equity owners in those cases, as well as

[6] Though one alleged interferer in *Mitel* also held the company's debt and invoked the economic interest doctrine, that creditor received full repayment of its *existing* debt. *See Ocean Trails CLO VII v. MLN TopCo Ltd.*, Index No. 651327/2023, ECF 30 (Am. Compl.), ¶¶ 3, 9, 16.

[7] *See* ECF 1394 at 34-35; *see, e.g.*, ECF 879 (O'Connell, Feb. 21 Tr.) at 187:5-188:11 (Debtors' contemporaneous projections assumed that the $25 million promissory note would not be paid at maturity); ECF 610-18, at 7 (March 2, 2022, PJT and Milbank reiterating Platinum's inclusion in exchange of unsecured holdings for "Super Senior Second-Out Debt").

Robertshaw, where Judge Lopez recently found that an equity sponsor in yet another credit-agreement dispute did not intend to procure a breach because it neither structured, voted for, nor influenced other participants to execute the challenged transaction. *In re Robertshaw US Holding Corp.* No. 24-90052, 2024 WL 3200467, at *13 (Bankr. S.D. Tex. June 20, 2024).

While Platinum might ordinarily be entitled to assert an economic interest defense as shareholder if it were acting to protect its equity position derivatively, a corporate parent loses that defense when it procures a breach to advance its own direct interests, not the company's interest, from which the interferer would benefit only indirectly. In *North Shore Window & Door, Inc. v. Andersen Corp.*, for instance, the court rejected a parent company's economic interest defense to procuring a breach of a distribution agreement because of its self-interest. 2021 WL 4205196, at *11. The subsidiary saved money, but the parent company procured the breach to enrich itself by "rely[ing] on its own network of sales employees and service subcontractors." *Id*. So too here. Platinum sought substantial *independent* benefits by rolling its unsecured debt into secured notes.

B. The economic interest defense does not excuse the Interferers' conduct.

The Interferers insist that the 2026 Holders must show fraudulent or illegal means to overcome their economic interest defense. They are wrong. Even if the Interferers had established that they were acting to protect a preexisting economic interest equal or superior to the 2026 Holders' liens—which they were not, as discussed above—the economic interest defense does not protect their conduct.

As a threshold matter, New York's intermediate appellate courts have held that the economic interest defense is "*inapplicable*" to allegations of "for interference with an existing contract, rather than a prospective economic relationship." *Kronish Lieb Weiner & Hellman LLP v. Tahari, Ltd.*, 829 N.Y.S.2d 7, 9 (N.Y. App. Div. 1st Dep't 2006) (emphasis added). The New York Court of Appeals, moreover, instructs that liability for interference with an existing contract

can attach "even if the defendant was engaged in lawful behavior." *NBT Bancorp Inc. v. Fleet/Norstar Fin. Grp., Inc.*, 664 N.E.2d 492, 496 (N.Y. 1996).

The economic interest defense is also unavailable here because the trial evidence demonstrates "either malice on the one hand, or fraudulent or illegal means on the other." *N. Shipping Funds I, L.L.C. v. Icon Cap. Corp.*, No. 12 Civ. 3584 (JCF), 2013 WL 1500333, at *5 (S.D.N.Y. Apr. 12, 2013) (citations omitted); *see also In re Refco Inc. Secs. Litig.*, 826 F. Supp. 2d 478, 519 ("New York only requires proof of malice if the economic interest defense has been triggered.") (quoting *White Plains Coat & Apron Co.*, 867 N.E.2d at 382). As explained by the Restatement—which the Court of Appeals often cites in tortious interference cases—"what is meant is not malice in the sense of ill will but merely 'intentional interference without justification.'" *Restatement* § 766.

By wrongfully exercising dominion over the 2026 Holders' property interest, the Interferers used illegal means, even if it did not amount to conversion under the Court's summary judgment ruling. When the alleged interference constitutes an independent wrong, the economic interest defense is unavailable. *See 138-77 Queens Blvd LLC v. Silver*, 682 F. Supp. 3d 271, 286 (E.D.N.Y. 2023) (fraudulent transfer negated economic interest defense). Breaches of fiduciary duties—such as the Platinum directors' approval of the self-dealing 2022 Transaction—likewise negate the economic interest defense. *See Lannan Found. v. Gingold*, 300 F. Supp. 3d 1, 28–29 (D.D.C. 2017) (applying *Restatement* § 767).

Apart from illegal acts, New York's Court of Appeals has also included "economic pressure" as a type of "wrongful conduct" that can establish tortious interference liability. *Guard-Life,* 406 N.E.2d at 449 (listing conduct that improperly interferes with prospective contracts). Here, the Court has already found that PIMCO and Silver Point exerted extreme economic pressure

by using their "power position" to coerce a transaction and forcing the Company to choose between breaching the 2026 Indenture or filing for immediate bankruptcy. And PIMCO and Silver Point enticed Platinum to support the 2022 Transaction by allowing it to exchange its unsecured debt for new notes with junior liens. Not surprisingly, Platinum's interested directors approved the deal. *See* ECF 1395 at 12-32 (finding Company's so-called independent director did not act independently).

Finally, the Interferers' malice is also demonstrated by the covenants stripped by the 2022 Transaction, including the removal of a provision to obstruct the 2026 Holders from redressing the breach. *See* ECF 1350 (Healy, Jun. 3 Tr.) at 293:20-295:11 (admitting that, in his decades of experience, he has never seen the right of a majority of holders to appoint a replacement trustee stripped from any other indenture).

III. The 2024/2026 Holders are entitled to a complete remedy.

At the core of the Interferers' argument is a fundamental misunderstanding of why the economic interest defense exists under New York law. Tortious interference expands liability to third parties who were responsible for inducing a breach, and it does so as a matter of tort liability and damages, not in contract solely against the breaching party. *See Guard-Life,* 406 N.E.2d at 452 n.6. One who tortiously interferes with another's contract becomes legally responsible for making the non-breaching party whole, by restoring it to the position it would have occupied absent the breach, at the time of the breach. This is particularly important if the breaching party cannot provide a complete remedy to the claimant.

A finding of tortious interference will thus ensure that the 2024/2026 Holders have a complete remedy for the breach that the Court has already found, as PIMCO and Silver Point have exhibited their intention to have the Company suffer at the expense of their breaching deal.

CONCLUSION

For the foregoing reasons, the Court should find the Interferers liable for tortious interference with the 2026 Indenture and set a schedule for further proceedings to ascertain damages.[8]

[*Remainder of Page Left Intentionally Blank*]

[8] Given the Court's oral ruling that the 2022 Transaction did not breach the 2024 Indenture, this brief does not address tortious interference with that contract. *See* Oral Ruling at 37:14-19. If that finding were reversed, whether by a final order or on appeal, the arguments herein would apply with equal force to the 2024 Notes.

Dated: September 18, 2024
New York, New York

Respectfully submitted,

KOBRE & KIM LLP

By: */s/ Zachary D. Rosenbaum*

Zachary D. Rosenbaum
Adam M. Lavine
Darryl G. Stein
Igor Margulyan
Udi Karklinsky
Michael S. Brasky
John G. Conte
Vincent C. Yiu
800 Third Avenue
New York, NY 10022
Tel: 212-488-1200
zachary.rosenbaum@kobrekim.com
adam.lavine@kobrekim.com
darryl.stein@kobrekim.com
igor.margulyan@kobrekim.com
udi.karklinsky@kobrekim.com
michael.brasky@kobrekim.com
john.conte@kobrekim.com
vincent.yiu@kobrekim.com

-and-

FOLEY & LARDNER LLP

John P. Melko
1000 Louisiana Street, Suite 2000
Houston, TX 77002
Tel: 713-276-5500
JMelko@foley.com

Counsel to the 2024/2026 Holders

CERTIFICATE OF SERVICE

I certify that on September 18, 2024, I caused a copy of the foregoing document to be served by the Electronic Case Filing System for the United States Bankruptcy Court for the Southern District of Texas.

/s/ Zachary D. Rosenbaum
Zachary D. Rosenbaum